NATIONAL REPORTER SYSTEM—UNITED STATES SERIES

THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 243

PERMANENT EDITION

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

SEPTEMBER—OCTOBER, 1917

ST. PAUL
WEST PUBLISHING CO.
1917

(243 FED.)

This is a Key-Numbered Volume

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

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

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge[1].....Portland, Me.
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Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. VICTOR B. WOOLLEY, Circuit Judge.....Wilmington, Del.
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Hon. 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 September 17, 1917.

[2] Appointed October 1, 1917.

FOURTH CIRCUIT

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Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
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Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
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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.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee..Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

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Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.

[a] Appointed August 8, 1917.

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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[4]..... Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois..... Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana..... Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin..... Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin..... Madison, Wis.

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Hon. KIMBROUGH STONE, Circuit Judge ..... Kansas City, Mo.
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Hon. F. A. YOUMANS, District Judge, W. D. Arkansas..... Ft. Smith, Ark.
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Hon. MARTIN J. WADE, District Judge, S. D. Iowa..... Iowa City, Iowa.
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Hon. PAGE MORRIS, District Judge, Minnesota..... Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota..... Minneapolis, Minn.
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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.

[4] Died October 7, 1917.

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CASES REPORTED

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

BLUEFIELDS S. S. CO., Limited, v. UNITED FRUIT CO.

(Circuit Court of Appeals, Third Circuit. June 26, 1917.)

No. 2196.

1. JUDGMENT ⇐958(1)—RULINGS AND EVIDENCE AS TO RES JUDICATA.

In an action under Sherman Act July 2, 1890, c. 647, 26 Stat. 209, to recover damages for injuries alleged to have been sustained in consequence of conduct therein declared unlawful, plaintiff, being desirous of proving its case by introducing the findings of a master in an action against the same defendant, heard and decided in another district, petitioned for a preliminary hearing upon the question whether such findings were admissible. The court, having before it the full record of the prior case and only so much of the record of the instant case as had been made by the pleadings, stated that it would rule that such of the findings and conclusions of the prior case as were material and essential were res judicata, in so far as they were relevant to the issues in the instant case. *Held* that, having discovered on trial that some of the findings which it originally deemed material were not material, it was proper for the court to reject them, having reserved that question by the ruling; this being particularly true as plaintiffs, anticipating the possibility of such action, proceeded to prove such matters by the testimony of witnesses introduced at trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1827–1829.]

2. JUDGMENT ⇐542—CONCLUSIVENESS—"RES JUDICATA."

The doctrine of "res judicata" means simply that a cause of action, once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot be litigated by a new proceeding, either before the same or any other tribunal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 987.

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

3. JUDGMENT ⇐624—RES JUDICATA—ESSENTIALS.

One of the essentials of res judicata is identity of the parties to the actions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1139.]

4. JUDGMENT ⇐704—CONCLUSIVENESS—RES JUDICATA—PERSONS CONCLUDED.

A stockholder of plaintiff company, on his own behalf as well as on behalf of all other stockholders who might chose to intervene, sued defendant, joining the plaintiff corporation and others, on the ground that plaintiff had exercised an unlawful control over defendant. The suit was determined in favor of the stockholder, and the master made findings to

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the effect that plaintiff had been greatly damaged by defendant's control. In the original suit, both plaintiff and defendant made answer to the bill, denying its charges, but neither filed a cross-bill against the other. *Held*, that there was no issue raised or contested by the plaintiff or defendant, and, as they did not occupy adversary positions, the findings in such suit are not conclusive in an action by plaintiff against defendant to recover damages claimed to have been suffered on account of defendant's acts, asserted to have violated the Sherman Act.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229.]

5. JUDGMENT ⊜715(2)—CONCLUSIVENESS—RES JUDICATA—IDENTITY OF ISSUES.
As in the original action the relief sought was an injunction against defendant on the ground that it voted its stock in plaintiff company in violation of law and the appointment of a receiver, the matter in controversy was not identical with that in the subsequent suit, in which damages for violation of the Sherman Act were sought, and hence the findings in the original suit were not conclusive against defendant, for, had they been otherwise, plaintiff might nevertheless have subsequently maintained an action for damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1245.]

6. JUDGMENT ⊜624—CONCLUSIVENESS—RES JUDICATA.
No one can take advantage of a judgment or decree, if he would not have been prejudiced by it, had it been otherwise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1139.]

7. APPEAL AND ERROR ⊜1050(1)—REVIEW—HARMLESS ERROR.
In plaintiff's action under the Sherman Act for damages for violation thereof, plaintiff, asserting that findings in a previous case to which defendant was a party were conclusive, presented that question before trial, and the court erroneously ruled that such findings were conclusive, although, when the case was actually presented, it rejected some of the findings as not being material. *Held*, that the erroneous admission of part of the findings was not prejudicial to plaintiff, relieving it of the burden of proving those facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

8. APPEAL AND ERROR ⊜1071(1)—REVIEW—HARMLESS ERROR.
In such case, as plaintiff did not wholly rely on the findings, but offered the testimony of witnesses to establish the facts therein found, the act of the court in changing its position and rejecting some of the findings was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4234.]

9. MONOPOLIES ⊜21—ACTIONS FOR DAMAGES—DEFENSES.
Where the plaintiff company allowed defendant to secure the control of its stock, and participated in the arrangement whereby defendant assumed control, plaintiff cannot, in a suit under the Sherman Act for damages alleged to have been sustained in consequence of conduct declared unlawful, recover, where it participated in and acquiesced in the unlawful conduct; the fact that plaintiff did not reap the benefits expected giving it no cause of action, and the usual rule that in torts the elements of intent to inflict injury and acquiescence in wrongs done do not enter, having no application, any more than the usual rule that in an action under the Sherman Act parties are presumed to have intended the probable consequences of their illegal agreements.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15.]

10. MONOPOLIES ⊜28—ACTIONS—EVIDENCE—SUFFICIENCY.
In an action under the Sherman Act for damages for injuries alleged to have been sustained in consequence of conduct declared unlawful, evi-

dence *held* to warrant a finding that plaintiff participated in the unlawful combination in restraint of trade and consented to defendant's acquiring a controlling interest in its stock.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18.]

11. MONOPOLIES ⟸21—CRIMINAL ENTERPRISES—RIGHT TO RELIEF.
Where a criminal combination is made or a criminal enterprise is undertaken by two parties, and either party violates the agreement with injury to the other, the law will give the injured party no redress, but leave him in the condition it found him.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15.]

12. MONOPOLIES ⟸21—STOCKHOLDERS OF CORPORATIONS—POWER OF.
Where all of the stockholders of a corporation joined in forming an unlawful combination with another corporation, and acquiesced for a long term of years in the part their company played, accepting and enjoying benefits springing from such corporation, the corporation itself is bound by their acts, and cannot subsequently assert a cause of action on the ground such acts were violations of the Sherman Act; this being true, though new and innocent parties subsequently acquired some of the corporate stock.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15.]

13. APPEAL AND ERROR ⟸1001(1)—REVIEW—VERDICT—EFFECT.
The verdict of the jury on questions of fact, supported by evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928–3933.]

14. LIMITATION OF ACTIONS ⟸2(3)—WHAT LAW GOVERNS.
In an action under the Sherman Act, the statute of limitations where the action is brought governs.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 7.]

15. LIMITATION OF ACTIONS ⟸55(1)—WHAT LAW GOVERNS.
Where plaintiff and its stockholders acquiesced in defendant's acquiring stock control and consented to the illegal combination, if any, making no attempt to sue plaintiff before the suit was instituted, the cause of action, which was based on the Sherman Act, must be deemed to have arisen at the time the damage occurred, there being no showing that defendant prevented a prior suit, and hence the limitation statute of Pennsylvania (Purdon's Dig. Pa. [13th Ed.] p. 2282), in which district the action was begun, was properly treated as beginning to run at the time the damage occurred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 299.]

16. APPEAL AND ERROR ⟸1071(2)—REVIEW—HARMLESS ERROR.
In an action under the Sherman Act, begun in the district for Pennsylvania, the six-year Pennsylvania statute of limitations (Purdon's Dig. Pa. [13th Ed.] p. 2282) was applied, instead of the one-year Louisiana statute (Civ. Code La. arts. 3536, 3537), which was the law of the place where the action accrued. Act Pa. June 26, 1895 (P. L. 375), declares that, when a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to a suit brought within Pennsylvania. *Held*, that any error in applying the Pennsylvania limitation act, instead of the shorter Louisiana act, was not prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4235.]

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

Action by the Bluefields Steamship Company, Limited, to the use of Elmer E. Wood, ancillary receiver, against the United Fruit Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Robert W. Childs and John S. Hummer, both of Chicago, Ill., William L. Hughes, of New Orleans, La., and Thomas F. Gain, Francis Shunk Brown, and Alexander Simpson, Jr., all of Philadelphia, Pa., for plaintiff in error.

George Wharton Pepper, of Philadelphia, Pa., and Moorfield Storey and Robert G. Dodge, both of Boston, Mass., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action brought under the seventh section of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209) to recover damages for injuries alleged to have been sustained in consequence of conduct thereby forbidden and declared unlawful.

The plaintiff's case may be briefly stated as follows: Before October 14, 1899, the parties to this action were active competitors in importing bananas into the United States and selling them in interstate commerce. On that date, the defendant, for the purpose of destroying competition and monopolizing the importation of bananas and controlling their distribution and price in the several states, purchased from various stockholders of the plaintiff one-half of its capital stock, and procured the voting power of one additional share.

By force of the control thus obtained, the defendant dominated the affairs of the plaintiff, elected its officers, and through them directed its policy in a manner that unreasonably restrained trade and created in itself a monopoly in the banana business contrary to law.

To attain this end the defendant, acting through officers of its selection, compelled the plaintiff to enter into contracts with the Fruit Dispatch Company, a corporate subsidiary of the defendant, whereby the plaintiff was required to distribute all its fruit in the manner and dispose of it at prices determined by that company, and by various acts greatly reduced the acreage and increased the cost of banana planting upon the plaintiff's plantations, sold its fruit at greatly reduced prices compared with what would have been obtained if the fruit had not been sold through the Dispatch Company, curtailed importations, increased operating expenses, wasted money in unnecessary competition, leased certain of its properties for inadequate rents to irresponsible tenants, neglected and abandoned other properties, and permitted deterioration of its shipping facilities and equipment. From all these things, the plaintiff claimed to have suffered actual damage to the amount of five million dollars, to be trebled by the provision of the Sherman Act. Stated generally, the plaintiff's principal claim of damage was the loss of profits which it would have

made if it had been allowed to continue its business in competition with the defendant.

For defense the defendant offered evidence tending to prove that no injury had been inflicted upon the plaintiff by anything it had done or had permitted to be done, but, that, on the contrary, its control had been to the plaintiff's financial advantage; that if it inflicted any injury upon the plaintiff it was done without intent to injure; and that the conduct of its control and its management of the plaintiff's properties and the marketing of its product through the channels employed were pursued according to the terms and within the spirit of contracts sought by all the plaintiff's stockholders and entered into between the defendant and all the plaintiff's stockholders (save one), in which contracts the plaintiff corporation actively participated and all its stockholders (including this one) freely acquiesced through a long period of years, so that, the defendant maintained, if its conduct be found to offend the provisions of the Sherman Act, then the plaintiff was in pari delicto and was without right to recover. The defendant further pleaded the statute of limitations.

The jury rendered a verdict for the defendant; on the judgment entered, the plaintiff sued out this writ of error.

This trial, covering a period of forty-five days, produced a record of unusual length. Eighty-four errors are assigned. While some of the assignments bear upon separate and unrelated matters, it has been possible, with the assistance of counsel, to so group the most of them, that the substantial questions may be considered and determined upon broad principles of law.

Before we approach the trial and follow its trend, we shall dispose of a number of assignments of error arising out of certain action which the court took before trial.

[1] In addition to testimony from witnesses to be produced at the trial, the plaintiff proposed to prove its case by introducing the findings of a master in the case of Steele v. United Fruit Company et al., heard and decided in the Circuit Court of the United States for the Eastern District of Louisiana (190 Fed. 631) and affirmed by the Circuit Court of Appeals for the Fifth Circuit (194 Fed. 1023, 114 C. C. A. 666).

That was an action against the United Fruit Company and others, instituted by a stockholder of the plaintiff, and concerned the defendant's stock control over the plaintiff. The findings recited in detail the manner of its acquisition and exercise. The plaintiff conceived that many of the facts upon which the decree in that case was based would sustain a judgment in this case, and therefore their submission and determination in that case constituted res judicata in this case. If that were so, then manifestly the plaintiff would have the great advantage of being relieved of the necessity of proving here what had there been judicially determined, and the defendant would have the corresponding disadvantage of being concluded thereby. So in order to ascertain before trial what the court would decide at trial as to whether and to what extent the findings in the Steele Case were res judicata of the issues in this case, the plain-

tiff petitioned the court for a preliminary hearing upon those questions. Upon granting the petition and stipulation by counsel as to questions submitted and exceptions reserved, the court, in a commendable effort to facilitate the litigation, attempted the doubtful expedient of declaring before trial what would be its decision at trial upon the offer of the master's findings as res judicata.

Having before it the full record of the Steele Case and only so much of the record of this case as had then been made by the pleadings, the trial court heard argument and stated in advance the rulings which it would make at the trial.

To the first question—whether or not the findings and conclusions in the case of Steele v. United Fruit Company in the District Court for Louisiana are res judicata as to any of the issues in this case—the court stated it would rule that:

"Such of the findings and conclusions in the Steele Case as are material and essential as a basis for the decrees therein are res judicata in so far as they are material and relevant to the determination of the issues in this case."

To the next question—to what extent are the findings and conclusions in the Steele suit res judicata—the court announced that they would be held to be "res judicata only in so far as they are evidence—

"1. To show domination and control of the Bluefields Company by the United Fruit Company up to the time of the commencement of the Steele suit;

"2. To show intent to dominate and control;

"3. To show intent through domination and control to injure the business or property of the Bluefields Company in restraint of interstate or foreign trade or commerce.

"4. To show that, through such domination and control, injury was done resulting in damage to the business or property of the Bluefields Company within the period of the applicable statute of limitations.

"They are not res judicata as to the extent of damages suffered by the Bluefields Company, because the extent of damages was not in issue in the Steele Case."

The court then passed upon and designated the particular findings and conclusions of the special master (being thirty-four in number) which were within its ruling. When the case came on for trial and the record grew from pleadings of parties to testimony of witnesses, the court, acting within what appears to be a deliberately made saving clause in its advance statement, refused to hold as res judicata some of the findings it had previously designated as such, because found immaterial and irrelevant to the issues in this case as they had developed. The plaintiff therefore claims, under appropriate assignments, that the court erred greatly to its prejudice: (1) By refusing to admit as res judicata certain findings and by striking out others; (2) in admitting evidence offered by the defendant tending to contradict matters concluded by the findings; and (3) in neutralizing or devitalizing certain other findings, duly admitted, by charging the jury in a manner inconsistent with their proper application.

We think no criticism should be directed to the trial judge for his change of attitude at trial, for to determine before trial, merely from examination of pleadings and before the case has broadened into tes-

timony, whether matters in a case previously tried are material and relevant to a case yet to be tried, is a judicial task rather difficult of accurate performance. Apparently alive to this, the judge wisely saved himself in his advance ruling by deciding generally that the matters in the Steele Case were res judicata in this case only in so far as they proved material or relevant to the issues in this case. The effect of that ruling was to defer to trial final decision on questions of materiality. Upon discovering that some of the findings which he had thought would be relevant were not relevant, the trial judge very properly refused to admit certain of them, struck out certain others after admitting them, and in his charge explained or limited others. We are of opinion that in stating in advance of trial that findings in the Steele Case would be ruled res judicata in this case according to their materiality and relevancy in this case, the court did not foreclose to itself the right to rule at the trial upon their admissibility according as their materiality and relevancy developed in the progress of the trial, and therefore in ruling at the trial in a manner different from what it indicated before trial, the court did not err. Evidently anticipating the possibility of such action, counsel for the plaintiff very wisely did not rely for proof of their case upon the court's advance statement of what it would do, but proceeded to prove it by testimony of witnesses, though seeking, of course, to hold the tactical advantage of the court's advance rulings in an effort to lock their case by the concluding effect of res judicata.

But as the rulings when made at the trial were duly excepted to, the questions still remain whether the matters to which they related were res judicata. In order to determine these questions we must inquire into the Steele Case and ascertain what was that case, what were the issues raised and contested, the nature of the findings, the character of the relief sought and afforded, and what was there decided.

The Steele Case was begun by bill filed in the Circuit Court of the United States for the Eastern District of Louisiana, on December 3, 1909, by Frederick M. Steele (on his own behalf as well as on behalf of all other stockholders of the Bluefields Steamship Company, who chose to intervene) against United Fruit Company, Bluefields Steamship Company, Jacob Weinberger, Charles Weinberger, and certain other individuals, officers and stockholders of both companies. Adolph Segal, a stockholder, intervened, and Simon and Emanuel Steinhardt, codefendants, filed cross-bills, all praying substantially for the same relief; the remaining parties answered. Issue being joined, the case was referred to a special master.

As the reference was made upon the pleadings, and the decree upon the findings, we must first inquire into the bill. The stating part of the bill recited acts and conduct of the Fruit Company in the unlawful acquisition and exercise of control over the Bluefields Company. Much of this conduct, stated at length and in detail, was pleaded we think rather as inducement or matter leading up to the matter particularly complained of and from which relief was sought. The matter complained of was: (1) That the Fruit Company controlled by stock ownership the Bluefields Company; (2) that its control was hidden by an assignment of its stock to the Weinbergers. The relief prayed for was

that it should be enjoined from further exercising such control, the right to such relief being based upon the law of Louisiana, which forbids the ownership and voting of stock in one corporation by a competing corporation, and the control of one corporation by another. The Bluefields Company was a Louisiana corporation subject to Louisiana law. The specific relief asked was, that (1) "Jacob Weinberger and Charles Weinberger be decreed not to have any title * * * in the stock of the Bluefields Steamship Company assigned to them by the United Fruit Company (and in certain other shares assigned by William Adler) and that they and each of them be enjoined from voting * * * such stock at a meeting of the Bluefields Company to be held on December 13, 1909, or at any meeting of that company; (2) that the United Fruit Company be enjoined from attempting directly or indirectly or through or by the said Jacob Weinberger or Charles Weinberger * * * to vote any stock of the Bluefields Steamship Company or to control, interfere with, affect or influence the said Bluefields Steamship Company in any of its affairs or in the election of its directors and officers; (3) that the said United Fruit Company be enjoined from claiming any right or interest in the stock of the said Bluefields Steamship Company by reason of holding the same as collateral security; * * *" and (4) that the receiver for the Bluefields Company appointed pendente lite be continued, and its officers, agents, servants and attorneys be enjoined from interfering with its business during the receivership.

The master's findings of fact, being fifty-three in number, sustained not only the main allegations of the bill, that the Fruit Company had acquired stock control in the Bluefields Company and had exercised that control contrary to Louisiana law, upon which was based the complainant's right to the relief prayed and ultimately granted, but sustained in detail the allegations of acts and conduct of the Fruit Company, by which that control, made unlawful by the law of Louisiana, had been acquired and exercised (such findings of acts and conduct being the principal matters urged as res judicata of the issues of the case now before us).

Upon the master's findings the court entered its decree. By the decree the court (1) overruled exceptions to the master's report, (2) dissolved the preliminary injunction enjoining an election of officers and directors of the Bluefields Steamship Company, (3) directed an election of that company to be held by the master, (4) enjoined the Fruit Company and Charles and Jacob Weinberger from voting at that or any other election of the Bluefields Company the shares of the capital stock of that company assigned by the former to the latter, and (5) maintained the receiver in control of the property of the Bluefields Company.

Upon petition previously presented by the receiver representing that he believed "that the Bluefields Steamship Company, Limited, has a very large, well-founded and provable claim for damages against the United Fruit Company and that suit should be prosecuted on behalf of said Bluefields Steamship Company, Limited, and against the said United Fruit Company for recovery of such damages," and praying leave to intervene in a suit then brought or to be brought, or to insti-

tute a suit to that end in the District Court of the United States for the Eastern District of Pennsylvania, the court by decree (made before approval of the master's findings and before the final decree above referred to) authorized the receiver to so intervene or institute an action of his own "to recover for and on behalf of Bluefields Steamship Company, Limited, and against the Fruit Company on said claim such amount as might justly be owing, as prayed for in the petition."

We have recited at some length the offense charged and relief sought and granted in the Steele Case in order to disclose the controversy in that case, and show the matters to which the allegations of the bill were addressed, the inquiry and findings of the master were directed and the decree of the court extended.

The inquiry of the master followed the stating part of the bill, which covered a wide range and dealt with the relations of the two companies —the dominant conduct of the one and the servient conduct of the other—through the period of years they were in business association. As the District Judge (Louisiana) said in his opinion:

"The master endeavored to deal specifically with all the contentions of the parties and to find the facts with particularity, those collateral as well as those material to the main issue."

He further said:

"There appears to be evidence to sustain all of the master's findings of fact, though I have not examined with particularity those matters not bearing directly on the main issues before me."

The "main issues," clearly shown not only by the court's decree but by its accompanying opinion (the decree authorizing the receiver to bring this action having already been entered on his petition), were (1) whether the two corporations had been competing corporations, (2) whether one had acquired and exercised over the other a control forbidden by the laws of Louisiana, and (3) whether that control had ceased and terminated by the transfer of its shares to the Weinbergers. Some of the findings manifestly did not bear upon these main issues. Under no theory can they be res judicata in this action; while those which were material to the main issues are res judicata and concluding upon the defendant in this action only if the matters there determined and here upon trial were in controversy between the same parties and were identical.

[2] In considering these assignments we do not think it necessary to repeat or review the elaborate discussion in the briefs on the rule of res judicata. As to the reasons upon which the rule is founded and the principles by which it is controlled there is no dispute. We are concerned only with its application. The doctrine of res judicata is plain and intelligible, and, as stated in Foster v. The Richard Busteed, 100 Mass. 409, 412, 1 Am. Rep. 125, amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either before the same or any other tribunal.

[3, 4] It is an elementary conception of the doctrine that in order to make a matter res judicata there must be a concurrence of several

conditions (Bouvier's Law Dictionary, 2910), with but two of which we are here concerned. The first is: Identity of parties to the actions.

The adversary parties in this case were not (at least by alignment) adversary parties in the Steele Case. In that case, the controversy was between Steele and the Fruit Company. Other persons and corporations conceivably related to or affected by that controversy were made parties to the action in order that they might be reached by the decree. The Bluefields Company and the Fruit Company were co-defendants. As both were present as parties, the plaintiff here maintains that both are bound by the judgment. This contention is based principally upon what is unquestionably true, that in an action in equity the mere alignment of parties does not determine their position in the action, or affect the assertion of rights by or against them upon issues raised in which they are involved, or alter the force of the decree when it includes them. But the doctrine of res judicata, in requiring identity of parties, demands something more than their mere presence in the two actions howsoever aligned. It requires that they shall be parties to the issues raised, asserting or having an opportunity of asserting their rights, and declares that they shall be bound in so far and only in so far as the decisions embrace those issues and determine their rights. 16 Cyc. 196; 24 Am. & E. Cyc. (2d Ed.) 732, 753; Corcoran v. C. & O. Canal Co., 94 U. S. 741, 24 L. Ed. 190; Snell v. Campbell (C. C.) 24 Fed. 884; South Covington, etc., Ry. Co. v. Gest (C. C.) 34 Fed. 628; Stearns v. Lawrence, 83 Fed. 738, 28 C. C. A. 66; Montgomery v. McDermott (C. C.) 99 Fed. 502; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; Mitchell v. Banks, 180 U. S. 471, 480, 21 Sup. Ct. 418, 45 L. Ed. 627.

The parties to the Steele Case were Steele, and a certain intervener, as plaintiffs, and United Fruit Company, sundry persons, and finally Bluefields Steamship Company, as defendants. The objects of the suit, as indicated by the prayer of the bill, were to enjoin the Fruit Company from voting its stock in the Bluefields Company at an election of that company, and to secure the appointment of a receiver for the Bluefields Company (not then so stated but obviously for the purpose of bringing the action we are now reviewing). The charges of wrongdoing were directed against the Fruit Company, developing a situation which, if true, justified an injunction against the Fruit Company and the appointment of a receiver for the Bluefields Company. Upon the issue between Steele and the Fruit Company as to an unlawful stock control, the Bluefields Company was merely a nominal and passive party, while upon the issue between Steele and the Bluefields Company as to the expediency of the appointment of a receiver for the Bluefields Company, the Fruit Company was presently interested only as a stockholder, though prospectively interested as a party in another action. Both made answer directly to the bill. Both denied its charges. Neither filed a cross-bill against the other. There was thus no issue raised or contested between the two, a requisite to the doctrine of res judicata. 1 Van Fleet on Former Adjudication, § 256; Peters v. St. Louis, 226 Mo. 62, 125 S. W. 1134, 21 Ann. Cas. 1069. The finding that the Fruit Company held stock control of the

Bluefields Company hidden by an assignment to the Weinbergers, and therefore violative of the law of Louisiana, was a finding upon an issue which did not involve the Bluefields Company, as shown not only by the pleadings but by the obvious fact that if the finding had been the reverse, the Bluefields Company would not thereby have been concluded from maintaining this action against the Fruit Company for a violation of the Sherman law, had it thereafter chosen to bring it. It seems very clear that in the Steele Case there was raised, contested and adjudged no issue between the Bluefields Company and the Fruit Company. Therefore the two companies, adversary parties in this case, were not adversary parties in that case.

[5, 6] In order to invoke the doctrine of res judicata there must also be: Identity of the matter in controversy. This does not mean identity of form of action (Hopkins v. Lee, 6 Wheat, 109, 5 L. Ed. 518; Foster v. The Richard Busteed, supra), or of cause of action (Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355). It means identity of those matters upon which both actions may be maintained (Lawrence v. Vernon, 3 Sumn. 22, Fed. Cas. No. 8,146) and with reference to which the adjudications in both extend. From this has arisen the rule of the Supreme Court that:

"A right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." Mitchell v. National Bank, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627; Hopkins v. Lee, 6 Wheat. 109, 5 L. Ed. 218.

We must therefore inquire what "questions" and "facts" were "distinctly put in issue and directly determined * * * as a ground of recovery" in the former action, and what are the like matters in controversy in this one. We may do this by inquiring, what were the things sued for in the two actions? Bull v. Hopkins, 7 Johns. (N. Y.) 22; 5 M. & W. 109.

The things sued for in the Steele Case, as we have found it necessary to say several times, were (1) an injunction against the Fruit Company from voting its stock in the Bluefields Company in violation of the law of Louisiana, and (2) the appointment of a receiver for the Bluefields Company (with authority to bring this suit). The thing sued for in this case is damages for injuries arising out of a violation of a law of the United States. Both actions, we assume, may be maintained by proof of some of the same facts. Based upon these facts, the decree in the Steele Case was two-fold: (1) It was a judgment that the Fruit Company had violated a law of the state of Louisiana. It was not a judgment that the Fruit Company had violated a law of the United States. (2) It was a judgment that, in finding that the Fruit Company had violated a law of Louisiana, enough was shown that it had also violated a law of the United States, with consequent injury to the Bluefields Company, to justify the appointment of a receiver for that company and his authorization to institute suit for damages against the Fruit Company. The judgment, in so far as it affected

the Bluefields Company, was that, upon the facts shown, the issue of the Fruit Company's guilt in violating a law of the United States should be tried in another action. The court did not prejudge that issue by predetermining the facts. It did no more than determine that the facts before it prima facie showed ground for the action and were sufficient to appeal to its discretion and induce it to appoint a receiver with authority to bring the action and try out the issue.

If, instead of adjudging the master's finding sufficient to justify the appointment of a receiver for the Bluefields Company with authority to bring this action against the Fruit Company for a violation of the Sherman Act, the court had adjudged the findings insufficient and had thereupon dismissed Steele's bill, surely that adjudication would not have been a judgment that the Fruit Company had not violated the Sherman Act, nor would it have made the findings upon which it was based res judicata pleadable by the Fruit Company in an action by the Bluefields Company for a violation of the act, nor would it have concluded the Bluefields Company from bringing such an action. This is upon the principle that no one can take advantage of a judgment or decree if he would not have been prejudiced by it if it had been otherwise. Chandler's Appeal, 100 Pa. 262, 265; Chantangco v. Abaroa, 218 U. S. 476, 481, 31 Sup. Ct. 34, 54 L. Ed. 1116; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 127, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875; Penfield v. Potts, 126 Fed. 476, 479, 61 C. C. A. 371.

As between the Bluefields Company and the Fruit Company there is not even a remote resemblance between the things sought and recoverable in the two actions, nor is there as to them a resemblance between the controversies in the two actions. We are therefore impressed that the difference in the adversary parties, in the matters in controversy and in the relief sought and matters decided in the two cases makes the evidence in the first wholly inadmissible as res judicata of the issues in the second.

[7, 8] While we thus decide that the trial court erred in ruling certain findings of the master res judicata of the issues in this case, we are of opinion that the plaintiff cannot complain of that error. The findings admitted were not prejudicial to it. On the contrary, they must have been immensely beneficial to it, for the thirty or more findings admitted as res judicata served the plaintiff with their binding and concluding effect as though of matters already adjudged, and correspondingly concluded and limited the defense. Nor do we feel that the plaintiff was prejudiced by the rulings of the court excluding the remaining findings, for it is very clear that its counsel, anticipating or fearing such rulings, did not rely upon them but proceeded to prove their case by the testimony of witnesses.

We therefore dismiss as without merit all assignments of error relating to questions of res judicata.

There are two groups of assignments charging error to the court in certain rulings upon evidence and instructions upon the law. These rulings and instructions, appearing repeatedly in one form or another throughout the trial, disclose what the court conceived to be the under-

lying and fundamental principles of the case and show very clearly the theory upon which the case was tried and decided. If the court was wrong in its conception of these principles, then obviously it committed many substantial errors. If, on the contrary, it was right, then its errors, if any, are likely to be few and without prejudice. We may therefore dispose of these assignments by considering the principles they broadly raise as affecting the whole trial.

[9] It should be kept in mind that this is an action under section 7 of the Sherman Act to recover damages for injuries sustained in consequence of violations of section 1 of the act (which makes illegal "every contract, combination * * * in restraint of trade or commerce * * *") and of section 2 (which provides punishment for "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign countries * * *"). The plaintiff charged the defendant with such combination in restraint of trade and such monopolization of trade, and in support of its charge produced a great mass of testimony. The testimony disclosed a novel feature, which distinguished this case from the usual case where a combination or monopoly injures an independent competitor. In sustaining its averment that the defendant was an unlawful combination in restraint of trade and was an unlawful monopoly, the plaintiff showed that it was itself a party to that combination and a part of that monopoly. It soon appeared that the evidence was quite sufficient for the jury to find that the plaintiff itself participated in, acquiesced in and ratified the acts of which it here complains and for which it seeks damages by this action.

In this aspect of the case the learned trial judge discovered very early in the trial that much of the law announced by courts in actions brought under the Sherman Act by independent competitors for injuries inflicted by unlawful combinations was not applicable to this case. Instead of having, as in such cases, two clear issues, one as to whether the defendant was an unlawful combination and the other as to the fact of injury done and damages sustained, there arose in this case (1) the controlling question whether the plaintiff had not itself violated the Sherman Act, together with the defendant, in forming an unlawful combination which did the acts complained of, this question being dependent upon other questions (2) as to the manner in which that combination was formed; (3) its nature and the extent of control over the plaintiff intended thereby to be conferred upon the defendant; (4) the manner of its exercise, whether within or without the scope of the combination, and (5) not only whether injury was inflicted, but (6) if inflicted, whether it was the natural and probable consequence of the combination as formed, or extended beyond it, and was committed with intent to injure and destroy the plaintiff.

Issues of acquiescence and intent arose at once from the very nature of the acquisition of control and its exercise, for if the things complained of were things agreed to or acquiesced in, then manifestly if they were unlawful, the plaintiff was in pari delicto and was without right to recover. If, on the contrary, they were things not agreed to

or acquiesced in, then with equal certainty the defendant could not escape liability for wrongs done and injury inflicted without the connivance or the concurrence of the plaintiff.

The court therefore consistently ruled and finally charged that in all these acts there entered the elements of the plaintiff's acquiescence and of the defendant's intent to injure. Of this the plaintiff now earnestly complains, contending that the acts which occasioned the injury were torts and that in torts the elements of intent to inflict injury and of acquiescence in the wrongs done do not enter. Ross v. Pines, Wythe (Va.) 69; Nagy v. Press Co., 16 Manitoba, 616; Stephenson v. Brown, 147 Pa. 300, 23 Atl. 443; McCloskey v. Powell, 123 Pa. 62, 16 Atl. 420, 10 Am. St. Rep. 512.

Taken in the abstract and without reference to the facts of the case, that is the law. When in this class of torts unlawful combinations or unlawful agreements necessarily operate to unduly restrain trade and inflict injury, questions of willful purpose or conscious design to violate the law and inflict injury have no place. Addyston Pipe Case, 175 U. S. 211, 214, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679. The courts have held that so far as intent is involved (that is, intent either to violate the law or thereby to inflict injury) persons so combining or contracting are presumed to have intended the necessary, natural and probable consequences of their acts and agreements, and if their effect is to unduly restrain interstate trade with consequent injury, then the combination is illegal and the participants are chargeable with the consequences and are liable for the damages resulting. Continental Wall Paper Co. v. Voight, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; O'Halloran v. American Sea Green Slate Co. (D. C.) 207 Fed. 187, 189. There in no question about this law when the damages inflicted by an unlawful combination fall upon one not involved in the combination and not participating in violating the law. But here there was evidence that the plaintiff, acting through all its stockholders, had combined with the defendant to restrain trade and commerce and to build up a monopoly between them. In prescribing the zone for banana cultivation and in limiting the purchase price and regulating the importation of bananas into the United States, the parties unquestionably effected thereby a combination which in some degree restrained trade and measurably created a monopoly. If that combination unlawfully restrained trade and created an unlawful monopoly, as averred by the plaintiff, then certainly when the plaintiff complains of injury done by the defendant, the question arises ex necessitate rei whether the injury complained of was the natural and the probable consequence of the combination or was in consequence of conduct pursued beyond its scope with intent to inflict injury not within the agreement of the parties.

The plaintiff's claim was in effect that it did not reap all the profits which the combination should have yielded because of the manner in which the defendant exercised its control and conducted the plaintiff's business. The plaintiff's business was intended to be conducted by the

defendant along lines of restraint of trade and monoply, in the course of which injury might follow as a natural effect, or might be occasioned by intentional and malevolent acts of the defendant. In this state of the case, the origin and purpose of the injury became questions for the jury.

It is impracticable to rehearse even briefly the testimony of the case, but the theory upon which the court tried the case and submitted it to the jury runs through its most elaborate and carefully delivered charge and is disclosed by a few excerpts.[1]

[1] As to the plaintiff's action the court said: "The plaintiff's case is based on an unlawful combination and unlawful contracts." This unlawful combination is the one made by stockholders of the plaintiff with the defendant, and the unlawful contracts are the two made between stockholders of the plaintiff and the defendant, and one made between the plaintiff and the defendant. Upon the subject of the defendant's unlawful acquisition of control and its intent to injure the plaintiff, the court said:

"In other words, to put it briefly, the plaintiff's claim is based on injury through the destruction of competition, which is alleged existed, and which ought to have existed, between it and the defendant, and the injuries are based or the damages for injuries are based on the losses which the plaintiff claims were caused by the destruction of that competition.

"All of these averments in the statement of claim set up unlawful acts, and the question then arises as to whether the plaintiff was a party to those unlawful acts. While the law prohibits unreasonable restraint of trade, it does not permit parties to take an unreasonable position with regard to acts in restraint of trade, and where two parties are equally guilty of a violation of the provisions of the Sherman Act, it does not permit one of the guilty parties to recover from the other. The policy of the law is that as between two wrongdoers, who are jointly responsible for the conditions of which one party complains, the law leaves them in the position in which it finds them, and the courts will not interfere to protect one wrongdoer against the other.

"I am outlining this at the outstart so that you may bear these principles in mind when you come to consider the evidence as to the circumstances under which the alleged unlawful combination was formed, the alleged unlawful contract was entered into, and the alleged unlawful use that was made of the control, which it is claimed the defendant exercised over the plaintiff.

"If, under all the evidence, you find that the defendant did obtain a control of the plaintiff, and used that control in the restraint of interstate commerce, with the view of monopolization of the banana business in interstate trade and commerce, and did various unlawful acts which the plaintiff alleges it did, and did these things without the acquiescence or consent of the plaintiff, with the intent to injure the plaintiff, then it would be your duty to return a verdict in favor of the plaintiff for the amount of damages which it has suffered by reason of the injurious acts.

"If, however, you find that there were such unlawful acts, and there was such an unlawful combination, and the plaintiff through the unanimous consent of its stockholders, joined in forming the unlawful combination, joined in entering into the alleged unlawful contracts, and acquiesced in the use of alleged unlawful control, then the plaintiff cannot recover in this case, and it would be your duty to return a verdict for the defendant. And if you should find that there was an unlawful combination, an unlawful control, an unlawful use of the control, and you should fail to find that the plaintiff was injured thereby, even though the control was exercised, without consent, then your verdict should be for the defendant because the plaintiff cannot recover in this case unless it was injured. * * *

"If from all the evidence you find that at that time it was the purpose, not only of the United Fruit Company, but also the Bluefields Steamship Company, through its direction, and with the unanimous consent of its stockholders, to make that combination, to destroy competition, or the arrangement by which

We must inquire whether the facts of the case justify these instructions upon the law. The facts have been established by the verdict. They are vast in number and cover a wide range. While we have given consideration to all, we shall repeat only those which because

this competition was destroyed between the two parties, and the contract with the Fruit Dispatch Company were entered into under the same circumstances, then you would be justified, and I instruct you to find in that case that both parties were equally guilty of a violation of the Sherman Act, if either was.

"If the defendant was not guilty of a violation of the Sherman Act, it is not liable in this case. If by doing these acts with the consent of the plaintiff, it was guilty of a violation of the Sherman Act, it follows that the plaintiff was equally guilty of a violation of the Sherman Act in forming a combination and entering into contracts in restraint of trade, and for the destruction of competition between these two companies."

Upon the subject of the defendant's unlawful exercise of control lawfully acquired over the plaintiff, and of its intent to injure, the court said:

"The further question arises whether in case the contracts were not intended at that time to be contracts in violation of the Sherman Act, the defendant thereafter made an unlawful use of the combination, that is to say, exercised its control to do injurious acts, which had the purpose of destroying competition in this combination, and the monopolization of the banana business in the defendant. As to those acts, if you find from the evidence that they were done with the acquiescence of the board of directors and stockholders, of the Bluefields Steamship Company, then the Bluefields Steamship Company would be in exactly the same position as to the use of that control that it would be in in the entering into of this combination and the contracts with the Fruit Dispatch Company at the outstart. So that in either of these cases it would be your duty to return a verdict for the defendant without going into any question as to whether or not the plaintiff was injured. If, on the other hand, you find from the evidence that the defendant compelled the plaintiff to enter into this Fruit Dispatch Company contract by reason of the stock control obtained without the unanimous consent of the stockholders, and that through the exercise of power through the Fruit Dispatch Company and through control obtained by the ownership of stock, that it alone had the purpose of restraint of trade, and a destruction of competition between the two, and that in the exercise of the control and in the carrying out of the purpose, it injured the plaintiff in its business, then it would be your duty to return a verdict in favor of the plaintiff. * * *"

"The plaintiff cannot recover if, prior to the acquisition by Steele of his shares in the Bluefields Steamship Company, all the stockholders had acquiesced in the control of the United Fruit Company and in the various things now complained of by the plaintiff.

"I instruct you that acquiescence by all of the stockholders of the plaintiff in the exercise of the voting power by the defendant upon the shares held by it had the same legal effect as original consent to the formation of the illegal combination, and for any acts or omissions while such acquiescence continued the plaintiff cannot maintain this action."

In addition to what is found in these excerpts upon the element of intent, the court repeatedly charged in different phraseology what it said in affirming a point:

"If you are not satisfied by preponderance of evidence that the defendant in this case intentionally injured the plaintiff, then I charge you that your verdict must be for the defendant."

And again:

"In case you find that intentional injury has been done the plaintiff company by the exercise of control by the defendant, I instruct you that the proper measure of damage in this case is the difference between what the plaintiff company actually earned during the continuance of the control of the defendant, and the sum which it would have earned if there had been no control and if the plaintiff and defendant had been strictly competitive."

of their importance and prominence constitute the main structure of the case.

[10] The defendant maintained that a verdict should be directed in its favor for the reason, inter alia, that all the stockholders of the Bluefields Company (1) participated in forming the combination, and (2) acquiesced in the things done by the defendant in the exercise of the control conferred by the combination. As the question of its right to a directed verdict is not raised by writ of error, we are concerned with the contention only as it now presents the question, whether the evidence, if properly admitted, sustains the verdict.

It appears that the Bluefields Steamship Company was a corporation engaged in the business of importing bananas into the United States. It was a small combination of one-time competing concerns having a rather close control of the banana business in Bluefields, Nicaragua. In June 1899, the United Fruit Company, a larger combination, engaged in the same business elsewhere in Central America, entered the Bluefields region in competition with the Bluefields Company. In August 1899, after two months' competition, the directors of the Bluefields Company sent a committee to New York or Boston for the purpose of coming to a trade understanding with the Fruit Company. The authority which the board of directors conferred upon the committee in its proposed dealings with the Fruit Company extended to the fixing of prices by a combination of fruit importers, the limitation of importations, the fixing of uniform freight and passenger rates, the regulation of prices at purchasing points, and division of territory. This committee was appointed upon the unanimous vote of the directors on motion made by one Simon Steinhardt, who figured conspicuously in the matters now in litigation. As a result of the negotiations three contracts were entered into on October 14 following. Of the three contracts signed on that date, one was between an officer of the Fruit Company acting for that company, and stockholders of the Bluefields Company, and was signed by the president of the Fruit Company and all stockholders of the Bluefields Company excepting Simon Steinhardt. After providing that the stockholders should not compete with the Bluefields Company in growing, importing or selling tropical fruit in Nicaragua, Honduras or New Orleans for ten years, the stockholders of the Bluefields Company agreed to sell five hundred shares or one-half of its capital stock to the Fruit Company. In pursuance of this undertaking, each shareholder of the Bluefields Company (excepting Simon Steinhardt) transferred one-half of his shares to a designated person for the Fruit Company. Simon Steinhardt did not sign the contract or assign one-half of his shares, it being testified that he stated he did not wish to sell his shares, but that, however, "one-half the joint holdings of him and Emanuel Steinhardt would be covered by the contract." Emanuel assigned all his shares, sixty-two and one-half, and Simon retained the same number, sixty-two and one-half. By the assignment of one-half its stock and an arrangement by which the voting power of an additional share was conveyed, the Fruit Company acquired stock control over the Bluefields Company.

The second contract was between the Fruit Company and stockholders of the Bluefields Company, similarly signed by the stockhold-

ers. Its purpose, as indicated by preamble, was "to obtain for the Bluefields Company an assurance that its business shall not be impaired by interference of the United Fruit Company," and to that end fixed the amount of fruit which each company might import into the United States from Nicaragua and which the Bluefields Company might import from Honduras, with further restrictions on imports "upon a proportionate basis mutually agreed upon" by five importing companies, and provided that the classification of fruits and the fixation of rates for freight and passengers should be by agreement of the two companies.

The third contract was between the Bluefields Company and Fruit Dispatch Company (a subsidiary of the Fruit Company), made the Dispatch Company the sole selling agent of the Bluefields Company, and provided for the fixing of prices. This agreement was unanimously ratified by the board of directors of the Bluefields Company at a meeting at which Simon Steinhardt was present, there being testimony that Steinhardt urged and with the others approved the whole arrangement including the contracts of October 14, 1899.

[11] We are of opinion that upon this testimony the jury might have found that the combination effected by the three contracts was an unlawful combination in restraint of trade; that in its formation the plaintiff company participated, and to the control thereby conferred upon the Fruit Company the Bluefields Company consented. Therefore the court's instructions upon the law as to the plaintiff's participation in the defendant's acquisition of control was, in our opinion, manifestly correct. If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that company was a natural consequence, then the case comes within the well settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and either party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. In pari delicto potior est conditio defendantis. Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Pittsburgh Dredging & Construction Co. v. Monongahela & Western Dredging Co. (C. C.) 139 Fed. 780; Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & T. Ry. Co., 61 Fed. 993, 9 C. C. A. 659; Bishop v. American Preserves Co. (C. C.) 105 Fed. 845; Continental Wall Paper Co. v. Voight, 212 U. S. 227, 262, 29 Sup. Ct. 280, 53 L. Ed. 486.

[12] So also were correct the court's rulings and instructions as to the plaintiff's acquiescence in the defendant's exercise of its control. If, upon evidence which we think abundantly sufficient, the jury found that all the stockholders of the Bluefields Company joined in forming the alleged unlawful combination and in placing their company in it; acquiesced for a long term of years in the part their company played in that combination and in the manner it played it or was caused to play it; and accepted and enjoyed the profits which sprang from it, we are of opinion that the corporation itself was bound by their acts and was precluded from asserting a right of action based upon them. Morawetz on Corporations, § 262; Wells v. Northern Trust Co., 195

Ill. 288, 63 N. E. 136; Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917. The rights of its two new and innocent stockholders are not superior to the rights of the corporation. It is urged, however, that even if the corporation is precluded from maintaining an action for the benefit of its stockholders, the corporation might later repudiate their acts and recover for the benefit of its creditors. But there is in this case no question of creditors other than such as may always technically be present in cases in which corporate action is involved. The litigation had its rise on a stockholder's bill, and though now prosecuted by a receiver in an action at law, the rights involved are obviously those which exist between the corporation and its stockholders.

[13] The jury were next required to determine whether the defendant's control, if lawfully acquired, was lawfully exercised, and as one interpretation of the verdict may be that they found a lawful exercise, we must inquire whether there is evidence to sustain that finding. We lay aside any question as to whether the Sherman Act recognizes the lawful exercise of control unlawfully acquired as not raised by this writ of error, and restrict our inquiry to the question, as stated by the plaintiff, whether "by reason of said unlawful control and contracts and *by reason of the unlawful use of said control*" the defendant violated the Sherman Act and inflicted injuries for which recovery may be had. Assuming that the court was correct in its fundamental theory of the case arising out of the plaintiff's grant of control to the defendant and its acquiescence in the manner of its exercise, the question whether its exercise was lawful or unlawful is one purely of fact. This question was sharply controverted by a great mass of testimony as to conduct covering a period of ten years, from which it appears that the affairs of the Bluefields Company, as administered by the Fruit Company, prospered greatly or suffered much according as the testimony is read and believed. This testimony raised kindred questions, vigorously contested, as to whether the acts done and omitted by the Fruit Company in the administration of the affairs of the Bluefields Company were in pursuance merely of wrong business policy, in consequence of incompetent or indifferent managers, or in furtherance of a design on the part of the Fruit Company to injure the Bluefields Company; whether to the acts done or omitted the Bluefields Company gave its consent or made protest; and whether in consequence thereof any injury was inflicted.

It would add nothing to the discussion to repeat the evidence upon which these questions were submitted to the jury. The point for our consideration is whether they were properly submitted. As they were submitted on the theory of the law which we have found the trial court properly applied to the peculiar facts of this case, we find that they were determined by the verdict of the jury upon evidence which was sufficient to sustain it.

[14-16] The remaining question is what statute of limitations, if any, applied to the case. The plaintiff maintained that no statute of limitations was applicable, because no right of action accrued to the Bluefields Company so long as it was under the repressive control of the Fruit Company, and that until it got from under its control the statute did not begin to run against it. We are not persuaded to this

view, as we are inclined to agree with the trial judge that "there is no evidence in this case of any fact which prevents the running of the statute of limitations." The question therefore is (1) when did the statute of limitations begin to run, and (2) what statute was applicable? The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred. Then action might have been brought. The plaintiff claimed that the damage began when the combination was created in 1899, and continued until the bringing of suit on June 23, 1911; hence any limitation upon the action was a matter of importance to the plaintiff. Recognizing that to an action under the Sherman Act the statute of limitations of the state where the action is brought, applies (Chattanooga Foundry and Pipe Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241), the receiver for the Bluefields Company gave consideration to the question where to bring his action, and was induced by the liberality of the Pennsylvania Act (Purdon's Dig. [13th Ed.] p. 2282) to bring it in a district of Pennsylvania, as shown by his petition to the District Court for Louisiana, for leave to intervene or to bring suit in Pennsylvania, wherein he stated, that there were "strong and controlling reasons for prosecuting such suit * * * in the state of Pennsylvania instead of in this district (Louisiana), * * * one of such reasons * * * being that it will be claimed * * * that in Louisiana recovery can be had only for such damages as have accrued within one year from the date of bringing suit on account of the laws of prescriptions of limitations of actions, whereas he is advised that in said Eastern district of Pennsylvania, recovery may be had for damages accruing within six years." In bringing this action from Louisiana to Pennsylvania for the purpose of procuring the advantages of the statute of limitations of the latter state, the plaintiff was met by the Pennsylvania Act of June 26, 1895 (P. L. 375), and was confronted by one of its provisions, found in acts of limitations of many states, that:

"When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

It is a very close question whether that provision of the Pennsylvania Act did not throw the plaintiff back upon the statute of limitations of Louisiana as the place where the damage was done and the cause of action arose. Under the statute of that state, the limitation in actions in tort is one year. Civil Code, arts. 3536, 3537; Warner v. New Orleans and Carrollton R. R., 104 La. 536, 29 South. 226. The trial court however did not apply the Louisiana one year limitation by force of the recited provision of the Pennsylvania Act, but applied the six year limitation of the Pennsylvania Act. If the court's refusal to apply the one year Louisiana limitation by direction of the Pennsylvania statute was error, it was beneficial rather than prejudicial to the plaintiff and is no ground for reversal. The only question is whether the six year limitation of the Pennsylvania Act was properly applied. During the period in question the plaintiff was undoubtedly under the stock control of the defendant, which elected its officers and directed its affairs. Yet, until this suit was contemplated, we find no evidence

of an attempt or even of a desire by the plaintiff or by any of its stockholders to sue the defendant for the manner it exercised its control, or of any act or attempt by the defendant to hinder or prevent the institution of such a suit. The naked fact of control, unaccompanied by acts preventing or at least discouraging the bringing of an action, cannot suspend the running of a statute of limitations. We are of opinion that the defendant did not suffer from error in having applied to its case the six year limitation of the Pennsylvania Act.

After a full and painstaking consideration of the many errors assigned in this very considerable record, we are of opinion that the trial court committed no reversible error.

The judgment below is affirmed.

DERNBERGER v. BALTIMORE & O. R. CO.

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

No. 1474.

1. TRIAL ⟸142—QUESTIONS FOR JURY—INFERENCES FROM EVIDENCE.
Whenever the evidence is such that reasonable men may reasonably differ as to the inferences to be drawn therefrom, the case should be submitted to the jury.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337.]

2. TRIAL ⟸168—DIRECTION OF VERDICT—INFERENCES FROM EVIDENCE.
Where from the evidence only one inference may be reasonably drawn, it is the imperative duty of the court to direct a verdict.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380.]

3. TRIAL ⟸168—DIRECTION OF VERDICT—WHEN WARRANTED.
It is the duty of the trial court to direct a verdict for plaintiff or defendant, as to the court may seem proper, where the evidence is uncontradicted, or of such conclusive character that the court in the exercise of a sound judicial discretion would feel impelled to set aside a verdict in opposition to it.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380.]

4. RAILROADS ⟸328(1)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—OBSTRUCTION OF VIEW.
Where at a railroad crossing there is a heavy growth of weeds, underbrush, etc., so as to obscure the view of the track in the direction from which a train comes, such condition is a warning to a driver on the highway of the imminence of danger, and in the nature of an admonition to exercise reasonable caution in approaching the track.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057, 1060, 1069.]

5. RAILROADS ⟸348(8)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
In an action for death in a crossing accident, evidence *held* to show that, from a point 150 feet from the crossing, deceased drove towards and upon the crossing without looking or listening, and apparently oblivious to the fact that he might encounter a train in so doing.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1146.]

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6. RAILROADS ⟸335(3)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—EFFECT.

The failure of a railroad train to give a signal in approaching a crossing, by ringing the bell or blowing the whistle, as required by statute, does not make the railway company liable to one who drives upon the crossing without looking or listening for trains.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1087.]

7. RAILROADS ⟸348(9)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—WEIGHT OF EVIDENCE.

In an action for death in a crossing accident, evidence as to the space intervening between obstructions and the crossing, and the distance one could have seen along the track in the direction from which the train came, *held* sufficient to show that, if deceased had looked and listened before going upon the crossing, he could have seen or heard the approaching train in ample time to avoid the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1147.]

8. COURTS ⟸368—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

If a decision of a state court overruled prior decisions, a federal court was not bound by such decision as to a cause of action which accrued prior to the date of its rendition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951.]

9. COURTS ⟸370—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

In the absence of a well-established rule by the state court, the federal court is warranted in forming its independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 953, 953½.]

10. RAILROADS ⟸328(4)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE—OBSTRUCTION OF VIEW.

Where, notwithstanding obstructions to the view of approaching trains, a driver on a highway could have seen or heard an approaching train in ample time to avoid an accident, if he had looked and listened, but, from a point 150 feet from the crossing, he drove towards and upon the crossing without looking and listening, apparently oblivious to the danger, he did not exercise the care that a reasonable man would take for his own protection, and there could be no recovery for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1061.]

In Error to the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Action by Martha Dernberger, administratrix of the estate of Benjamin Dernberger, deceased, against the Baltimore & Ohio Railway Company. From a judgment for defendant on a directed verdict (234 Fed. 405), plaintiff brings error. Affirmed.

C. M. Hanna and Reese Blizzard, both of Parkersburg, W. Va. (R. E. Bills, of Parkersburg, W. Va., on the briefs), for plaintiff in error.

George M. Hoffheimer, of Clarksburg, W. Va., and B. M. Ambler, of Parkersburg, W. Va. (J. W. Vandervort and Van Winkle & Ambler, all of Parkersburg, W. Va., on the briefs), for defendant in error.

E. G. Smith and Stephen G. Jackson, both of Clarksburg, W. Va., amici curiæ.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This action was instituted in the District Court of the United States for the Northern District of West Virginia by Martha Dernberger, administratrix of Benjamin Dernberger, deceased, against the Baltimore & Ohio Railroad Company, to recover damages for alleged injuries sustained by Benjamin Dernberger at the hands of defendant in error, under chapter 103, section 3488, of the Code of West Virginia, which is in the following language:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter."

The case is now before us on a writ of error. The plaintiff in error will be referred to as plaintiff, and the defendant in error as defendant; such being the relative positions the parties occupied in the court below.

An action of this kind always presents points more or less difficult of solution, involving as it does primarily on the one hand the question as to whether the alleged injuries of the plaintiff were occasioned by the negligence of the railroad company, or whether on the other hand the plaintiff by his negligence contributed to his own injury to such an extent as to warrant the trial judge in holding as a matter of law that the defendant upon the whole evidence is entitled to have the court instruct the jury to return a verdict in its favor. So much has been written in regard to this question that it would be impractical to undertake to distinguish all the cases decided by the different courts of the several circuits, as well as the courts of last resort of the states, and relied upon by counsel for the respective parties. Therefore, we shall confine our discussion to what we deem to be some of the controlling cases.

Counsel for plaintiff's intestate have filed four briefs, counsel for defendant five, and counsel as amici curiæ two. While the briefs thus filed are voluminous, we greatly appreciate the industry and skill displayed by counsel in attempting to throw as much light as possible upon a proposition which is extremely complicated when we come to apply the law to the facts as testified to by the witnesses in the court below. It is earnestly insisted by counsel for plaintiff that the court below erred in directing a verdict in favor of the defendant; in other words, that the death of plaintiff's intestate was due to the negligence of the defendant in failing to give a signal while approaching the crossing as required by the statute of West Virginia.

[1-3] Counsel earnestly contend that the conflict of evidence in this case is such that the court below should have submitted the determination of the same to the jury. The rule is that, whenever the evidence is such that reasonable men may reasonably differ as to the inferences to be drawn therefrom, the case should be submitted to the jury. While

this is true, it is well settled that where, from the evidence, only one inference may be reasonably drawn, it is the imperative duty of the court as a matter of law to direct a verdict. In other words, it is the duty of the trial court to direct a verdict for the plaintiff or defendant, as to the court may seem proper, where the evidence is uncontradicted, or of such conclusive character that the court, in the exercise of a sound judicial discretion, would feel impelled to set aside a verdict in opposition to it. Merchants' Bank v. State Bank, 10 Wall. (77 U. S.) 604, 19 L. Ed. 1008; Delaware, Lackawanna & Western Railroad Company v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Patton v. Texas & Pacific Railway Company, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Southern Pacific Company v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; Zilbersher v. Pennsylvania R. Co., 208 Fed. 280, 125 C. C. A. 480; Union Pacific Railway Company v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Elliott v. Chicago, Milwaukee & St. Paul Railway Co., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068.

An examination of the cases cited will show that the court not only had the power, but it is its duty in cases like the one at bar, as well as all other cases involving a trial by jury, to direct a verdict whenever the facts are such as to warrant the same. Mr. Justice Swayne, in the case of Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899, in referring to this point says:

"A judge has no right to submit a question where the state of the evidence forbids it."

In the case of Southern Pacific Railway Company v. Pool, supra, Chief Justice White, who was then Associate Justice, among other things, said:

"There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. Union Pacific Railway Company v. McDonald, 152 U. S. 262, 283 [14 Sup. Ct. 619, 38 L. Ed. 434]. The rule is thus announced in that case: 'Upon the question of negligence * * * the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. Delaware, Lackawanna, etc., Railroad v. Converse, 139 U. S. 469, 472 [11 Sup. Ct. 569, 35 L. Ed. 213], and authorities there cited; Elliott v. Chicago, Milwaukee & St. Paul Railway, 150 U. S. 245 [14 Sup. Ct. 85, 37 L. Ed. 1068]; Anderson County Commissioners v. Beal, 113 U. S. 227, 241 [5 Sup. Ct. 433, 28 L. Ed. 966].'"

This being the rule, the question arises as to whether the facts as established in the court below were such as to warrant the learned judge who heard this case in directing a verdict in favor of the defendant.

It is insisted by counsel for defendant that the evidence brings this case clearly within the rule announced in Neininger v. Cowan et al., 101 Fed. 787, 42 C. C. A. 20; Beyel v. Newport News & M. V. R. Co., 34 W. Va. 538, 12 S. E. 532; Horn v. Baltimore & O. R. Co., 54 Fed.

301, 4 C. C. A. 346; Chicago, M. & St. P. Ry. Co. v. Bennett, 181 Fed. 799, 104 C. C. A. 309; Shatto v. Erie R. Co., 121 Fed. 678, 59 C. C. A. 1; Northern Pac. Ry. Co. v. Alderson et ux., 199 Fed. 735, 118 C. C. A. 173; Southern Ry. Co. v. Carroll, 138 Fed. 639, 71 C. C. A. 88; Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542. Counsel also cite numerous other cases. The plaintiff's intestate relies upon the cases of Continental Improvement Company v. Stead, 95 U. S. 161, 24 L. Ed. 403; Grand Trunk Railway Company v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 32 Sup. Ct. 783, 56 L. Ed. 1221, 44 L. R. A. (N. S.) 154; Baltimore & Ohio Railroad Company v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Lehigh Valley R. Co. v. Kilmer, 231 Fed. 628, 145 C. C. A. 514; Morrissey v. Boston & L. R. R. Co., 216 Mass. 5, 102 N. E. 924; City of Elkins v. Western Maryland Co., 86 S. E. 762; and numerous other cases.

[4] The danger incident to a crossing is increased or diminished according to the nature of the land on either side of the road over which one must travel to reach the same. Where the banks are level, and the intervening space between the road and the railroad consists of cleared land, the risk is less; but where, as in this instance, it appears that there is a heavy growth of weeds, underbrush, etc., so as to obscure the view of the track beyond the crossing in the direction from whence the train comes, the risk is correspondingly increased. Such condition is a warning to the traveler of the imminence of danger, and in the nature of an admonition to exercise reasonable caution in approaching a railroad track; also, the means of transportation employed by the traveler becomes an important factor in determining the degree of diligence to be exercised. These are questions that are important, and must be considered by the court in a case like the one at bar, in determining whether the negligence of the deceased was the proximate cause of his injury.

In this instance the deceased, a farmer, had lived in the vicinity of the crossing where the accident occurred for many years, and it is but fair to assume that he was familiar with the location of the track at the point of crossing, and was also familiar with the approach thereto. Under these circumstances, he must have been fully cognizant of the risks incident to crossing at this point, and, as a matter of common knowledge, he must have known that the railroad company operated over its tracks heavy freight trains incapable of being promptly stopped, and his expression at the fatal moment, "My God, there is the Fast Line!" shows that he appreciated the fact that passenger trains of a high rate of speed were passing to and fro during the day. This expression, which is the last one that the deceased ever made, also shows that he understood that in crossing the track a fast train might be expected at or about that time, and that he had made a fatal mistake in going upon the track without first looking and listening. Plaintiff introduced a number of witnesses, but before she rested her case defendant's counsel introduced two witnesses. At the conclusion of the evidence the defendant moved the court to direct a verdict in its favor, and in response thereto the court below granted the motion.

The deceased came to his death on the afternoon of July 27, 1915, between 4 and 5 o'clock, at a point about 15 miles below Parkersburg, at a country crossing where the dirt road crosses the Ohio Division of the defendant. The railroad station is situated about one-half mile north of the crossing, which is known as the Cove Run Crossing. The railroad runs nearly north and south and somewhat parallel with the river. The highway from Bellville runs south between the railroad and the river. When within about 200 feet of the railroad, it turns sharply to the east and crosses it. The train by which Dernberger was killed was coming from the south, and was due to pass this crossing at about 4:20 p. m., and was known as the "Fast Line Express."

On the afternoon of the accident the deceased had gone to the depot to meet his daughter and a young lady, who had arrived that afternoon to pay her a visit. For some reason the young ladies preferred not to go in the wagon, but took a short cut, intending to get in the wagon after it had passed the crossing. They walked down the track where the accident occurred at a slow gait, consuming about 20 minutes, expecting to meet the deceased. It appears that they were listening "for the train," knowing that it was about time for "another train." Not finding the deceased, they started along the highway and had gone but a short distance east of the crossing when the accident happened.

The deceased, after leaving Bellville, and while proceeding towards the crossing, passed his son-in-law, Mike R. Buffington, on the road, who was also driving a team. The wagon in which deceased was riding was of a peculiar type; the wheels, hubs, etc., being of iron. The wheels were 36 inches in diameter. The bottom of the bed, which rested on the axles, was 19 or 20 inches from the ground. The team consisted of a pair of "right sprightly horses," about four years old, "which acted like any other horses." The top of the wagon bed was 37 inches, coming to the top of the wheels. Buffington, whose wagon was heavily loaded (his horses being "scary" and afraid of the trains), dropped back and let the deceased pass. Buffington says that when about 345 or 350 yards from the crossing his attention was called to the train, and that he knew that it was after time for the train to come, and that it had not come up.

After passing Buffington the deceased was joined by George Anderson and Charles Barton, who got into the wagon for the purpose of riding a part of the way to their respective homes; it being the intention of Anderson to get off at the crossing. Anderson had been employed by the railroad company for seven years, and had worked "right along that crossing." Barton had also worked for the company. Anderson stated that after he got in the wagon deceased said that it (the wagon) was not fit for the public highway on account of being so low, but that it was handy in hauling hay and wheat in; that it could be driven over rough ground without being upset, and that it was not fit for the roads. He said that "we talked about hauling in hay and wheat, and how nice the wagon was on the place"; that when the wagon reached a point about 200 feet from the track a trace became unhooked, and the deceased got out and hooked it up, and then got in the wagon and started again, the horses going in a prance or trot for

about 50 feet; that within about 150 feet of the track, where the upgrade commenced, the horses were checked down to a slow walk; and that just before reaching the crossing the horses were traveling not over 2 miles an hour. Witness also testified that when about 150 feet from the crossing the deceased "looked and listened, but did not see any train or hear any," and he checked the horses and looked for the train; that the south side of the road was all grown up with weeds, apple trees, horse weeds, elms, etc., there being horse weeds at this point 12 or 14 feet high. The witness, in referring to what they did at this point, said that they "pulled to the right," but that the railroad could not be seen on account of the growth of weeds, brush, and trees, and that there was a cornfield there on the right of way which hid their view.

Traveling in the direction of the crossing in which the parties were going at the time, there was a curve in the highway where it turned from north and south to west and east. The witnesses vary as to the location, width, and opportunity to see by the opening at this point, which is but natural, where parties rely upon recollection, without having made actual measurements. However, they all agree that a train on the track could be seen through this opening, but in order for a person riding in a wagon to see through the same it would be necessary for him to "raise up"; that this would be especially true where one was riding in a wagon the height of the one used by deceased. Anderson testified that it was a narrow space about 150 feet from the crossing, and that by rising up in the wagon one could see two rail lengths of the railroad, or cars on it at a distance of about 11 rods down the track. Thomas Anderson, another witness, locates the opening at the same point, or a little farther from the track. He says that the top of an engine could be seen probably 400 or 500 feet down the track. Charles Anderson, another witness, said that it was a "little open space" just below the curve in the road, and that through this opening a little of the track could be seen. Buffington also testified that the open space was 3 or 4 feet wide, 30 or 40 yards from the crossing, and through which you could see a train coming from the south, and that the track above the whistling board could be seen from this point. However, he also testified that probably a train could be seen 1,000 feet from the crossing above the whistling board.

Alexander Bosco, a farmer and practical surveyor, said that he measured the distance of the open space on the curve of the road; that it was about 30 or 35 yards from the track; that the nearest end of the opening was 30 yards, and the other end 5 yards farther, which would make the opening 5 yards wide. This witness also testified that the opening was probably 8 or 10 feet wide at the point from which one could see the whistling post, and that probably one-half of the whole length of a train could be seen in nearing the post. Witness Young said that the open space was about 120 feet from the river rail, and that you could see a train about two-thirds of the distance between two telegraph poles, but that you could not see it down to the curve in the track, which was shut off by the embankment. Witness Smith said that the opening was 9 or 10 feet wide just at the point where the grade started, and that a train could be seen coming on the track from

that point. Witness Sheets also testified that at 150 feet from the crossing there was an opening of 20 or 30 feet in width, and that one could see a train traveling between the crossing and the whistling post while passing over 30 or 40 feet of the track.

It is but fair to assume that, if the deceased had "raised up" in his wagon at this particular point, he could have seen a considerable portion of the track, and, not having done so, we think his conduct in this respect is a circumstance which the court very properly considered as tending to show that he did not exercise the care and caution a traveler should, in view of the peculiar conditions surrounding the approach to this crossing. After leaving the point referred to as being 150 feet from the crossing, the deceased traveled at a rate of about 2 miles an hour until he reached the crossing, and continued so to travel, according to the evidence, until the horses' feet were in or near the center of the track, when the deceased exclaimed, "My God, there comes the Fast Line!"

The defendant introduced a signed statement given by Anderson to the claim agent, the day after the accident occurred, in which, among other things, he said:

"He (referring to the deceased) never spoke of the train, or apparently made no effort to see if a train was coming."

However, the witness at the trial, in referring to what transpired just before the accident, among other things said:

"Q. After you and Mr. Barton got into this wagon, what did you do then? A. We sat down on an egg case and was talking about his wagon. He said it wasn't fit for the public highway on account of being so low, but was the nicest and handiest thing he ever had on the farm to haul in hay and wheat on. Q. What direction did you go after you got into the wagon? A. Well, we went south. Q. How high was that wagon, if you know—the body—from the ground? A. Well, it was about 37 inches. Q. How was Mr. Dernberger sitting? A. He was sitting on an egg case pretty well front of the wagon. Q. Where were you in reference to the front of the wagon? A. Setting about 2½ feet from the back end on an egg case; Mr. Dernberger and Mr. Barton setting side by side. Q. What, if anything, did you and Mr. Dernberger do between the time you got upon this wagon and the time of the accident? A. Well, we talked about hauling in hay and wheat—how nice the wagon was on the place. Q. Now, go on and tell in reference to looking or not looking for the train. A. We got within about 200 feet of the track when the trace became unhooked, and he stopped and hooked up that trace and then picked up the lines. Q. What, if anything, did you do in reference to looking for the approach of the train?

"Mr. Ambler: Objected to."

Counsel for plaintiff insist that the witness Anderson, among other things, testified that when within 16 feet of the track deceased looked and listened. A careful analysis of the evidence fails to sustain this contention. Anderson was the only witness who testified as to what happened just before and at the time the accident occurred. His testimony bearing on this point is as follows:

"Q. What else did he do at that point? A. Well, we started along and about 150 feet of the track started upgrade.

"Court: About 200 feet of the track you say the traces became unfastened? A. Yes, sir; and about 150 feet of the track started up a little grade to the crossing, and he checked his horses to a slow walk, and looked and listened, but didn't see any train or hear any.

"Court: That was 150 feet, where you went upgrade? A. Yes, sir.
"Court: And he checked his horses? A. Yes, sir.
"Court: Checked his horses and went at slow speed? A. Yes, sir.
"Court: Did or did he not stop at that place? A. No, sir; he did not stop.
"Mr. Bills: What, if anything, else did Mr. Dernberger do at or near the crossing? A. Well, that's all he done until we came up on the crossing, and when the horses' front feet came up in the middle of the track, he says, 'My God, there is the Fast Line!' and when he said that I looked, and it looked to me like it was within 15 or 20 feet of us, and I made a jump backwards, and he made an attempt to raise off the egg case, and my opinion is made an attempt to jump to the right. Q. At what speed was Mr. Dernberger driving his team just before he came to the crossing? A. Very slow. I don't know how slow, but the horses almost stopped when he checked them and looked and listened for the train. Q. What, if anything, did he do in the way of looking for the train? A. Well, we pulled to the right and tried to look down, but couldn't see down the road on account of brush, weeds, and stuff growing up—couldn't see down from the road to the railroad track."

From this testimony it appears that the point at which deceased turned to the right and looked and listened for the train was 150 feet distant from the crossing. It is true that, in response to the question as to what deceased did just before he came to the crossing, witness said, "The horses almost stopped when he checked them and looked and listened for the train;" but in response to the next question witness explains by saying, "We turned to the right and tried to look down, but couldn't see down the road on account of weeds, brush, and stuff growing up—couldn't see down from the road to the railroad track." In response to the second question preceding this question, wherein the witness was asked, "What, if anything, else did Mr. Dernberger do at or near the crossing?" witness said, "Well, that's all he done until we came up on the crossing and when the horses' front feet were in the middle of the track." Witness could not have intended to convey the idea that when they got within 16 feet of the crossing deceased could not see down the road to the railroad track. Therefore we think the proper interpretation to be placed upon this testimony is that they could not see down the road to the railroad track on account of brush, weeds, etc., which obstructed the view at the point about 150 feet from the crossing.

The uncontradicted evidence shows that no signals were given at or near the whistling board. In describing just what happened as the train was in a very short distance of the parties, witness testified as follows:

"Q. What happened after Mr. Dernberger drove upon the crossing? A. Why, he said, there is the fast train, and made an attempt to jump out of the wagon, and the train struck the wagon as he made the attempt to rise off of the egg case. * * * Q. How far could you see down the track at the time of this accident, when you were 16 or 18 feet from the track? A. Well, you could see probably 30 or 40 feet. Q. What, if anything, prevented you from seeing further than that? A. Why, there was brush and weeds grown up on the right of way. Q. As you approached near to the crossing from this point 16 or 18 feet back, what was the condition down the track as to seeing or not seeing? A. There was an embankment down there, between 12 and 13 feet high, grown up with brush and weeds that hid your view all of the way from that down the track. Q. Can you state to the court and jury the distance that embankment is or was at that time down the track from the crossing? A. Well, I never measured it, but I judge it is 200 feet. Q. What is

the condition of the track, the railroad track, on down from the cut there or embankment? A. Well, grown up with brush and weeds. Q. I mean as to being or not being straight track? A. Kind of on a curve. Q. What direction does it curve in reference to the Ohio river? A. Well, it kind of comes up on a curve this way. Q. Curves towards the river or away from the river? A. Yes, sir; curves towards the river. Q. Can you state what the greatest possible distance is that a person could have seen that train down the track approaching from the south at the time of the accident, if he had been on the crossing? A. Well, you could see it down the track, if right on the crossing, 600 or 700 feet. Q. What, if anything, was there to prevent you from seeing a train still further down the track? A. Why it goes behind a big cut there; the curve turns there, and it goes behind this cut and hides your view."

The witness, on cross-examination, among other things, testified as follows:

"Q. How many places from where you stopped there at 200 feet from the crossing were there that you could look through and see the railroad, or cars on the railroad? A. There is one place, I know. Q. Where was that? A. About 150 feet from the railroad crossing. Q. There was one place, haven't you stated, sitting down you couldn't see through? A. Yes, sir; could see through by raising up in the wagon; could see down probably two rail lengths. Q. And you didn't raise up? A. No, sir. Q. And Mr. Dernberger didn't raise up? A. No, sir. Q. And Mr. Barton didn't raise up? A. No, sir. Q. Were not you gentlemen teasing Mr. Dernberger about the little wagon, or he talking to you about that, about that time? A. No, sir. Q. What did he say about what his wagon could do? A. He was talking, when we first got in the wagon, how handy and nice it was on the place to haul in wheat and hay with; that he could drive it over rough ground and wouldn't upset. Q. Didn't he say it wasn't fit for a road wagon? A. He said it wasn't fit for the roads. Q. Don't you remember you were talking with him up until you got to the railroad track? A. No, sir. Q. What were you doing as you got there towards the track? Witness: Sir?

"Mr. Ambler: What were you doing—you three men—as you got up towards the track? A. We were setting on egg cases, and I had raised up about halfway maybe before, and put my hand on the wagon bed to get off at the crossing. Q. Why? A. I always get off there to go to my home. Q. Where was your home in reference to the railroad track? A. About three-quarters of a mile below Cove Run Crossing. Q. And you were going to get off at Cove Run Crossing and walk down the railroad track? A. No, sir; I walk along the public road. * * * Q. What was the first thing that anybody said about the train as you went along up there? A. Mr. Dernberger was the first man that spoke about the train. When his horses' front feet were in the middle of the track he saw the train and said, 'My God, there is the fast train now!' Q. Where were you? A. I was standing in the wagon bed. Q. Standing up? A. Yes, sir. Q. How far was the train from you then, coming from the south? A. It looked like it was within 15 or 20 feet of me. Q. What did you do? A. I immediately jumped to escape, and as I made the jump she picked up the wagon. Q. Did you notice the horses' feet, and notice where the train was when you made your jump? A. When he first spoke, the horses' front feet were in the middle of the track; but before I made the jump they had jerked the wagon onto the middle of the track. * * * Q. How long, to your knowledge, had Mr. Dernberger been in the habit of going across there at that crossing? * * * A. All his life, I reckon, so far as I know. Q. Well, how many years had you known of him being in the habit of going across there? A. The last 27 or 28 years. * * * Q. Haven't you worked along there in years gone by yourself? A. Yes, sir. Q. Well, now, I believe you testified after you left that point about 150 feet back you didn't stop at all? A. No, sir; he checked his horses to a very slow walk, almost to a standstill. Q. And kept coming on? A. Yes, sir. * * * Q. Do you remember Mr. Dernberger telling you about the age of his horses? A. Yes, sir. Q. What did he say? A. Four years old. Q. And they acted like it, didn't they? A. They acted like any other horses. Q. Pretty

lively horses? Now, how much of a space did you say there was between the line of the right of way and the rail in which you could look south, down the track? A. Why, there wasn't any you could see until within 16 feet of the track. Q. Very well. When you got within 16 feet of the track, how far could you look south? A. About 30 or 40 yards. Q. If you said feet before, do you mean yards now? Which do you mean? A. If I said feet, I mean yards. * * * Q. Now, how many places did you say you stopped after you got in the wagon before you got on the track? A. Only one place. Q. Where was that? A. About 200 feet from the crossing. Q. And that was to hitch up a trace, wasn't it? A. Yes, sir. Q. Now, to get it right, where was that you could have looked through some place if you had raised up in the wagon? A. About 150 feet from the crossing. Q. But you didn't stop there? A. No, sir. Q. Did you stop any more until the engine struck the wagon? A. No, sir."

Witness also testified as follows in regard to the statement that he had given the claim agent:

"Q. I hand this paper to you, and ask you if this paper, three pages, two sheets, with your name on it, isn't the paper you signed there? A. A page and a half is what I signed. Q. Was that name signed there signed by you? A. Yes, sir. Q. And it was signed on that paper, wasn't it? A. A page and a half I signed; yes, sir. I cannot say whether that is the paper or not. Q. I believe you do not read or write, except your name? A. No, sir; I cannot read, but I can write my own name."

An examination of the testimony of this witness shows that he testified at three different times that the deceased, just before the train came upon him, attempted to rise up and jump. After all the evidence offered by the plaintiff had been submitted to the jury, plaintiff announced that she rested her case, and defendant moved the court to direct a verdict, upon the ground that the evidence was insufficient to entitle plaintiff to a judgment. The court took the case under advisement until the next morning, when counsel for plaintiff asked permission to recall the witness Anderson and interrogate him further before the jury touching newly discovered evidence. The witness, when asked as to what the deceased was doing in regard to the team he was driving when he reached the point where a train approaching could be seen, said:

"It looked to me like he was holding them with all the strength he had to bring them to a stop."

And, when asked as to what the team did, witness said:

"Well, they just stopped about on the track, maybe was in the middle of the track and made a lunge at the time it seen the train and jerked the wagon upon the track."

On cross-examination witness was asked if he had not theretofore testified that he could not make out whether the deceased was trying to rush his horses or draw them back, and said:

"Why, he made an attempt to hit the horses or check them, or raised to jump from the wagon; I couldn't say."

Witness was further interrogated as to whether he had not already testified that, when deceased got up, he (witness) thought it was with the intention of making a jump. In response to this question witness said:

"I said 'in my opinion.' I didn't know which he intended to do."

While it was obviously the purpose of the plaintiff to show by this witness, when recalled, that the horses became unmanageable and the deceased did everything in his power to keep them from going upon the track, the mere reading of witness' testimony as to this point is sufficient to show that no such inference could be drawn therefrom. Further, this testimony is highly inconsistent with the statements made by witness when he was first on the witness stand. Indeed, his own admission shows that he was not willing to testify affirmatively to the state of facts sought to be established.

As we have already stated, the defendant by leave of the court introduced two witnesses out of order. At that time counsel no doubt felt that the case might go to the jury; but when they decided to request the court to direct a verdict the testimony of these two witnesses was excluded, or rather not considered; the court saying, among other things:

"And the court further certifies that, in determining the motion to direct a verdict, the evidence of these two witnesses was totally disregarded by it."

Therefore the court below, in disposing of the defendant's motion, based its judgment upon the uncontradicted evidence offered by the plaintiff.

The daughter of the deceased was introduced as a witness, and among other things testified that the train which killed her father was 10 minutes late. This evidence at most was conjectural; she not having a time-table with which to verify her opinion in regard to the matter. In view of the peculiar circumstances surrounding this case, we fail to see how evidence of this character could be material in determining the question at issue. The deceased, in attempting to go upon the crossing, evidently knew about the "Fast Line," and he also must have known as a matter of common knowledge that railroads operate special trains, and that frequently trains are not run on time. New York, P. & N. R. Co. v. Kellam's Adm'r, 83 Va. 851, 3 S. E. 703.

A number of other witnesses were introduced, most of whom testified as to the condition of the approach to the crossing; others, that no signal was given by the defendant; and some as to the amount of damages which plaintiff would be entitled to recover, in the event the court should hold that she had established a good cause of action. The real question presented to this court is as to whether, under all the circumstances, the deceased exercised ordinary care from the time he left the point 150 feet distant from the crossing until he first saw the train approaching.

[5] While Anderson, as we have said, testified that deceased "looked and listened" at a point 150 feet from the crossing, no other inference can be drawn from his testimony than that after leaving this point he drove slowly, going at about the rate of 2 miles an hour, and that after he came to within 16 feet of the track, where witness said he could have seen 30 or 40 yards south of the crossing if he had looked, deceased drove his team onto the crossing, apparently oblivious to the fact that he might encounter the train in so doing. If he had only looked or listened, or even hesitated, when he came within 16 feet of the track, he could have saved his life and that of the other unfortunate

man who was riding with him. Bearing upon this point the court below, in referring to the facts, said:

"Anderson testified that they were driving at a rapid rate until they reached 150 feet of the track, when they did not stop, but slowed down to a speed of 2 miles per hour. It was proved beyond all doubt that the view of the track was obstructed. Anderson stated that, at a point about 16 feet before reaching it, the track could be seen for a distance of 30 or 40 rods; he subsequently corrected this statement and said for a distance of 30 or 40 yards. Young testified that from that point—16 feet before the team reached it—the track could be seen 360 feet. Recalling the fact that 5,280 feet constitute a mile, 10,560 feet 2 miles, it is mathematically sure that Dernberger, driving at a speed of 2 miles per hour, would go 176 feet a minute, or $2^{14}/_{15}$ feet per second. He therefore drove this 16 feet from where he could see the track in a little over 5 seconds; had he stopped the noise of his wagon at that point for these few seconds, so as to be able to look and listen effectively, he would have saved his life. Nay, more, admitting that the train was running 45 miles an hour, it was then covering 237,600 feet an hour, 3,860 feet a minute, 66 feet a second. If Dernberger had stopped at the point 16 feet before reaching the crossing, where he could see the track for a distance of 150 to 200 feet according to Anderson, 360 feet according to Young, for two seconds, the train would have beat him to the crossing. Such mathematical demonstrations must startle us into a realization of how necessary it was for Dernberger to have obeyed the legal obligation to stop, look, and listen."

[6] Among other things, it was shown that the defendant failed to give a signal in approaching the crossing, either by ringing the bell or blowing the whistle, and, as we have stated, the plaintiff insists that the failure of the defendant to give the signal as required by the statutes of West Virginia was the proximate cause of the injury of plaintiff's intestate. In other words, that if the defendant had given this warning the accident would not have happened. The Supreme Court of the United States in the case of Railroad Company v. Houston, 95 U. S. 697, 24 L. Ed. 542, in discussing this question passed upon this point; the first syllabus in that case being in the following language:

"The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They cannot be visited upon the railroad company."

In the case of R. A. Abernathy, Administrator, v. Southern Railway Company, 164 N. C. 91, 80 S. E. 421, and in Cork Treadwell, Administrator of Henderson Treadwell, deceased, v. The Atlantic Coast Line Railroad Company, 169 N. C. 694, 86 S. E. 617, the case of Railroad Company v. Houston, supra, is cited with approval.

In the case of Neininger v. Cowan, supra, 101 Fed. 787, 42 C. C. A. 20, this court in passing upon the case, the facts of which are somewhat analogous to the case at bar, speaking through Judge Simonton, said:

"There can be no doubt, from the testimony presented at the trial, that the defendants were guilty of negligence. The train approached a crossing of two

important streets in the city, and gave no notice whatever of its coming. The witnesses heard no bell, and no whistle was sounded. No gates had been erected at the crossing, and no person was stationed at that place to give notice of a moving train. The defendants had neglected to observe the regulations prescribed both by an act of the Legislature and by the ordinances of the city. So it must be assumed that at the time of the accident, and as one cause of the accident, there was negligence on the part of the defendants. But this does not decide the case. 'The question in such cases' as this at bar 'is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that, but for such negligence or want of care and caution on his part, the misfortune would not have happened.' Railroad Co. v. Jones, 95 U. S. 442, 24 L. Ed. 507; Railway Co. v. Ives, 144 U. S. 424, 12 Sup. Ct. 679, 36 L. Ed. 485.".

Judge Simonton in referring to the case of Missouri Pacific R. Co. v. Moseley, 57 Fed. 922, 6 C. C. A. 642, also said:

"It goes without saying that injury from engines or cars can be and ought to be foreseen or anticipated as the probable result of walking across or on a railroad track without looking both ways and listening for approaching engines. This is demonstrated by the fact that so universal is the experience that it has become a settled rule of law that such action is negligence. Railway v. Moseley, supra; Elliott v. Railway, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068. The negligence of the servants of a railroad company in not sounding a whistle or ringing a bell does not excuse a person for not exercising ordinary care in crossing a track. Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542."

Also the case of Wright v. Southern Railroad Co., 155 N. C. 325, 71 S. E. 306, extends the doctrine almost beyond the rule announced by the Supreme Court of the United States. In that case the plaintiff, who testified in his own behalf, said that:

"On September 6, 1909, he was going toward Canton, and had just passed a little branch, and a freight train hove in sight coming from Canton; that he drove on, his mare in a slow trot, kind of cantering along; he did not see anything to stop for, as the train had just passed. He thought everything was clear, and when he got to the railroad crossing, Hall, the man in the buggy with him, said, 'There is another train coming up there,' and plaintiff said, 'It is that train down there,' and Hall jumped out of the buggy right at the track and said, 'Whip up your mare, or you will be caught,' and plaintiff turned his head and looked up the track, and the train was about 40 or 60 feet from him, coming backwards down the track, and he struck his mare, and the smoke and steam coming out scared the mare, and she threw him against the sign post and injured him."

The Supreme Court of North Carolina in that case, among other things, said:

"But we must recognize the principle, firmly established, that the judge must decide, as a matter of law, the preliminary question whether there is any legal evidence to be submitted to the jury."

After stating that caution should be observed, and the construction of the evidence most favorable to the plaintiff adopted, the court said:

"Considering the evidence in this light, we must sustain the ruling of the judge, as it appears clear to us that the plaintiff was guilty of contributory negligence on his own evidence."

Indeed, this rule is so well settled that we do not deem it necessary to prolong the discussion on this point, further than to say that the cases

of Southern Ry. Co. v. Carroll, 138 Fed. 638, 71 C. C. A. 88, and Chicago, St. P., M. & O. R. Co. v. Rossow, 117 Fed. 491, 54 C. C. A. 313, are directly in point and sustain the contention of the defendant. It will be noted that the case of Missouri Pacific Railroad Co. v. Moseley, supra, and also the case of Railroad Company v. Houston, supra, the latter being the leading case by the Supreme Court on this point, are to the same effect.

In the case of Northern Pacific Railroad Company v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, the Supreme Court, through Mr. Justice Brown, who delivered the opinion of the court, said:

"So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked, nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony, and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that, if he had looked and listened, he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of 40 feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and, as the train was a freight train, going at a speed not exceeding 20 miles an hour, he would have had no difficulty in avoiding it. * * * If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or, if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence."

However, counsel for plaintiff insists that the evidence shows that deceased continued to look and listen up to the very moment that he was struck by the train. As we have stated, we do not think that there is any evidence to sustain this contention; but, even if there had been testimony that deceased was looking and listening the circumstances surrounding this occurrence are such as to render the truthfulness of such evidence highly improbable. Judge Van Devanter in the case of Chicago & N. W. Ry. Co. v. Andrews, 130 Fed. 65, 64 C. C. A. 399, in an opinion rendered by the Circuit Court of Appeals for the Eighth Circuit, said:

"Common knowledge tells us that in the presence of a strong wind blowing across the track the train could not have been entirely or largely obscured by smoke issuing from a small smokestack 25 feet in the air and only 18 feet from the track. The action of the wind would necessarily dissipate the smoke, and prevent it from falling to the ground in large volume so near the stack from which it was being discharged. If plaintiff had looked with any care, he would have seen the train. It was there. His presence upon the track and the collision were practically simultaneous. His mistake is disclosed by his own testimony, wherein he admits his controlling anxiety to cross in advance of the freight train, and says: 'I placed my eyes on this freight train, and advanced [two steps], * * * and saw this [passenger] train.' He actually stepped immediately in front of the moving train. If plaintiff had listened at-

tentively, he would also have heard the approaching train before he took the two unfortunate steps. Common knowledge tells us that a train of cars drawn over a railroad track by a 90-ton engine at a rate of 50 miles an hour makes a great noise, and that even a strong wind, not of extraordinary or unusual velocity or force, does not render it possible for such a train to come unexpectedly upon one who possesses a good sense of hearing and is reasonably employing it for his protection under circumstances which otherwise permit its free use. That plaintiff, in possession of good sight and hearing, could have looked and listened, and not have seen or heard the train, which must have been in plain view, and making a great noise, is contrary to all reasonable probability, in opposition to the physical facts, and impossible of belief. In these circumstances his testimony that he looked and listened is entitled to no credence, and does not create a conflict in the evidence."

The following cases are to the same effect: William Holden v. Pennsylvania Railroad, 169 Pa. 1, 32 Atl. 103; Eliza Coppuck v. Philadelphia, Wilmington & Baltimore Railroad Company, 191 Pa. 172, 43 Atl. 70; Virginia & S. W. Ry. Co. v. Skinner, 119 Va. 843, 89 S. E. 887.

As we have said, it is earnestly insisted by counsel for plaintiff that the case of Continental Improvement Co. v. Stead, supra, 95 U. S. 161, 24 L. Ed. 403, is on "all fours" with the case at bar, and therefore binding on this court. A careful consideration of this case, in view of the rulings of the Supreme Court since the judgment therein was rendered we think justifies us in saying that a proper interpretation of all the Supreme Court had to say at that time shows that it was not intended to in any wise modify the rule as announced in the cases of Railroad Co. v. Houston, supra, Railroad Co. v. Jones, supra, and Railroad Co. v. Freeman, supra. There the—

"plaintiff was going east, away from the village, following another wagon, and in approaching the railroad track could not see a train coming from the north, by reason of the cut and intervening obstructions. There was no evidence tending to show that the plaintiff, though he looked to the southward (from which direction the next regular train was to come), did not look northwardly; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired, and that he did not stop before attempting to cross the track; also, evidence tending to show that the engineer in charge of the train used all efforts in his power to stop it after he saw the plaintiff's wagon on the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed the train was running at the time; some witnesses testifying that it was at an unusual and improper rate, and others to the contrary."

There no motion was made to direct a verdict for the defendant. However, exceptions were taken to the refusal of the court below to adopt certain instructions presented by counsel for defendant. In referring to the questions sought to be reviewed Mr. Justice Bradley said:

"The present writ of error is brought to review the instructions given by the court to the jury on the trial."

The first and second paragraphs of the syllabus are in the following language:

"1. Travelers upon a common highway which crosses a railroad upon the same level, and the railroad company running a train, have mutual and reciprocal duties and obligations; and, although the train has the right of

way, the same degree of care and diligence in avoiding a collision is required from each of them.

"2. That right does not, therefore, impose upon such a traveler the whole duty of avoiding a collision, but is accompanied with and conditioned upon the duty of the train to give due and timely warning of its approach."

The court, after announcing the rule as epitomized in the syllabus from which we have quoted, among other things, said:

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them—such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. They are the authors of their own misfortune."

In this connection it should be remembered that the cases of Railroad Co. v. Houston, supra, and Railroad Company v. Jones, supra, are reported in the same volume and were decided at the same term at which the Stead Case was decided. Therefore, that the court must have had the Stead Case in mind at the time the opinions in the other two cases were rendered. There being, as we have stated, no motion to direct a verdict in the Stead Case, the real question presented in this case, where the facts are different from that case, was not passed upon by the Supreme Court at that time.

In the case of Schofield v. Chicago, Milwaukee & St. Paul Railway Company, supra, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, the Supreme Court also applied the doctrine announced in the Houston Case. There the court below directed a verdict in favor of the defendant upon the ground that the plaintiff by his own showing was guilty of negligence, whatever the negligence may have been on the part of the defendant; the court, among other things, saying:

"Applying the test that, if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in Continental Improvement Co. v. Stead, 95 U. S. 161 [24 L. Ed. 403], and especially in Railroad Co. v. Houston, 95 U. S. 697 [24 L. Ed. 542], and arrived at the conclusions of law, that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it, if he had look-

ed, and have avoided the accident by stopping until it had passed by, he was negligent in not looking."

The plaintiff, as we have stated, cites the case of Grand Trunk Railway Company v. Ives, supra, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, in support of its contention. The Supreme Court in that case, among other things, says:

"Nothing was said by this court in Railroad v. Houston, 95 U. S. 697 [24 L. Ed. 542], or in Schofield v. Chicago & St. Paul Railway, 114 U. S. 615 [5 Sup. Ct. 1125, 29 L. Ed. 224], which are relied upon by the defendant, that in any wise conflicts with the instructions of the court below in this case, or lays down any different doctrine with respect to contributory negligence. Delaware Railroad v. Converse, 139 U. S. 469 [11 Sup. Ct. 569, 35 L. Ed. 213]."

In the case of Delaware, etc., Railroad Co. v. Converse, 139 U. S. 474, 11 Sup. Ct. 569, 35 L. Ed. 213, it being shown that there was a severing of a train of cars on a railroad track at nighttime, leaving a part uncontrolled, except by ordinary brakes, to run across a public highway at a grade, without warning by either flagman, bell, whistle, or some other effective means that they were approaching, was this evidence of an utter disregard of persons using the highway, such as to justify the court in saying as a matter of law that it constituted negligence on the part of the railroad company for which plaintiff could recover unless he had been guilty of contributory negligence? The Supreme Court in that case cites with approval the cases of Railroad Co. v. Houston, supra, and Railroad Co. v. Jones, supra. Instead of modifying the doctrine announced in these cases, the court reaffirmed the same, quoting that portion of the Jones Case wherein the court said:

"The plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened."

The Houston Case has often been quoted, it appearing, as shown by "Shepherd's United States Citations," to have been cited 7 times by the Supreme Court and 71 times in the Federal Reporter. While in the Schofield Case the court refers to the Stead Case as well as the Houston Case, it prefers the Houston Case, and cites with approval that portion of the Houston Case wherein it was held that the failure of the engineer to sound a whistle or ring a bell did not release the deceased from taking ordinary precautions for her safety.

Counsel for plaintiff further contend that the facts in the case of Sealey v. Southern Ry. Co., 151 Fed. 736, 81 C. C. A. 282, decided by this court, are analogous to those of the case at bar, and therefore that the same is an "authority on all fours, binding here." The facts of that case are wholly different from the case at bar. In order to show this, we need only quote that portion of the opinion wherein the court says:

"He looked in going down the steps, within a few feet of the track of the defendant company, and, after getting down, again looked for the approach of trains, and, none being in sight, proceeded on his way over the company's tracks to his place of business. * * * After he had looked the second time, he walked a distance of 30 feet along the track, then stepped upon it, without at the moment looking back. It is not clear from the evidence that he thus stepped upon the track, or when he did so after looking; but, assuming that he did walk the 30 feet after looking, he had only a moment before looked

back, where he could see a distance of 300 yards, and he should not, therefore, be held conclusively disentitled to recover, because of his failure again to look, especially as he was observing the movements of a shifting engine in front of which he had to pass."

The foregoing, we think, disposes of plaintiff's contention as respects that case.

[7] From what we have said we are of opinion that the rule announced in the Houston Case, as well as the Neininger Case, is controlling, and should be followed by this court. When we apply that rule to the facts in the case at bar, we cannot escape the conclusion that, had it not been for the negligence of the plaintiff's intestate at and just before the time he reached the crossing, the accident would not have happened. The testimony of the various witnesses as to the intervening space between the obstructions to which we have referred and the crossing, and the distance one could have seen along the track in the direction from whence the train came, we think, was sufficient to establish the fact that, if the plaintiff had looked and listened at that point before going upon the crossing, he could have seen or heard the approaching train in ample time to avoid the accident.

Counsel for plaintiff also contend that, notwithstanding the Neininger Case, this court should follow the decisions of the highest court of the state in actions at law, except in cases of grave and palpable error, as to general commercial law and general jurisprudence, and cite in support of this contention the case of Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199, wherein the court, among other things, said:

"This court has many times considered how far federal tribunals, when undertaking to enforce laws of the states, should follow opinions of their courts. The authorities were reviewed and rule announced in Burgess v. Seligman, 107 U. S. 20, 33, 34, 35 [2 Sup. Ct. 10, 27 L. Ed. 359], which declared that, as to doctrines of commercial law and general jurisprudence, the former exercise their own judgment; 'but even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt.' * * * The conclusions of the Court of Appeals in Heckscher's Case [203 N. Y. 210, 96 N. E. 441], are not in direct conflict with any declared views of this court, and some expressions in our former opinions tend to support them."

Counsel insist that the decisions of the Supreme Court of West Virginia are to the effect that the question as to whether one has been negligent in failing to stop, look, and listen "is generally presented as a mixed question of law and fact to be submitted to the jury. * * *" In support of this contention the case of City of Elkins v. Western Maryland R. Co. (W. Va.) 86 S. E. 763, is cited. The court in that case, among other things, said:

"The sole question presented for our decision is whether, under all the facts and circumstances attending them at the time, plaintiff's servants were guilty per se, and as matter of law, of contributory negligence in not stopping before going upon the track. * * * We do not think the court was justified in holding in this case that plaintiff's servants were guilty per se of contributory negligence."

In the above case it was held that it was not negligence per se in all cases for a traveler upon a public street or road, in approaching a rail-

road, not to stop, as well as to look and listen, before attempting to go upon the track. On the other hand, it was held that, when a question arises as to whether the party attempting to cross had failed to stop, then an issue is raised as to a mixed question of law and fact, and therefore should be submitted to the jury. In that case it was also conceded that in cases of peculiar circumstances, where the facts were such that no two men could differ, it would then become the duty of the court, as a matter of law, to determine upon all the facts as to whether the negligence of the plaintiff was the proximate cause of his injury. There the court sought to distinguish between Beyel v. Newport News & M. V. R. Co., 34 W. Va. 538, 12 S. E. 532, on the ground that in the latter case it was shown that the plaintiff neither stopped, looked, nor listened where he could have heard a signal from an approaching train, and that being behind a wall running almost down to the railroad, which obscured his vision, and to a considerable extent his hearing, until he had reached a point within a very short distance of the track, and at a time when he knew that a train was about due. When we apply the rule announced in the City of Elkins Case to the facts as established in this case, we find nothing therein in conflict with what we conceive to be the universal rule where one, in utter disregard of surrounding dangers, neither listens nor looks before placing himself in a position of imminent peril.

It is well settled that, where a rule has been established by the federal courts anterior to a decision by the state courts, or where, on the other hand, the cause of action accrued after a change of decision in the state courts, the federal courts will abide their own decisions, or follow the decision of the state court at the time the cause of action accrued. It appears from the evidence that the plaintiff's cause of action accrued on the 25th day of July, 1915, and the Supreme Court of West Virginia rendered its decision in the case of City of Elkins v. Western Maryland Railroad Company, supra, on the 12th day of October, 1915. It is urged by counsel for plaintiff that Neininger v. Cowan, supra, was decided in view of the rule announced in Beyel v. Newport News & M. V. R. Co., supra, and Berkeley v. Chesapeake & O. R. Co., 43 W. Va. 11, 26 S. E. 349, and that the local law of that state is now expressed in the City of Elkins Case, which practically overrules the two last-named cases, and should, therefore, be adopted by this court.

[8, 9] We cannot concur in this suggestion for two reasons: (a) If the decision in the City of Elkins Case overrules the decisions of that court, this court would not be bound by such decision as to a cause of action which accrued prior to the date of its rendition; and (b) if the cases which counsel contend have been overruled did not establish the law of that state, then this court would not be required to alter its judgment in the case of Neininger v. Cowan, supra, simply because the state court had changed its view of the law. In other words, this court, in the absence of a well-established rule by the state court of West Virginia, was warranted in forming its independent judgment on the subject, and, in any event, it is not disposed to change its judgment, so as to meet the views of the later decisions in a cause of action like the one at bar, where rights and liabilities have arisen before the last-nam-

ed decision by the Supreme Court of the state. Stanley Co. Commissioners v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; Kuhn v. Fairmont Coal Company, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. In the latter case the Supreme Court said:

"We take it, then, that it is no longer to be questioned that the federal courts in determining cases before them are to be guided by the following rules: (1) When administering state laws, and determining rights accruing under those laws, the jurisdiction of the federal court is an independent one, not subordinate to, but co-ordinate and concurrent, with the jurisdiction of the state courts. (2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal court as authoritative declarations of the law of the state. (3) But, where the law of the state has not been thus settled, it is not only the right but the duty of the federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

Being of opinion that the other assignments of error are without merit, we do not deem it necessary to discuss the same.

[10] No hard and fast rule as to the duty of a traveler on the highway to stop, look, and listen before crossing a railroad can be laid down. Under some circumstances the railroad company may so act as to allay the sense of danger and relieve the traveler from the obligation to stop, look, and listen. A plain view of the track may make it no breach of duty for him not to stop or listen. He may be traveling on foot or so silently that he can listen as well going as stopping. The obstruction of the view may be such that he is obliged to depend upon his hearing without the aid of his sight. We, therefore, do not lay down the inflexible rule that a traveler must stop, look, and listen under all circumstances. All that we decide in this case is that the evidence excludes any other reasonable conclusion, and that the decedent did not exercise the care in going on the track that a reasonable man would take for his own protection, and therefore the plaintiff cannot recover.

The facts of this case, when considered from any viewpoint, are such as to impel us to the conclusion that the negligent conduct of plaintiff's intestate was the proximate cause of his injury. Such being the case, we are of opinion that the action of the lower court in directing a verdict in favor of defendant was eminently proper.

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

PARKER, Superintendent for Five Civilized Tribes, et al. v. RILEY et al.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1917.)

No. 4520.

1. INDIANS ⟸16(3)—LANDS—LEASES—APPROVAL BY SECRETARY OF INTERIOR.
Act May 27, 1908, c. 199, § 1, 35 Stat. 312, provides that homesteads of allottees enrolled as mixed-blood Indians having half or more than half Indian blood, and all allotted lands of enrolled full-bloods and mixed-bloods of three-fourths or more Indian blood shall not be subject to alienation prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part. Section 2 authorizes leases of restricted lands for oil, gas, or other mining purposes with the approval of the Secretary of the Interior. Section 9 provides that, if any member of the Five Civilized Tribes shall die leaving issue born since March 4, 1906, the homestead of the allottee shall remain inalienable for the use and support of such issue during their lives until April 26, 1931, unless restrictions against alienation are removed by the Secretary of Interior in the manner provided in section 1. *Held* that, where an allottee died leaving a child born since March 4, 1906, and other heirs, the subsequent approval by the Secretary of the Interior of an oil and gas lease by the heirs removed the restrictions on alienation from the leasehold and the royalties thereunder, without a removal of the restrictions or alienation being first procured under section 1.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45.]

2. INDIANS ⟸16(3)—LANDS—LEASES—APPROVAL BY SECRETARY OF INTERIOR.
Such lease was an alienation of the oil and gas taken from the land by the lessor, and the approval thereof by the Secretary of the Interior was a removal of restrictions on such alienation.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 45.]

3. INDIANS ⟸18—LANDS—DESCENT—RIGHTS OF PARTIES.
Assuming that the child born after March 4, 1906, has an estate for life in the allotment, and that this estate was not terminated or changed by the lease, the royalties nevertheless belonged to the heirs in equal shares, to whom the land descended under the Laws of Oklahoma, since as owner of an estate for life she had no right to open any mines, and no right by virtue of her life estate to the royalties or rents and profits from mines subsequently opened.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49.]

4. INDIANS ⟸18—LANDS—DESCENT—RIGHTS OF PARTIES.
The child born subsequently to March 4, 1906, did not have an estate for life in the allotment, but at most only an estate for years, defeasible during its term by her death, or by the removal of the restrictions on alienation by the Secretary of the Interior.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49.]

5. CONSTITUTIONAL LAW ⟸93(1)—INDIANS ⟸15(1)—LANDS—RESTRICTIONS ON ALIENATION—VESTED RIGHTS.
Section 7 of the Original Creek Agreement (Act March 1, 1901, c. 676, 31 Stat. 861) and section 16 of the Supplemental Creek Agreement (Act June 30, 1902, c. 1323, 32 Stat. 500) provided that the homestead of Indian allottees should be inalienable for 21 years, and remain after the death of the allottee for the use and support of children born after the date of the ratification of the original agreement. *Held*, that Act May 27, 1908, so far as its provisions are repugnant to and inconsistent with the original

and Supplemental Agreements, repeals them, and is a substitute therefor, and such repeal did not deprive the children of an Indian allottee of any vested estate or constitutional rights.

Reed, District Judge, dissenting in part.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Tootie Riley, a minor, by U. C. Stockton, her guardian, and others, against Gabe E. Parker, as Superintendent for the Five Civilized Tribes, successor of Dana H. Kelsey, as United States Indian Superintendent, Union Agency, and another. From the decree (218 Fed. 391), defendants appeal. Affirmed.

Paul Pinson, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., and Carter Smith, Sp. Asst. U. S. Atty., of Tulsa, Okl., on the brief), for appellants.

W. J. Horton, of South McAlester, Okl. (R. A. Smith, of McAlester, Okl., on the brief), for appellee Riley.

C. H. Tully, of Eufaula, Okl., for other appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

SANBORN, Circuit Judge. On October 3, 1912, Tootie Riley, a minor, by her guardian, Julia Willingham, a minor, by her guardian, and Doc Willingham, the sole heirs at law of Emma Derrisaw Willingham, who before her marriage to Doc Willingham was Emma Derrisaw, a full-blood Creek Indian, made an oil and gas mining lease of 40 acres of land in Creek county, Okl., which had been allotted to Emma Derrisaw as her homestead, and provided in the lease that the royalties payable by the lessee should be paid, and they have been paid, to the United States Indian superintendent, Union agency, and to his successor, Gabe E. Parker, superintendent of the Five Civilized Tribes, who, together with W. M. Baker, cashier and special disbursing agent for the Five Civilized Tribes, now hold the same in trust for the benefit of the lessors. More than $15,000 are thus held and are ready for distribution, and the question in this case is when and in what way it should be divided among the lessors. The court below held that each of them was entitled to receive one-third thereof, and so decreed. From this decree the officers appeal, and their counsel present numerous objections and theories inconsistent with the adjudication below.

In the first place they contend that the approval of the lease by the Secretary of the Interior did not effect the removal of the restrictions on alienation of the part of the property which the lease granted to the lessee the right to take from it, and hence that the fund must be retained until 1931: (a) Because a removal of restrictions is expressly a distinct act from the approval of a lease; and (b) because an oil and gas mining lease is not an alienation of land. The first arugment in support of this contention is founded on the fact that in the disposition of the lands of the Indians Congress imposed more extensive restrictions upon their homesteads than upon their other allotted lands, and upon sections 1, 2, and 9 of the act of May 27, 1908 (35 Stat. 312, 315,

c. 199). These are the provisions of these sections material to this controversy:

Section 1: "All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Section 2: "Leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise."

Section 9: "That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such * * * allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931, * * * in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions."

Emma Derrisaw's homestead allotment was duly selected, allotted, and patented to her. In the year 1901 her daughter, Tootie Riley, was born. In July 1905, Emma Derrisaw and Doc Willingham intermarried, and as the result of this marriage Julia Willingham was born on February 11, 1907. In November, 1907, Emma Derrisaw Willingham died intestate. As Julia Willingham is her only issue born since March 4, 1906, the right to use and occupation of the homestead until April 26, 1931, is vested in her by the terms of section 9, subject to the termination of that right by her death before that time, or by the removal of restrictions on alienation from the land, either in whole or in part. Subject to this homestead right of Julia, the title to the land, according to the laws of descent and distribution of Oklahoma, vested in Tootie Riley, Julia Willingham, and Doc Willingham in fee in equal shares upon the decease of Emma Derrisaw Willingham. The fact that the lease was lawfully and regularly made and that it was duly approved by the Secretary is conceded.

[1] But counsel call attention to the declaration of section 9 to the effect that the homestead in cases of this class shall remain inalienable "unless restrictions against alienation thereof are removed therefrom by the Secretary of the Interior in the manner prescribed by section 1 hereof," and insist that the approval of the lease was ineffective to remove the restrictions on alienation from the leasehold or from the royalties collected from it, because the Secretary in the approval of the lease acted under section 2, and not under section 1 of the act of May 27, 1908. They also urge that under section 5 of the act (35 Stat. 313), which declares that any attempted alienation or incum-

brance by deed, mortgage, contract to sell, or other instrument or method of incumbering real estate, which affects the title to land allotted to allottees of the Five Civilized Tribes, prior to the removal of restrictions therefrom, and also any lease of such restricted land made in violation of law, shall be absolutely null and void, necessarily renders the attempted removal of any restriction upon alienation by the approval of a lease by the Secretary void unless the restriction upon alienation had been first removed by a prior proceeding under section 1. These arguments, however, seem too subtle and ingenious to be sound. Section 1 provides that the Secretary may remove the restrictions on alienation wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds as he may prescribe. Section 2 provides that leases of restricted lands for oil, gas, or mining purposes approved by the Secretary under rules and regulations provided by him shall be valid. Valid leases of lands valuable for their oil, gas, or mineral result in the extraction and disposition of the most valuable part of the property and necessarily remove from that part of the property all restrictions upon alienation. If they failed to remove such restrictions, they would be ineffective and void. If approved under section 2 they necessarily remove the restrictions from the property in part under rules and regulations provided by the Secretary, and if restrictions were removed to the same extent under section 1 they would likewise be removed under rules and regulations provided by the Secretary.

Section 1 is indeed broader than section 2, and it authorizes the Secretary to remove the restrictions wholly as well as partly from the land; but as the whole is greater than any of its parts, and includes them all, section 1 includes the power to remove the restrictions on the leaseholds and their products which the Secretary is also empowered to remove by means of his approval of leases under section 2. It may be that the provision in section 9 that the homestead shall remain inalienable unless the restrictions are removed under section 1 refers to the removal of the restrictions wholly and not in part. However this may be, the court is without doubt that it was neither the intent of Congress nor is it the effect of that provision to invalidate leases approved by the Secretary under section 2, or to deprive them of the indispensable effect of valid leases, the removal of the restrictions on alienation from the leaseholds they evidenced, and the royalties they provide. Nor, since restrictions on alienation may be removed from leaseholds and their royalties either under section 1 or under section 2, is it essential to the validity of the removal under either section that the same or a like removal should have been first sought and procured under the other. This construction of this act is consonant with the cardinal rules that every statute should receive a rational, sensible interpretation, that the intention of the legislative body should be ascertained and given effect, if possible, and that this intention must be deduced, not from a part, but from the entire statute which expresses it, because the enacting body did not express its intention by a portion, but expressed it by all, of the law it passed upon the subject. On the other hand, the construction sought which would deprive oil and gas mining leases authorized by section 2 of the effect of the removal of

restrictions upon the alienation of the leaseholds and the royalties they evidence, and thus render them ineffective, flies in the face of the familiar maxim that "all the words of a law must have effect rather than that part should perish by construction." City of St. Louis v. Lane, 110 Mo. 254, 258, 19 S. W. 533; United States v. Ninety-nine Diamonds, 139 Fed. 961, 963, 72 C. C. A. 9, 11, 2 L. R. A. (N. S.) 185; Knox County v. Morton, 68 Fed. 787, 790, 15 C. C. A. 671, 675; Wrightman v. Boone County, 88 Fed. 435, 437, 31 C. C. A. 570, 572; Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29.

[2] It is next said that the lease did not constitute an alienation of any part of the land, and that consequently its approval by the Secretary did not effect a removal of any restrictions on alienation. In support of this position counsel cite Duff v. Keaton, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472, wherein the Supreme Court of Oklahoma held that an oil and gas lease was neither a conveyance nor a sale of a minor's land within the meaning of section 5314, Comp. Laws of Oklahoma 1909, so that it was not necessary for his guardian, in order to make such a lease on his behalf, to follow the procedure there prescribed to enable him to make a sale or conveyance of the land. But that court was careful to add:

"This conclusion does not militate against the rule announced in Eldred v. Okmulgee Loan & Trust Co., 22 Okl. 742, 98 Pac. 929. There it was held that a lease was an alienation within the terms of an act of Congress approved April 21, 1904 (33 Stat. 204, c. 1402), which reads: 'And all restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads removed'—wherein this court said: 'Hence we conclude that a lease conveys a leasehold estate; is an alienation by deed; is an alienation within the intent and meaning of the act of April 21, 1904, supra, upon which species of alienation restrictions by that act were removed.'" 33 Okl. 103, 124 Pac. 295, 42 L. R. A. (N. S.) 472.

They cite Kolachny v. Galbreath, 26 Okl. 772, 110 Pac. 902, 38 L. R. A. (N. S.) 451, which holds that a grant by lease of oil and gas, when it is in the ground, is a grant, not of the oil and gas in the ground, but of such part of the oil and gas as the lessee finds and reduces to possession, and that, as such a lease does not convey a corporeal hereditament, it will not sustain an action of ejectment. And such is also the holding by this court. Priddy v. Thompson, 204 Fed. 955, 960, 123 C. C. A. 277, 282. They cite Traer v. Fowler, 144 Fed. 810, 75 C. C. A. 540, State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520, and other cases of like character, to the general rule that coal, iron, oil, gas, and other minerals derived from the ordinary and reasonable operation of opened mines constitute the rents and profits and not the body of the property, and belong to the owners of the former and not to the owners of the latter. But these decisions do not rule, nor did the judges in rendering them consider, the question here at issue. That question is: Does an oil and gas mining lease of a restricted homestead, made and approved under section 2 of the act of May 27, 1908, constitute an alienation thereof wholly or in part within the meaning of that act? Section 1 of that act declares that all homesteads of the class here under consideration "shall not be subject to alienation, contract to sell, power of attorney,

or any other incumbrance prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions wholly or in part" etc.

Oil and gas in the ground are a part of the land, and in this case they were the most valuable part of the land of the lessors. While a lease of such land, granting the exclusive right to find and extract all the oil and gas therein, conveys only that part of the oil and gas which the lessee finds and reduces to possession, and not all the fugacious oil and gas in the land, it nevertheless grants the right and gives the power to the lessee to extract and apply to his own use the most valuable part of the land of the lessors, their oil and gas in their ground; and when, as here, the execution of such a lease is followed by the discovery and extraction of valuable deposits of oil and gas thereunder, it not only conveys an incorporeal hereditament, but it effects the removal from the lessors of the title to the most valuable part of their land, for oil and gas in the ground is a part of the land of the owners of the latter. Such a lease becomes an alienation of that part of the land of the lessors which the lessee takes from it, converts into personal property, and appropriates to his own use. That it was not the intent of the members of Congress that such a lease should fall without the alienation they forbade is evident from the fact that such a result would have left property of incapable Indians of great value free from restrictions on alienation, and also from the fact that they thought it necessary to enact section 2 in order to provide a way by which such leases might, with the approval of the Secretary of the Interior, be relieved from the restrictions on alienation which they clearly believed had been imposed upon them by section 1. And the conclusion is that a lease of a restricted homestead for oil, gas, or other mining purposes under section 2 of the act of May 27, 1908, is an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from it by the discovery and removal thereunder of the oil, gas, or other mineral therein. Moore v. Sawyer (C. C.) 167 Fed. 826, 835; Eldred v. Okmulgee Loan & Trust Co., 22 Okl. 742, 745, 746, 98 Pac. 929; Sharp v. Lancaster County, 23 Okl. 349, 100 Pac. 578, 579; Truskett v. Closser, 198 Fed. 835, 836, 838, 117 C. C. A. 477, 478, 480; Beck v. Flournoy Live Stock & Real Estate Co., 65 Fed. 30, 31, 34, 35, 12 C. C. A. 497, 498, 501, 502.

Another position of counsel for the appellants is that the approval of the oil and gas mining lease, and the consequent removal of the restrictions on alienation from that part of the homestead which consisted of the oil and gas in the ground which the lessee has taken and may take from the land under the lease, did not effect any change in the character or in the termination of any estate inherited by Julia Willingham, and that she still retained thereafter the same interest and estate in the land and in the homestead which she had previously held. The only question in this case is the extent of the respective interests of the three lessors in the fund which has been accumulated in royalties out of the oil and gas extracted under the lease. From that oil and gas, and from the part of the land which the lessee took from the lessors in order to obtain them, the restrictions upon alienation were removed on October

25, 1912, when the Secretary approved the lease. It is immaterial to the determination of the interests of these lessors in this fund what estates or interests they retain in that part of the land constituting the homestead not covered by the lease, and it is also immaterial whether or not the restrictions on alienation have been removed from that part of the land. Those questions are therefore here dismissed.

[3] Nor is it fatal to the decree of the court below that each of these three lessors is entitled to one-third of the fund in controversy that the estate or interest of Julia Willingham in the part of the land which the lessors granted to the lessee remained the same after the removal of the restrictions as before. When these restrictions were removed on October 25, 1912, the land was agricultural or grazing land. No oil or gas wells had been drilled, and no mines had been opened. Julia Willingham had the right during her life, until April 26, 1931, to the use and occupation of the land, and she, Tootie Riley, and Doc Willingham each owned one undivided one-third of the land in fee subject to that right. As an estate for life is the largest estate that right could possibly be, let us concede, without deciding, that the title of the three heirs was subject to an estate for life in Julia Willingham, and that her estates and interests in the lands were not terminated or changed by the removal of the restrictions on the alienation of the part of the land leased. As, when the restrictions were removed, there were no mines opened on the land, she, as owner of an estate for life, had no right to open any, and no right by virtue of her life estate to the royalties or rents and profits from any oil or gas that might be obtained from mines subsequently opened. The title to the oil and gas in the ground, and to the rents, profits, and royalties that might in the future be obtained from mines that were subsequently opened, was in the three owners of the fee. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 Pac. 995; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Hook v. Garfield Coal Co., 112 Iowa, 210, 83 N. W. 963; Oolagah Coal Co. v. McCaleb, 68 Fed. 86, 15 C. C. A. 270; Ohio Oil Co. v. Daughetee, 240 Ill. 361, 88 N. E. 818, 36 L. R. A. (N. S.) 1108. If, therefore, as counsel argue, the removal of the restrictions on alienation from the part of the land subject to the lease neither terminated nor changed the character of the estates of the three parties interested in the land, Julia Willingham, who had no right to nor interest in the oil or gas in the lands, or in their future proceeds, before the removal of the restrictions by reason of her homestead right, had none thereafter by virtue of that right, and those proceeds were rightly decreed to the three owners of the fee share and share alike.

[4] Moreover, if this conclusion were erroneous, a careful study of section 9 has satisfied that the homestead right of Julia Willingham in reality never rose to the dignity of an estate for life in any part of the land allotted to Emma Derrisaw. The purpose and effect of the act of July 28, 1908, was not to create estates, but to limit the extent of and to remove restrictions upon alienation. United States v. Knight, 206 Fed. 145, 124 C. C. A. 211. This homestead was originally vested in Emma Derrisaw, the allottee, and remained inalienable after the

death of that allottee for the use and support of her issue. Section 9 of the act of May 27, 1908, which limited the duration of the restrictions on its alienation and the time during which Julia Willingham had the right to it for her use and support, provided that neither should continue beyond April 26, 1931, in any event, and that both might be terminated at any time before that date, either by the death of Julia or by the removal by the Secretary of the restrictions on its alienation. The contention of counsel that the clause "unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof," in the provision in section 9 that if the allottee of one-half or more Indian blood shall die leaving issue surviving born since March 4, 1906, "the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931," limits the word "inalienable" only, and does not limit the duration of the right of such issue to the homestead for their use and support, has received consideration and meditation, but it has not proved persuasive. The subject of the act, which was restrictions on alienation, the purpose of its enactment, which was to limit and remove them, and the plain terms of this provision, convince that its true construction is that restrictions on the alienation of, and the right of the issue to, the homestead for their use and support, terminated at the same time, whether that termination is wrought by the removal of the restrictions on alienation by the Secretary, by the death of the issue before May 26, 1931, or by the arrival of that date. And the result is that, even if Julia Willingham ever had any homestead right for her use and support in the part of the land of the lessors granted by the lease, it did not constitute an estate for life, it did not rise higher than an estate for years defeasible during its term by her death, or by the removal of the restrictions on its alienation by the Secretary, and, as the Secretary removed all restrictions on the alienation of that part of the land by his approval of the lease on October 23, 1912, her homestead right to it for her use and support, if she ever had any, then terminated. And the conclusion is that, because Julia Willingham never had, by virtue of her homestead right, any estate for life in or right to the part of the land here in controversy that was leased, or to the proceeds thereof for her use and support, and because, even if she had any estate or interest therein, it was terminated on October 23, 1912, when the restrictions on its alienation were removed, she is entitled to no larger share of the royalties derived from the lease than is each of the other lessors.

In opposition to this result the decision of the Supreme Court of Oklahoma in Barnes v. Keys, 36 Okl. 6, 127 Pac. 261, 45 L. R. A. (N. S.) 178, Ann. Cas. 1915A, 515, Wilson v. Youst, 43 W. Va. 826, 28 S. E. 781, 787, 39 L. R. A. 292, Ammons v. Ammons, 50 W. Va. 390, 40 S. E. 490, 494, Eakin v. Hawkins, 52 W. Va. 124, 43 S. E. 211, 212, Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223, 229, and Blakley v. Marshall, 174 Pa. 425, 34 Atl. 564, have been cited. The opinions in

these cases and in Higgins Oil & Fuel Co. v. Snow, 113 Fed. 433, 437, 439, 51 C. C. A. 267, 271, 273, and Raynolds v. Hanna (C. C.) 55 Fed. 783, have been examined and thoughtfully considered. They rest on the proposition that, although the owner of a life estate may not lawfully open mines and extract and appropriate to his own use minerals from unopened land, yet, where the owner of the life estate in mineral land and the remaindermen join in a mining lease for the purpose of opening and operating mines in the land, the life tenant is entitled to receive a part of the royalties proportionate to the value of his life estate.

The facts in these cases, however, differ so radically from those of the case at bar that the decisions in them, not only fail to rule this case, but they fail to persuade that the conclusion by the court below and now by this court is erroneous. For example, Barnes v. Keys, was a partition suit between the owners of the life estate in mineral land and the remaindermen. The life expectancy of the estate was 38 years. The trial court had heard, considered, and found the respective proportional values of the life estate and the estate of the remaindermen in the land which they had jointly leased for mining purposes. It had found that the value of the life estate was 80 per cent. of the entire value of the property and the value of the estate of the remaindermen only 20 per cent. of that value, and upon the basis of that finding the Supreme Court of Oklahoma held that the owners of the life estate were entitled to receive interest on the royalties at 6 per cent. per annum from the times when they were respectively produced until the expiration of the life estate. In the case at bar there is no life estate. Even if there was a defeasible estate for years in the part of the land leased, that was terminated by the removal of the restrictions on the alienation of that part when the lease was approved, and before the mine was opened or any of the royalties were collected. The court below did not find in this case that the homestead right of Julia Willingham in the part of the land leased, or in the whole body of the land, ever had any value, but it adjudged that she was entitled to no part of the royalties on account of her homestead right and that was in effect a finding that her homestead right in the part of the land leased was of no value, and there is no evidence in the record that it had any value. Because the legal proposition on which the cases cited by counsel for the appellants relative to this subject are founded is inapplicable to the facts of this case, and because the facts in those cases are not analogous to the facts in the case at bar, the opinions in those cases fail to satisfy that the conclusion of the court below that Julia Willingham was entitled to no part of, or interest in, the royalties under the lease, was not just and equitable.

[5] Finally, counsel for the appellants, after exhaustively discussing the rights and interests of the lessors on the theory that they are measured by the provisions of the act of May 27, 1908, propose near the end of their brief a new theory, which they concede that they did not present to the court below, to the effect that conceivable estates differing from those resulting from the act of 1908 were vested in Tootie Riley and Julia Willingham by section 7 of the Original Creek Agreement

(Act March 1, 1901, c. 676, 31 Stat. 861) or by section 16 of the Supplemental Creek Agreement, which took the place of section 7 (Act June 30, 1902, c. 1323, 32 Stat. 500), which estates could not constitutionally be and were not devested or modified by the act of 1908, by virtue of which conceivable estates Tootie Riley and Julia Willingham are each entitled to one-half of the royalties under the lease as joint owners of the fee to the land from which they are derived, or that they are entitled as joint life tenants to the interest on the royalties. Section 7 of the Original Creek Agreement provided that the homestead of each citizen should be inalienable for 21 years, and should remain after the death of the allottee for the use and support of children born to him after the ratification thereof, which was made on May 25, 1901, and Tootie Riley and Julia Willingham were born after that date. Section 16 of the Supplemental Creek Agreement (32 Stat. 500) declares that such homestead shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for 21 years from the date of the deed therefor, and that it shall remain after the death of the allottee for the use and support of children born to him after May 25, 1901.

The arguments of counsel in support of their new theory have not proved convincing. They are ingenious and subtle. But they do not tend to lead to clarity and certainty, but to confusion and doubt. Suffice it to say upon this subject that, in view of the opinion of the Supreme Court in Tiger v. Western Development Company, 221 U. S. 286, 304, 306, 307, 308, 309, 311, 313 and 316, 31 Sup. Ct. 578, 55 L. Ed. 738, and of the later decisions which have quoted and followed that opinion, our conclusion is that the provisions of the act of May 27, 1908, relative to the rights and interests of these lessors so far as they are in any respect repugnant to and inconsistent with those of the original or the Supplemental Creek Agreement relative to the same subject, repealed to the extent of that repugnancy and became substitutes for those earlier provisions, that they did not deprive any of the parties in interest here of any of their vested estates or constitutional rights, and that the rights and interests of these parties are governed and measured by the provisions of the act of May 27, 1908.

Let the decree below be affirmed.

REED, District Judge (dissenting in part). The restrictions upon alienation of the oil and gas deposits in the homestead of Emma Derrisaw, a full-blood citizen of the Creek Nation, the allottee of the land in question, if removed at all, other than by her death, were removed by the approval of the oil and gas mining lease of October 3, 1912, by the Secretary of the Interior on November 9, 1912. Admitting for the present that the Secretary of the Interior, in view of section 6 of the act of Congress approved May 27, 1908 (35 Stat. c. 199, p. 315), was thereafter authorized to approve such leases to effect the removal of such restrictions, the question is: To what share, if any, of the royalties in the custody of the superintendent of the disbursing agency of the Five Civilized Tribes arising from the lease of such premises is the minor defendant Julia Willingham now entitled, she being the only child of Emma Derrisaw deceased intestate, born since March 4, 1906,

and restrictions upon the alienation of her homestead not having been removed prior to her death?

It seems to be conceded that section 9 of the act of May 27, 1908, controls the determination of this question. That section in full reads in this way:

"Sec. 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, that if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the state of Oklahoma, free from all restrictions: Provided further, that the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section."

Other provisions of the act of May 27, 1908, that may bear upon this question are:

Section 2 as set forth in the majority opinion further provides: "That the jurisdiction of the probate courts of the state of Oklahoma over lands of minors * * * shall be subject to the foregoing provisions. * * *"

"Sec. 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to the removal of restrictions therefrom, and also any lease of such restricted land made by violation of law before or after the approval of this act shall be absolutely null and void."

"Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

And further provisions of this section empower the Secretary of the Interior, under rules and regulations prescribed by him, to exercise supervision and control over all guardians of minors, to the end that their estates in restricted and other lands shall be preserved and their property protected for the benefit of said minors, and the probate courts may in their discretion appoint any representative of the Secretary as guardian for such minors, without fee or charge.

Upon the death of Emma Derrisaw intestate (the restrictions against alienation of the homestead not having been previously removed, and issue born to her since March 4, 1906, surviving her), section 9 of the act conferred upon her minor child, Julia Willingham, who was born since March 4, 1906, the sole right to the use of the homestead for her support until April 26, 1931, unless she should die prior to that date, when her right would cease and the land then descend to the heirs of her mother Emma Derrisaw Willingham. The minor Julia is still liv-

ing, or was at the time of the hearing in the court below, and that court held, as I read its opinion, that, upon the death of Julia's mother intestate, this minor became entitled only to such use of the land as she might make of it, with the restrictions against its alienation still existing; that the use contemplated by the statute did not permit the lease of the land for oil and gas mining purposes, because that would amount to a disposition of that part of the corpus of the property and prevent its going to the heirs of the allottee at the expiration of the minor's term as granted by section 9, and would in effect be a conversion for the benefit of the minor of that part of this homestead property; that the minor could not therefore rightly be allowed anything from the proceeds arising from the oil and gas mining lease for her support during the term granted by that section.

I am unable to concur in that part of the decree, for under section 9 upon the death of Emma Derrisaw intestate all restrictions against the alienation of this homestead were removed and it then descended to her heirs under the statute of Oklahoma, subject to the right of her heirs born since March 4, 1906, the child Julia being the only heir so born. The restrictions against alienation it is true had not, previous to her death, been removed in the manner provided by section 1 of the act; but under section 9 all restrictions upon her land, including this homestead, were removed by her death. The removal of the restrictions is, of course, for the purpose alone of permitting alienation of the land. United States v. Knight, 206 Fed. 145, 124 C. C. A. 211. And unless alienation is in fact made the rights of parties in the land, other than the right of alienation, it seems to me are not affected. But if it be conceded that the removal alone of the restrictions by the Secretary of the Interior can deprive the minor Julia of her right to the use of this homestead for the purpose for which it was granted to her, clearly she could not be deprived of such right until the restrictions are so removed, which in this case was not until November 9, 1912, four years after the death of her mother and after her right to the use thereof had fully vested in her. The clause of section 9 which reads, "unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof," has reference to and limits the word "alienation," and does not affect the right in or to the land other than the right to alienate or incumber it. Emma Derrisaw died intestate in November, 1908, seised in fee of this homestead, the restrictions upon its alienation not having been previously removed, but were removed under section 9 of the act by her death. No alienation of the land, or of its oil and gas deposits, or will of Emma Derrisaw, having then been made, its descent was then cast upon her legal heirs, subject, however, to the rights of the child Julia under section 9, who was born since March 4, 1906, to its use for her support until April 26, 1931, or until her death should that occur before that date.

I am unable to bring myself to believe that the right of Julia to the use of this entire homestead property, if necessary for her support, which vested in her on the death of her mother in November, 1908, could be devested by the approval of the Secretary of the Interior four years later. Jones v. Meehan, 175 U. S. 1, 32, 20 Sup. Ct. 1, 44 L. Ed.

49. Conceding, for the present, that under section 6 of the act of May 27, 1908, the Secretary of the Interior was authorized to approve the lease after the death of Emma Derrisaw (sections 11, 12, and 13 of article 7 of the Constitution of Oklahoma, and sections 3330, 3335, 6447, 6532, 6554, and 6569 of the Revised Laws of Oklahoma [1910], which confer upon the proper county court of the state of Oklahoma, jurisdiction of the persons and property of minors in that state), it seems clear that the right of the minor Julia to this entire homestead property, or the income from or proceeds of this homestead, for her support during the term granted by section 9, is not, and cannot rightly be, barred by the approval of the lease by the Secretary of the Interior in November, 1912. Jones v. Meehan, 175 U. S. 1, 32, 20 Sup. Ct. 1, 44 L. Ed. 49, above. If this be not true, then, if the homestead is not susceptible of use for agricultural or similar purposes, the minor would be deprived of all means of support from its use during the term for which it was granted to her. See Mallen v. Ruth Oil Company et al., 231 Fed. 845, 146 C. C. A. 41.

It also seems clear that the royalties received under this oil and gas mining lease, deposited with the disbursing agency of the Five Civilized Tribes, are rent and income from that part of this homestead, which may be rightly used for the support of this minor, and only such of the proceeds or income thereof as remains after a reasonable support has been furnished to the minor therefrom during the term of her right to the use thereof can rightly be distributed to the heirs, including this minor, of Emma Derrisaw. The Congress, in enacting section 9 of this act, was not concerning itself with any technical definition or meaning of the estate or interest in the homestead right to which the children of allottees of lands in the Creek Nation born since March 4, 1906, would be entitled under that section, for it grants to such children the right to the use of such estate, whatever the legal definition of that right may be, for their support during the term granted. In Jones v. Meehan, above, it is said, in construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the treaty must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians, citing Worcester v. Georgia, 6 Pet. 515, 582, 8 L. Ed. 483; Choctaw Nation v. United States, 119 U. S. 1, 27, 28, 7 Sup. Ct. 75, 30 L. Ed. 306; and the same rule should apply in construing the acts of Congress, since the government has adopted that method of dealing with Indians, instead of by treaty.

That the right granted is not a life estate may be admitted; but that it is a right to use it for a term of years, subject to the termination of that right by her own death, or the death testate of her mother, prior to the expiration of the term granted, cannot be doubted. The oil and gas deposits in this land are of a migratory character, and probably its principal value, and may be exhausted by the operation of oil and gas wells upon land adjacent or near thereto, or dissipated from other causes long before the year 1931, and thus the allottee, or upon her death her heirs, deprived of the principal value and source of revenue from this land. Mallen v. Ruth Oil Co. et al., 231 Fed. 845, 849, 146 C.

C. A. 41, and Barnes v. Keys, 36 Okl. 6, 127 Pac. 261, 45 L. R. A. (N. S.) 178, Ann. Cas. 1915A, 515. See, also, as bearing upon this question: Raynolds v. Hanna (C. C.) 55 Fed. 783, 801, and cases there cited; Lacey v. Newcomb, 95 Iowa, 287, 294, 63 N. W. 704, and its citations; State v. Evans, 99 Minn. 220, 108 N. W. 958, 9 Ann. Cas. 520, and note; Appeal of Bedford, 126 Pa. 117, 17 Atl. 538. It was therefore to the interest of all the heirs of the allottee, Emma Derrisaw, that the oil and gas deposits in this homestead should be disposed of at an opportune time, and the proceeds arising therefrom invested or otherwise conserved for the support of the minor Julia during the term for which she is entitled to the use thereof, and the remainder for the benefit of all the heirs after the expiration of such term.

The fact that the oil wells had not been drilled prior to the death of Emma Derrisaw is quite immaterial; for by the lease of the adult, and the minor heirs by their guardian, under authority of the probate court, it was intended that the oil and gas deposits should be removed from the land, and the lease authorized the sinking of requisite wells, in order that such deposits might be removed and the proceeds conserved, as before stated.

As to the minor defendant, Tootie Riley, and the defendant Doc Willingham, it appears that Tootie Riley was born prior to March 4, 1906, but whether before or after September 1, 1902, does not definitely appear; but, whether before or after that date, she was entitled to enrollment as a member of the Creek Nation, and to participate in the allotment and distribution of its lands and funds under the acts of April 26, 1906 (34 Stat. c. 1876, p. 148), and June 21, 1906 (34 Stat. c. 3504, pp. 325, 341), amending the act of 1902, as held in the case of Gritts v. Secretary of the Interior, 224 U. S. 640, 32 Sup. Ct. 580, 56 L. Ed. 928. Doc Willingham married Emma Derrisaw in July, 1905, and the minor Julia is the issue of that marriage, born February 11, 1907. Neither the minor Tootie Riley nor Doc Willingham is therefore entitled to anything under the act of May 27, 1908, except as they may inherit from the allottee Emma Derrisaw, and as such heirs their rights are subject to the right of the minor Julia Willingham in this homestead; and it seems to me that the purpose of section 9 of that act is to enable minor children born since March 4, 1906, to have the use of the homestead of their parents dying intestate for the term granted by that section, and it should be given a liberal construction to effectuate that purpose.

Whether or not the provisions of section 6 of the act of May 27, 1908, which confers upon the probate courts of Oklahoma jurisdiction of the persons and property of these minors, deprives the Secretary of the Interior of the right to remove restrictions against alienation of the property of such minors after their rights become vested, is a question not raised in the trial court, has not been discussed here, and need not be considered.

The record fails to show what amount of the royalties arising from the lease in question will be sufficient for the reasonable support of the minor Julia during the term for which she is entitled to such use; the cause should be remanded to the District Court, to ascertain the reason-

able value of such support, and to provide for its payment to her out of the royalties now in the custody of the superintendent or disbursing agency of the Five Civilized Tribes, or that it may hereafter receive for such royalties, before the remainder of such fund is distributed to the legal heirs of Emma Derrisaw.

In re MIDTOWN CONTRACTING CO.

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

No. 225.

1. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURTS OF BANKRUPTCY—ADVERSE CLAIMS.

Bankr. Act July 1, 1898, c. 541, § 23a. 30 Stat. 552 (Comp. St. 1916, § 9607), provides that United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse claimants concerning property acquired or claimed by the trustees, to the same extent only as though such controversies had been between the bankrupts and such adverse claimants. Subdivision "b" provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. *Held*, that, if a real adverse claim exists, as distinguished from one merely colorable, the claimant cannot be compelled against his will to try the issue in the bankruptcy court, and whether the claim is real or colorable does not depend upon whether it turns upon a question of fact or one of law, but on whether the claim rests upon mere pretense of fact or law, not put forward in good faith, and if there is a real question, either of law or fact, the trustee must institute his independent action in a court having jurisdiction of the subject-matter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411.]

2. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS—NATURE OF CLAIM.

A contract for the construction of a school building authorized the board of education, upon the contractor's default, to stop all work by the contractor and complete the contract itself, and in such case to use all equipment and materials found upon the work. *Held* that, where the board had declared the contractor in default and taken possession of his plant and building material before a petition in bankruptcy was filed, its claim to such material and plant involved a substantial question of law, which could not be determined in a summary proceeding, except with the board's consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447.]

Hough, Circuit Judge, dissenting.

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

In the matter of the Midtown Contracting Company, bankrupt. On petition to revise an order (238 Fed. 871) reversing an order of the referee denying a petition of the trustee for a summary order requiring the Board of Education of the City of New York to deliver certain property to him. Reversed, and trustee's motion denied.

Lamar Hardy, Corp. Counsel, of New York City (R. Percy Chittenden and Joseph L. Pascal, both of New York City, of counsel), for petitioner.

Olcott, Gruber, Bonynge & McManus, of New York City (David W. Kahn, of New York City, of counsel), for trustee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The petitioner claims to be entitled to use certain building material and equipment brought by the bankrupt upon the grounds of the Evander Childs High School, in the borough of the Bronx, in the city of New York, for the completion of the high school under a certain contract for the construction of the building entered into between the petitioner and the bankrupt, dated October 13, 1914. The contract provided that the contractor should furnish all the labor and material necessary for the erection of the building for the sum of $414,141.00 to be paid in certain installments. Payments under the contract have been made to the amount of $275,721.39.

It appears that before the work called for by the contract was completed the contractor found itself in financial difficulties and did not prosecute the work. Thereupon in July, 1916, the superintendent of school buildings certified to the committee on school buildings of the board of education that the performance of the work under the contract was unnecessarily and unreasonably delayed, and that the contractor was willfully violating the conditions and covenants of the contract, and that the work was not being done or progressing according to the terms of the contract. And on the 9th day of August, 1916, the committee on school buildings passed resolutions declaring the contractor to be in default, and notified the contractor to discontinue all work under this contract, and that it would proceed to complete the building under the provisions of clause Q of the contract.

A written notice to the foregoing effect, signed by the chairman of the committee on school buildings, was served upon the contractor on the 11th day of August, 1916, on which day the board of education of the city of New York took possession of the building material and plant on the grounds of the Evander Childs High School, which had been brought there by the contractor, and it placed watchmen to take care of the uncompleted building and of the building material and plant on the grounds. Thereafter the board relet the contract for the completion of the Evander Childs High School to Conners Bros. Company, by which contract the board gave to Conners Bros. Company the right to use the building material and plant of the Midtown Contracting Company upon the line of the work in the completion of the building.

Clause Q of the contract contained the following provision:

"* * * If at any time the superintendent of school buildings shall be of the opinion, and shall so certify in writing to the committee on buildings, that the performance of the contract is unnecessarily or unreasonably delayed, or that the contractor is willfully violating any of the conditions or covenants of this contract, * * * the committee on buildings shall notify the contractor to discontinue all work or any part thereof, under this contract, * * * and thereupon the contractor shall discontinue the work or such part thereof, and the board of education shall thereupon have the power

to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem advisable, by contract or otherwise, to work at and complete the work herein described, or such part thereof, and to use such materials as he may find upon the line of the work, and to procure other materials for the completion, so as to fully execute the same in every respect, and the cost and expenses thereof at the reasonable market rates shall be a charge against the contractor, who shall pay to the party of the first part the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the contractor shall have no claim or demand to such unpaid balance, or by reason of the nonpayment thereof to him, and shall forfeit all claim to any moneys retained; and no molds, models, centers, scaffolding, planks, horses, derricks, tackle, implements, power plants, or building material of any kind belonging to or used by the contractor shall be removed so long as the same may be wanted for the work."

On the 15th day of August, 1916, or six days after the board of education had declared the Midtown Contracting Company to be in default, and after the board had taken possession of the building material and plant of the contractor upon the line of the work under clause Q of the contract, an involuntary petition in bankruptcy was filed, and on the 7th day of September, 1916, the contractor was adjudged a bankrupt. The trustee of the bankrupt on December 9, 1916, made a motion before the referee in bankruptcy for an order requiring the department of education to turn over to the trustee all of the building material and equipment brought on the ground of the high school by the bankrupt for use in the construction of the building under the contract, and declaring that the claim of title thereto set up by the department of education was colorable and void as against the trustee.

The attorneys for the trustee contended before the referee that the above provision of the contract, whereby the contractor gave to the board of education of the city of New York the right to use its materials and plant upon the line of the work to complete the building in case the contractor defaulted, was invalid as against the trustee of the bankrupt contractor; and the attorney for the city of New York asserted that a question of fact was involved, and denied that the referee was without jurisdiction to pass upon the issues raised by the opposing affidavits. On the record, the assets in controversy appear to have been purchased from unspecified materialmen and to have been brought on the ground by the contracting company after the date of the contract, and at all times thereafter to have been owned by the contractor. The record also discloses that possession of the assets was taken by the department of education before the filing of the petition in bankruptcy.

The referee denied the petition of the trustee for the summary order requested, stated that he was satisfied that the controversy was one in which the parties should be remitted to a plenary action, and that he was without authority to grant a summary order. The District Judge has reversed the referee, and held that the trustee is entitled to the summary order asked for by him. Judge Mayer in his opinion declares that there is no dispute of fact between the parties, and adds, whether or not a summary order is the proper relief depends solely upon whether the question involved is one of fact or one of law.

It is not disputed that, at the time the board of education took possession of the property involved herein, the bankruptcy proceedings had not been instituted. With this fact conceded, we are led to inquire as to the effect of the appointment of the trustee in bankruptcy upon the rights of the board of education in this property. The property being of a tangible nature and in possession of the city of New York, which claims a beneficial interest therein, can the city be compelled by the trustee to have its rights adjudicated in a summary proceeding in a court of bankruptcy, or is the city entitled to be heard in a plenary action?

Section 23 of the Bankruptcy Act reads as follows:

"Sec. 23. a. 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 concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b; section sixty-seven, subdivision e; and section seventy, subdivision e. * * *"

U. S. Compiled Statutes (1916) Ann. volume 9, § 9607.

The exceptions under clause "b" do not now concern us, and they relate to certain cases over which the federal and state courts are given a concurrent jurisdiction. The Supreme Court repeatedly held under the Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person who thereafter claimed to hold it adversely to the assignee could only be enforced by a plenary suit at law or in equity under the second section of the act, and not by summary proceedings under the first section thereof. Smith v. Mason, 14 Wall. 419, 20 L. Ed. 748 (1871); Marshall v. Knox, 16 Wall. 551, 557, 21 L. Ed. 481 (1872); Eyster v. Gaff, 91 U. S. 521, 525, 23 L. Ed. 403 (1875). In the case last cited the court, speaking through Mr. Justice Miller, said:

"The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit

of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the state courts."

In Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175 (1900), the court had the act of 1898, the one now in force, under consideration. Attention was directed to the omission from that act of certain provisions contained in the act of 1867, before referred to, and the addition in their place of section 23, and it was held that the District Court could not, without the defendant's consent, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside transfers of property made by a bankrupt to third parties before the institution of the proceedings in bankruptcy.

In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405 (1902), the Supreme Court recognized the right to proceed summarily where the adverse claim is merely colorable. By proceedings summarily is meant by petition and rule to show cause. The question presented in that case was whether the trustee is obliged to resort to a plenary suit in cases where property of a bankrupt comes into the possession of a third party as the agent of the bankrupt, before the filing of the petition in bankruptcy and to which such third party asserts no adverse claim but simply refuses to turn over the property. The conclusion was that in the case of claims merely "colorable" there is no necessity for a plenary action. The court said:

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

In the above case emphasis is to be laid on the fact that the property came into the possession of the third party as the agent of the bankrupt and that he asserted no adverse claim.

In Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620 (1902), it was held that the District Court did not have jurisdiction in a summary proceeding on the petition of the trustee to compel one, who received money to indemnify him for giving bail bonds for a person subsequently and more than four months thereafter adjudicated a bankrupt, to turn over to the trustee in bankruptcy the money so received. The court, through Mr. Justice Peckham, said:

"To extend such a jurisdiction over an adverse claimant would be within the prohibition of section 23, 'a' and 'b,' whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the court in bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court unless by his consent, as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to."

In Babbitt v. Dutcher, 216 U. S. 102, 113, 30 Sup. Ct. 372, 377, 54 L. Ed. 402, 17 Ann. Cas. 969 (1909), the court, speaking through Mr. Chief Justice Fuller, said:

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily, and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation."

According to the doctrine thus stated by the Chief Justice, as the title or beneficial interest of the city of New York is adverse and is based upon a transfer antedating the bankruptcy, the trustee must bring a plenary action in which the claim can be adjudicated.

In Re Howe Manufacturing Company (D. C.) 193 Fed. 524 (1912), District Judge Evans, in discussing the summary jurisdiction of the bankruptcy court, said:

"While considering this question, we may also inquire whether relief could be given the trustee in this proceeding in bankruptcy proper, either summarily or by a plenary action (if we can regard the petition as such) filed therein. As we have seen, the trustee was directed to proceed against Jefferson. But it did not follow that it could introduce another action into this proceeding in bankruptcy in order to do so. If in a proceeding in bankruptcy proper the trustee could intrude a separate suit against every debtor of the bankrupt, no difference what the demand might be, we should have a conglomeration of issues of the most remarkable extent and character in a bankruptcy proceeding. Nothing of the sort was contemplated by Congress, nor provided for by the act. On the contrary, the trustee, if he succeeds to the rights of the bankrupt, must do as the latter would have been compelled to do, and, if he have any claim to property or any right to recover upon any indebtedness alleged to be due from another person, he must, like every other litigant, institute his own separate and independent action in a court having jurisdiction of the subject-matter, and have his claim regularly adjudicated in due course of law. Being a trustee in bankruptcy gives him no special privileges in the courts. He stands there like other people. These general propositions seem to admit of no doubt. There are cases, however, which are exceptional, and in them summary proceedings may be resorted to, for example, in cases where property is in the possession of the trustee and therefore in custodia legis. If that possession is interfered with, summary action is admissible, and where the bankrupt refuses, or some agent of his refuses, to deliver to the trustee property belonging to the estate, a similar course is open. But these exceptions do not embrace cases where there are adverse claims to the property made in good faith, nor those in which there is an outstanding indebtedness of any character. Nor do they embrace a case where a third person has the property in his possession claiming it adversely, nor a case where recovery on a contract is sought, for in respect to all such cases it cannot be said that the debtor is in 'possession' of any property of the estate within the rule as to summary proceedings."

And in Re Bacon, 210 Fed. 129, 134, 126 C. C. A. 643, 648 (1913), we said:

"If it be ascertained by proper inquiry that a real adverse claim exists, no matter how ill supported it may appear to be, a court of bankruptcy cannot summarily decide as to the validity of the claim."

In Re Luken, 216 Fed. 890, 133 C. C. A. 94 (1914), the question was before the Seventh Circuit. The court said:

"In the present proceeding there is no conflict about the facts, and the trustee therefore contends that the bankruptcy court had summary jurisdiction to compel Steger to surrender possession by the summary process of a contempt order or other summary means. His argument is that, * * * the legal proceedings being taken against the defendant therein while the defendant was insolvent, we might have no difficulty, the facts being undisputed, in determining that the adverse holder's claim of legal right to retain possession was so clearly without substance, so void of color, as to bring him within the summary jurisdiction of the bankruptcy court. But it seems to us that a controversy may be as substantial in regard to the legal rights of a party on undisputed facts as is a controversy wherein the only conflict is on the facts. Our observation and experience is that there are fully as many controversies in plenary suits over the question of legal rights on undisputed facts as there are controversies respecting the facts."

In Remington on Bankruptcy (2d Ed. 1915) § 1796, the author, in referring to the matter of summary jurisdiction, states that, if some third party claims a beneficial interest in the property which he has in his possession (except in certain instances with which we are not now concerned), "he need not come into the bankruptcy proceedings for his rights, and the trustee cannot bring him into the proceedings and he is entitled to be heard in a plenary action."

In Black on Bankruptcy, § 404, the law is stated as follows:

"Whenever a trustee in bankruptcy lays claim to money or property which is in the possession of a third person, and petitions for an order requiring its surrender to him, the court of bankruptcy has jurisdiction to cite such person to show cause why he should not be required to yield up the money or property to the trustee. And if the respondent denies that the property in question belongs to the estate in bankruptcy and sets up a claim of title in himself, the court has jurisdiction to inquire and determine whether or not such claim is genuine, really adverse, and interposed in good faith. If it shall determine that such claim is merely colorable or fictitious, frivolous on its face or plainly false, or manifestly pretended and without any foundation in law, it may proceed to make the order asked by the trustee; but on the other hand, if it shall be determined that the respondent's claim to the property is genuine and interposed in good faith and with the intention of supporting it, the court cannot proceed to inquire into the merits, but must dismiss the petition and remit the trustee to his remedy by a plenary suit."

The courts have held in numerous cases that a stranger to the proceedings in bankruptcy, who sets up an adverse title to property which is claimed by the trustee as assets of the bankrupt, cannot be compelled to submit his claim to adjudication in a summary proceeding in the court of bankruptcy provided his claim is made with the apparent intention of defending it in good faith and is not merely colorable, but is entitled to be heard in a plenary suit. Courtney v. Shea, 225 Fed. 358, 140 C. C. A. 382 (1915); In re McCrum, 214 Fed. 207, 130 C. C. A. 555 (1914); First National Bank v. Hopkins, 199 Fed. 873, 118 C. C. A. 321 (1912); Johnston v. Spencer, 195 Fed. 215, 115 C. C. A. 167 (1912); Cooney v. Collins, 176 Fed. 189, 99 C. C. A. 543 (1910); In re Horgan, 158 Fed. 774, 86 C. C. A. 130 (1907); In re Baudouine, 101 Fed. 574, 41 C. C. A. 318 (1900).

[1] We understand the rule in all such cases to be that if a real adverse claim exists, as distinguished from one which is merely color-

able, the claimant cannot be compelled against his will to try the issue in the court of bankruptcy. Whether the claim is real or colorable does not depend upon whether it turns upon a question of fact or upon a question of law. Does the claim rest upon mere pretense of fact or of law? Is it put forward in good faith, and in that sense is it real? Or is it put forward in bad faith, and therefore unreal? If there is a real question either of law or of fact, the claimant need not submit it to the court of bankruptcy, unless he consents to do so; but the trustee must institute his independent action in a court having jurisdiction of the subject-matter and have the claim regularly adjudicated, as the bankrupt himself must have done, had bankruptcy proceedings not been pending.

Bankruptcy proceedings are a branch of equity jurisprudence, and the provisions of the Seventh Amendment securing a right to trial by jury are not applicable thereto. The issues involved in such proceedings are therefore to be tried by the court, subject to the right of the court in its discretion to submit any specific question of fact to a jury in which case the jury's determination is merely advisory, and subject to the further exception that the Bankruptcy Act expressly gives to the debtor resisting his adjudication as a bankrupt the absolute right to have the issues as to his insolvency and as to his having committed the act of bankruptcy charged determined by a jury. U. S. Compiled Statutes, volume 9, § 9603. But this right is personal to the bankrupt, and can only be had on his demand, and then simply as regards the two questions above mentioned. It is evident, therefore, that, if a trustee seeks to recover property held by an adverse claimant, the latter should have the same right as against him that he had as against the bankrupt to have his claim of title passed on by a jury in a plenary action, unless his claim is clearly colorable.

If, however, the claim does not rest upon a disputed question of fact, but rests upon a question of law, which must be decided in any event by a court, it is not so evident that upon principle it should be determined in a plenary suit, rather than summarily in the bankruptcy court. To allow the matter to be disposed of in a summary proceeding deprives the claimant of no constitutional right, not being contrary to due process of law. It is the general purpose and policy of the bankruptcy law to settle estates with expedition and without unnecessary expense. If an adverse claim which turns on a question of law is not to be settled in the bankruptcy court without the bankrupt's consent, it may cause delay in the settlement of the estate and increase the expenses incident thereto. But it does not follow for any of these reasons that a claim based on a question of law which is not colorable can be disposed of in a summary proceeding.

The District Judge in the case at bar arrived at the conclusion he did because of a misapprehension of two cases decided by this court, which he thought were intended to lay down the proposition that whether or not a summary order is the proper relief depends solely upon whether the question involved is one of fact or one of law. In the case of In re R. & W. Skirt Co., 222 Fed. 256, 138 C. C. A. 67 (1915), payment of a debt was conceded to have been made out of the bankrupt's estate after the petition in bankruptcy was filed and the

question was whether money so paid was recoverable in a summary proceeding. This court, speaking through Judge Coxe, said:

"This upon admitted facts is a question of law. The court would, therefore, have been justified in dealing with it in a summary proceeding and, in order that the estate may be speedily and economically settled, it should have done so. These views, we think, are supported by Lazarus v. Prentice, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305; Everett v. Judson, 228 U. S. 474, 478, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 17, 22 Sup. Ct. 269, 46 L. Ed. 405."

While the question was one of law, it was purely colorable, and all that was actually decided was that an adverse claim merely colorable, though there was no disputed question of fact, but only of law, could be determined by summary order.

In Alco Film Corp. v. Alco Film Service of Minnesota, 234 Fed. 55, 148 C. C. A. 71 (1916), this court held that the District Court had jurisdiction to proceed by summary order to dispose of claims, the facts being undisputed. The District Judge had exercised his jurisdiction and in his opinion said:

"The first objection proceeds upon the theory that, where facts are undisputed, and only a question of law is involved, and the question of law is debatable, the person resisting is an adverse claimant. Such is not the law."

This court did not pass on the language quoted, but simply affirmed the orders holding that the objection to the jurisdiction had been waived. The adverse claim was clearly colorable.

In Re Michaelis & Lindeman, 196 Fed. 718 (1912), which was a case in the District Court for the Southern District of New York, the learned District Judge, after stating that there is no power in the bankruptcy court by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee, added:

"But this does not prevent the entry of a summary order, where the only title set up rests, not upon any matter of fact, but upon a statement of law."

No authority is cited and no reason is given for this statement of the law.

In 7 Corpus Juris, p. 106, it is said that, when goods alleged to belong to the bankrupt are in the possession of a third person claiming to be the owner:

"The true rule as to such cases appears to be that the court of bankruptcy has jurisdiction to proceed summarily to the extent of ascertaining whether or not there is any foundation for the adverse claim, and if it appears to be without foundation it may order the property turned over to the trustee; but if it appears that there is some foundation for the adverse claim and questions of fact are involved, the summary proceedings can go no further and the right of possession must be tried in plenary action."

If the writer would have it understood that if the adverse claim has some foundation, and questions of law and not of fact are involved, it may be disposed of summarily, the authorities he cites do not support him; and we are not disposed to attribute to him any such intention. We do not feel ourselves concluded by the two previous decisions of this court, for we do not understand them, or either

of them, as intending to assert that an adverse claim which is not colorable can be summarily settled in the bankruptcy court against the consent of the claimant, provided it raises an issue of law and not of fact. We find no support for that view in the decisions of the Supreme Court, or in those of any of the Circuit Courts of Appeals or in any of the District Courts, except in the Southern district of New York.

[2] The question raised by the adverse claimant clearly involves a substantial question of law, and therefore it cannot be determined in a summary proceeding, except with the claimant's consent.

The order of the District Judge is reversed, and the motion of the trustee is denied.

HOUGH, Circuit Judge (dissenting). This petition to revise should be dismissed; it was prematurely or improperly taken. The referee refused jurisdiction upon inspection of pleadings. The court reversed his order, and instructed him to proceed with an ascertainment of facts. This was in accordance with the ruling in Re Goldstein, 216 Fed. 888, 133 C. C. A. 91 (C. C. A. 7th), to the effect that the District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. No trial was ever had, and the order directing it is the subject for review. As we have no means of knowing whether the claim is either adverse or colorable, except an ex parte statement, there is nothing to review. For this reason I dissent from the judgment given.

But the opinion of this court, dealing with what I consider a moot point, asks and answers the question: What is a colorable adverse claim? In so doing the prior decisions of this court have been disapproved; therefore I dissent from the opinion. It seems to be admitted (and is undeniable) that under Babbitt v. Dutcher and Mueller v. Nugent, supra, the bankruptcy court may not proceed summarily to adjudicate upon the rights of an adverse claimant whose claim is more than colorable and based upon a transfer antedating the bankruptcy. Whether in this case there ever was a transfer antedating bankruptcy is the question of fact, as to which no evidence has been taken. This renders inquiry into the meaning of the words "colorable" and "adverse" necessarily in vacuo.

The proposition laid down for law is that of In re Luken, 216 Fed. 890, 133 C. C. A. 94, and is equivalent to saying that, assuming no disputed question of fact, any debatable proposition of law constitutes its maker an adverse claimant. This in turn identifies "arguable" or "debatable" with "colorable"; the latter being the word of controlling and numerous decisions. A colorable question of law is a meaningless phrase. As a modifier in legal parlance, "color" means appearance, as distinct from reality. Colorable law is certainly no more than "color of law," which "does not mean actual law." McCain v. Des Moines, 174 U. S. 175, 19 Sup. Ct. 644, 43 L. Ed. 936. Both "color" and "colorable" always connote pretense, sham, or falsity. Chicago, etc., Co. v. Allfree, 64 Iowa, 500, 20 N. W. 779; Virginia v. De Hart (C. C.) 119 Fed. 628.

In a case earlier than the Luken and Goldstein decisions the same court declared the true rule to be that, "where the party in possession sets out in his answer facts which, if true, would constitute an adverse title," a summary proceeding is not proper. In re Blum, 202 Fed. 887, 121 C. C. A. 241. This must be construed with the Goldstein ruling, supra. In re Yorkville Coal Co., 211 Fed. 621, 128 C. C. A. 570, this court held that an adverse claim was disclosed by testimony which, "if submitted in a court and no evidence offered in contradiction, would be sufficient to support a judgment in favor of the claimant." These words mean the same thing as those quoted in the opinion of the majority from In re R. & W. Skirt Co., 222 Fed. 256, 138 C. C. A. 67, where it was further and truly said that "the purpose of the act will be largely defeated if, each time a question of law arises over the title to property, an action at law or a suit in equity must be commenced."

To say that the adverse position must rest upon testimony which, if uncontradicted, would support it, and then add to that the doctrine that an arguable or debatable proposition of law is enough to put the trustee to the delay and expense of a suit, leaves summary jurisdiction resting on nothing but agreement. Nor can our prior decisions be explained away by now calling the claims merely colorable; in the Skirt Company Case the report contains no statement of what the point of law was; but it was plainly debatable, as counsel differed about it and the claimant prevailed in the lower court.

In Alco Film Corporation v. Alco Film Service, 234 Fed. 55, 148 C. C. A. 71, the report shows on its face that the question of adverse claim was specifically raised. Objection to service of the order outside the district was waived, but nothing else; and it was impossible to decide that case as it was decided without holding that a claimant who raised merely propositions of law was not entitled to require a plenary suit to test his rights.

The doctrine enunciated in the case from this court was substantially adhered to in Courtney v. Shea, 225 Fed. 358, 140 C. C. A. 382 (C. C. A. 6th), where it was held that summary proceedings should be dismissed when it appeared that the claim set up existed when petition filed, and "if supported by uncontradicted testimony would sustain a judgment in favor of the claimant." No amount of uncontradicted testimony can sustain a judgment unless the law awards it.

I do not think the District Judge misapprehended the decisions of this court; on the contrary, this judgment overrules them.

DOANE v. CALIFORNIA LAND CO.

(Circuit Court of Appeals, Ninth Circuit. May 28, 1917.)

No. 2854.

1. ABATEMENT AND REVIVAL ⟸12—PENDENCY OF PRIOR ACTION—STATE AND FEDERAL COURTS.

The pendency in a state court of a suit to have a declaration of trust declared a mortgage, to redeem thereunder, and to restrain the trustee from selling, was no ground for dismissing a suit in the federal court, by persons claiming under a sale by the trustee, to quiet title as against the claim of the plaintiff in the state court suit, as the pendency of an action in a state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87–91, 94, 95, 98.]

2. COURTS ⟸312(8)—FEDERAL COURTS—JURISDICTION—CONVEYANCES TO GIVEN JURISDICTION.

Where the incorporation of a company to take title to land was bona fide and for the purpose of affording a means of handling and selling the land expeditiously and without the inconvenience incident to an ownership and control by numerous owners, and the conveyance to the corporation was bona fide and without reservation of any right in the trustee, the fact that it was also sought by such incorporation to secure the necessary diversity of citizenship to enable the jurisdiction of the federal court to be invoked in any litigation did not deprive such court of jurisdiction of an action to quiet title to the land.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–867.]

3. MORTGAGES ⟸8—CHARACTER OF INSTRUMENT—DECLARATION OF TRUST—"LIEN"—"MORTGAGE."

Owners of land, who had contracted to sell it to defendant, conveyed it to a bank by an absolute deed, and subsequently, by agreement of all parties, the bank executed a declaration of trust stating that the conveyance to it was for the benefit of persons named, and that the bank had paid no consideration and had no interest therein other than as trustee. It then provided that the bank should hold the property to secure to the vendors the payment by defendant of an amount specified in installments; that on payment of the first two installments defendant should receive possession; that thereafter the land in half sections might be released to defendant on payment of a specified amount to be applied on the next installment; that the trustee should apply moneys realized to the payment of its expenses and taxes and then to the payment of the purchase price, the balance to be held subject to defendant's orders; that the trustee should be paid by defendant for extraordinary services and have a lien therefor subject to the lien of the vendors for the purchase price; that defendant should pay all taxes, etc., indemnify the trustee from all liabilities, and defend all suits; and that in case of default by defendant the property should be sold by the trustee and the proceeds applied on the purchase price. A certificate thereto subscribed by all parties stated that the trusts were accurately stated therein. *Held*, that though the vendors' interest was spoken of as a lien, and though it was claimed defendant was treated as the owner, the transaction was not a mortgage, in view of Civ. Code Cal. § 2872, defining a "lien" as a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act, and section 2924, providing that every transfer of an interest in property other than

in trust made only as security for the performance of another act is to be deemed a "mortgage."

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 7, 8.

For other definitions, see Words and Phrases, First and Second Series, Lien; Mortgage.]

4. MORTGAGES ⊂⊃591(1)—REDEMPTION—RIGHT TO REDEEM.

After a sale of the land by the trustee in accordance with the terms of the declaration of trust, no right of redemption remained in defendant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1693–1698, 1700, 1702–1708.]

5. MORTGAGES ⊂⊃334—POWER OF SALE—REVOCATION OF POWER—REVIVAL.

Assuming that notice by defendant to the grantors and the trustee that he thereby revoked the power of sale granted to the trustee operated to revoke such power, the power was revived where defendant subsequently, in obtaining additional time within which to make certain payments, signed an agreement that each and every one of the conditions or agreements of the declaration of trust should remain in full force and effect except as expressly modified thereby.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1017, 1018.]

Appeal from the District Court of the United States for the Northern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit to quiet title by the California Land Company against F. F. Doane. From a decree for plaintiff, defendant appeals. Affirmed.

This is a suit brought by the appellee to quiet its title to certain lands in Fresno county, Cal., which had, on February 25, 1913, been conveyed to the Los Angeles Trust & Savings Bank by H. N. Coffin, John McMillan, and F. H. Parsons, appellee's predecessors in interest, under a contract for the sale thereof to appellant. The contract of sale was merged in a declaration of trust executed by the Los Angeles Trust & Savings Bank on August 14, 1914, under an agreement of all parties to that effect.

This declaration of trust recites that the conveyance to the Los Angeles Trust & Savings Bank, although absolute in form and purporting to convey the absolute legal and equitable title to the bank, was nevertheless intended to convey said property for the benefit of certain persons named and designated beneficiaries, subject to certain trusts provided therein, and that the bank paid no consideration for the property and had no interest therein other than as trustee. The declaration of trust then provided as follows: That the bank, as trustee, should hold the property to secure to H. N. Coffin, John McMillan, and F. H. Parsons (the vendors) the payment by appellant (the vendee) of $379,000 in various installments with interest thereon; that upon the payment of the first two installments of $20,000 and $55,000, respectively, the vendee should be given possession of the property, and thereafter any of the lands, in half sections, might be released to him from under the lien of the purchase price upon the payment by him of $10,000 for each half section so released, which payments were to apply on the next regular installment of principal and interest; that the personal property located on and used in connection with the property should be turned over to the vendee at the time of his taking possession of the property, to be used by him and his assigns during the life of the trust, and, in the event the conditions and provisions of the trust should be complied with, the title to the personal property should vest in the vendee and his assigns; that the trustee should apply the moneys realized from the sale of the property, first to reimburse itself for its expenses, fees, and commissions under the trust, as provided for therein, next to pay any taxes accrued, next to the payment of the purchase price and interest, and the balance to be held subject to the order of the vendee; that the trustee should be paid by the vendee for all extraordinary services rendered in the

execution of the trust, in addition to the compensation theretofore provided, and should have a lien on all of the trust property to secure the same, subject to the lien of the vendors for the purchase price and interest; that the vendors should not be liable for any of such expenses, fees, and commissions of the trustee, except in the case of foreclosure sale, in which event they should pay a sum not exceeding $1,000 for such expenses, fees, and commissions, and trustee should not be entitled to any lien upon the lands, or any part thereof, superior to the lien of the vendors for the balance of the purchase price and interest; that it should be the duty of the vendee to pay all taxes, assessments, mortgages, liens, and incumbrances then on the property, or that might thereafter be assessed or levied, or placed thereon by the vendee or by any other person at his request; that the vendors and vendee should indemnify the trustee from any and all liabilities, claims, demands, injuries, or damages which it might suffer or sustain by reason of the acceptance of the trust or its position as trustee thereunder, and the vendee, and not the trustee, should defend any suit brought with reference to the property or growing out of the trust; that in case of the default of the vendee in the payment of any of the installments or interest, upon demand by the vendors (which demand constituted conclusive notice of an election to declare the whole amount of the purchase price and interest immediately payable), the property should be sold by the trustee at public auction and the proceeds applied to defray the expense of such sale, to the payment of the balance of the purchase price and interest, and the balance to the order of the vendee.

On February 24, 1915, the vendee mailed to the vendors a notice to the effect that he had revoked the power granted to the trustee to sell the property upon his failure to pay any installment of the purchase money or interest, as provided in the declaration of trust, which notice was received by them on the 27th of the same month. The same notice was served upon the trustee on February 26, 1915.

Various installments of principal and interest were paid by the vendee; but in 1915, being unable to meet the installment of interest falling due on September 1st, the vendee obtained a 30-day extension of time, at the end of which this installment was still unpaid, and has not since been paid. The vendors then elected to declare the whole remaining sum of the principal indebtedness and interest thereon immediately due and payable, under the terms of the declaration of trust, and ordered the trustee to sell the property. The trustee accordingly published a notice of such sale, on November 3, 1915, giving notice that the property would be sold at public auction on the 13th of the following month.

On November 20, 1915, the appellant brought an action in the superior court of the state of California in and for the county of Fresno, against the trustee, vendors, and others, praying judgment that the deed from the vendors to the trustee be declared a mortgage; and that appellant should have the right to redeem the property in the manner and time as provided by the laws of California for the redemption of property under foreclosure sale; and that the defendants be restrained from selling and conveying the absolute title to the property other than by foreclosure and sale as provided by section 726 of the California Code of Civil Procedure. Summons in this action was served upon the Los Angeles Trust & Savings Bank on the 30th of the same month, together with a copy of the complaint. On December 29, 1915, a lis pendens was filed.

The property having been sold under the trust deed to H. N. Coffin, John McMillan, and F. H. Parsons at public auction, the Los Angeles Trust & Savings Bank, on December 23, 1915, executed a deed in their favor as trustees.

Thereafter, Messrs. Coffin, McMillan, and Parsons and others, each owning an undivided one-tenth interest in the lands in suit, and being desirous of organizing as a corporation so that their business could be transacted through a board of directors, and thus expedite the handling and sale of the property, incorporated the appellee company under the laws of the state of Idaho; and on February 12, 1916, the parties named conveyed to it the lands in suit. It is stipulated that a further reason for the incorporation of appellee company was that by so doing an opportunity was afforded to invoke the jurisdiction

of a United States court, upon the ground of diversity of citizenship, in any litigation commenced by them or by any other persons against them.

The present suit was commenced by the appellee on February 21, 1916, alleging that the claim of appellant operates as a cloud upon its title, and praying that it be adjudged that appellee is the owner of the premises and entitled to their possession. Appellant moved to dismiss upon the ground that there was pending in the state court an action by the appellant against the predecessors in interest of appellee involving the same issues as involved in the present suit, and that the appellee corporation was formed for the purpose of ousting the state court of jurisdiction to try the issues involved in the case, and that therefore the suit should be dismissed as provided in section 37 of the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1098 (Comp. St. 1916, § 1019). This motion was overruled. Appellant answered, alleging the transaction whereby the legal title to the property was vested in the Los Angeles Trust & Savings Bank as trustee was in the nature of a mortgage, and that the foreclosure thereof, not being in accordance with the provisions of the California statute relating to the foreclosure of mortgage liens, was invalid.

The District Court was of opinion that the deed in controversy was a trust deed, but that, even though it were in fact a mortgage, the appellant, not having tendered the amount due thereunder, should have no standing in a court of equity; and awarded appellee a decree quieting its title to the premises in suit. Defendant appeals.

G. R. Freeman, of Corona, Cal., for appellant.

Alfred A. Fraser, of Boise, Idaho, and H. G. Redwine, of Los Angeles, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. The first assignment of error relates to the action of the trial court in overruling appellant's motion to dismiss upon the ground that there was pending in the state court an action by the appellant against the predecessors in interest of the appellee, and upon the further ground that the appellee corporation was formed and the lands conveyed to it for the purpose of ousting the state court of jurisdiction to try the issues involved in this case and of creating a case cognizable in the United States District Court.

So far as is shown by the record in the present case, the proceeding in the state court was never carried further than the filing of the complaint and service of summons upon the Los Angeles Trust & Savings Bank, one of the defendants therein. No judgment had been entered therein, and it does not appear that the cause had ever gone to trial, at the time the present suit was instituted.

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case." McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 [54 L. Ed. 762]; Falls City Const. Co. v. Monroe County (D. C.) 208 Fed. 482, 483; Wolf v. District Court, 235 Fed. 69, 74, 148 C. C. A. 563.

[2] 2. It is contended by the appellant that the appellee corporation was formed and the lands conveyed to it for the purpose of oust-

ing the state court of jurisdiction and of creating a case cognizable in the federal courts.

The parties have stipulated as to the various objects and benefits sought to be attained by such incorporation, among others:

"If it became necessary or desirable they could in that event, having the necessary diversity of citizenship, invoke the jurisdiction of the United States court in any litigation commenced by them or by any other persons against said corporation."

But it does not appear that the incorporation was a mere subterfuge for the purpose of obtaining that benefit, or that the benefit so obtained furnished the sole or controlling reason for such incorporation. Upon the contrary, it appears that the incorporation was bona fide and for the purpose of affording a means to expeditiously handle and sell the lands in suit and avoid the inconvenience incident to an ownership and control by numerous co-owners.

Nor does it appear that the conveyance from Messrs. Coffin, McMillan, and Parsons was other than bona fide; they held the lands as trustees for the 10 co-owners, and their conveyance to the corporation was nothing more than an execution of the trust in accordance with its terms; title was unconditionally vested in the corporation, and no right in the property reserved by the trustees. As said by the Supreme Court of the United States in Lehigh Mining & Manufacturing Co. v. Kelly, 160 U. S. 327, 336, 16 Sup. Ct. 307, 311 [40 L. Ed. 444]:

"The privilege of a grantee or purchaser of property, being a citizen of one of the states, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another state—the value of the matter in dispute being sufficient for the purpose—cannot be affected or impaired *merely* because of the motive that induced his grantor to convey, or his vendee (vendor) to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him of the property in question."

[3] 3. It is next assigned as error that the trial court held the conveyance to the Los Angeles Trust & Savings Bank to be a trust deed and not a mortgage; which, it is urged, is inconsistent with the provisions of the instrument relied upon by appellee as a declaration of trust, wherein appellant is treated as the owner of the property and invested with the right of possession and the right to create liens and mortgages thereon, and the vendors as mortgagees and their interest designated and defined as a lien.

The fact that the trustors' interest is termed a "lien" in the declaration of trust is not conclusive. Section 2872 of the Civil Code of California provides:

"A lien is a charge imposed in some mode *other than by a transfer in trust* upon specific property by which it is made security for the performance of an act."

Nor is the fact that appellant is therein treated as the owner and invested with certain rights incident to ownership so inconsistent with the declaration of trust that we should close our eyes to the various other provisions thereof (particularly the provision that appellant should not be entitled to possession until certain payments had been

made), which are inconsistent with the mortgage theory contended for by appellant and which clearly evidence an intention to create a fee in trust for the purpose of securing to the grantors the payment of the purchase price, while vesting only an equitable title in appellant.

Appellant cites numerous Code sections and decisions of the state courts to the effect that a deed made to one as security for a debt may be enforced as a mortgage and not as a conveyance; that the lien thus created can only be enforced by means of foreclosure and judicial sale, as prescribed in the Codes; and that any agreement to the contrary, or which is in restraint of the right of redemption incident to such foreclosure sales, is void. But while it is thereby established that, under the state law, a conveyance made as security for another act is to be deemed a mortgage and subject to all its incidents, yet valid conveyances in trust are expressly excepted from the operation of this rule.

Section 2924 of the Civil Code of California provides that:

"Every transfer of an interest in property, *other than in trust*, made only as a security for the performance of another act, is to be deemed a mortgage."

The question, then, to be determined, is: Does the conveyance in the present case fall within this exception? It was not made as security for any act to be done by the grantors or any one in privity with them, but was made for the purpose of securing the grantors by withholding title from the buyer until he had fully complied with the conditions of the contract of sale. In this respect the present case is distinguishable from the cases cited by appellant, wherein certain conveyances made as security for acts to be done by the grantors, or by persons for whom they stood in the position of guarantors or sureties, were held to be mortgages.

That a valid trust may be created for the purpose of securing a debt is established in numerous decisions of the state courts. Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813, and cases there cited. But it is urged that the latter case is distinguishable from the one at bar. It is true that in that case, as in the various cases cited by appellant, the conveyance was for the purpose of securing a debt owing by the grantors; but this distinction only tends, we think, to strengthen the appellee's position. In other words, if A. may by conveying to X. create a valid trust as security for a debt owing by A. to B., a fortiori he may by such a conveyance create a valid trust as security for a debt owing from B. to himself or another. The further distinction, that there was in the case at bar no provision for a reconveyance to the trustors, also tends rather to strengthen the trust than the mortgage theory.

"A mortgage is essentially a pledge or security, and it is distinguishable from a trust in this only: That the property described in it is to revert to the mortgagor on the discharge of the obligation for the performance of which it is pledged." Lance's Appeal, 112 Pa. 456, 4 Atl. 375.

It is also urged that the conveyance in the case at bar differs from that in the Alcorn Case in that it is not absolute. But it appears that the deed executed on February 25, 1913, was absolute in form, and the recital in the declaration of trust that, "Whereas, the said conveyance

to the Los Angeles Trust & Savings Bank is absolute in form and purports to convey to said bank the absolute, legal and equitable title to all of said property, * * * nevertheless the said deed and grant was intended to convey said property to said bank for the benefit of those certain persons hereinafter named and designated as beneficiaries, and whose respective interests are hereinafter set up; and * * * said Los Angeles Trust & Savings Bank paid no consideration for said property, and has no interest therein, except as hereinafter stated"—does not mean, as contended by appellant, that the bank received only a title in form and did not in fact hold either the legal or equitable title. Upon the contrary, this clause, when read with the other provisions of the instrument, clearly evidences an intention to declare an apparently absolute conveyance of the legal and equitable title to be a conveyance of the legal title only, to be held by the bank subject to certain trusts thereinafter set forth.

It is contended, however, that the transfer to the trustee amounts in effect to a conveyance to appellant and a reconveyance by him to the trustee as security for the purchase money, and that the latter transaction should be construed as a mortgage. Such a construction, we think, would do violence to the plain intent and purpose of the parties as evidenced by the unambiguous terms and conditions of the declaration of trust, which was ratified in a certificate thereto attached, subscribed by them, and reading as follows:

"We, the undersigned, do hereby certify and declare that the above and foregoing declaration of trust correctly and accurately states and declares the trusts under and by which the property described in said declaration of trust is held by the Los Angeles Trust & Savings Bank, as trustee, and that the same correctly sets forth and declares our respective interests therein, and we hereby ratify and confirm the same in all its particulars in accordance with the conditions and stipulations therein expressed."

The declaration of trust does not provide that appellant should receive the title until after a full compliance with the terms and conditions of the trust. In this respect the case is similar to that of Woodard v. Hennegan, 128 Cal. 293, 60 Pac. 769, wherein plaintiff's testator advanced money for the purchase of certain lands and took title in his own name as security, executing to the defendant a bond for a deed or agreement to convey the same to defendant on or before June 1, 1894, provided defendant should have paid the purchase money with interest. Defendant was in possession of the lands at the time of the making of the bond for a deed, and remained in possession, paying the interest on the purchase money until the death of plaintiff's testator. Plaintiff sued to recover possession and to quiet title as against defendant. Upon appeal from a judgment in favor of defendant, the Supreme Court of California said:

"The contention of defendant in the court below, and the one evidently adopted by the court, was that the deeds made to Woodard were in fact made as security, and that the transactions amounted to and were in effect a mortgage. The title was held by Woodard as security, and in some features the transactions partook of the nature of a mortgage; but we do not think that the effect was simply a mortgage and nothing more. If defendant had been the owner of the property and had borrowed the fourteen thousand dollars

from Woodard, giving deeds to the property as security for the amount, the transaction would in law have been a mortgage. But in this case the legal title never was in defendant. He had no legal title to convey, and did not attempt to convey, any title as security. The legal title was transferred to Woodard, and he held it, not only as security, but in trust for defendant."

Referring to section 2924 of the Civil Code of California, the court said:

"The transfer in this case was not made solely as security for the purchase money. It was made for the purpose of finally having the title go to defendant, but in the meantime such title was held in trust for defendant and for the security of Woodard. The transactions did not simply constitute a mortgage and nothing more"—citing cases.

Concerning the quality of the interest held by the trustee in that case, the court said:

"When defendant desired to purchase the land, the owners, Lowe and Merkeley, might have given him a bond for a deed each for the amount of the purchase price. If this had been done, it does not seem that it could be contended that Lowe and Merkeley would hold the title as mere security. Their position is well defined in Pomeroy's Equity Jurisprudence, vol. 3, § 1260. The author says, in speaking of a bond or agreement to convey from vendor to vendee: 'In the latter, although possession may have been delivered to the vendee, and although under the doctrine of conversion, the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title or do anything by which it shall be divested except by performing the very obligation on his part which the retention of such title was intended to secure, namely, by paying the price according to the terms of the contract. To call this complete legal title a lien is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title and has no need of any lien. His title is more efficient security, since the vendee cannot defeat it by any act or transfer even to or with a bona fide purchaser.'

"We think Woodard possessed the same rights as would have been possessed by Lowe and Merkeley if they had made the agreement to convey to defendant."

This decision was followed in Lamberson v. Bashore, 167 Cal. 387, 390, 139 Pac. 817, 818, wherein the court said:

"While it is true that an instrument purporting to convey the title to real property may be shown to have been intended as a mortgage, clear and convincing proof of that fact must be shown to justify a court in so finding, and appellate courts are slow to disturb a finding either against or in favor of the theory that a mortgage has been shown to exist"—citing Beckman v. Waters, 161 Cal. 584, 119 Pac. 922.

Under the foregoing authorities, we must hold that the legal title was never in the appellant. He could not, therefore, convey the same as security for his payment of the purchase money for the property. On the contrary, the title was conveyed by the vendors directly to the trustee, who, we think, possessed the same rights as they would have possessed under the contract of sale had they retained the title. In view of these facts, we must hold the transaction to be something more than a mortgage; it was made for the purpose of finally having the title go to appellant, but in the meantime such title was held in trust for appellant and for the security of the vendors.

[4] 4. It is contended further, on behalf of the appellant, that he at no time contracted away his right of redemption, and he now claims

that right under the deed of trust construed as a mortgage. The deed of trust provides for a sale of the property by the trustee to accomplish the objects of the trust, and the method of procedure is provided in detail. The certificate at the end of the deed of trust declares that it correctly and accurately states the trust and confirms it in all particulars in accordance with the conditions and stipulations therein expressed. The certificate is signed by the appellant, and is therefore a part of his contract. The sale of the property by the trustee appears to have been made in accordance with the terms specified in the deed of trust.

In Bell Mining Co. v. First Nat. Bank, 156 U. S. 470, 477, 15 Sup. Ct. 440, 443 [39 L. Ed. 49], the Supreme Court of the United States had before it this question under the laws of Montana. In that case the court said:

"There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and, if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance. Grant v. Burr, 54 Cal. 298; Bateman v. Burr, 57 Cal. 480.

"The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed, under the power added for the sale of the property, to obtain payment of the indebtedness. The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted, and the mortgage is not, as it may be, foreclosed in the ordinary manner; but, when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption."

[5] 5. With respect to the further contention that the power of sale contained in the declaration of trust was revoked by the notices of rescission served by appellant upon the trustee and vendors on February 26 and 27, 1915, it may be said that thereafter appellant, being unable to make the payment of principal and interest falling due on March 1, 1915, in accordance with the terms and conditions of the declaration of trust, entered into an agreement for additional time within which to pay the various installments of principal and interest remaining unpaid. It was expressly understood and agreed in this renewal contract "*that each and every of the conditions or agreements mentioned in said declaration of trust shall remain in full force and effect* except as the same is expressly changed or modified by this agreement," and the instrument was signed by appellant. Even were we to concede that the power of sale was revoked by the notices of rescission, the effect of the latter agreement would be to revive such power in the trustee; and, as no further attempts to effect a revocation have apparently been made, this power was valid and subsisting at the time of the trustee's sale. This brings the case within the rule established by the authorities heretofore cited.

The decree of the District Court is affirmed.

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

(Circuit Court of Appeals, Sixth Circuit. June 15, 1917.)

No. 2888.

1. APPEAL AND ERROR ⟨⟩928(2)—EXCEPTIONS—PRESUMPTIONS.
The court is presumed to have correctly charged the jury, in the absence of exception.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3750.]

2. NEGLIGENCE ⟨⟩101—MASTER AND SERVANT ⟨⟩179, 228(1)—INJURIES TO SERVANT—DEFENSES.
Contributory negligence and the acts of fellow servants are not good defenses to an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]); the former, if existing, affecting only the amount of the recovery.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164; Master and Servant, Cent. Dig. §§ 354–358, 670.]

3. COMMERCE ⟨⟩27(8)—INTERSTATE COMMERCE—PERSONS ENGAGED.
An employé engaged in repairing a bridge used by an interstate carrier on its main line is engaged in interstate commerce.

4. MASTER AND SERVANT ⟨⟩103(1)—INJURIES TO SERVANT—DUTY OF MASTER.
A master owes his servants the nondelegable duty to exercise reasonable care to provide a safe place in which to work, which care may not be relaxed whenever the circumstances demand it.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175.]

5. MASTER AND SERVANT ⟨⟩112(1)—INJURIES TO SERVANT—CARE.
A railroad company owes its employés a continuing duty to maintain its roadbed in a reasonably safe condition for work.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218.]

6. MASTER AND SERVANT ⟨⟩205(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.
An employé has the right to act upon the assumption that proper care has been exercised with respect to the place of work and to suitable appliances, and does not assume any negligence of the master in those respects until he becomes aware of it, or is charged with notice of facts showing the master's failure to exercise such care.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547.]

7. MASTER AND SERVANT ⟨⟩112(1)—INJURIES TO SERVANT—NEGLIGENCE OF RAILROAD COMPANY.
A railroad company, whose employés were engaged in making a cut in a fill approaching a new bridge, which cut was to make a place for a wooden bent intended to hold up the track and bridge while the abutment was being removed and other permanent structure built in its place, is guilty of negligence in failing to shore up the fill for the protection of those employés engaged therein, where the fill was so constructed that trains passing over it might and did cause it to cave in and injure employés.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218.]

8. APPEAL AND ERROR ⟨⟩999(3)—VERDICT—CONCLUSIVENESS.
The verdict of the jury on questions of fact, as to whether an employé was appropriately warned of the danger of his place of work, is conclusive.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3923, 3924.]

9. MASTER AND SERVANT ⊂=211—INJURIES TO SERVANT—ASSUMPTION OF RISK.
An employé, engaged in digging a cut in a fill approaching a stream over which a new bridge was to be constructed, does not, on the theory that he was creating his own place of work, assume the risk of injury from the caving of the fill where such caving was due to the passage of a train and to the peculiar construction of the fill, of which it did not appear that the employé had knowledge; the case being different from that of the ordinary ditch case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557.]

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

Action by W. E. Hall, administrator of the estate of Rufus Hood, deceased, against the Cincinnati, New Orleans & Texas Pacific Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Preparatory to the substitution of a new bridge for an old one over Soddy creek, in Tennessee, on the main line of plaintiff in error, herein called defendant, the defendant caused a cut to be made in the fill approaching the bridge and immediately next to a stone abutment at the south end of the bridge, 24 feet long, 7½ feet high, 3½ feet wide; those figures measuring a transverse section of the fill at that point. The cut was to make a place for a wooden bent, which, with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and other permanent structure built in its place.

Hood, an employé, was, with others, engaged on the cut, which was supervised immediately by a foreman. There was also a foreman of the entire work on the bridge and both approaches, and all the work and men engaged upon it were under the supervision of the defendant's bridge builder, of long experience. When the men were set to work at the cut, a foreman marked off the places where they were to work, showed them how deep to go, and how much to take out.

Beginning one afternoon, the men had cut in on either side about 6 feet and to the bottom. As the work proceeded, the face of the fill was shored up by direction of the supervisor; planks being placed uprightly against the face of the cut braced by crosspieces running from the face of the planks to the face of the abutment. Who did the work of shoring does not appear. The supervisor said it was done "To protect the stringers, we always should in doing that sort of work, that makes it solid down there, so it can be used without danger. * * * We shored it up on account of the soft and loose dirt. It was liable to cave in."

To the end that traffic might not be interrupted, strong stringers were introduced under the ties to hold up the tracks; the ends on one side resting on the abutment and on the other on the roadbed itself, or upon a heavy crosssill, as the jury might determine from conflicting evidence. The supervisor testified, and it is clear, that stringers resting on the fill itself would make the work more dangerous to those working in the cut.

The fill was composed of sand and some clay for about half its height from the bottom; above that some sand and clay, with many round and smooth boulders running in size from large pebbles to 14 inches in diameter. The top of the fill was ballasted with slag of perhaps a foot and a half in thickness, having a tendency to form into masses. The supervisor knew the character of the fill. Whether the ends of the stringers rested on a sill or on the top of the fill, the ties must have been lifted out of their positions in the slag, thus leaving transverse depressions and heavy ridges in the slag. One stringer was under the middle of the track, and the other two at the sides, though how far apart does not certainly appear.

In the early afternoon of the second day, the men had cut through from side to side and down from the top about 6 feet, leaving to be removed but about 1½ to 2 feet at the bottom immediately under the track and about 4 feet long on each side and sloping down from the middle outwardly. How far the shoring had been completed does not certainly appear, but there was no shoring under the track at the deepest part of the cut and where it was needed the most. An employé working with Hood (an intelligent witness, so far as one can judge from the record) made the unshored distance 10 feet. The supervisor first said it was 4 feet, and, after making some calculations involving the width of the stringers and the distance between them, calculated the distance to be 6½ feet. The jury were at liberty to find the distance 10 feet. When questioned on the assumption that the distance was 10 feet, the supervisor said: "It would be an unusual and dangerous method to do the work, if there should be as much as 10 or 12 feet left under the track unshored. It is not the usual method to leave so long a space as that unshored." Trains passed over from time to time, the last at one-half to three-quarters of an hour before the accident happened. Hood was at work under the track when the fill caved in. He was thrown against the abutment and fatally injured. Sand and loose earth covered his legs and the lower part of his body, while his chest and head were crushed in by masses of slag, one said to be as large as a flour barrel.

In the débris was found a rotten log or tie about 3½ feet long, which had been imbedded in the sand and boulders about 3 feet from the top of the fill and the same distance from the face of the cut. The material above the log fell. It may be that this piece of decayed wood, disturbed by the jarring of the trains, precipitated the fall of the sand and boulders in which it was, and thus caused the fall of the then overhanging slag. It may be the log had nothing to do with it; but the fall of all the débris was practically simultaneous. There was some testimony tending to show warning to the workmen to look out for cracks and for falling earth; but the burden of the warning was to get out from under when trains were passing, lest blocks, brake beams, etc., might fall. One witness testified the men were told they could see when the earth began to crumble.

If the shoring had been carried under the track, there is no reason to think an accident would have happened. The break in the face of the fill did not go down to the bottom, but only about 3 feet from the top, and it was the opinion of the supervisor that the work Hood was immediately doing did not contribute to the fall. The supervisor left the work on a train about one-half to three-quarters of an hour before the accident. He said the train had not apparently affected the top of the embankment, and he stood at the end to see whether the stringers were sufficient to hold up the roadbed. He made no inspection of the face of the cut, and was unwilling to say that the passing train had nothing to do with the fall. Neither of the foremen had been present for perhaps three-quarters of an hour before the accident.

Hood was 27 years old, industrious, of good habits, and was a "good husband," earning $1.65 a day, which he applied to the support of his family. The action was brought by his administrator under the Employers' Liability Act for the benefit of his widow (23 years of age) and two children (one posthumous), who at the time the action was brought were, respectively, 4 years and 16 months old. The verdict was for plaintiff for $9,750, of which the court required a remittitur of $3,000.

Among other things, the court charged the jury:

"There is, generally speaking, a duty on a man who employs laborers to use reasonable care to make the place in which they are to work safe. He does not insure their safety. He is not responsible for accidents that happen to them unless he fails to take reasonable care for their protection. The care which he must take is such as a reasonably prudent employer would take under the circumstances, having due regard for the safety of his employés. It is the ordinary care of a reasonably prudent man; no more, and no less. The question is to be determined by the jury in the light of all the circumstances.

"Now, ordinarily, where men are laborers, engaged in the work of excavation, considering the changes that take place in the place where they work,

this duty of the master to furnish a safe place to work is held to have no application on the idea that the men themselves are making their place of work and that the conditions of the working place are constantly changing as a result of their own labor, and under such circumstances the master cannot be held, cannot be expected to exercise a constant supervision over the safety of the place where the place is changing from moment to moment as a consequence of their own labor.

"In this particular case, however, there may be another element which enters into the question as to the safety of this working place. This was not an excavation in the nature of an ordinary ditch, but it was an excavation which was being made under a railroad track where trains were run over it from time to time, and the excavation on one side was in the embankment which was a part of the fill on which the line of the railroad rests, and the railroad was from time to time running its trains over this fill on this track, and the danger of the place, the danger incident to the digging which the men were doing, may have been materially increased by the fact that trains were run over this embankment, which tended to loosen the earth and make the place more dangerous than it would have been, if they were at work in an ordinary excavation in another place. And the plaintiff maintains that this doctrine of the nonliability of the master as to making the place safe does not apply, and that he must use reasonable care under this condition to see that the place in which his men were at work was made safe; that is, he must use ordinary care of a reasonably prudent man.

"Now, I charge you that that is the law, and that if you find from the greater weight of this evidence that the condition of this place as to safety depended, not only on the work that the men were doing in digging there, but also depended materially upon the fact that trains were from time to time run over this fill, then there would be a duty on the master; and if the danger of the place was materially increased by the fact that trains were being run over the fill, then the master must use the care of an ordinarily prudent man in reference to making the place safe in view of all those conditions."

The record shows: "To that portion of the charge last quoted above the defendant duly excepted. The remaining portions of the charge were wholly unexcepted to." "The parties agree that the foregoing part of the charge covers the controlling question in the case on the question of liability." The only assigned errors needing notice are those involving the claim that the verdict was excessive and those having to do with the charge of the court as given above.

J. J. Lynch, of Chattanooga, Tenn., for plaintiff in error.
W. B. Miller, of Chattanooga, Tenn., for defendant in error.

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

HOLLISTER, District Judge (after stating the facts as above). [1, 2] What the learned trial judge said to the jury on the subjects of contributory negligence, assumption of risk, consequences of acts of fellow servants, the alleged failure of defendant to make adequate inspection, and to give proper warning to Hood of the danger of the work, does not appear; but in the absence of exception the judge is presumed to have charged the jury correctly on those subjects.[1] In any event, contributory negligence and acts of fellow servants would

[1] Myers v. Coal Co., 233 U. S. 184, 195, 34 Sup. Ct. 559, 58 L. Ed. 906; Ducktown, etc., Co. v. Fortner, 228 Fed. 191, 142 C. C. A. 547 (C. C. A. 6); Railway Co. v. Mustell, 222 Fed. 879, 881, 138 C. C. A. 305 (C. C. A. 9).

not, under the act under which this suit was brought, be good defenses; the former, if existing, only affecting the amount of recovery.[2]

[3] The interstate character of Hood's service is by the agreement admitted; but, since such admission of matter of law may not be conclusive of the court's duty to inquire into its jurisdiction, it may be said the facts bring the case within the act without any doubt.[3]

[4, 5] Apparently the agreement of the parties eliminates all of those subjects from the case; but the questions of assumption of risk and inspection and warning are so involved in the determination of the responsibility of defendant under the circumstances of the case that it will be assumed to be necessary to give some consideration to these subjects as reflecting upon the broader and the ultimate question immediately involved in the charge of the existence of a duty by defendant to exercise reasonable care to provide for its employés a safe place in which to work. That there is ordinarily such a duty, primary and nondelegable, is established,[4] and the care may not be relaxed, for its exercise is a continuing duty whenever the circumstances demand it.[5] Such circumstances include properly constructed roadbed, structures, and track used in the operation of a railroad.[6]

[6] The Supreme Court have held a railroad company liable for the death of its locomotive engineer, whose engine was thrown from the track because of an accumulation of sand and gravel deposited thereon in a curve, and for the death of a train hand whose duty called him to the top of a high freight car, from which he was knocked by an iron spout projecting from a water tank.[7] In each of these cases the employé, of course, assumed the risks attending his hazardous employment as far as they involved defects incident thereto, but did not assume risks caused by his employer's negligence. The Supreme Court says:

"The master is not to be held as guaranteeing or warranting absolute safety under all circumstances, but it is bound to exercise the care which the exigen-

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[2] Second Employers' Liability Cases, 223 U. S. 49, 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Seaboard Air Line v. Tilghman, 237 U. S. 499, 500, 35 Sup. Ct. 653, 59 L. Ed. 1069; Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 70, 36 Sup. Ct. 249, 60 L. Ed. 528.

[3] Pedersen v. Railroad, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

[4] Balti. & Pot. R. R. Co. v. Mackey, 157 U. S. 72, 87, 15 Sup. Ct. 491, 39 L. Ed. 624; Union Pac. R. R. Co. v. O'Brien, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; Choctaw, etc., R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; Kreigh v. Westinghouse, 214 U. S. 249, 255, 256, 29 Sup. Ct. 619, 53 L. Ed. 984.

[5] Santa Fé & Pac. R. R. Co. v. Holmes, 202 U. S. 438, 442, 26 Sup. Ct. 676, 50 L. Ed. 1094; Kreigh v. Westinghouse, 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984.

[6] Union Pac. R. R. Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766; Choctaw, etc., R. R. Co. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96.

[7] Union Pacific R. R. Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766; Choctaw, etc., Ry. Co. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96.

cy reasonably demands in furnishing proper roadbed, track, and other structures. * * *"[8]

The duty arises by implication from the contract of the employer, who agrees that in the place where the employé is to work there is no other danger than is obvious and necessary.[9] The employé has the right to act upon the assumption that proper care has been exercised with respect to the place of work and to suitable appliances for it, and does not assume any negligence in those respects attributable to his employer until he becomes aware of it, or it is so plainly observable that he may be presumed to know of it; and it must appear not only that he had, or is presumed to have had, knowledge, but that he knew his danger and ought to have appreciated it,[10] and consciously assumed it.[11] The employé may assume that proper care has been exercised in establishing a reasonably safe system or method of work, and "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method but to negligence in pursuing it."[12] The employé may assume, in the absence of notice to the contrary, that his employer will use reasonable care in furnishing appliances necessary in carrying on the business.[13] The risks inherent in dangerous work, and which the employé assumes, are those which arise after the employer has used reasonable diligence to make the work place reasonably safe.[14] He assumes the danger which inheres in the thing itself "which is a matter of necessity, and cannot be obviated";[15] and the rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him.[16]

[7] Hood's duty was, with others, to cut through the fill, including the work under the track over which, to his knowledge, trains passed periodically. He had nothing to do with raising the track or laying the stringers. He had little experience in work of this kind. Assum-

[8] Union Pacific R. R. Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766.

[9] B. & O. R. R. Co. v. Baugh, 149 U. S. 368, 386, 13 Sup. Ct. 914, 37 L. Ed. 772.

[10] Gila Valley, etc., Ry. Co. v. Hall, 232 U S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521: Railway Co. v. Proffitt, 241 U. S. 462, 468, 36 Sup. Ct. 620, 60 L. Ed. 1102.

[11] Railroad Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521; Railroad Co. v. Wright, 207 Fed. 281, 125 C. C. A. 25 (C. C. A. 6); Copper Co. v. Gaddy, 207 Fed. 297, 125 C. C. A. 41 (C. C. A. 6); Paper Co. v. Hamel, 207 Fed. 300, 125 C. C. A. 44 (C. C. A. 6).

[12] C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 468, 469, 36 Sup. Ct. 620, 60 L. Ed. 1102.

[13] Kreigh v. Westinghouse, 214 U. S. 249, 255, 256, 29 Sup. Ct. 619, 53 L. Ed. 984.

[14] Griffin v Brick Co., 84 Kan. 347, 349, 114 Pac. 217, 40 L. R. A. (N. S.) 1088; La Salle v. Kostka, 190 Ill. 130, 135, 60 N. E. 72; Noyes v. Smith, 28 Vt. *59, *64, 65 Am. Dec. 222.

[15] B. & O. R. R. Co. v. Baugh, 149 U. S. 368, 386, 13 Sup. Ct. 914, 37 L. Ed. 772.

[16] Pantzar v. Iron Min. Co., 99 N. Y. 368, 376, 2 N. E. 24.

ing he had theretofore done much ditch digging, he could not for that reason be presumed to know whether the stringers were laid properly, or whether the shoring actually done was sufficient. His danger lay, not only in the work he was doing and by what he was doing, but was increased by the loosening of the fill caused by trains running over stringers laid as these were, and by the abortive attempt of defendant to shore up as the work proceeded.

The defendant knew the materials of which the fill was composed and the effect of running heavy trains on the track over the stringers laid as these were. It knew the danger to Hood was gradually increasing through its operations as the cut deepened. Reasonable prudence would have suggested steps to hold up the fill, not only for the safe operation of the trains, but also to lessen the danger to Hood. The shoring done indicated an appreciation on the part of defendant that the circumstances called on it for action, and we have no doubt that a reasonably prudent man would have shored up the cut where the need was greatest.

[8] But it is said the danger was obvious, and Hood knew it, or may be presumed to have known it; that the supervisor inspected the work three-quarters of an hour before the accident happened, and that Hood was warned of the danger. The evidence of inspection is meager There was no inspection of the face of the cut at all. There is some evidence that the men were told to look out for falling dirt, but the warning given was chiefly to get out of the way when trains were passing, lest blocks, brake beams, etc., might fall. The employer's duty requires information to his employé of all perils which should be reasonably known to the employer, and of any change which introduces a new element of danger.[17] The stability of the roadbed was constantly changing by the operations of the defendant and the method by which the operations were carried on.

Knowledge and appreciation by Hood, or adequate inspection and sufficient warning, would have excused the defendant; but these were facts necessarily submitted to the jury, which they could determine one way or the other from the testimony. The determination of these facts were peculiarly within their province,[18] and by their verdict they must have decided them against the defendant. On such matters their verdict is conclusive.[19]

[9] To escape responsibility, defendant invokes the rule, and cites many cases more or less pertinent,[20] that when the employment itself

[17] McCalman v. Railroad Co., 215 Fed. 465, 469, 132 C. C. A. 15 (C. C. A. 6).

[18] Railroad Co. v. Ponn, 191 Fed. 682, 690, 112 C. C. A. 228 (C. C. A. 6); Coan v. Marlborough, 164 Mass. 206, 41 N. E. 238; Laporte v. Cook, 21 R. I. 158, 42 Atl. 519.

[19] Sterling Paper Co. v. Hamel, 207 Fed. 300, 303, 125 C. C. A. 44 (C. C. A. 6); National Fire Proofing Co. v. Andrews, 158 Fed. 294, 296, 85 C. C. A. 526 (C. C. A. 6).

[20] Railway Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507; Finlayson v. Mining Co., 67 Fed. 507; Railway Co. v. Brown, 73 Fed. 971, 20 C. C. A. 147; Hauss v. Lake Erie & W. R. Co., 105 Fed. 733, 46 C. C. A. 94; Fortin v. Manville Co. (C. C.) 128 Fed. 642; Omaha Packing Co. v. Sanduski, 155 Fed. 897, 84 C. C. A. 89, 19 L. R. A. (N. S.) 355; Dasher v. Mining Co., 212 Fed. 628, 129

is to make a dangerous place safe, or when, as is claimed here, the place is constantly changing because of the work the employé is employed to do and is doing, and he is by it making his own place in which to work, the employer is relieved from his otherwise duty of furnishing the safe place. This rule, called an exception to the general rule, has been stated by Judge Knappen, speaking for this court, and the reason for it given:

"That it would be impracticable, if not impossible, for a master in such case to look out for the safety of the employé while operations of the nature stated are being carried on." [21]

The exception has no application to the facts in this case, and the many cases dealing with the exception are easily distinguished from this. They need no discussion, because, for one reason at least, this accident did not happen because of any change made by Hood himself by the work he was doing when injured. But, aside from that, and assuming that the fall was partly caused by what Hood was doing at the time, yet it was also caused by what the defendant was doing and failed to do while co-operating in the entire enterprise of passing trains over the cut while the excavation was going on—in introducing new elements of danger not obvious to Hood or known to him, while known to the defendant, and of negligently performing that part of the entire work involved in the system adopted of running trains over the cut while it was being made. The safety of this work depended, not only upon the due performance of it by Hood and his fellows,[22] but also upon the work defendant was doing and the way it was being done. In cases in which the negligence of the employer in failing to provide and maintain a safe place contributes to the injury to the employé, the employer is liable, even when fellow employés are concurrently negligent.[23] The Supreme Court have said that, if the negligence of the company "contributed to, that is to say, had a share in producing, the injury, the company was liable." [24]

The act itself [25] gives a right of action for death "resulting in whole or in part from the negligence of the * * * agents" of the carrier, "or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, * * * track, roadbed, * * * or other equipment."

C. C. A. 164 (C. C. A. 6); Brown v. Railway Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666; Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80; Strepanski v. Grand Rapids Plaster Co, 162 Mich. 696, 127 N. W. 706; Citrone v. O'Rourke, etc., Co., 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340; 1 Bailey on Personal Injuries, §§ 80, 81.

[21] Dasher v. Hocking Mining Co., 212 Fed. 628, 632, 129 C. C. A. 164 (C. C. A. 6).

[22] Armour v. Hahn, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440.

[23] Deserant v. Railroad Co., 178 U. S. 409, 420, 20 Sup. Ct. 967, 44 L. Ed. 1127; Kreigh v. Westinghouse, 214 U. S. 249, 257, 29 Sup. Ct. 619, 53 L. Ed. 984.

[24] Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266.

[25] 35 Stat. at L. 65, 66, § 2.

The discussion need not be carried further. It is plain enough that the trial court was right in saying that this was not the ordinary ditch case, in which the employé makes his own place to work as he excavates,[26] and correctly charged the jury that there was a duty on the defendant to use ordinary care in protecting its employés.

The jury having found, on facts amply justifying their conclusion, that the defendant failed to discharge that duty, and the recovery finally awarded not being too large under the applicable facts, the judgment below will be affirmed, at the costs of plaintiff in error.

ELDER et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. June 16, 1917)

No. 2816.

1. CRIMINAL LAW ⟸1160—REVIEW—QUESTIONS OF FACT—APPROVAL OF VERDICT BY TRIAL COURT.

Where, on a trial for conspiracy to use the mails in furtherance of a scheme to defraud, there was a great deal of substantial evidence to sustain the allegations of the indictment, and the trial court declined to grant a new trial for insufficiency of the evidence to sustain a verdict, the Circuit Court of Appeals could not disturb the conclusion of the jury as to the existence of the facts or the inferences to be drawn therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084.]

2. INDICTMENT AND INFORMATION ⟸137(3)—GROUNDS FOR QUASHING—MISCONDUCT OF GRAND JUROR.

It was no ground for quashing an indictment for using the mails in furtherance of a scheme to defraud, in connection with the sale of stocks and bonds of an investment company, that the matter was brought to the attention of the grand jury by one of its members, who, as a practicing attorney, had represented a client holding some of the obligations of the investment company, where, after calling the matter to the attention of the grand jury, he withdrew and did not attend the sessions of such grand jury while the investigation of the matter was in progress, and did not hear any of the evidence, and took no part in the consideration or discussion of the matter.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 482, 484.]

3. CRIMINAL LAW ⟸927(1)—NEW TRIAL—MISCONDUCT OF JUROR.

It was not error to deny a new trial on the ground that one of the jurors, notwithstanding an order that the jury should not be allowed to separate, left the other jurors, and went to his office over the protest of the bailiff in charge, and was absent about 20 minutes, where no circumstance was shown to justify an inference of possible injury to defendant's rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2257, 2258.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Chas. A. Elder and others were convicted of an offense, and they bring error. Affirmed.

[26] Ritzema v. Brick Co., 152 Mich. 75, 115 N. W. 705; Hodgson v. Railroad Co., 146 Mich. 627, 109 N. W. 1125.

* Rehearing denied October 8, 1917.

F. McD. Spencer and S. M. Johnstone, both of Los Angeles, Cal., for plaintiffs in error.

Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The defendants Chas. A. Elder, W D. Deeble, and George M. Derby (plaintiffs in error), together with eight others, were indicted under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1916, § 10201]) for conspiracy to violate section 215 (Comp. St. 1916, § 10385), in using the mails in furtherance of a scheme to defraud. The plaintiffs in error were convicted, and the other defendants were acquitted.

The indictment charged, in substance, that in January, 1911, Elder, Deeble, Derby, and others were in exclusive control of the affairs of the Los Angeles Investment Company, a California corporation at Los Angeles; that defendants conspired to defraud divers persons, inducing them by false and fraudulent representations to purchase of shares and bonds in the corporation at prices greatly in excess of their value, and for the purpose of executing the scheme would place, and cause to be placed, letters, circulars, etc., in the mail of the United States, in which mail matter they would pretend that the earnings of the company were grossly in excess of what they actually were, and that the cash balances on hand were grossly in excess of the actual balances; that the stock was increasing in actual value at the rate of 5 per cent. of its par value per month; that a so-called "Guarantee Fund" was maintained under the control of the Globe Savings Bank of Los Angeles for the protection of the stock purchasers, and that there were and would be in this fund amounts grossly in excess of what it actually contained, and that no one ever had or could buy a single share of stock in the company except upon payment of the full purchase price in cash or by a one-third cash payment with the remainder in notes; that the payment of certain so-called "Gold Notes" was secured by a first lien on the treasury and real estate of the corporation, and that the entire stock premiums were held for the future benefit of stockholders, and that the dividends declared upon the stock were paid out and would be paid out of the earnings and profits of the corporation, and if a balance was due the corporation from stockholders, including defendants, all dividends payable to such stockholders would be applied on the amount owing by them; that the defendants, as a part of the conspiracy, would issue to themselves about 1,000,000 shares of the stock of the corporation without consideration therefor, and would pay to themselves dividends upon it, and would divert money of the corporation to the "Guarantee Fund," and would divert money to "Home Makers," a corporation controlled and managed by defendants.

The overt acts charged consisted of mailing of letters and copies of "Homes of Los Angeles," a paper published each month by defendants in the name of the Los Angeles Investment Company. These alleged published representations related to "Gold Notes" as safe and

sure investments secured by first lien on the treasury and real estate of the corporation. One of the advertisements pertained to dividends and expenses as being paid out of actual profits, not for premiums on sales of stock, and the surplus was published as over $7,800,000 in November, 1912. Another copy of the paper, in April, 1913, published that the guarantee fund of the company, held as a separate fund and managed by officers of the Globe Savings Bank, amounted to $252,242.51, a gain of 128 per cent. during the year next preceding publication. In October, 1913, the paper published that the balances due, mortgages, loans, etc., amounted to over $10,000,000, and that these loans were made on security much in excess of the amount of the loan. Another overt act charged was mailing a letter to Mrs. Carns in Los Angeles, telling her that, if she bought stock and left it for reinvestment, at each time dividends would be sufficient to buy five shares or more the reinvestment would be made, and she would be sent a notice together with an order for the stock certificate, and when this was signed and returned the certificate would be mailed to her; that, if the dividend did not amount to enough to purchase five shares, she would be sent a credit memorandum each quarter, and that she would not lose by her investment, as the "Guarantee Fund" of $100,000 was an assurance of her protection. This letter contained other alluring statements concerning the proposed investment. Other letters are set forth in the overt acts alleged, but it is enough to say that they represented that the notes and obligations of the company were amply secured, and that the stock would be advanced in price after December 31, 1912. In one letter mailed under date of October 13, 1913, addressed to the stockholders, they were told that the company had sufficient profits to warrant a dividend. The stockholders were asked as to their advice in the premises, and told that the stock was worth more if a dividend was not declared.

The testimony is voluminous, but the gist of much of it is as follows: Elder, Deeble, and Derby were the president, secretary, and treasurer, respectively, of the Los Angeles Investment Company, and all three were directors and in control. Elder was also director and president of "Home Makers," a corporation owned by the defendant, and was trustee of the "Guarantee Fund," and also director and president of the Globe Savings Bank. Deeble and Derby were also directors and officials in the "Home Makers" and in the Globe Savings Bank. They sold 5,000,000 shares of the capital stock of the Los Angeles Investment Company, of the par value of $1 each, for over $16,000,000. They also sold the obligations of the "Gold Notes," of more than $2,000,000, and certificates of over $500,000. 670,588 shares of the capital stock of the Investment Company were issued to the 11 persons who had been included in this indictment, at an aggregate price of $1,306,305.75, charged against the 11, leaving $18,246,622.81, for which the stock and obligations of the company were sold to the public. Counsel for the United States accepts the statement of counsel for defendants, that the "company had throughout its history paid a quarterly cash dividend amounting to 7 per cent. per annum, upon the market value of the stock at the time of the dividend. The company had also advanced in each of the eight nondividend months every year

the selling price of its stock five cents per share." The evidence showed that a vigorous campaign of advertising was carried on through the paper "Homes," the paper having large circulation by mail and personal delivery. Pamphlets, entitled "Seventeen Miles of Dividends," were also mailed to prospective investors. In the publications the company stated that stock could be bought at the price quoted until after the first day of the ensuing month, when the price would be advanced five cents a share, and it was published that 7 per cent. interest on the market value of the stock at the time the dividend was declared was justified as payable out of the actual earnings and profits of the company, emphasis being laid on the statement that the company was not paying any portion of its dividends from the profits on the sales of the stock, all such profits being carried to the surplus account, in which, for instance, in July, 1912, there were over $6,000,000. The method of making such announcements was by publishing in "Homes" a "Question Box." For example, in the issue of January, 1911, in the "Question Box," we find:

"Question: From what source can you pay 28 per cent. a year in cash dividends?"

"Answer: All dividends are paid from profits on real estate, interest on loans, building profits, architectural, rental, and insurance departments, etc. The last annual statement showed profits for the preceding year to be, for real estate, $261,319.69; for interest, $180,000.00; and for building construction, $10,191.89."

At a directors' meeting held on May 7, 1901, the directors present, Elder, Deeble, Derby, and Fay, declared a dividend of 200 per cent. on the paid-up capital stock of the corporation "out of the surplus earnings of the corporation already accrued and hereafter to accrue," payable to the stockholders in proportion to their several holdings. A resolution passed the same day also provided that the stockholders might purchase with the dividends treasury stock to the entire amount of the dividends, at $1 per share if purchased on or before May 31, 1901, and the president and secretary were authorized to sell treasury stock to the amount of $1,000 to pay the debts of the company. There was evidence to the effect that when this 200 per cent. dividend was declared the outstanding capital stock was 2,000 shares, which made the dividend $4,000; but it appears that at that time there was a deficit on the books of the company amounting to $696.57. In August, 1901, this deficit was covered by "surplus earnings of the corporation hereafter to accrue," in this way: 2,081 shares of stock in a corporation called the Automatic Tool Company was placed on the books as worth 40 cents a share, a total of $771.44, which covered the deficit and left a small excess. But the evidence showed that 46 shares of stock in the tool company cost the Los Angeles Investment Company 10 cents a share, that 522 shares cost 5 cents a share, and 1,513 shares cost 2 cents a share; that the 1,513 shares were acquired on July 31, 1901, one day before the deficit created by the dividend was covered by putting the tool company stock at 40 cents a share. Subsequently the stock of the Automatic Tool Company was charged off to profit and loss in installments. Notwithstanding such conditions, the company continued to advertise that cash dividends had been declared, and that

the company had paid 677 per cent. in quarterly cash dividends, and in May, 1913, in "Homes," tables were published showing enormous profits to investors. Advertisements at different times also elaborated upon the security of the "Guarantee Fund" as giving a positive guarantee to the small stockholder that he could not lose his money. It was represented that the "Guarantee Fund" was made up of the contributions of the officers of the company and maintained independently of possible control by such officers, thereby perpetually assuring to the investor that the company was a practically perfectly safe concern. In one issue of "Homes," March, 1913, it was said, in speaking of the guarantee fund, "It is a trust fund * * * for one purpose, to protect the small stockholder against loss. This fund is a perpetual trust," etc. Letters purporting to come from stockholders expressing satisfaction with the "Guarantee Fund" were published in "Homes," and it was stated that the "Guarantee Fund" in December, 1911, contained over $100,000 in money ready to buy back stock from those who wished to sell, whereas the evidence goes to show that in 1911 there was in the "Guarantee Fund" only $20,156 cash, together with debts due to it by the directors amounting to over $54,800, and stock in the Los Angeles Investment Company carried at over $25,700. In January, 1913, the representation in "Homes" was that the "Guarantee Fund" amounted to over $219,000, but the evidence is that there was then only $4,268 in cash in the fund, that the indebtedness of the directors was $144,115, and that the Los Angeles Investment Company stock was carried at $317,658. Elder, one of the directors, then owed the "Guarantee Fund" $58,904.08, Deeble owed it $32,868.05, and Derby owed $40,226.34.

When the adoption of the proposed "Blue Sky Law" was being advocated in California, "Homes" in February, 1913, and in subsequent issues, opposed such proposed legislation; but stated that, before the law could be effective, the Los Angeles Investment Company would be a closed corporation, with no stock for sale, and therefore would not be brought within the provisions of the proposed law. The contemplated disposition of the stock of the company was advertised in an interview had with Elder, wherein Elder spoke of expected sale of the property of the company, 6,000 acres, to certain capitalists at $3,000 per acre. Another effort to sell stock seems to have been made, by advertising to the effect that a bankers' syndicate was being formed to buy all the shares of the Investment Company remaining unsold on the last day of May, 1913. Stockholders were advised that the syndicate was open for them to come into, and that the syndicate intended to buy at $4.35 a share. But on June 1st over 200,000 shares of the capital stock of the company were still unsold. The officers of the Investment Company then as of date of May 31, 1913, transferred these 200,000 and more shares from the Investment Company to the "Guarantee Fund," at $4.30 per share, in acceptance of an offer of the "Guarantee Fund" to the company, spread upon the minutes of the director's meeting of the Investment Company of May 7, 1913. The consideration named for this transfer was $860,176.30, upon terms, one-third cash, and the balance by note executed by Elder and Derby as trustees of the "Guarantee Fund," dated May 31, 1913, due three

years after date. There is evidence that on May 31, 1913, the "Guarantee Fund" had a cash balance of $14,998.42. On June 4, 1913, the Investment Company advanced to the fund $255,000, and on June 5, 1913, the fund gave its check to the Investment Company for a cash payment of $286,725.45. In the issue of "Homes" published in June, 1913, it was stated that the bankers' syndicate had vanished into "thin air," as the stock of the company was completely sold on the last day of May, "making an immense addition to the paid-up capital and surplus of the company, an addition of $1,172,695.16, bringing the total up to the stupendous sum of $16,884,964.53." It appears, however, that in 1913, when the "Guarantee Fund" purchased the shares of the Investment Company's stock, there was a decline in the shares of the Investment Company, and certain stockholders became suspicious. Between January 1, 1913, and May 31, 1913, the company sold 860,363 shares of its stock, but the price dropped from $4.12½ to $1.15½. For the stock charged to Elder, Deeble, and Derby, the par value of which represented $947,000, they did not pay even a third in cash, nor did Deeble, Derby, and Elder apply dividends received by them upon their debts to the company, and the evidence tends to show that the defendants diverted over $2,000,000 of the money of the Investment Company to the "Guarantee Fund," and over $230,000 to the "Home Makers."

[1] The issues tried called for a verdict predicated upon the question whether or not the prosecution proved that defendants devised and entered upon the scheme charged with intent to defraud stockholders and made use of the mails in the execution of the scheme. The defendants contend that the evidence was insufficient to warrant conclusion of guilt. But where there is as much substantial evidence as the foregoing statement shows there was, to sustain the allegations of fact in the indictment, and the trial court has declined to grant a new trial based upon the ground of insufficiency of evidence to sustain the verdict, it is not for the appellate court to disturb the conclusion of the jury, either as to the existence of the facts or as to the inferences drawn from the facts. Humes v. U. S., 170 U. S. 210, 18 Sup. Ct. 602, 42 L. Ed. 1011.

[2] It is argued that the court erred in not quashing the indictment because of misconduct on the part of a grand juror. One of the grand jurors, Mr. A. S. Gear, had been a practicing attorney at law, and was interested in some of the "Gold Notes" issued by the Los Angeles Investment Company, and on different occasions in 1913 had called upon some of the defendants, officials of the Investment Company, concerning the payment of the obligations of the company held by him. Defendant Derby, in support of his motion to quash, filed an affidavit wherein he said that on November 8, 1913, Col. Gear called upon him, and, after inquiring about getting the notes cashed, said that he was on the grand jury, and that if the matter came up before the grand jury he (Derby) might need a friend; that he did not pay the note, and that he told Mr. Gear that as a member of the grand jury he would get no special favors. On November 10, 1913, Col. Gear left with Deeble, the secretary of the company, a note setting forth grievances which his client had against the Investment Company, and stating that his

client wanted her money and damages in withholding the payment of the same. November 11th Col. Gear appeared before the grand jury, and read to his fellow grand jurors a statement to this effect; that he believed himself disqualified from acting as a member of the grand jury if they should undertake to investigate a matter which he desired to call to their attention; that the Los Angeles Investment Company had invited the public to invest in gold bonds of the company as being a first lien on all assets of the corporation, whereas in truth he found that they were not secured by assets, but were merely liabilities entitling the holders to participation in the assets of the company along with other creditors, and he desired the grand jury to take such action as might seem appropriate.

There is nothing to show that the grand jury had been considering any charge against the Los Angeles Investment Company before Mr. Gear read his statement to the body. The foreman of the grand jury and the secretary filed counter-affidavits saying that the grand juror Gear was not present at any time during the deliberations or the proceedings upon which the indictments against these defendants were based or returned; that he left the grand jury room before the matter was taken up or considered, and did not return, and never was present in the grand jury room when the matters were heard or considered or discussed by the members of the grand jury; and that the statement read by Mr. Gear on November 11th had been thereafter given by the foreman to the United States attorney, and was not thereafter read or considered in the proceedings or deliberations of the jury. The grand juror Gear himself, in an affidavit, denied that he had ever told Derby that, if the matter of the Los Angeles Investment Company should come before the grand jury, he might need a friend, and denied that the question of his being on the grand jury ever was mentioned; but said that when he called on Derby he sent in a card, upon which he wrote, "Will Mr. Derby see Col. Gear, 4306 E. First street, member of United States grand jury?" Mr. Gear further says in his affidavit that he did not attend the sessions of the grand jury while the investigation of the officers of the Los Angeles Investment Company was in progress, heard none of the evidence, and did not vote on the indictment, and never talked to any member of the grand jury in reference to the company, and never tried to influence or persuade any member of the grand jury to vote to indict the officers of the company; that he considered it his duty to present the matter to the grand jury as he did, because he had received through the United States mails literature in reference to the "Gold Notes" in which a client of his had invested a thousand dollars.

There is no doubt of the fact that, if a grand juror knows that a crime has been committed which is properly the subject of investigation by the grand jury of which he is a member, it is his duty to call the matter to the attention of his fellow grand jurors. Of course, if he is in any way personally or otherwise directly concerned, he should excuse himself from participation in the investigation and the deliberations of the grand jury with respect to the matter. Clearly, in the present case, the grand juror did nothing illegal, and we affirm the ruling that there was no sufficient ground for quashing the indictment.

[3] It is said that the verdict should be set aside because of the misconduct of a trial juror. The point comes in this way: The court made an order that the jury should not be allowed to separate after it was impaneled and sworn, but on the morning of July 21, 1915, while the trial was in progress, one of the jurors told the bailiff in charge he must go down to his office. The bailiff told him that there was not time for him to do this, meaning that there was not time before the opening of court to assign the proper court officer to accompany the juror to his office. The juror said that he would go and take the consequences. The juror was gone about 20 minutes, and then returned. Except for the fact of this brief separation of the jurors, no circumstance is shown to justify an inference of possible injury to the rights of the defendant. The Supreme Court in Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138, in discussing the action of the District Court in overruling a motion for a new trial based upon the ground that some of the jurors had read articles on the case in the daily papers while the trial was going on, said:

"We are dealing with a motion for a new trial, the denial of which cannot be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. Mattox v. United States, 146 U. S. 140 [13 Sup. Ct. 50, 36 L. Ed. 917]. See Holmgren v. United States, 217 U. S. 509, [30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778]. It would be hard to say that this case presented a sufficient exception to the general rule The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day."

A number of exceptions are based upon the action of the court in admitting and excluding certain testimony. We have examined them, and find no substantial error in the rulings of the court. Nor do we find error in the instructions which stated the law carefully and with sufficient fullness to enable the jury to understand the principles which should control in their consideration of the evidence.

Believing that no substantial reason is advanced for holding that the defendants did not have a fair and legal trial, the judgment is affirmed.

UNITED METALS SELLING CO. v. PRYOR et al.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1917. Rehearing Denied July 9, 1917.)

No. 4526.

1. CARRIERS ⇐140—CARRIER AS WAREHOUSEMAN—GOODS AWAITING DELIVERY.

Defendant railroad company, as the last connecting carrier, received a carload of copper ingots, shipped under a bill of lading providing that "property not removed by the party entitled to receive it within 48 hours * * * after notice of its arrival * * * may be kept in car * * *

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

or warehouse subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only." Defendant's tariff schedule, duly filed and posted as required by law, and which, in accordance with Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 584 (Comp. St. 1916, § 8569), contained rules and regulations governing terminal privileges and charges, provided that, "when delivery of cars consigned or ordered to private industrial spur tracks cannot be made on account of the act, neglect, or inability of the consignee to receive them, delivery will be considered to have been made when the cars are tendered." On arrival of the car of copper the private track of the consignee was fully occupied, and defendant left the car on its connecting side track, and notified the consignee that the car was at its disposition, subject to the payment of a demurrage charge after the free time allowed by the rules of the company. Six days later the consignee paid the demurrage charges and the car was moved upon its track, when it was found that one of the seals was broken and that a part of the copper was gone, although, when inspected by defendant's yard watchman the evening before, the seals were secure. *Held*, that defendant's liability was that of warehouseman only.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609, 609½, 611–616.]

2. COURTS ⟸365—INTERSTATE COMMERCE ACT—LIABILITY FOR GOODS LOST—LAW GOVERNING.

The liability of a railroad company subject to the Interstate Commerce Act on a contract with an interstate shipper is not governed by state law, but is a federal question, governed by uniform rule.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971.]

3. WAREHOUSEMEN ⟸24(1)—ACTION AGAINST FOR LOSS OF GOODS—BURDEN AND MEASURE OF PROOF.

Under the rule of the federal courts, a warehouseman is liable only for negligence, the burden of proving which rests on the party alleging it, and is not shifted by proof merely of loss or destruction of property in charge of the warehouseman.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 11, 48.]

Appeal from the District Court of the United States for the Eastern District of Missouri; Elmer B. Adams, Judge.

Suit in equity by the Equitable Trust Company of New York, as trustee, against the Wabash Railroad Company. On petition of intervention by the United Metals Selling Company against defendant and Edward B. Pryor and Edward F. Kearney, its receivers. From a decree dismissing its petition, intervener appeals. Affirmed.

Jones, Hocker, Hawes & Angert and George F. Haid, all of St. Louis, Mo., and Shearman & Sterling, of New York City, for appellant.

James L. Minnis and N. S. Brown, both of St. Louis, Mo., for appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

REED, District Judge. In a suit of the Equitable Trust Company of New York, as trustee, a New Jersey corporation, against the Wabash Railroad Company, a consolidated railroad corporation of Mis-

souri and other states, pending in the United States District Court for the Eastern District of Missouri, to foreclose certain mortgages upon the property of the railroad company, in which Edward B. Pryor and Edward F. Kearney were duly appointed as receivers of the property of the railroad company, the appellant, the United Metals Selling Company, a corporation, in due time filed an intervening petition claiming of the Wabash Railroad Company the sum of $2,447.60 as the value of 415 ingots or bars of refined copper, weighing 18,674 pounds, alleged to have been lost from the car in which it was shipped, while in the custody of the railroad company upon its tracks in St. Louis, Mo., consigned to the Moore-Jones Brass & Metal Company of that city, under a bill of lading issued to the intervener by the Chicago & Duluth Transportation Company at Chicago, Ill., December 6, 1909, which copper it is alleged was delivered to the railroad company at St. Louis and lost from the car in which it was shipped while in its custody, about January 7, 1910, solely through the negligence, carelessness, and wrongful acts of the defendant railroad company; and judgment is prayed against the railroad company for the value of said copper, with interest from January 7, 1910, and that it be decreed a lien upon the property of the railroad company or its proceeds in the custody of the court, prior to the complainant's mortgage upon said property.

The railroad company and the receivers answered the intervening petition, admitting that about December 6, 1909, the intervener shipped some 40,000 pounds of refined copper from Chicago, to the Moore-Jones Brass & Metal Company at St. Louis, by the Chicago & Duluth Transportation Company and connecting carriers, but denies that it was lost, if lost at all, because of any neglect or fault upon the part of the railroad company, and further allege that the defendant railroad company on December 30, 1909, received the car containing said copper from the Terminal Railroad Association of St. Louis, and on January 1, 1910, notified in writing the consignee, Moore-Jones Brass & Metal Company, of the receipt thereof, and thereafter held said car as a warehouseman only, and not as a common carrier. Some other defenses may be noticed in the course of the opinion.

The matter was submitted to the special master in said foreclosure proceedings upon a stipulation of facts, which so far as deemed material is set forth in the margin.[1]

[1] STIPULATION OF FACTS.

"That on or about December 6, 1909, the intervener shipped 775 copper ingot bars, of the weight of 40,002 pounds, from Chicago, Illinois, to the Moore-Jones Brass & Metal Company at St. Louis, Missouri, under a bill of lading contract of shipment entered into between the Chicago & Duluth Transportation Company, a common carrier, and the intervener, dated Chicago, Illinois, December 6, 1909, a copy of which is hereto attached, made a part hereof and marked Exhibit 'A.'

"The bill of lading, Exhibit A is the uniform bill of lading—standard form of straight bill of lading, approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908, and includes a receipt which recites that, subject to the classifications and tariffs in effect on the date of its issue, December 6, 1909, it received from the United Metals Selling Company the

1. The master filed with the court his findings and recommendations as follows:

"* * * The [intervening] petition alleges that about December 6, 1909, the petitioner shipped 775 ingots of refined copper, weighing 40,002 pounds

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property described below, 775 copper ingot bars, weight 40,002 pounds, signed, 'Chicago & Duluth Transportation Company, B. L. Burke, Traff. Agt., Chicago, Ill.,' consigned to Moore-Jones Brass & Metal Company, St. Louis, Mo., and that said company agrees to carry to its usual place of delivery at said destination, if on its road; otherwise, to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

* * * * * * * * * *

"Indorsed on the back of the bill, Exhibit A, is the following:

* * * * * * * * * *

"'Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse, at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges including a reasonable charge for storage.'

"That the copper covered by the bill of lading was placed in Illinois Central car No. 130479 at Chicago; each of the doors of the car being sealed after the car was loaded and contents checked. That the car was carried by the Illinois Central Railroad Company to East St. Louis, where it was examined, seals found intact, and delivered to the Terminal Railroad Association of St. Louis. The Terminal Railroad Association transported the car across the river and turned the same over to the Wabash Railroad Company, at St. Louis, at which time the car was again examined and the seals found unbroken. The car was then carried by the Wabash Railroad Company to its yards, and for the reasons hereinafter stated the car was placed on its track No. 24, December 30, 1909, with seals intact. On January 1, 1910, the car was transferred to track No. 25, and the following notice was then mailed to the consignee, Moore-Jones Brass & Metal Company, and received by said company: 'You are hereby notified that the following cars are now on tracks at this station for your unloading or disposition and that said cars are subject to a charge of $1.00 per day or fraction of a day, for all time that they are held beyond the free time allowed by the rules of this company.' That said notice contained the number of the car containing the shipment involved in this case, and otherwise complied with the tariff requirements of the Wabash Railroad Company, lawfully in effect at that time. That the tariff of the Wabash Railroad Company, providing the rules and regulations and charges governing the assessment of demurrage and storage charges, and during all of said times on file in the office of the Interstate Commerce Commission at Washington, in the District of Columbia, and duly posted as required by law, provided as follows: 'When delivery of cars consigned or ordered to private industrial spur tracks cannot be made on account of the act or neglect of the consignee or the inability of the consignee to receive, delivery will be considered to have been made when the cars were tendered. The carrier's agent must give the consignee written notice of all cars he has been unable to deliver, because of the condition of the private industrial track or because of other conditions attributable to consignee, this will be considered a constructive placement.'

"The consignee paid to the Wabash Railroad Company $4.00 for demurrage

from Chicago, Ill., to the Moore-Jones Brass & Metal Company in St. Louis, under a bill of lading issued by the Chicago & Duluth Transportation Company to the petitioner, dated at Chicago, December 6, 1909. This is admitted by the defendants. It is alleged that the car containing the copper was delivered by the Terminal Railroad Company of St. Louis to the defendant railroad

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charges lawfully assessed on said car under the tariffs aforesaid, and covering four days next subsequent to the expiration of the forty-eight hours allowed as free time for unloading; that said demurrage charges accrued while said car was held by the Wabash Railroad Company on said track No. 25. That during all of the time said car was held by the Wabash Railroad Company on said track No. 25, the same was reasonably accessible to the consignee, Moore-Jones Brass & Metal Company, for unloading, but it had been the uniform custom of the said consignee to unload cars only when placed upon its industrial spur track.

"The consignee, Moore-Jones Brass & Metal Company had a private industrial spur track to its plant upon which it received carload shipments consigned to it. That said switch track was just of sufficient length to accommodate two cars, and was occupied by loaded cars at the time the above car was received by the Wabash Railroad Company. That under an arrangement between the Wabash Railroad Company and the said consignee, then in effect, all cars received by the said railroad company consigned to said consignee were to be placed by the Wabash Railroad Company on said private industrial spur track of said consignee, in the order in which said cars were received by the Wabash Railroad for such placement. That on January 1, 1910, the said Wabash Railroad Company was holding on its tracks seven cars for said consignee, all of which had been received prior to the receipt of said car of copper ingots. That on January 2, 1910, the said Wabash Railroad Company was holding out for said consignee, under same conditions, seven cars, and seven cars on January 3d, six cars on January 4th, nine cars on January 5th, nine cars on January 6th, eight cars on January 7th, and five cars on January 8th, all of which cars the Wabash Railroad Company had been unable to place on consignee's private industrial spur track, on account of said track being filled with other cars. That said consignee had no means of clearing its switch track, but, after emptying a car had to wait until the Wabash Railroad Company removed the car from said spur track.

"The Wabash Railroad Company employed during the times stated two watchmen in the yard where the car in question was located. The territory assigned to such watchmen covered six city blocks, within which there were from 9 to 19 tracks, of a combined length of about 30,000 feet. That one of said watchmen examined said car and the seals thereon at about 5 o'clock p. m., of January 6, 1910, and found all seals intact. The car in question was actually placed on consignee's private industrial spur track on the morning of January 7, 1910, at 10:30 a. m., and the same was immediately examined by the receiving clerk of the consignee, who found there was no seal on the west side door. It was also examined by two other employés of consignee, who also found there was no seal on the west side door. The consignee thereupon notified a watchman of the Wabash Railroad Company, and also requested the office of the freight agent of the Wabash Railroad Company to send a man to check the contents of the car. Immediately upon the discovery that the west side door contained no seal, the consignee caused the car to be locked, and the car remained so locked until the next day, January 8, 1910, when an employé of the Wabash Company appeared and checked the contents. On such checking the car was found to contain 415 copper ingots, weighing 21,328 pounds, instead of 775 ingots, weighing 40,002 pounds.

"That the reasonable market value of the missing 18,764 pounds of copper ingots was the sum of $2.447.60.

"[Signed] Wells H. Blodgett,
"N. S. Brown,
"Attorneys for Wabash Railroad Co.
"Jones, Hocker, Hawes & Angert,
"Attorneys for Intervener."

company about January 2, 1910, with the seals of the car intact; that thereafter, about January 7, 1910, the car was delivered by the defendant railroad company to the Moore-Jones Brass & Metal Company, but that at the time of the delivery the seal of the west side door of the car was missing, and the car contained only 415 ingots of copper, weighing 21,328 pounds, which was 18,674 pounds less than the car contained when it was delivered to the defendant railroad company. This allegation is disputed and denied by the defendants, who aver that the Terminal Railroad Company did not deliver the car until December 30, 1909, and that the delivery by the Wabash Railroad Company to the Moore-Jones Brass & Metal Company was made on the 2d of January, 1910, instead of the 7th of January. The defendants also dispute the averment as to the seals, and as to the loss of copper from the car. It is alleged and admitted that the petitioner lodged its claim with the defendant railroad company on account of its alleged loss about January 20, 1910, and thereafter made repeated demands upon the railroad company for the settlement of the claim. There are averments as to repeated efforts to adjust the claim between the parties, prior to the receivership and since; but these matters are not considered material by the undersigned, in view of the conclusions which he has reached upon the merits of the controversy. * * *

"Upon the facts submitted to me, which are altogether covered by stipulation herewith returned, I find that the defendant railroad company effected a complete delivery of the shipment to the consignee, Moore-Jones Brass & Metal Company, because of the provisions of the tariff of the Wabash Railroad Company, under which delivery must be considered to have been made when the car was tendered by the railroad company to the consignee. The car containing the copper was carried by the Wabash Railroad Company to its yard and placed on its track No. 24 on December 30, 1909, with seals intact. On January 1, 1910, the car was transferred to track No. 25 and the consignee was notified that the car was on the track for its unloading or disposition. This notice was given by reason of condition of tracks on which car was being held by the railroad company for the consignee.

"Finding, as I do, that the delivery of the car was made by the railroad company for the consignee, it is unnecessary to consider whether any liability was attached to the defendant railroad company as a warehouseman. I accordingly recommend that the intervening petition be dismissed.

"[Signed] Chester H. Krum, Special Master."

The court overruled intervener's exceptions to the findings and report of the master, and entered a decree dismissing its petition, and it prosecutes this appeal to reverse such decree.

The appellant assigns as error that under the facts stipulated the master and court erred in finding and holding:

[1] (1) That under the bill of lading and tariff schedules of the carriers, filed with the Interstate Commerce Commission and duly posted, the tender of the car containing the copper by the defendant railroad company to the consignee Moore-Jones Brass & Metal Company on January 1, 1910, effected a delivery of the copper to the consignee and relieved the railroad company of any further liability as a common carrier for the copper.

The bill of lading and tariff schedules in unmistakable terms provide:

"Sec. 5. That property not removed by the party entitled to receive it, within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may at the option of the carrier be removed to and stored in a public or licensed warehouse, at the cost of the owner and there held at the owner's risk and without liability

on the part of the carrier and subject to a lien for all freight and other lawful charges including a reasonable charge for storage."

The car containing this copper was received by the Wabash Railroad Company in St. Louis from the Terminal Railroad Company December 30, 1909, and placed on one of its tracks (No. 24) in its yards, on January 1, 1910, and was transferred to track No. 25 in the same yard, and the consignee notified in writing that the car was there for its unloading or other disposition subject to a charge of $1 a day or fraction thereof for all time that it should be held beyond the free time allowed by the rules of the company for unloading. The tariff of the Wabash Company, then on file with the Interstate Commerce Commission and duly posted as required by law, provides:

"That when delivery of cars consigned or ordered to private industrial spur tracks cannot be made on account of the act, neglect, or inability of the consignee to receive them, delivery will be considered to have been made when the cars are tendered. The carrier's agent must give the consignee written notice of all cars it has been unable to deliver, because of the condition of the private track, or of other conditions attributable to consignee; this will be considered a constructive placement."

Such was the contract between the appellant, the consignee, and the Wabash Railroad Company; and the consignee paid to the Wabash Railroad Company $4 for demurrage charges on this car under such schedules, covering the 4 days next succeeding the 48-hour period allowing for unloading, which demurrage accrued while the car was held by the Wabash Company on its track No. 25.

The act to regulate commerce as amended to and including June 29, 1906, provides in effect (section 1) that "transportation," which the act regulates, shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract express or implied for the use thereof and all services in connection with the receipt, delivery, elevation, transfer in transit, ventilation, or storage, and handling of property transported; and it shall be the duty of every carrier, subject to the provisions of the act, to provide and furnish such transportation upon reasonable request therefor, and to establish just and reasonable rates, and provide for reasonable compensation to those entitled thereto; also that all charges made for any service rendered or to be rendered in such transportation or in connection therewith, shall be just and reasonable. And section 6 requires that the carrier's schedules filed with the Commission shall be printed and posted, and shall contain the classification of freight in force, and also state separately all terminal charges, storage charges, and other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such rates, fares, and charges, or the value of the service rendered to the consignee. 34 Stat. c. 3591, pp. 584, 586; U. S. Compiled Stats. 1916, §§ 8563, 8569.

The bill of lading in this case, in accordance with the provisions of the act, provides that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein con-

tained, among which is the express condition (as appears in the stipulated facts) that the responsibility of the Wabash Railroad Company shall be that of warehouseman only for the property, if not removed by the consignee from its tracks within the 48-hour period for unloading, after notice of the arrival of the car, in which the copper was shipped, in its yard at St. Louis. Under the recent decision of the Supreme Court in Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, it must be held that the liability of the Wabash Railroad Company in this case, under the agreed facts, was that of warehouseman only.

[2, 3] (2) The appellant next complains of the decree because it did not adjudge the Wabash Company liable (under the facts stipulated) as a warehouseman. This complaint might well be dismissed, for the reason that appellant seeks to recover from the railroad company upon the ground alone of its liability as a common carrier, and there is no claim or sufficient proof that it has incurred any liability as a warehouseman. True, the intervener's petition asks for such other and further relief as may be just; and the answer alleges that under the facts the liability of the Wabash Company, if any, is that of a warehouseman only. But that is not sufficient to enable the appellant to recover in the absence of proof by it of the negligence it charges against the railroad company whereby the copper was lost from the car. The appellant, however, maintains in argument that, having shown the loss of the copper from the car (or other grounds from which it might be inferred that it was stolen from the car), a prima facie case of negligence is shown against the defendant, and that the burden then shifts to it to show its freedom from negligence, and cases from certain of the state courts, including Missouri, are cited in support of this contention. But an equal or greater number of decisions from the courts of other states may be cited to the contrary. But this question is hardly open to debate in this court, for in the case of Southern Railway Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836, above, it is directly held that the rule of the Supreme Court of the United States itself is, under the act to regulate commerce, opposed to the contention of the appellant. In that case the same contention was made by the appellee as is made by the appellant here, and the Supreme Court said:

"Viewing the contract set forth in the bill of lading [in that case] as still in force, the measure of liability under it must also be regarded as a federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute (the act to regulate commerce) shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions [citing many cases]. And the question as to the responsibility under the bill of lading is none the less a federal one because it must be resolved by the application of general principles of the common law. * * * It was explicitly provided that in case the property was not removed within the specified time it should be kept subject to liability 'as warehouseman only.' The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, how-

ever, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff having the affirmative of the issue must go forward with the evidence [citing a number of cases]. * * * It is undisputed that the loss was due to fire which destroyed the company's warehouse with its contents, including the property in question. The fire occurred in the early morning, when the depot and warehouse were closed. The cause of the fire did not appear, and there was nothing in the circumstances to indicate neglect on the part of the railway company. The trial court denied the motion [of the railway company] for a direction of a verdict and charged the jury that 'the burden of showing that there was no negligence is on the defendant.' Applying the rule established by the state decisions, * * * the Supreme Court of the state overruled the defendant's objection and sustained the judgment. * * * It has been recognized by the state court, as was said in the Fleischman Case, supra [Fleischman v. Southern R. Co., 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519], that the rule it applies is a 'somewhat exceptional rule' to which the court adheres 'notwithstanding the great number of opposing authorities in other jurisdictions.' * * * For the reasons we have stated, we think that the obligation of the railway company was not governed by the state law and that, in this view, the exceptions of the plaintiff in error were well taken."

The judgment was reversed. See Clark v. Barnwell et al., 12 How. 272, 13 L. Ed. 985; Railroad Co. v. Reeves, 10 Wall. 176, 19 L. Ed. 909; De Grau v. Wilson (C. C.) 22 Fed. 560, affirming (D. C.) 17 Fed. 698 (in admiralty); Strauss v. Wilson (D. C.) 17 Fed. 701 (in admiralty); Lamb v. Camden & Amboy, etc., Co., 46 N. Y. 271, 7 Am. Rep. 327; Denton v. Railway Co., 52 Iowa, 161, 2 N. W. 1093, 35 Am. Rep. 263; Yazoo & M. Valley R. Co. v. Hughes, 94 Miss. 242, 47 South. 662, 22 L. R. A. (N. S.) 975, and note.

There is no evidence that the car, or the seal upon the west door thereof, were insufficient or defective in any respect; and the inference that the seal was broken and the copper stolen from the car was not sufficient to warrant a finding that the copper was lost because of any neglect or want of ordinary care upon the part of the railroad company as warehouseman.

It follows that the decree of the District Court must be and is affirmed.

WICHITA MILL & ELEVATOR CO. v. LIBERAL ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. May 10, 1917.)

No. 4776.

1. SALES ⇐89—MODIFICATION OF CONTRACT BY NEW AGREEMENT.

A contract of sale of wheat for delivery during July was subject to a rule of a grain dealers' association requiring the seller, if unable to complete the contract, within the agreed limit to advise the buyer by mail, telephone, or telegraph, whereupon it should be the duty of the buyer to at once elect either to buy in, or cancel the deficit, or extend the contract to cover such deficit. On July 29th the seller advised the buyer that it would be prevented by a railroad embargo from shipping until August 2d, but would get the wheat out as soon as the railroads would receive it. On August 2d and 3d the buyer wired the seller, requesting that shipments be held up temporarily, and in a second wire that the sale be canceled. The seller in reply ignored or barely acknowledged

the request for delay, stating that it had the wheat ready to deliver as soon as the embargo was raised, and would much prefer to deliver it as soon as possible. In reply to a further request for delay and offer for cancellation, it again ignored, beyond a bare acknowledgment, the request to delay, and at no time in the correspondence ever did more than simply acknowledge receipt of such request. *Held*, that there was no acceptance of the offer to delay, so as to create a new contract, replacing the original contract; the fact that the seller did delay being caused by its absolute inability to ship by reason of the embargo, and not by its compliance with the buyer's request.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

2. SALES ⟸89—OPTION TO MODIFY CONTRACT—TIME FOR EXERCISE—"AT ONCE."

Within the provisions of such contract authorizing the buyer to elect at once to extend the contract, "at once" did not mean instantaneously, but with reasonable expedition under all the circumstances, and the circumstances in this connection comprehended both those in mind at the time the contract was made and those present at the time the party acted under such provision, and the contract included any conduct of the other party which would influence the action of the one required to act at once.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.

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

3. SALES ⟸89—OPTION TO MODIFY CONTRACT—TIME FOR EXERCISE.

An election by the buyer on August 10th and 11th to extend the contract was in time, where negotiations for cancellation of the contract, in which the seller actively participated, were in progress during the intervening time, and the buyer notified the seller that it extended the contract as soon as the seller demanded instructions as to disposition of the wheat.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

4. SALES ⟸89—OPTION TO MODIFY CONTRACT—VALIDITY OF EXTENSION OF TIME.

An attempted extension of the contract by the buyer was not ineffective, because it fixed no definite time to which the contract was extended, as the contract itself did not require performance upon a certain day, and any extension was intended to be of similar character, and, moreover, the seller could not be injured by an indefinite extension, as it was at liberty to deliver at any time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259.]

5. SALES ⟸418(2)—NONDELIVERY BY SELLER—DAMAGES.

As the extension was seasonably made and was within the terms of the contract, the contract was not broken by the seller until its failure to deliver within the time as extended, and the damages for its breach were to be measured as of that date, with interest from that date.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1175–1179.]

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

Action by the Wichita Mill & Elevator Company against the Liberal Elevator Company. Judgment for plaintiff for an insufficient amount, and it brings error. Reversed and remanded, with instructions.

Chester I. Long, of Wichita, Kan. (Austin M. Cowan, of Wichita, Kan., on the brief), for plaintiff in error.

C. M. Williams, of Hutchinson, Kan., for defendant in error.

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

STONE, Circuit Judge. *Damage for Breach of Contract.* A writ of error based on alleged right of larger recovery by plaintiff below from judgment in its favor for $986.97. Tried to the court on stipulation of facts and brief undisputed oral testimony.

The Contract. July 14, 1914, the Liberal Elevator Company of Hutchinson, Kan., sold to the Wichita Mill & Elevator Company, of Wichita Falls, Tex., 25,000 bushels of wheat to be delivered f. o. b. Galveston, Tex., during that month subject to the following rule of the Kansas Grain Dealers' Association:

"Rule 7. *Incomplete Shipments.* When the seller finds he will not be able to complete a contract within the agreed limit, it shall be his duty to so advise the buyer by mail, telephone, or telegraph, whereupon it shall be the duty of the buyer to at once elect either to buy in or cancel the deficit, or to extend the contract to cover said deficit. Should the seller fail to notify the buyer of his, the seller's, inability to complete a contract for shipment, as in this rule above provided, the said contract shall remain in force unless and until completed, extended, bought in, or canceled."

The Breach. After shipping 7,055 bushels, the seller, on July 29th, informed the buyer of its inability to complete its contract in July because of a railway embargo. No further deliveries were made, and after an extended correspondence the buyer on September 3d, being refused further performance, bought in the deficit at Galveston. The suit is for the expense and price difference in buying in this deficit. Recovery was allowed by the court below on the basis of a breach on August 10th and measure of damage as of that date. The buyer claims breach on September 3d and measure of damage as of that date.

The Railway Embargo. Before stating the position of the parties, it will be useful to clear away a false issue which has been presented by both sides. While it has its importance as a circumstance in the consideration of other points in the case, the railway embargo as a defense is not an issue in this court. It was determined by the trial court to be no defense, and no other conclusion could sustain the judgment below. The determination on that point was in favor of plaintiff, and the case is here solely on its writ of error.

The Controversy. The dispute is solely as to whether the breach and measure of damage is to be taken as of August 10th or as of September 3d. It hinges on the rights of the parties under rule 7, supra, and the dealings between them from July 29th to September 3d (revealed in correspondence) as controlled by that rule. Under rule 7 the defaulting seller could not cancel the contract; the buyer could. The buyer never exercised its right to cancel under the contract, for, although negotiations for cancellation were under way at various times, they were without results. When these negotiations failed, the seller on August 10th demanded disposition orders for the grain, whereupon the buyer attempted to extend the contract. The seller refused to recognize this extension. If the extension was binding, the buyer's contention is correct; if not, that of the seller must prevail.

Was the contract extended by the buyer, so that it was in force upon September 3d? The buyer contends it was. The seller contests this

because, as it claims, (a) the original contract was replaced by a new contract; (b) whatever right of extension existed, either under the original or under the new contract, was not exercised seasonably; (c) any such right was not exercised properly, because the extension was indefinite as to time.

[1] (a) *New Contract.* The theory of the seller is that on August 2d the buyer requested that the wheat be held for a few days, to which it (seller) acceded, and from this arose a new contract. As it will be necessary, in considering the subsequent points in this case, to set out the correspondence (August 2d to August 8th) relied upon by the seller to sustain this contention, it will not be duplicated here. That correspondence shows this situation: When it began, the time for delivery under the original contract was two days past; the seller had assured the buyer five days earlier that it would be prevented by a railway embargo from shipping until August 2d, but would get the wheat out as soon as the railroads would receive it; the duration of the embargo after that date seems to have been uncertain, or at least unknown to these parties; between the above dates the embargo continued, so that the seller could not have shipped; during the same period there was a congestion at Galveston, so that the buyer did not desire shipment; that under these circumstances the buyer, in two wires reaching the seller on the same day, requested, first, that shipments be temporarily held up, and, second, that sale be canceled; that on the day of such receipt the seller wired and wrote buyer, in its wire ignoring the request to delay and stating it had the wheat to "apply on sales as soon as embargo is raised," and in its letter barely acknowledging such request and saying, in confirming its wire, that it had the wheat "ready to apply as soon as the Galveston embargo is raised," and "would very much prefer to deliver this wheat to you as soon as it is possible for us to do so"; that on August 4th the buyer again wired request for delay and offer for cancellation at stated price; that to this the seller replied, again ignoring, beyond bare acknowledgment, the request to delay, and saying it had the wheat stored in its elevator "ready to ship any time, consequently would not feel like giving you any money to cancel this sale"; that at no time did the seller in its correspondence ever refer to such request for delay, except to simply acknowledge its receipt. This reveals no acceptance of the offer, if such it was, to delay. Nor can the fact that the seller did delay be of any force in this connection, for such delay was caused by its absolute inability to ship, and not by its compliance with the buyer's request. There was no new contract.

[2] (b) *Seasonable Extension of Contract.* The buyer was notified at Wichita Falls, Tex., by letter mailed at Hutchinson, Kan., July 29th, that the seller would be unable to complete its contract within the contract time. No extension by the buyer under the contract (rule 7) was attempted until August 10th and 11th. Had the right of extension expired before that time? Rule 7 provided that, upon notification from the seller of his inability to complete contract within time limit, it (buyer) should "at once elect to buy in or cancel the deficit, or to extend the contract to cover said deficit." Was this election exercised "at once" within the meaning of the contract?

"At once" does not mean instantaneously, but with reasonable ex-

pedition under all of the circumstances. 5 C. J. 1439, and citations; Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; Empire State Surety Co. v. Northwest Lumber Co., 203 Fed. 417, 121 C. C. A. 527 (9th C. C. A.). Each case must necessarily rest largely upon its own facts; therefore authorities are usually of little aid. However, this much may be gained from them: The "circumstances" comprehend both those in mind at the time the contract is made and also those present at the time the party acts under such provision of the contract (see above citations); and it has been held that in the latter class is included any conduct of the other party to the contract which would influence the action of the one who must act "at once." McCormick Harvesting Mach. Co. v. Warfield, 33 App. Div. 513, 53 N. Y. Supp. 737 (3 months' delay); Bennett v. Ins. Co., 67 N. Y. 274 (26 days' delay). Also see Peterson v. Hansen, 15 N. D. 198, 107 N. W. 528.

What were the "circumstances" attending the election by the buyer to extend this contract? They are revealed in the communications between the parties from July 29th to August 14th, inclusive. Such parts of the correspondence as bear upon all questions in the case are quoted below in the margin.[1]

[1] Up to July 29th the seller had delivered 7,055 bushels. On that date it wrote: "Yesterday morning the Santa Fé and Rock Island roads advised us that they had declared an embargo on Galveston until August 2d, which of course will prevent us shipping any wheat until that date. We assure you that we will get this wheat out the earliest moment that the railroads will receive same."

August 2d, night wire from buyer: "Account unusual congestion please hold wheat purchased from you for further instructions."

August 3d, wire from buyer: "Wire best cancellation offer wheat bought from you. Markets firmer to-day but Galveston congested."

August 3d, wire from seller: "Have the wheat bought and in our elevators ready to apply on sale as soon as embargo is raised. Would prefer to deliver the wheat, if however you wish to cancel wire your idea as to terms."

Same date, letter from seller: "We are in receipt of your night telegram of the 2d, asking us to hold back wheat sold to you for further instructions. We are also in receipt of your message later in the day asking us to wire best cancellation offer on the wheat sold to you. We note that you state in your letter [wire] that markets are firmer, but Galveston is congested. * * * We have just wired you that we have the wheat bought and in the elevator ready to apply as soon as the Galveston embargo is raised. We also stated to you that we would very much prefer to deliver this wheat to you as soon as it is possible for us to do so. If you decide to cancel this sale, please wire us your idea as to terms. We would not care to cancel unless we could cancel on terms satisfactory to us and as soon as we hear from you will take the matter up with you again."

August 4th, wire from buyer: "Will appreciate holding wheat few days 86 Galveston best cancellation offer. Reply must reach us by ten to-day."

Same date, letter from seller: "We are also in receipt of your message a little later stating that you would appreciate, if we would hold the wheat a few days we have sold to you. We note that 86¢ Galveston is the best cancellation you can make at this time. Beg to state that we have this wheat bought, and stored in our elevator ready to ship at any time, consequently would not feel like giving you any money to cancel this sale."

August 8th, letter from seller (after referring to correspondence concerning other matters): "Every one has a good deal of wheat sold to exporters to go to Galveston, and have this wheat on hand and are unable to deliver it

[3] From this correspondence we form these conclusions: That the parties at all times regarded the contract in existence; that the occasion for the exercise of the buyer's option arose on the receipt of the seller's letter of July 29th; that at that time the delay, as stated by the seller, would be only for two or three days; that when it developed there would be longer delay of uncertain duration the parties began negotiations for cancellation; that failure of those negotiations finally resulted in the request from the seller for disposition; that this request resulted in the communications upon that same day, the day following, and four days later, extending the contract under the buyer's election therein. The contract gave the buyer the absolute right to extend the contract if it acted promptly. If there was here any delay, it resulted from causes actively participated in by the seller. It was its (seller's) assurance of the very brief delay of two days over the contract time that would have made an immediate election under the contract by the buyer unnecessary. Beginning with the end of that period, it was an active party in attempting to arrange some amicable

on account of embargo. We believe that unless some change occurs in the situation, that the dealers in this territory will have to take some action in order to realize on their wheat."

August 10th, wire from seller: "We are holding eighteen thousand wheat drawing demurrage time shipment expired cannot hold longer wire disposition or basis of cancellation."

Same date, wire from buyer: "Ship our wheat Galveston Texas care Star Mills. * * *"

Same date, wire from seller: "You know there is embargo on Galveston if you cannot furnish other disposition we consider sale canceled now."

Same date, letter from seller: "We wire you this morning that we are holding 18,000 bushels of wheat drawing demurrage, the time of shipment has expired, cannot hold longer. Wire disposition or basis of cancellation. We have your wire in reply saying, Ship our wheat to Galveston Texas care Star Mills. You know there is an embargo on Galveston. This wheat cannot be shipped to Galveston, not now or possibly not two or three months from now. We thought possibly by wiring you that you could give some other disposition of this wheat and place it where there is no embargo, as other people have been doing when it was out of date. If you had not asked us to hold this wheat a little, we could have worked it out to you at that time, but of course now we could not do it. In reply to your wire we wired you. You know there is embargo on Galveston and if you cannot furnish other disposition we consider sale canceled. Now we certainly do not like to do this, but it is a matter of compulsion with us, as we cannot afford to keep it here on track paying demurrage and we are compelled to get action on the money we have invested in it. If you can see anything different in this matter aside from the unsatisfactory message you wired us, we will be pleased to do our part with you. Other people that have had stuff bought from us, also other dealers to go to Galveston or New Orleans, and it could not be billed to them there, have made other disposition of it. We want to fill our contracts. We cannot hold this wheat indefinitely for you."

Same date, wire from buyer: "Sorry bought for Galveston ordered to Galveston. Will extend contract until further notice, but cannot agree to cancellation wheat sold."

August 11th, letter from buyer: "We beg to confirm our exchange of message with you this afternoon relative to a batch of wheat bought from you going to Galveston. We are a little surprised that you should suggest the position you have in your message. This wheat was bought for Galveston and ordered to Galveston, and we must ask that you ship same to Galveston, as we are unwilling to agree to cancellation, as we have the wheat sold and must have

adjustment of the situation which would have made any extension useless. Those negotiations were not in accord with any powers given by the contract, but were commendable efforts to arrive at a mutually satisfactory solution of the difficulty. Promptly upon their failure the buyer exercised its election to extend the contract. Under these circumstances it acted within the terms of the contract.

[4] (c) *Proper Extension under Contract.* The seller claims that the attempted extension of the contract was not of the character allowed by the contract, since it was entirely indefinite as to time. It is true that the buyer, in making its extension, did not designate any certain date for its termination. Respecting this power of extension, the contract could hardly be broader than it is. It does no more than set out the condition which authorizes the exercise of the right and the requirement that it be then exercised promptly.

Ordinarily, where time of contract performance is limited, a failure

it shipped, and you have no right to refuse to follow the instructions as agreed in our exchange of telegrams."

Same date, another letter from buyer: "We are in receipt of your letter of the 10th. * * * Inasmuch as we have this wheat sold to go to Galveston for export, we would not be able to tender ladings showing destination at some other point, therefore, we would be unable to accept other ladings until some satisfactory arrangements could be made. We are willing to grant an indefinite extension of the contract until further notice. We, ourselves, have a great deal of wheat here still tied up on the tracks, which we wish to go to Galveston, and which we will be unable to ship until the embargo has been removed."

August 13th, wire from buyer: "Will cancel balance our Galveston contract 95¢ export. Answer by wire immediately."'

Same date letter from seller: "We are in receipt of your favor of the 11th and note fully what you have to say. Also your message this morning, stating that you will cancel balance of your wheat, your Galveston contract with us at 95¢ export. We also note that you understand that Chicago is bidding relatively no more. We did not answer by wire as your proposition is entirely out of line. * * * All of the other exporters of Chicago and Kansas City, as well as St. Louis, to whom we had wheat sold on Galveston terms, are now giving us either Kansas City or Chicago billing on this wheat. These billing orders are all on wheat which was to be shipped either during August or September. Our contract with you, however, expired August 1st. Our attorney advises us that contracts of this character cannot be extended by one party, without the consent of the other. It would be a different proposition if we did not have the wheat ready to deliver. By extending the time for us, you would cause us an injury, as we have this wheat on hand, and are compelled at this time to ship it some place in order to realize on it, as we are blocked up with wheat and need the money."

August 14th, letter from buyer: "Yours of the 13th. We suggest that you get you another attorney. We have not canceled your contract and you are at liberty at all times, in case you could not hold the wheat longer, to ship it in accordance with our original instructions. We wired you on August 1st [2d], asking you to please hold up the shipments for further instructions, on account of the congested conditions, but we have not canceled the contract, nor have we turned down any of your drafts. The buyer has the right to extend the time without the consent of the seller, although it is optional with the seller whether he accepts the extension or not, however, it is optional with the buyer, in case the contract has expired, to extend, buy in, or cancel. We have elected to extend the time and will thank you to make the shipments in accordance with the original instructions unless we agree to the contrary later."

to complete within the period is a finished breach, with its attendant damage liability. However, this contract provided that the buyer might elect to waive the breach and extend the time for performance. The position of the seller regarding this contention is based upon a misconception of the meaning of the contract. This is not a contract where performance must be upon a certain day. If it were, the seller might be correct in its contention. But this contract provided for delivery during *any* day of July after its execution. Any extension under the contract was intended by it to be of similar character. This contract, by "extension," means not the fixing of a definite future date upon which delivery must be made, but an additional period during every day of which the seller may make delivery. In no way can the seller be injured by an extension; nor by an indefinite extension, because every day of the extension is an additional opportunity, uncontrolled by the buyer, for it to perform its contract. The buyer does not have to grant any extension; it can claim the advantage of the breach caused by the seller. If it does extend, it can be for as short or as long a period as it may elect. If it chooses to set a definite date, that simply marks the end of the extension, and limits the time within which the seller must deliver. It is obvious that, if the delivery continues in default, the buyer would ultimately have to prescribe a definite date for terminating the extension. But there is no requirement in the terms of the contract, as expressed or as implied by law, to require such date to be determined at the time the extension is granted, and the seller may on any day terminate the extension by full performance.

In this case the buyer was eminently fair concerning this extension. More than once the seller expressed its willingness and desire to deliver as soon as the embargo would permit. In the midst of the embargo, when apparently neither party could estimate its duration, the buyer granted an indefinite extension until further notice at a time when it wanted the wheat as soon as it could get it. From that time on it stated the seller was "at liberty at all times" to deliver. In giving its "further notice" it was entirely reasonable. As soon as the embargo was lifted, and delivery made possible, the buyer repeatedly (from August 28th to September 2d) by wire requested delivery. Its requests were not even acknowledged. Finally, upon September 3d, it wired:

"Will extend your contract until September 15th, providing you wire us you will ship wheat. Otherwise please wire authority buy for your account. Must have definite understanding immediately."

Seller ignoring this, the buyer on same date again wired:

"Account your failure to respond to our wires, will buy best advantage for your account wheat due us."

To which, same date, seller wired:

"We consider contract to ship additional wheat canceled will not agree to extension of contract will not authorize you to buy for our account we are under no obligation to take any further steps in the matter."

Whereupon the buyer went into the market and bought grain, with the resulting loss here in suit.

[5] The extension was seasonably made, it was within the terms of the contract, it has been fairly acted upon by the buyer, the contract was breached by the seller on September 3d, and the measure of damage was of that date.

The judgment should be reversed and remanded, with instructions to enter judgment for plaintiff on the merits for $6,359.50 and interest thereon from the 3d day of September, 1914.

CITY OF OMAHA v. VENNER.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1917.)

No. 4757.

1. APPEAL AND ERROR ⇐184—JURISDICTION—ADEQUATE REMEDY AT LAW—WAIVER OF OBJECTION.

Where the subject-matter of a suit is within the jurisdiction of a court of equity, the objection that complaint had an adequate remedy at law will not be considered, when made for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1150, 1179–1183.]

2. MUNICIPAL CORPORATIONS ⇐921(1)—BONDS—SALE—RESCISSION—MISTAKE.

Complainant submitted a bid for an issue of bonds of the city of Omaha, which was accepted, and was based on a circular sent out by the city inviting bids, and containing a financial statement which, inter alia, gave the "valuation for assessment purposes 1912, estimated," of the property in the city, at $164,167,720. Rev. St. Neb. 1913, § 6300, provides that all property subject to taxation "shall be valued at its actual value, * * * and shall be assessed at 20 per cent. of its actual value." The valuation given in the circular was the actual value as fixed under such statute, and the assessed valuation was one-fifth of that amount, but such fact was not stated and was not known to complainant. His bid was in the expectation of reselling the bonds to savings banks in New York and other Eastern states, by whose laws such bank were permitted to invest in bonds of municipalities whose net indebtedness should not exceed 7 per cent. of the valuation of their property for taxation. The indebtedness of Omaha was within such limit if the valuation given in the circular were taken, but largely exceeded it upon the assessed valuation. The attorney general of New York had ruled that in such cases the assessed valuation was to be taken. *Held*, that whatever construction should be placed on the statement of the circular or upon the statutes of the states limiting investments by savings banks, they were sufficiently uncertain to entitle complainant to be relieved from his bid on the ground of mistake in supposing that the statement referred to assessed valuation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1932, 1935.]

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

In Equity. Suit by Clarence H. Venner, doing business as C. H. Venner & Co., against the City of Omaha. Decree for complainant, and defendant appeals. Affirmed.

The appellee brought this action against appellant to obtain a rescission and cancellation of a contract arising out of a bid by him

and the acceptance thereof by appellant for certan municipal renewal bonds, and to recover the sum of $5,000 earnest money deposited with the bid. The district court granted the relief prayed for and appellant appeals. The material facts as shown by the record are substantially as follows:

Appellee is a dealer in investment securities in the city of New York. Early in April, 1912, he learned of a proposed bond issue by appellant on receiving from it a circular dated at Omaha, Neb., March 28, 1912, and signed by Fred H. Cosgrove, city comptroller. The circular stated that sealed bids would be received by the city council of the city of Omaha up to 8 o'clock, p. m. of the 16th day of April, 1912, for the bonds described in the circular, viz. 600 bonds, of the denomination of $1,000 each; that bids must be accompanied by a certified check in the sum of $5,000, to be regarded as liquidated damages in case of failure on the part of the successful bidder to carry out his contract; that bids should be subject to bonds having been legally and regularly issued. The circular contained among other information, under the heading "Financial Data," the following:

Bonded debt including these issues.....	$ 6,120,000 00
Valuation for assessment purposes, 1912, estimated.....	164,167,720 00
Tax rate for all purposes 1912 per one thousand dollars...	12 96

Debt limitation 5 per cent. of valuation as above.

At the time appellee was considering the above proposal he had in his possession another circular signed by the city treasurer of appellant for the sale of bonds dated July 15, 1911, which contained among other information, under the heading "Financial Data," the following:

Assessed valuation	$151,331,701 00
Tax rate per one thousand dollars.....	12 58

On April 13, 1912, by letter addressed to the city council of appellant, appellee made an offer for all the bonds mentioned in the circular dated March 28, 1912, of 102.513 per cent., plus accrued interest, and accompanied the offer with a certified check for $5,000, payable to appellant in accordance with the requirement of the circular. Appellee relied upon the statements contained in the circular, and made his bid with reference to a sale of the bonds to savings banks in the states of New York, Massachusetts, New Hampshire, Vermont, and Rhode Island, which banks paid a higher price than that of the general bond market.

The law of Vermont conditioned the right of savings banks to purchase municipal bonds upon the fact that the municipality issuing the bonds did not have an indebtedness exceeding 7 per cent. of the last preceding valuation for the assessment of taxes.

The New Hampshire statute provided that the net indebtedness of the municipality issuing the bonds should not exceed 7 per cent. of the last preceding valuation of the property therein for taxation.

The Rhode Island statute provided that the net indebtedness of the municipality should not exceed 7 per cent. of the valuation of the taxable property therein for the assessment of taxes.

The Massachusetts statute provided that the net indebtedness of the municipality should not exceed 7 per cent. of the valuation of the taxable property therein, to be ascertained by the last preceding valuation of property therein for the assessment of taxes.

The New York statute provided that, if the indebtedness of the municipality should exceed 7 per cent. of the valuation for the purpose of taxation, its bonds and stocks should thereafter and until such indebtedness should be reduced to 7 per cent. of the valuation for the purposes of taxation, cease to be an authorized investment for the moneys of savings banks.

The bid of appellee was accepted by appellant April 17, 1912. On April 18, 1912, appellee was informed for the first time that the bonds of appellant as investments for the savings banks of New York had been decided invalid by the attorney general of that state. The attorney general had so decided

in December, 1911. Opinions of Attorneys General, New York, 1911, p. 686. Upon receiving this information, appellee wired Cosgrove, city comptroller of appellant: "We are informed that assessed valuation of Omaha is only one-fifth of amount stated in city circulars upon which we relied in making bid. Please wire explanation." April 19, 1912, appellee received a telegram from Cosgrove reading as follows: "Assessment made on one-fifth actual valuation." On same day appellee wired Cosgrove as follows: "Wire us exact amount assessed valuation for this year, also for 1911." On April 20, 1912, appellee received from Cosgrove a night letter reading as follows: "Exact assessed valuation for 1911 is $30,376,213; for 1912, $31,779,681. Full valuation or as stated in circular; valuation for assessment purposes is five times above amount. Debt limit based upon full valuation."

On the same day appellee mailed the following letter to Cosgrove, comptroller:

"New York, April 20, 1912.

"Fred H. Cosgrove, Esq., Comptroller, City of Omaha, Nebraska.

"Dear Sir: In reference to the $600,000 of city of Omaha bonds awarded to us, we telegraphed you on the 18th instant as follows: [Set out above.] We received your telegram on the 19th (dated the 18th), as follows: [Set out above.] As your telegram did not give us the necessary information, we wired you on the 19th as follows: [Set out above.] In answer to this last telegram we have received your telegram as follows: [Set out above.] In your circular dated March 28, 1912, inviting bids for the $600,000 of bonds, you stated, among other things, in reference to the financial condition of the city: 'Valuation for assessment purposes, 1912 (est'd.), $164,167,720.'

"This appearing to be an estimate, we inferred that the assessment rolls for 1912 had not been finally completed, and that the figures given were approximately correct. But to further assure ourselves with respect to the assessed valuation, we consulted our files, and found the circular dated July 15, 1911, signed Frank A. Furay, city treasurer, which invited proposals for $379,000 city of Omaha street improvement bonds. Among the other items set forth in said circular was, 'Assessed valuation, $151,331,701.'

"Construing the two circulars, we concluded that the assessed valuation for purposes of taxation for the year 1912 would show an increase of some $13,000,000 over the assessed valuation for 1911. It appears, however, from your telegram received to-day, that the exact assessed valuation for 1911 was only $30,376,213, and that for 1912 the exact assessed valuation is $31,779,681.

"The facts and figures above set forth raise a very interesting question. You are aware, as doubtless your predecessors have been, that the market for Omaha bonds, which has enabled the city to realize high prices for them, has been confined largely to the savings banks of certain Eastern states, which, by the laws affecting them, are permitted to invest their funds in the bonds of certain cities whose net indebtedness does not exceed a certain percentage of the assessed valuation of property in such cities. In New York state the percentage is 7 per cent., and in the other states 5 per cent.

"We bid for these bonds upon the faith of the representations contained in the circulars above referred to, to wit:

" 'Assessed valuation for 1911..... $151,331,701'
" 'Estimated assessed valuation, 1912..... 164,167,720'

—for the purpose of selling them to savings banks of the several states which would be legally allowed to buy them, if either of said statements of assessed valuation for 1911 or 1912 had been correct.

"You can imagine, therefore, that we are now considerably surprised to learn that the figures given for 1911 and 1912 are five times the amount of the assessed valuation. Under this condition, it is apparent that the bonds of the city of Omaha are no longer a legal investment for the banks in the states of New York, Maine, New Hampshire, Vermont, and Rhode Island, and we have just learned that the attorney general of the state of New York has so ruled in respect to this state.

"It is hardly necessary to call your attention to the fact that, with such a market closed to them, the bonds are not as valuable as they would otherwise

be, and that we will be deprived of the market and profit which we had in view when we made our bid.

"In our investigation of this subject of assessed valuation, we have, among other things, been furnished with a statement of the financial statement of the school district of Omaha, as shown by official records of October 26, 1911. Among the items are the following:

"'Actual value of property..... $163,420,760'
"'Assessed valuation for 1911..... 32,684,152'

"Had you prepared your statement in the same form, giving separately the amounts of actual valuation and assessed valuation, we would not have been misled, and a very unpleasant question would not have arisen.

"This being Saturday, we have not had the opportunity of taking the matter up with our counsel, but we will do so on Monday, on which day we expect to receive for submission to counsel the transcript of the proceedings authorizing the issue of the bonds.

"Yours truly, [Signed] C. H. Venner & Co."

April 25, 1912, appellee, receiving no reply to his letter of April 20th, wired Cosgrove as follows:

"New York, April 25, 1912.

"Fred H. Cosgrove, City Comptroller, Omaha, Nebraska:

"Under advice of counsel for reasons stated in our letter of twentieth and other material ones, we decline to take the six hundred thousand dollars city of Omaha bonds at our bid and request return of our five thousand dollar cheque. We are willing, however, subject to approval of legality by our counsel to buy the bonds at a fair price based upon your revised statement of assessed valuation and market conditions arising therefrom. Answer.

"C. H. Venner & Co.

"Chg. C. H. Venner & Co."

Appellant, acting on the above telegram, resold the bonds at a price more than $5,000 less than the bid of appellee, appropriated the proceeds of the certified check as liquidated damages, and at all times since has refused to return the same to appellee. The assessed valuation of property within the city of Omaha subject to taxation, as equalized and corrected by the state board of equalization and the county board of the county of Douglas, Neb., was for the year 1911, $31,494,743; for 1912, $32,808,025.

Section 12 of the Nebraska revenue law (Rev. Stat. Neb. 1913, § 6300) is as follows:

"All property in this state not expressly exempt therefrom shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value. Such assessed value shall be entered in separate column opposite each item, and shall be taken and considered as the taxable value of such property, and the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this chapter, shall mean its value in the market in the ordinary course of trade."

W. C. Lambert, of Omaha, Neb. (John A. Rine and L. J. TePoel, both of Omaha, Neb., on the brief), for appellant.

Halleck F. Rose, of Omaha, Neb. (John F. Stout and Arthur R. Wells, both of Omaha, Neb., on the brief), for appellee.

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

CARLAND, Circuit Judge (after stating the facts above). It is urged in the brief of counsel for appellant that appellee had a complete and adequate remedy at law to recover the proceeds of the check accompanying his bid, and therefore a court of equity has no jurisdic-

tion of the present action. As to this point it is sufficient to say that where the subject-matter of a suit is within the jurisdiction of a court of equity and the objection that the complainant had an adequate remedy at law is not made until a hearing in the appellate court, the reviewing court will not consider the objection. Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82; Brown v. Lake Superior Iron Co., 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Highland Boy G. M. Co. v. Strickley (C. C. A. 8 Cir.) 116 Fed. 852, 54 C. C. A. 186; National Bank of Commerce v. Equitable Trust Co. (C. C. A. 8 Cir.) 227 Fed. 526, 142 C. C. A. 158.

It appears from the record that the question as to whether appellee had an adequate remedy at law was in no wise raised in the court below. Moreover, the appellee may have had much difficulty in recovering in an action at law the $5,000 earnest money, with the contract created by the acceptance of his bid in full force. It was alleged, in the answer of appellant to the complaint of appellee and also in the brief of counsel, that appellee's objection to carrying out his bid was not in good faith, but an attempt to cause the bonds to be sold to the next highest bidder, and the language contained in appellee's bid, requesting that the names and prices bid by the next two highest bidders should be telegraphed in case appellee became the successful bidder, is referred to in support of this charge.

[2] We have examined the testimony in the record carefully, and are clearly of the opinion that appellee acted in entire good faith in refusing to perform his bid. Appellee bases his right to recover upon two propositions: First, that the information contained in the circular of March 28, 1912, relating to the valuation for assessment purposes of the property of appellant for the year 1912, and also of the statement as to the tax rate for all purposes for 1912, per $1,000, were false, and placed in the circular by appellant with the intention of misleading persons who should desire to bid for the bonds offered for sale; second, if the statement shall be held to have been true, then appellee in bidding for the bonds acted under an honest mistake as to the material facts touching the assessed valuation and tax rate of appellant, and in either event he is entitled to rescind the contract and recover the sum demanded. In this connection appellee claims that, if the language of the circular shall be construed to mean the assessed value of the property of appellant for the year 1912, then the statement was false and known to be so by appellant; and, if the statement shall be construed to be true, then appellee was justified in believing that the language referred to the assessed value of the property of appellant for taxation in the year 1912. In other words, he honestly believed that the assessed valuation of the property of appellant was five times the amount of the actual assessment and that the tax rate was in all one-fifth of the actual tax rate.

The statement contained in the circular dated March 28, 1912, concerning valuation, is as follows: "Valuation for assessment purposes 1912, estimated." If this language is construed to mean the assessed value of property upon which the annual tax is to be levied, then the

amount of $164,167,720 is false, because the assessed valuation for the year mentioned was $32,808,025.

Appellant claims, however, that the words quoted, when taken in connection with section 12 of the Nebraska Revenue Law, supra, states the truth. Section 12 provides that all property subject to taxation shall be valued at its actual value, and shall be assessed at 20 per cent. of that value; that such assessed value shall be considered as the taxable value of such property and the value at which it shall be listed and upon which the levy shall be made. It therefore is claimed by appellant that, when its comptroller stated that the valuation for assessment purposes for the year 1912 was a certain amount, the statement referred to the actual value of the property subject to taxation, and not one-fifth of that amount provided by law as the assessed value.

Exhaustive arguments are made in the briefs on both sides for the purpose of showing how the language used with reference to valuation in the circular of March 28, 1912, should be construed, and cases are cited in support of the different contentions. Exhaustive arguments are also made as to how the laws of the different states in which appellee intended to sell bonds should be construed, with reference to the eligibility of municipal bonds as investments by savings banks in those states. But we think it is unnecessary to determine whether the statement in the circular of March 28, 1912, as to valuation, when properly construed, referred to the assessed value as defined by the Nebraska statute, or the actual value of all property subject to taxation. If it is a question upon which legal minds may differ, it certainly was a question concerning which appellee had a right to be honestly mistaken, and if in making his bid he honestly believed that the language referred to the assessed value of appellant's property for taxation, and not its actual value, then he would be entitled to refuse performance of the contract at the time he did when he learned the contrary, whether the language was used by appellant with the intention to deceive or not.

Whether or not the bonds for which appellee made his bid were eligible in the savings bank market of the states mentioned would depend largely upon how the statement in the circular of March 28, 1912, should be construed and this was another question which appellee ought not to be held to decide at his peril, and furnishes another reason why, if he was honestly mistaken as to the meaning of the language used, he should be entitled to relief.

The statement as to valuation contained in the circular was a statement of fact and material, however we may construe the language used. In Chicago v. Fishburn, 189 Ill. 367, 59 N. E. 791, it was decided under a statute similar to section 12, supra, that the debt limitation should be computed upon the assessed valuation, and not upon the actual value which is ascertained in the process of fixing the assessed value. On the other hand, in the case of Halsey v. Belle Plaine et al., 128 Iowa, 467, 104 N. W. 494, under a statute of Iowa similar to section 12, supra, it was decided that the debt limit should be computed on the actual value and not on the assessed value.

If these learned courts may differ as to the meaning of the different statutes, it is clear that appellee could be honestly mistaken as to the meaning of the language used in the circular of March 28, 1912, and his testimony that he thought the language referred to the assessed value stands uncontradicted.

We are satisfied from the evidence in the record that the judgment of the lower court was right. We base our decision upon the proposition that if the language used with reference to valuation in the circular of March 28, 1912, shall be construed to mean the assessed value of the property within the city of Omaha, then it was false, and it is immaterial whether it was intentionally false or not so far as appellee is concerned. If the language used shall be construed to refer to the actual value of the property within the city of Omaha for taxation, then on this record appellee was honestly mistaken as to the meaning of the language when he made his bid, and in either event he is entitled to rescind and recover the money deposited with his bid. Turner v. Ward, 154 U. S. 618, 14 Sup. Ct. 1174, 23 L. Ed. 391; Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Hearne v. Marine Ins. Co., 20 Wall. 488, 22 L. Ed. 395; Moffett v. City of Rochester (C. C.) 82 Fed. 255, affirmed in Moffett v. City of Rochester, 178 U. S. 386, 20 Sup. Ct. 957, 44 L. Ed. 1108.

It is suggested by counsel for appellant that the mistake of appellee, if he was mistaken, was a mistake of law, and therefore not relievable in a court of equity. It may be conceded that as a general rule a mistake of law is not a ground for rescission of a contract, but there are exceptions to the rule. Snell v. Insurance Co., 98 U. S. 90, 25 L. Ed. 52. We do not think the mistake of appellee was one of law. He testifies and it is uncontradicted, that he thought the valuation stated in the circular was the assessed valuation. As a matter of fact it was the actual value.

It is further urged by counsel for appellant that the evidence shows that appellee was in some doubt as to the meaning of the language in regard to valuation contained in the circular of March 28, 1912, and thereupon he consulted the circular of July 15, 1911. Appellee testified that he consulted the circular of July 15, 1911, because of the use of the word "estimated" in the circular of March 28, 1912; that he inferred that the tax rolls had not been finally made up for 1912, and for that reason he consulted the circular of July 15, 1911, which gave the assessed valuation for 1911 at $151,331,701.

We think appellee had a right to rely upon the statements made in the circular, and that he did so rely when he made his bid; that the statement as to valuation was either false, or, if not, appellee was honestly mistaken in respect thereto when he made his bid, and in either event he is entitled to the relief prayed for.

Affirmed.

ATCHISON, T. & S. F. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1917.)

No. 4764.

1. MASTER AND SERVANT ⊂=13—HOURS OF SERVICE ACT—CASUALTY OR UNAVOIDABLE ACCIDENT.

A railroad train parted on a curve, where the track descended a heavy grade from either side to cross a natural depression. The automatic couplers, slipping, passed by each other because of worn places on the faces of each knuckle, due to the attrition of coupling and traction against similar knuckles. It appeared that the cars had been recently inspected, and that the usual inspection before the train started was made, but that the defect was not discovered. There was evidence that it could have been discovered only by the use of a gauge used by railroads for measuring such couplers. By reason of the parting of the train the railroad company kept employés on duty for more than 16 hours. *Held* that, as the railroad company might have used a gauge for the inspection of the couplers, the accident cannot be deemed a casualty or unavoidable accident as a matter of law, within the Hours of Service Act, providing that it shall not apply in case of casualty or unavoidable accident or act of God, and hence the railroad company could not escape liability for keeping its employés on duty for more than 16 hours in violation of the act.

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

2. MASTER AND SERVANT ⊂=13—OPERATION OF RAILROAD—HOURS OF SERVICE ACT.

A train telegraph operator at a station operated at night as well as day was required to remain on duty more than 9 hours to care for the United States mails, but he performed no services as train dispatcher after the expiration of the 9-hour period prescribed by the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1916, §§ 8677–8680]). *Held*, that such fact did not exempt him from the protection of the act.

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

3. MASTER AND SERVANT ⊂=13—OPERATION OF RAILROAD—HOURS OF SERVICE ACT.

A telegraph operator, whose regular period of service was from 3:30 p. m. to 12:30 a. m. each day, was directed to remain on duty to care for the United States mails, which were to be transmitted to and received from a passenger train scheduled to pass the station at 10:15 p. m. The train on this particular evening was known to the railroad company's officials to be 2½ hours late into a somewhat distant station, and it had been losing instead of gaining time. There was another employé at the station, who was under no restriction as to hours of service, but he was not bonded, and the railroad company made no effort to have him care for the mails. *Held* that, notwithstanding the company's officials had expectations that some of the lost time would be made up, and despite the fact that there was a considerable margin between the operator's hours and the scheduled time for the trains, the railroad company was guilty of violation of the Hours of Service Act in requiring its operator to remain on duty more than 9 hours, for, if it desired a bonded employé to handle the mail, it should have a sufficient supply of such help subject to call.

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

4. MASTER AND SERVANT ⊂=18—OPERATION—HOURS OF SERVICE.

A railroad company, which keeps employés on duty for longer time than authorized by the Hours of Service Act, has the burden of showing

that the causes of the excess service fall within the proviso of the act allowing the excess service.

5 APPEAL AND ERROR ⟸204(2)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

In an action against a railroad company for the penalty for violating the Hours of Service Act by retaining train employés on duty for more than 16 hours, the railroad company defended on the ground that two accidents had happened to the train. For the purpose of showing a negligent habit on the part of the company, the government introduced evidence of numerous accidents similar to one of those set up by the railroad company. Such evidence was limited in its effect to the question of the diligence the company should have exercised in inspection of the train. On appeal the company objected to the admission of such evidence, on the ground that one of the accidents was unusual in its character and different from those shown by the government. *Held* that, as such question was not presented to the trial court and no exception saved, it could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1260, 1261, 1280.]

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by the United States against the Atchison, Topeka & Santa Fé Railway Company. There was a judgment for the United States, and defendant brings error. Affirmed.

Charles H. Woods, of Oklahoma City, Okl. (Robert Dunlap, of Chicago, Ill., and J. R. Cottingham and S. W. Hayes, both of Oklahoma City, Okl., on the brief), for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C., and W. Boothe Merrill, Asst. U. S. Atty., of Oklahoma City, Okl. (John A. Fain, U. S. Atty., of Lawton, Okl., and Roscoe Walter, Asst. U. S. Atty., of Washington, D. C., on the brief), for defendant in error.

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

MUNGER, District Judge. The United States, hereafter called plaintiff, brought an action against the Atchison, Topeka & Santa Fé Railway Company, hereafter called defendant, for violation of the Hours of Service Law (34 Stat. 1415, 8 U. S. Comp. Stats. Ann. §§ 8677–8680).

[1] There were six counts in the petition. The case was submitted to a jury on the issues as to the first five counts, and a verdict was found in favor of the plaintiff on each of these counts, and a verdict was also returned in favor of the plaintiff on the sixth count, by direction of the court. In each of the first five counts it is charged that the defendant required and permitted a trainman connected with train No. 93 to remain on duty for more than 16 hours—from 2 o'clock a. m. to 7:45 o'clock p. m. on December 6, 1913. The defendant's answer admitted that these employés were on duty over 16 hours, but alleged the excess of service was because of unavoidable accidents—once when the cars pulled apart at Mile Post 270, because the knuckle pin holes and the knuckle locks between two of the cars permitted the knuckle locks to

slip by each other, and again when a drawbar pulled out at Skeedee. It was also alleged that before leaving the terminal the train was thoroughly inspected by skilled inspectors, who found no defects, and that the causes of the accident could not have been foreseen by the exercise of due care.

A proviso to the Hours of Service Act reads as follows:

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

The defendant complains because the court did not direct a verdict in its favor on the first five counts, and claims that the evidence clearly showed that it had brought itself within the terms of this proviso. It concedes that the accident at Skeedee need not be considered on this assignment of error, if the evidence was sufficient to send the case to the jury as to the first accident.

The defendant had offered proof to show that the parting of the train at Mile Post 270 occurred on a curve at a place where the track descended a heavy grade from either side to cross a natural depression. The automatic couplers were not broken when they slipped by each other. Worn places were found on the faces of each knuckle, due to the attrition of coupling and traction against similar knuckles. Nothing indicated this condition to be recent. The trainmen gave their opinions that the causes of the uncoupling were the curves in the track and the worn condition of these knuckles. The defendant then offered proof of inspection of one of these cars six days, and of the other three days, before this train departed; these inspections having been made on arrival of the cars in other trains. Another inspection was made just before the train started on its journey. This inspection was made at night after the train was coupled together, by lantern light; the two inspectors examining, not only the couplers, but also the draught rigging, the brake rigging, and the framework of the cars. The usual time given to an inspection of a train of this kind, which consisted of 59 cars, was 30 minutes. Some of the defendant's own witnesses testified that worn surfaces, such as existed on these couplers, would not be observable to the eye of an inspector under these circumstances, and that the only method of discovering them would be by the use of a gauge. This gauge is an instrument in practical use by railroads for measuring these couplers, and the defendant had such gauges at their shops at the terminal from which the train started. There was no testimony that these couplers had been examined at any time by means of this appliance. In Denver & R. G. R. Co. v. United States, 233 Fed. 62, 147 C. C. A. 132, it was said:

"A carrier must use diligence to anticipate, as this court held in United States v. Kansas City Southern Railway Co., 202 Fed. 828, 121 C. C. A. 136, 'all the usual causes incidental to operation.' And when any casualty occurs the carrier must still use diligence to avoid keeping its employés on duty overtime. Failure to perform either of those duties deprives it of the benefit of the proviso. Poor coal, meeting of trains, switching, defective shaker rod, leaky flues (United States v. Kansas City Southern Ry. Co., 202 Fed. 829,

121 C. C. A. 136), pulled-out drawbar, bursted air hose (United States v. Great Northern Railway Co., 220 Fed. 630, 136 C. C. A. 238), extraordinary head wind, heavy grain movement, hot box (Great Northern Railway Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408), high wind, broken tail pin, hot box (United States v. Lehigh Valley Railroad Co., 219 Fed. 532, 135 C. C. A. 282), have been held to be causes of delay 'incidental to operation.' We stated generally in United States v. Kansas City Southern Railway Co., 202 Fed. 828, 121 C. C. A. 136, that: 'It has been uniformly held by the courts that ordinarily delays in starting trains by reason of the fact that another train is late; from side tracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso.' As to such causes of delay we said: 'The carrier must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded.'"

It is obvious that the cause of the delay at Mile Post 270 was a defect in equipment. The defendant was bound to use due diligence to provide and keep in repair couplers that would stand the stress of the lateral and vertical curvature of the track over which it dispatched its trains. Although there was evidence that this accident was of an unusual kind, the defendant was bound to anticipate that couplers would wear to inefficiency, and there was sufficient evidence from which the jury could find that the uncoupling could have been foreseen by proper inspection, and that such diligence had not been supplied.

[2, 3] The sixth count of the petition charged that the defendant required and permitted a telegraph operator at Orlando, Okl., to remain on duty for more than 9 hours in a 24-hour period. The answer to this count admitted that the operator remained on duty over 9 hours, but said he did so to care for the United States mail about to arrive on a passenger train. This train should have reached the station, according to schedule, during the 9 hours of service of this operator, but was 4 hours late. It is alleged this delay was the result of causes beyond the defendant's control, and was not known to the defendant in time to get some one else to care for the mail, and there was no other person available at the station to care for it on the arrival of the train, and that these facts constituted an emergency within the meaning of the statute. The operator had a regular period of service from 3:30 p. m. to 12:30 a. m. each day. A passenger train from the north carrying mail was due at his station at 10:15 p. m., according to the regular schedules. The train did not stop at his station, but threw off incoming mail, and caught the outgoing mail, by an automatic device, as it passed. The train passed this station on this night at 2:20 a. m. The operator was directed to remain on duty to attend to the mail for this train, and did so. He performed no duties as train dispatcher after 12:30, but this fact did not exempt him from the protection of the statute. Delano v. United States, 220 Fed. 635, 136 C. C. A. 243. The specific duties laid upon the operator in caring for this mail consisted in his hanging the outgoing mail sack on the crane 15 minutes before, and watching it until, the arrival of the train, and in placing in the depot the mail sacks that were thrown off of the train. The mail received was left at the

depot until morning. There was another operator, who also served as station agent, and whose hours of duty ran from 5:30 a. m. to 3:30 p. m. A helper was furnished to these operators, who served from 7:00 a. m. to 7:00 p. m. The defendant required bonds from each of the operators for the faithful performance of their duties relating to the handling of mail, but the helper also handled the mail during his hours of duty.

The causes of the delay of the train on this date arose from the fact that the train waited at a junction point for the arrival of a regularly connecting train from Chicago. The Chicago train had been delayed along its route by various causes, such as stops for crossings, taking coal, head winds, snow, cold weather, and two ordinary breakages of appliances on the engines, requiring the substitution of other locomotives. If the train had arrived according to schedule, it would have reached Orlando 2¼ hours before the end of the operator's hours of service. At 9:52 a. m., the train was 2½ hours late into Kansas City. At 2:55 p. m. it was 2 hours and 25 minutes late into Newton, Kan. This was known to the defendant before the operator began his employment at Orlando at 3:30 p. m. At 7:34 it was known the train would be at least 2 hours and 25 minutes late into Arkansas City, and it was actually 3 hours and 40 minutes late on its arrival there at 10:55 p. m. Orlando was 69 miles from Arkansas City. The defendant's officials had expectations that some of the lost time would be made up. The trial court was of the opinion that these circumstances did not make an emergency, and so instructed the jury. In the practical operation of its road, the carrier is bound to anticipate such frequent occurrences as ordinary delays of trains. United States v. Chicago & N. W. Ry. Co. (D. C.) 219 Fed. 342; United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471. Had the margin between the regularly scheduled arrival of the train and the termination of the operator's service been but a few minutes, and had no other provision for caring for the mail been made, it would seem obvious that the carrier could not claim an emergency existed each time the train was delayed over that brief period. While the margin of safety in this case was 2 hours and 15 minutes, occasional delays beyond that period were inevitable in ordinary railroading. The helper, who was not subject to the Hours of Service Act, was not called upon for assistance on this occasion, nor was any effort made to supply the service, after the train was known to be so delayed that its arrival at Orlando on time was dangerously problematical. In the case of United States v. Southern Pac. Co., 209 Fed. 562, 126 C. C. A. 384, this court said:

"If the usual causes of delay incident to operation were to excuse, then the statute would be wholly ineffective to accomplish its purpose."

The defendant urges that its policy forbade the handling of mail by others than bonded employés, but its failure consisted in not having a sufficient supply of such help, if it wished to impose such restrictions. There was no error in the direction of the verdict on the sixth count.

[4] The trial court correctly placed the burden of proof on the defendant to show that the causes of the excess service of the train crew

came within the terms of the proviso to the Act of Congress. Chicago, B. & Q. R. Co. v. United States, 195 Fed. 241, 115 C. C. A. 193; Great Northern Ry. Co. v. United States, 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408; United States v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136; United States v. Kansas City Southern Ry. Co. (D. C.) 189 Fed. 471; United States v. Houston Belt & Terminal Ry. Co., 205 Fed. 344, 125 C. C. A. 481; Denver & R. G. R. Co. v. United States, 233 Fed. 62, 147 C. C. A. 132.

[5] The plaintiff offered in evidence 14 official reports by conductors of accidents that had occurred upon the line of railroad south of Arkansas City within 5 weeks prior to the accidents involved in this case. Complaint is made of the overruling of defendant's objections to them. In support of its objection the defendant now says that the only material issue was the accident at Mile Post 270, and as that arose from a break in two, caused by the knuckles slipping by each other, and these reports relate to the pulling out of drawbars and draught members, the dissimilarity made them immaterial. In reaching this conclusion the defendant assumes that the excess over 16 hours of service was less than the delay at Mile Post 270. The condition of the case when the trial court made its ruling was as follows: The plaintiff had alleged that the train crew had been employed for 17¾ hours; the defendant's answer admitted a service of 17 hours and 25 minutes, but alleged as an excuse that two unavoidable accidents had caused the delay, the one at Mile Post 270, caused by the knuckles slipping by, and the other at Skeedee, caused by a drawbar pulling out; that a proper inspection of these cars had been made at the terminal before the train started. The defendant's witnesses had testified as to both of these accidents, and to consequent delays of 1 hour and 30 minutes at Mile Post 270, and of 25 minutes at Skeedee. Defendant's testimony showed that, at the end of 17 hours and 25 minutes of service by the train crew, a switch engine and crew met this train, and coupled onto it, and pulled it for the next 20 minutes into the terminal; the engineer and fireman remained on the train engine and the other trainmen on the cars, and they entered on the register at the terminal both the time when the switch crew met them and the final arrival.

In this condition of the proof, the plaintiff offered the 14 reports of accidents, on the theory expressed in the case of United States v. Great Northern Ry. Co., 220 Fed. 630, 136 C. C. A. 238, that evidence of many similar accidents immediately preceding these accidents was admissible as tending to show a negligent habit of the railway company. The court, in admitting it, limited its effect in measuring the diligence the railway company should have exercised in its inspection of this train from its previous experiences. If these accidents lacked identity with the one at Mile Post 270, they were essentially similar to the one at Skeedee. No specific objection was made to the applicability of this evidence to the consideration of the accident at Mile Post 270, nor was any request made by the defendant that its effect be limited. The trial continued on the theory, which the defendant had introduced into the trial, that both of the accidents to this train were material, and the case was submitted to the jury for a finding as to the materiality of each of the accidents, and no exception was taken by the defendant. As the

question now raised was not presented to the trial court, and an exception saved, it is urged too late.

The judgment will be affirmed.

MISSOURI VALLEY BRIDGE & IRON CO. v. WALQUIST.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1917.)

No. 4553.

1. MASTER AND SERVANT ⟸265(3)—INJURIES TO SERVANT—BURDEN OF PROOF.
A widow, suing her husband's employer to recover damages on account of his death, has the burden of showing that the employer was guilty of negligence or breach of duty which was the proximate cause of the injury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 879, 897.]

2. MASTER AND SERVANT ⟸101, 102(8), 229—INJURIES TO SERVANT—DUTY OF MASTER—PROVISION—DUTY OF SERVANT—OPERATION.
The duty of the master is one of original construction or provision. The duty of the servant is one of operation. It is the duty of the master to exercise ordinary care to furnish to its servant a reasonably safe place in which to work and to exercise ordinary care to furnish him with reasonably safe appliances with which to work. It is the duty of the servants to exercise ordinary care to guard themselves and their fellow servants against the risk and danger that the reasonably safe place or reasonably safe appliances provided by the master may become dangerous by the negligent use of them, or the negligent operation of the work by themselves or their fellow servants. The master is not liable for injuries to a servant caused by his failure or the failure of his fellow servants to discharge this duty. The servant assumes the risk of the negligence of his fellow servants in the performance of their duty of operation of the work and use, the place and appliances provided by the master, including the risk and danger of the negligence of his superior, be he foreman, superintendent, or other, in the discharge of his duty of directing the conduct and operation of the work in hand and the use of and place and appliances provided. In the discharge of that duty the superior servant is the fellow servant of the subordinate servant who is subject to his orders.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 173, 674, 683.]

3. MASTER AND SERVANT ⟸103(1)—INJURIES TO SERVANT.
A master cannot, by delegation, escape liability for breach of his duty to exercise ordinary care to furnish employés with reasonably safe appliances and a reasonably safe place of work.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175.]

4. MASTER AND SERVANT ⟸162—INJURIES TO SERVANT—LIABILITY OF MASTER.
While a master must exercise ordinary care to furnish his servants with a reasonably safe place of work and reasonably safe appliances, he is not bound to guard his servants against risk and danger resulting from the negligence of fellow servants, or superior fellow servants, such as a foreman or superintendent; the servant assuming such risks.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 327.]

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5. MASTER AND SERVANT ⇐278(3)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the death of an employé, evidence *held* insufficient to show that the employer was negligent, either in failing to furnish a reasonably safe place of work, or reasonably safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958.]

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

Action by Alice Walquist against the Missouri Valley Bridge & Iron Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

Battle McCardle, of Kansas City, Mo. (Frank L. Barry, of Kansas City, Mo., on the brief), for plaintiff in error.

John H. McVay, of Kansas City, Mo. (S. D. Murphy, of Kansas City, Mo., on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

SANBORN, Circuit Judge. This is an action brought by Mrs. Alice Walquist for damages resulting to her, as she avers, from the negligence of the Missouri Valley Bridge & Iron Company, which she avers caused an injury to her husband, John Walquist, that resulted in his death. The trial resulted in a judgment against the company for $5,000. At the close of the testimony the court denied a motion of the company to direct the jury to return a verdict for the defendant, on the ground that there was no substantial evidence of any causal negligence of the company, and this ruling is one of the alleged errors upon which the company relies for a reversal of the judgment.

Most of the material facts of the case were established without conflict in the testimony, and among them these: The company was engaged in constructing the piers of a bridge across the river at Hannibal, Mo., and Mr. Walquist, who was a carpenter, was one of its employés, and had been such for several weeks. At the time of his injury he was one of a gang of five or six men, of which Henry F. Olson was the foreman, which was engaged in constructing an ice breaker to protect one of the concrete piers against the ice that forms on, and when the ice breaks up floats down, the river. This breaker was about 100 feet long from north to south and 35 feet wide at its base, but its northern end or nose was in the form of the letter "V." The foundation of this breaker had been filled with rocks, and this gang of men was building a superstructure of timbers, which it had raised from 6 to 13 feet above these rocks. On the northeast side of the nose of the ice breaker lay a barge, which carried a derrick, a boom, and an engine to operate the boom. Just south of the barge lay another barge, which was loaded with timbers to be used in the ice breaker, and the gang was taking these timbers from the barge by the use of the engine and the boom, putting them in place in the ice breaker, and fastening them there. A cable which dropped from the outer end of the boom was fastened to each timber in turn, and the timber was then raised in the usual

way to the requisite height by the operation of the engine, the boom was swung by the power of the engine by means of two lines, one on each of two revolvable spools or spindles, commonly called "nigger heads." One of these lines was attached to one side of the boom, and ran through a block at one end of the barge, and the other was attached to the other side of the boom, and ran through a block at the other end of the barge. These nigger heads were operated by Ed Jones, who by manipulating them and signaling to the engineer could tighten one line and slacken the other, and in that way could swing the boom either way, could control the direction and speed of its movements, hold it steady, and stop it over any point where a timber was to be placed, so that the engineer could then lower it into its destination. This work of removing these timbers from the barge and placing them on or in the ice breaker had been proceeding in this way for days. When a timber was to be placed, two of the gang, one at the place where one end of the timber was to lie, and the other at the place where the other end was to lie, took those places respectively, caught the timber when it was swung above its destination, and as it was lowered handled and located it in its proper place. The day before the accident Walquist was one of these two men, and worked at handling and placing the timbers. Olson was the foreman of the gang, and the other members of the gang were subject to his orders in the performance of this work. At the time of the injury Ed Jones operated the nigger heads, Perkins operated the engine, Hull handled and placed one of the ends of the timbers, and Walquist was either handling and placing the other ends of them, or he was boring a hole for a bolt with a power auger a few feet from the place where the timber was to be located, when that timber, which had been taken from the barge, raised 3½ feet above the ice breaker, and swung towards its destined place thereon, struck him and pushed him off the timber on which he stood, upon the rocks, from 6 to 13 feet below. At this time the witness Light was boring a hole with the motor auger within 3 feet of Walquist on the ice breaker. Within 50 feet of him were Hull, who stood at the place where one end of the timber was to be placed, Light, who was boring a hole within 3 feet of him, Youell, who was driving bolts, and Olson the foreman; and on the barge which carried the derrick were Jones, who saw the accident from his station, and Perkins, the engineer, who did not witness it.

The facts which have now been recited were established without conflict in the testimony. There was, however, a conflict in the evidence between the testimony of Mr. John Crimley, the only witness for the plaintiff relative to the happening of the accident, and the other witnesses, regarding the following facts: Mr. Crimley testified that he was on the ice breaker, handling and placing one end of each of the timbers. Hull, who handled one end of the timbers, Light, who was boring a hole within 3 feet of the place for the other end, and Olson, the foreman, testified that Crimley was not on the ice breaker at the time of the accident, and that Walquist was handling the other end of the timbers with Hull, and Youell testified that he did not see Crimley there at all. Crimley testified that at the time of the accident Walquist was boring a hole with the motor auger. Hull, Light, Olson, Jones,

and Youell testified that Walquist was not boring holes; that he was handling and placing one end of each of the timbers, while Hull placed the other end; and that he stood at the place where the opposite end of the timber from Hull's end was to be placed, and his work was to catch and place the timber as it was swung to him, and Jones, Youell, and Olson testified that Walquist never bored any holes with the motor auger. There was undisputed testimony that the auger was heavy, that it weighed 10 to 12 pounds, that, if the operator let go of it, it would fall and break, and that no auger fell or broke at the time of Walquist's injury. Crimley testified that the timber was 32 feet long and was to be put in a certain place. Olson, Hull, and Youell testified that it was only 12 or 14 feet in length, and that it was to be put in a different place from that specified by Crimley. Crimley testified that the timber was swung to its place with unusual force and rapidity, and that no notice or warning of its approach was given to Walquist. Hull, who handled one end of it, testified that the timber came slowly, gradually, as they usually swung; that Walquist was standing there to catch hold of the timber and land it; that the timber came with a safe speed, with just the slow customary speed, but Walquist was talking to some man and paying no attention to his work, and Hull called, "Look out!" and the timber knocked Walquist over. Olson and Jones testified that the timber was moving slowly in the usual way, and that they used the same appliances and operated them in the same way as they had been doing during the days past. Crimley testified that it was the custom to use a guide rope or line on a timber when raising it with a derrick, in order to prevent its circling or twisting, and that when, on raising it, it circles or twists, it is customary to let it down again, and then raise it again slowly. Jones, Youell, Light, Olson, and Hull testified that the lines attached to the sides of the boom operated by Jones by means of the nigger heads and the engine controlled the movement, speed and steadiness of the swing of the boom, and Olson, Light, and Hull testified that where the movement of the boom was controlled in that way, and the operation was in an open space, away from buildings or such obstructions, a guide rope or line attached to the timber was not usually used, and that they had never seen one so used, and there was no custom to use it.

[1] The burden was on the plaintiff to prove that the Bridge Company was guilty of negligence or breach of duty which was the proximate cause of the injury to Walquist. The rules of law by which the question of law this case presents must be answered are:

[2-4] It is the duty of the employer to exercise ordinary care to furnish to its employé a reasonably safe place in which to work, and to exercise ordinary care to furnish him with reasonably safe appliances with which to perform his work, and this duty may not be so delegated by him that he may escape liability for its breach.

It is not, however, the duty of the employer to guard his employé against the risk and danger that a reasonably safe place it furnishes, or reasonably safe appliances it provides, may become dangerous by the negligent use of them by the latter's fellow employés, or by the negligence of his superior fellow servant, his foreman or superintendent, in the performance of the latter's duty of directing his sub-

ordinate fellow employés in the performance of the work in which they are engaged. It is the duty of the employer to exercise reasonable care to provide place and appliances, but it is the duty of the employés to exercise reasonable care so to use the place and appliances furnished that their use shall inflict no injury upon them. The duty of the employer is one of original construction and provision. The duty of the employé is one of operation. The employé assumes the ordinary risks and dangers of his employment, and among these the risks and dangers of the negligence of his fellow servants in the performance of the work including the risk and danger of the negligence of his superior, be he foreman or superintendent, who in his direction or failure to direct the operation of the work is his fellow servant. Weeks v. Scharer, 111 Fed. 330, 335, 49 C. C. A. 372, 377; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Gulf Transit Co. v. Grande, 222 Fed. 817, 819, 820, 138 C. C. A. 243, 245, 246; Northern Pac. Ry. Co. v. Hambly, 154 U. S. 349, 359, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; City of Minneapolis v. Lundin, 58 Fed. 525, 527, 7 C. C. A. 344, 346; American Bridge Co. v. Seeds, 144 Fed. 605, 611, 612, 75 C. C. A. 407, 413, 414, 11 L. R. A. (N. S.) 1041; Wood v. Potlatch Lumber Co., 213 Fed. 591, 593, 594, 130 C. C. A. 171. "The true idea," said Judge Brewer, "is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that no negligent handling by an employé of the machinery shall create danger." Howard v. Denver & Rio Grande Ry. Co. (C. C.) 26 Fed. 837, 842.

[5] No substantial evidence has been discovered in this case that the Bridge Company failed to exercise ordinary care to furnish a reasonably safe place in which to construct this ice breaker, or that it failed to exercise ordinary care to furnish reasonably safe machinery and appliances with which to handle the timbers and build the structure. The nearest possible approach to any such evidence is Crimley's testimony that it was the custom, in raising timbers with a derrick, to use a line attached to the timber to prevent the whirling or twisting of the timber when it was raised, and that such line was not used on the timber which struck Walquist. It is possible that an inference might be drawn from this testimony that the Bridge Company furnished no snub line, or material to make a snub line, which the employés could use. But, even if that inference be indulged, this evidence falls far short of substantial evidence of negligence that was the proximate cause of the injury: (1) Because there is no evidence in the case that the failure to furnish, or even to use, such a line, caused, or probably caused, the injury, for the testimony of the plaintiff's witness is not that the injury was caused by the whirling or twisting of the timber when it was raised, but it is that it was caused by too forcible and rapid a swinging of the boom, a movement of operation, not of provision, which, if it occurred, was caused by the negligence of Walquist's fellow servant, the foreman, Olson, in his direction of the operation, or of the other fellow servants of Walquist, for which the Bridge Company is not liable. All the other acts or omissions of

which there is any testimony, and of which the plaintiff complains, such as the failure to raise the timber to a sufficient height, the failure to give Walquist warning of its approach, the failure to station a person near him to inform him of its movements, were acts or omissions in the operation of the work for which the foreman or the other fellow servants of Mr. Walquist were responsible, and the Bridge Company was not. The conclusion is that there was no substantial evidence in this case of any causal negligence of the Bridge Company, and the court should have instructed the jury to return a verdict in its favor.

Counsel for the plaintiff below cite Kreigh v. Westinghouse & Co., 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984, in opposition to this conclusion. The citation does not appear to be helpful to them. In that case the employer furnished a derrick with only one guide rope, which was attached to the end of the boom, so that when the rope was slack the boom could not be steadied or controlled. To prove that the defendant did not exercise reasonable care to furnish a reasonably safe boom, the plaintiff introduced testimony that the usual method of constructing such booms was to provide them with two ropes, one attached on either side of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation, the very method of construction of the boom furnished by the Bridge Company in the case at bar, and the court held that this testimony presented the question for the jury whether the failure of Westinghouse & Co. to furnish such a derrick and boom as the Bridge Company provided in this case was not negligence; and the court in that case, after stating the rule that an employé may assume, in the absence of notice, that reasonable care has been exercised by the employer in furnishing appliances requisite to carry on the business, set forth the principle that is decisive of the case at bar, in these words:

"But, while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employés to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. Armour v. Hahn, 111 U. S. 313 [4 Sup. Ct. 433, 28 L. Ed. 440]; Perry v. Rogers, 157 N. Y. 251 [51 N. E. 1021]." Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 622 [53 L. Ed. 984].

There are other assignments of alleged errors; but as, if errors were made, the questions of law to which they refer are not likely to arise upon a second trial of this case, their discussion is omitted.

Let the judgment below be reversed, and let the case be remanded to the court below for a new trial.

YEE CHUNG v. UNITED STATES. *

(Circuit Court of Appeals, Ninth Circuit. May 28, 1917.)

No. 2799.

1. ALIENS ⟸32(8)—PROCEEDINGS TO DEPORT—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a proceeding to deport a person of Chinese descent, evidence *held* sufficient to support his claim that he was a native-born citizen of the United States.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84.]

2. ALIENS ⟸32(8)—PROCEEDINGS TO DEPORT—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In a proceeding to deport a Chinese person, the court could not arbitrarily and without reason reject or discredit the testimony of witnesses favorable to the defendant, on the ground that they were Chinese persons and unworthy of credit.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Proceeding by the United States to deport Yee Chung. From an order affirming an order of deportation, the defendant appeals. Reversed and remanded, with directions.

John L. McNab, of San Francisco, Cal., and Isidore B. Dockweiler, of Los Angeles, Cal., for appellant.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellant was found by a commissioner of the United States to be unlawfully in this country and ordered deported to China, which order was, on hearing upon a writ of habeas corpus, affirmed by the court below. He claims to have been born in the United States of parents of Chinese descent, who, at the time of his birth, were subjects of the emperor of China, having a permanent domicile here and being engaged in business, and, therefore, that he is a citizen of the United States. It was said by Judge Holt in the case of United States v. Leu Jin (D. C.) 192 Fed. 580, that it is impossible in such cases "to be sure what the truth is," in which case, nevertheless, he reversed the order of deportation made by the commissioner, pointing out the insufficiency of the various inconsistencies relied upon by the government to overcome the evidence given that the defendant was born in this country. In the case of Pang Sho Yin v. United States, 154 Fed. 660, 83 C. C. A. 484, the Circuit Court of Appeals for the Sixth Circuit reversed the judgment of the District Court, which had affirmed an order of deportation made in a similar case by the commissioner, based on the immigration inspector's examination of the respondent, his answers to questions put to him on such examination, "and the testimony of the inspectors that at the

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

* Rehearing denied October 8, 1917.

time they seized the respondent at Ecorse he was coming from the direction of the Detroit river, in company with three other persons, one of whom was a Chinese person, and the other two white men." In the inspector's examination, said the court:

"The respondent stated that he was 34 years old; that he was born in San Francisco; that his father's name was San Foy, and his father died when the respondent was quite young; that he went to China when he was 4 years old; that he had lived there until his recent return to this country; that his occupation there was farming; that when he returned he landed in Vancouver, British Columbia, and paid a head tax there of $500; that he had been in various parts of Canada; that he left Windsor at 10 o'clock the evening before his arrest by the inspectors, and came across the Detroit river in company with the other three persons mentioned by the inspectors; and that he was then on his way to Paducah, Ky., where he had a relative. This account might fairly excite suspicion, but it was not irreconcilable with the supposition that on his return to America he had no clear ground for expecting that he could prove his birth in the United States, and establish his identity and right to entrance here, and that he did not intend to rely upon the fact of his birth in the United States. But several persons have been found and produced as witnesses whose veracity is vouched for by their neighbors, who swear to the circumstances of his nativity in San Francisco and his going to China when quite young, all as stated by him. One of these states the name of the street in San Francisco where the father lived and the respondent was born, and the month and year of the event, and he then knew the father and son; that he (the witness) afterwards saw the respondent in China, when the latter was 10 years old, and now recognizes him as the same person. The identification of the appellant by the witness as the child of their acquaintance in San Francisco is so positive that we cannot feel justified in disregarding it when the consequences are so serious as the possible (and we think probable) expulsion from his native country of one who is entitled to share the birthright of citizenship. We think the judgment and order of the District Court should be reversed, and the appellant discharged."

See, also, United States v. Chin Len, 187 Fed. 544, 109 C. C. A. 310; Woo Jew Dip v. United States, 192 Fed. 471, 112 C. C. A. 609.

[1] In the present case the appellant claims to have been born February 17, 1880, at 728 Sacramento street, San Francisco, where his father and mother at the time resided, the former being then bookkeeper for and a member of the firm of Quong Woh Chong; that in 1881 his father took his mother and himself (then about 2 years old) to China, where his father remained several months, and then returned to San Francisco, leaving the appellant in China with his mother; that appellant remained there until he was about 18 years old; that he married in China, and had one son born to him there July 5, 1897, and another born there after his return to this country; that in the latter part of December, 1897, he came back to the United States by way of Vancouver, British Columbia, going thence to Montreal, and from there to Burlington, Vt., where he was arrested on the charge of being unlawfully in this country, and after examination by a United States commissioner was discharged by that officer; that his father, some time after his return to the United States, sold his business interest in San Francisco and went to Boston, where he entered the merchandise store of Sam Sing; that when the appellant was arrested in Burlington his father went from Boston to Burlington and was a witness at his examination, and after his discharge appellant went to Boston with his father, where he remained a few days, when the latter

sent him to a laundryman named Yee Lee at Carnegie, Pa., for whom he worked about 10 years; that at the end of that time appellant went back to China, sailing from Seattle some time in February, 1907; that before leaving Carnegie for Seattle he procured a copy of the proceedings had before the commissioner at Burlington, to which he annexed his affidavit, containing his photograph, which affidavit stated the time and place of his birth in San Francisco, the names of his Chinese parents, the place of his then residence in Allegheny county, Pa., and his discharge by the commissioner at Burlington, Vt., on the ground that he was a native-born citizen of the United States, and which affidavit has this indorsement:

"We, the undersigned, citizens of Allegheny county, Pa., other than Chinese, are acquainted with the above-described affiant, Yee Chung, and believe his statement as herein set forth to be true.

"E. R. Donehoo, Presbyterian Minister.
"Herbert F. Johns, Banker."

The foregoing papers the appellant testified he submitted to the government official at Seattle before sailing for China, and upon which papers the latter indorsed the following:

"Identified on departure, this Feb. 17, 1907.

"J. V. Stewart, Chinese Inspector."

The appellant further testified, among other things, that he is the same Yee Chung named in those papers, and that when he landed in Hong Kong he went back to the village of Chung Doey, in the Sun Ning district, where his home was; that he remained in China until about October, 1909, when he returned to the United States by the steamship Manchuria, arriving at the port of San Francisco November 12, 1909. It is significant that upon this second return of the appellant to this country, and while his right to enter the United States was under consideration, his application was thus reported on:

"December 13, 1909.

"Inspector in Charge, C. D. I. S., San Francisco, Cal.:

"In re Yee Chung, native, C. R. 47 Manchuria, 11/12/09, I have to report as follows:

"This applicant presents a transcript of a record of Commissioner Johnson, district of Vermont, without a photograph attached, showing that a Chinaman by the same name was discharged by said commissioner January 19, 1897. The ground of the discharge is not shown, but in view of the fact that it appears that the respondent in that case entered the United States at Richford, Vt., and was subsequently taken to Burlington, where he was discharged by Commissioner Johnson, I am satisfied that he was discharged on the ground of birth in the United States, because, had he set up any other claim, such claim would have been investigated at the port of Richford.

"According to the report of the inspector in charge at Richford, dated November 26, 1909, there is no testimony in Commissioner Johnson's records of the cases at the time of the discharge of said respondent, and the commissioner's records consist simply of the docket entries, complaint, warrant, etc. By the telegram of the inspector in charge at Richford, dated December 19, 1909, in reply to telegram of this office of December 7, 1909, it appears that the transcript of the record presented by this applicant is genuine.

"Considering the lapse of time the applicant claims to have been arrested and discharged by Commissioner Johnson, I am reasonably satisfied from his examination that he is the respondent, Yee Chung, discharged by Commissioner Johnson, January 19, 1897. Although he claims that he distinctly re-

members the commissioner who discharged him, and the description he has given of said commissioner by no means shows him to have been Commissioner Johnson, I think it would be unreasonable to hold the applicant too strictly to this description, in view of the 12 years that have elapsed since his alleged discharge.

"In view of the foregoing, I recommend landing. All papers herewith.

"Respectfully, Chas. D. Mayer, Chinese Inspector."

The appellant being admitted, he further testified that from San Francisco he went to Homestead, Pa.; that in 1913 he had his two sons, the name of the elder of whom is Yee Wah, and the younger Lee Lai, brought to this country, entering at San Francisco, having sent them "a paper for him to come." Certificates of identity of these two boys, each containing a photograph and the certificate of his admission, were introduced in evidence; that of Yee Wah having also this indorsement:

"12720/8-17. "Memo. for the Commissioner.

"In re Yee Wah, alleged Son of a Native. "July 1, 1913.

"* * * The alleged father claims to have returned to the United States from China by Vancouver, B. C., ex SS. Empress of China, K. S. 23-11 (November or December, 1897), and to have immediately proceeded to the United States via Montreal and Richford, Vt. He presents court record of discharge No. 121, issued in his name, by the District Court of Vermont. The alleged father, it will be noted, was landed at this port No. 47 Manchuria, November 12, 1909, by virtue of his previous landing by Commissioner Johnson January 19, 1897. Manifestly the examining inspector is not satisfied that the essential trip has been absolutely verified, but in my opinion the prior landing record No. 47 contains sufficient evidence to show that the alleged father in the present case is the identical person landed by the court in 1897. Accordingly, the essential trip is verified and I recommend admission.

"A. W. Long, Inspector, Law Division, Pittsburg, Pa.

"* * * The alleged father Yee Chung, of his coming and now detained alleged son, Yee Wah, stated his testimony in a candid and frank way, corroborating all of his alleged son's statements in a most minute manner, so that I feel impressed that the truth was told. The witness Yee Wing also made a statement which corresponds in its entirety to all testimony given by Yee Wah. On account that all testimonies were given in such a frank way and corroboratively implying the truth, I think I feel justified to ask a favorable consideration concerning the admission of Yee Wah.

"[Signed] B. B. Marheineke, Investigating Interpreter."

The appellant further testified that after his sons arrived in San Francisco he put them in school in Pittsburg, where they still were at the time of his testimony.

The claim of the appellant to birth in the United States is corroborated by the testimony of seven other witnesses, one of whom is a white man and six Chinese persons. Of the latter, one was for about 25 years in the personal service of a Commissioner of Immigration of the United States, and the other five have been for many years prominent Chinese merchants of the city of San Francisco. In their testimony they specify various incidents in the appellant's life, both in the United States and in China, which, if true, leave no doubt whatever respecting appellant's birth as claimed. In rejecting the testimony of all the Chinese witnesses, the trial judge, in the opinion filed by him in the court below, said:

"I had occasion, in an oral opinion delivered in this court, late in January of last year, in the case of United States v. Jee Jan, to indicate my views as

to the amount of evidence that ought to be produced in behalf of a person of Chinese descent, in one of these deportation cases, in order that the requirement of the statute that the court should be satisfied might be had, and I see no reason to depart from the views there announced. The burden, I believe, is placed by the statute upon the defendant, and he must by the evidence adduced in his behalf 'satisfy' the court—i. e., produce moral certainty or conviction (C. C. P. § 1835)—of the truthfulness of his claim (186 U. S. 193 [22 Sup. Ct. 891, 46 L. Ed. 1121])."

The previous opinion of the learned judge thus referred to by him is printed in the brief of the attorney for the government, where he says, among other things:

"In this connection I am perfectly free to admit that with me there is always a good deal of dubiousness about the testimony of Chinamen in any case. Experience has shown that many of them have little, if any, regard for an oath administered to them in a court of justice in our country; and experience has shown that Chinese, in their relations among themselves and for the purpose of protecting one another in various ways and exigencies, think it is not at all beyond their province to color, if not actually to manufacture, their testimony, in that a given end may be accomplished thereby, and the mere fact that a Chinaman testifies to a thing does not, in my mind, because of my experience in such matters, prove to me that the fact is as testified to. It needs to be measured with the probabilities and improbabilities; it needs to be considered in relation to the interest of the Chinaman thus to testify and the reasons why it might be to his interest to testify one way as opposed to another—all of the time taking into consideration the fact, which I believe to exist, as it is commonly known and understood among those whose duty it is to administer and construe the laws, and who have to do with courts of justice, that the Chinese, as a race, when called upon in a matter in which Chinese are vitally interested, are disposed to be very free in their statements upon the witness stand."

[2] We are unable to approve the views thus expressed. To the contrary, this court said in the case of Woey Ho v. United States, 109 Fed. 888, 48 C. C. A. 705:

"A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim, or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision of which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner, and appearance of the witness, as seen by that tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit."

We see but little, if any, force in the circumstances or inconsistencies in the evidence referred to in the opinion of the court below. One of those circumstances is that, when the appellant was examined before the commissioner of the court, he was shown a photograph, and was asked whether he recognized it as a picture of any one he knew, to which his answer was, "No." On a subsequent examination before the court, the same photograph was shown the witness, when he said:

"This looks more like my father, a resemblance to my father's picture, but it is not in the other one. Q. You say this is a different picture, then, than was shown to you in the hearing before Mr. Williams, the commissioner? A. It don't appear to me to be the same. Q. That picture didn't look like your

father looked when you saw him in Boston after you went down from Burlington, Vt.—the picture that was shown to you before the commissioner? A. No. Q. And this picture does look like your father looked at that time? A. There was some resemblance of my father, but not exactly. Q. This? A. Yes. Q. Ask him how his father differed from that in appearance. A. He was not so fleshy at that time."

Another of the inconsistencies referred to by the trial court is that, when the appellant arrived at Vancouver, in December, 1897, his name was asked by the Chinese interpreter, and later he stated that it was not; that his ticket was purchased at Hong Kong through to Boston, which ticket he showed at Vancouver, and afterwards that the ticket was purchased only to Montreal, and that his ticket from Montreal to Boston was furnished him by his father.

When it is remembered that all of those matters occurred nearly 20 years ago, we think that such inconsistencies are of but little moment. So, too, as respects the appellant's recollection of the personal appearance of the commissioner before whom he claims to have been examined and discharged in Vermont in 1898. The further circumstances, referred to by the court below, that when the appellant was arrested in Los Angeles he claimed to have a "native paper," may, we think, in view of the record in the case, be well taken to mean the order for his discharge made by the commissioner in Vermont. The only other circumstance referred to in the opinion of the court as being against the appellant grows out of the testimony of the witness Jolliffe, whose testimony was of such a character as to throw no light respecting the truth of the appellant's claim. Looking at the entire record, we are of the opinion that it is sufficient to show that the appellant is a native-born citizen of the United States, as claimed by him.

Accordingly, the judgment is reversed, and the cause remanded, with directions to the court below to direct his discharge.

GLEN MARY COAL & COKE CO. v. WOLFE et al.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2969.

1. ADVERSE POSSESSION ⊂=103—CONFLICTING POSSESSION BY ADJOINING OWNERS.

Where defendant, owning a tract of land known as tract 1931, had possession for over 30 years of a strip which theoretically was a part of tract 1935, adjoining tract 1931 on the south, the claimed constructive possession of the owners of tract 1935 did not create a conflicting possession, defeating defendant's title, under Shannon's Code Tenn. § 4456, under which adverse possession under a deed for more than 7 years gives an indefeasible title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590–594.]

2. EJECTMENT ⊂=165—JUDGMENT—CONSTRUCTION—MATTERS EXCLUDED FROM DETERMINATION.

In a combined ejectment suit and bill to remove a cloud, in which it was sought to establish the title to coal underlying the land, plaintiff

claimed title to the whole of a tract known as tract 1935. The G. Company, owning tract 1931, adjoining tract 1935 on the north, filed an answer alleging that it was the owner of certain specified tracts, one of which was described merely as "entry 1931." The decree found in favor of the G. Company as to four parcels, and then awarded to plaintiff all other land within his boundaries, but then expressly provided that, as to other lands claimed by the G. Company within such boundaries, it was not intended to make any adjudication whatever. The G. Company was in possession of a strip, on the boundary of the two tracts, which was theoretically a part of tract 1935. *Held* that, while there was testimony that the exception in the decree as to lands claimed by the G. Company was intended to reach parcels actually claimed, but not described and claimed in the answer, it was not necessary to resort to such testimony to exclude the strip on the boundary, as the reference to tract 1931 had no possible pertinence, unless it referred to this strip.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 547.]

3. EJECTMENT ⊜165—EQUITABLE EJECTMENT—DECREE—INCONSISTENT PROVISIONS.

The inconsistency between the broad terms of the decree in favor of plaintiff and the specific provisions excluding lands claimed by the G. Company did not deprive such specific provisions of full effect, as the inference was that the draftsman of the decree by mistake had made it too inclusive and later corrected it, especially where this inference was confirmed by testimony that by agreement all parcels except four were withdrawn from the case, that in the lower courts plaintiffs made no claim of title to them, that such claim or title was first urged in the Supreme Court by new counsel not familiar with the agreement, that the Supreme Court, in ignorance of the agreement, approved this claim, and that as soon as this came to the attention of the former counsel it was corrected by inserting in the decree the provision excepting from its operation the tracts claimed by the G. Company other than those specifically adjudicated.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 547.]

Appeal from the District Court of the United States for the Eastern District of Tennessee; John E. McCall, Judge.

Suit by Edith McBurney Wolfe and others against the Glen Mary Coal & Coke Company. From a decree for plaintiffs, defendant appeals. Reversed and remanded, with instructions.

This case involves the location, in fact or by estoppel, of the boundary line between adjacent tracts of mountain land in Eastern Tennessee. In 1836 Eastland and Lane caused a survey to be made covering a large territory which, by this survey, they divided into rectangular tracts, each 1,000 poles east and west by 894 poles north and south, and each containing between 5,000 and 6,000 acres. Thereupon each tract was separately entered. To understand the present controversy, we need to observe the position only of tracts 1930, 1931, 1934, and 1935. They were adjacent to each other, and were, respectively, northwest, northeast, southwest, and southeast of their common center, which common center is recited as the starting point of entry 1935. By the method adopted, the surveyors actually ran and marked on the ground two north and south lines 2,000 poles apart. These lines formed the western boundary of 1930 and 1934 and the eastern boundary of 1931 and 1935. Upon these lines, at intervals of 894 poles, monuments were actually fixed, usually consisting of marked trees. The intervening north and south line, forming the boundary between 1930 and 1934 on the west and 1931 and 1935 on the east, and the east and west lines, one of which formed the boundary between 1931 on the north and 1935 on the south, were not actually surveyed, but each entry corner thereon was called for on the survey as "a stake and pointers."

For present purposes, it is sufficient to state that the land in controversy [1] is a strip 1,000 poles long east and west and 99 poles wide north and south, and constitutes the northerly 99 poles of entry 1935, if the line between 1931 and 1935 is located as it theoretically should be according to the starting point of 1935, as fixed by its entry recitals; while, if in any sufficient way this dividing line was or has become fixed and established 99 poles south of such theoretical location, this strip of land is a part of 1931. So far as affects this parcel, Samuel McBurney, in his lifetime, had the paper title to 1935, and the Glen Mary Company, since 1881, has had the paper title to 1931. As early as 1870 (probably much earlier) the more southerly of these two lines had been run and marked, by some one, and had become known as the "Gall Line." In 1913 this line had been recognized by the community for 40 years as the dividing line between 1931 and 1935; no other line between those entries had been marked or run prior to this controversy; many deeds, including two by McBurney, which intended to call for this dividing line, and approaching it from both sides, had called in terms for the Gall line; and the Glen Mary Company's deed, in 1881, clearly fixed the Gall line as its southern boundary. Continuously, after 1881, the Glen Mary Company was in possession of this strip, by buildings and improvements thereon, and during a great part of the time had been actually mining coal therefrom. For the reasons to be stated, it is immaterial how this Gall line came into existence, although its probable origin may be inferred. 1931, like 1935, had its starting point and its west boundary in an ideal location upon an ideal line. [2] Neither its northwest nor its southwest corner was in fact marked and located. Its east boundary, however, was upon a line which was surveyed, and its southeast corner, like the northeast corner of 1935, consisted of "a hickory in a hollow." Obviously, if the fixed and marked monuments called for along the east boundaries of these entries conflict with the ideal monuments upon the west boundaries, the former must prevail. The testimony tends to show that the Gall line was run from or to the "hickory in the hollow," since its east end is in a hollow and the east end of the line 99 poles north is on a hill. Under these conditions, it cannot be certain that the Gall line may not be the one which ought to prevail, regardless of all matters of recognition and possession.

In 1903 McBurney commenced, in the proper state court of Tennessee, a suit which, under the Tennessee practice, was treated as a proceeding in equity, but was a combined ejectment suit and bill to remove cloud, save that it sought only the establishment of title to and the recovery of possession of the coal underlying the land, and not of the surface. By his initial pleading he claimed title to the entire section 1935, describing it in the words of the entry, but "excluding the coal or mineral under the lands of this boundary known as the Elisha Chaney lands and owned by the defendant the Glen Mary Coal & Coke Company." He made defendants the Glen Mary Company, Carson and Foster, Diden, Young, and the Bartholomews. The Glen Mary Company filed an answer, denying McBurney's title, and alleging that "defendant is the owner and in the possession of the following tracts of land." Here followed descriptions, by metes and bounds, of 10 tracts, each of them under a heading "First Tract," "Second Tract," etc., and which 10 tracts covered a total of about 1,740 acres. The answer then proceeds: "Eleventh Tract: Being entry No. 1931. Twelfth Tract: Being entry No. 1934." Here the answer abruptly stops, without signature or further allegation. The chancery court dismissed McBurney's bill entirely. He appealed to the Court of Chancery Appeals, which affirmed; he then appealed to the Supreme Court of Tennessee,

[1] The bill claims the entire of 1935, with certain exceptions. The answer claims title in the Glen Mary Company to many parcels within 1935, and in addition to the 99-pole strip, and the decree might seem to cover some of the other parcels so claimed by defendant; but this 99-pole parcel is the only one to which the testimony is directed. A journal entry recites that the parties in open court agreed that it was the only matter in controversy, and the briefs in this court treat the case in the same way.

[2] We use the word "ideal" in the sense that seems to be common in litigation regarding boundaries of grants in Kentucky and Tennessee, viz., in contradistinction to actual, and as referring to lines or points existing only in the surveyor's notes, and not located by him upon the ground.

which discussed the case in an opinion reported in 121 Tenn. 304, 118 S. W. 694. This opinion shows that the Supreme Court thought McBurney should have had a decree for all lands within his boundary which the Glen Mary Company did not, by its answer, claim, and so directed a decree accordingly, but added, in substance, that, since McBurney had not brought any such claim to the attention of the court below, costs would be awarded against him.

The parties were represented in the Supreme Court by other counsel than those who had appeared below, but after a decree, awarding to McBurney all lands within 1935 with specified exceptions, had been prepared, it came to the attention of counsel who had represented the Glen Mary Company below. He testified in this, the instant case, and it is not disputed, that at the taking of the testimony in the chancery court he gave notice that he intended to amend the answer by adding other tracts than the 12 within the boundary sued for, to which other tracts the Glen Mary Company then claimed title, and it was then agreed between all counsel that the litigation between McBurney and the Glen Mary Company should be confined to a certain number (perhaps 4) out of the 12 tracts specified in the answer, and that, as to the remainder, no testimony should be taken and no adjudication would be sought. He further testified that, when the case was heard before the chancellor, he furnished to the court a written memorandum showing these 4 (?) tracts, followed by the statement, "While the Glen Mary Coal & Coke Company owns other tracts inside of the boundary sued for, the tracts above referred to are the only ones in litigation," and he says that this statement was, in open court assented to by opposing counsel. He further says that, when he noticed the form of the decree of the Supreme Court, as prepared, he observed that, while it awarded to the Glen Mary Company all of the four tracts which had actually been in controversy, it seemed, by general terms, to award to McBurney all the remaining tracts within the boundary, which tracts were owned or claimed by the Glen Mary Company, and which this agreement had excluded from the litigation. Thereupon, at his request and by the consent of McBurney's counsel, the following paragraph was inserted in the decree and became a part of it as entered: "And it is further ordered, adjudged, and decreed that, as to all other lands claimed by the Glen Mary Coal & Coke Company within the boundaries sued for, no recovery is sought, and the relative rights of the complainant and said Glen Mary Coal & Coke Company are not adjudicated."

This decree was in 1907. Defendant continued in the undisturbed and unquestioned use and possession of the premises until, in December, 1913, McBurney's widow and heir filed, upon the equity side of the court below, a bill of complaint against the Glen Mary Company, in which they prayed that their title be confirmed, and that defendant's title be removed as a cloud, and that plaintiffs be put in possession of the property, and that the defendant account for coal removed. There was, eventually, a final decree accordingly, and after an accounting before a master, an award of damages; and the Glen Mary Company brings this appeal.

W. R. Turner, of Knoxville, Tenn., for appellant.

S. B. Smith, of Chattanooga, Tenn., for appellees.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). 1. We pass, without deciding, the question whether the court below, as a court of equity, had jurisdiction of this case in spite of the fact that defendant was in the actual adverse possession. Butterfield v. Miller (C. C. A. 6) 195 Fed. 200, 202, 115 C. C. A. 152. The parties have not raised this question. The recent statute (section 274a, Judicial Code [Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, § 1251a)]) has made it unimportant in matters arising since the statute was passed, and we prefer to dispose of the case upon the merits.

[1] 2. It is the statutory law in Tennessee that actual possession, under adverse claim and under a deed, held for more than 7 years, is a perfect bar against a superior paper title, and that this bar extends to the entire tract as described in the defendant's deed. Shannon's Code, § 4456; Earnest v. Land Co., 109 Tenn. 427, 75 S. W. 1122; Mayse v. Lafferty, 1 Head (Tenn.) 60. It follows that the question to which most of the testimony has been directed—viz. whether the Gall line must be taken as the true south line of 1931—is wholly immaterial; defendant's established, and, indeed, unquestioned, possession for more than 30 years is the end of the case, except for the question of estoppel by judgment. True, plaintiffs suggest a conflicting possession; but it is only by construction through actual possession outside of the overlap, while defendant had actual possession of the overlap itself, and this constructive possession is insufficient. Byrd v. Phillips, 120 Tenn. 14, 23, 111 S. W. 1109.

[2] 3. Plaintiffs at last rest upon the claim that the title was adjudicated by the Supreme Court decree. We are unable to find any sufficient basis for this claim. If the decree had remained in the form in which it was drafted, it would still, in view of the opinion, have contained certain ambiguities as to its effect upon the parcel of land now involved, and the attending circumstances would have required that every ambiguity should be resolved against plaintiffs' present claim. This was a very valuable parcel. It had been in the exclusive and undisturbed possession of the defendant for over 20 years. Neither party had taken any proof whatever regarding it, and the plaintiffs, in the court below, had made no claim to it. It is incredible that either party could have supposed that it was involved in the litigation, or would have deliberately contended that the decree ought to cover it. However, the paragraph inserted in the decree leaves no ambiguity. The proposed decree affirmed the action of the lower courts in favor of the Glen Mary Company as to all 4 of the parcels about which there had been an actual controversy. Then, by a general phrase, it awarded to the plaintiffs all other lands within their boundaries. Thereupon this paragraph expressly provided that, as to the other lands claimed by the Glen Mary Company within these boundaries, it was not intended to make any adjudication whatever. It is not necessary to resort to the testimony of the counsel that this exception was intended to reach, also, parcels which were actually claimed, but which he had not described and claimed in his answer; for we find that the parcel in dispute is one of those claimed in the answer. The claim under the head "Eleventh Tract" must refer to this parcel. This eleventh tract so claimed is described only as "being entry 1931"; but since the tract sued for was 1935, and since this reference to the eleventh tract could have no possible pertinence in the answer, unless it referred to something that might be within the boundaries sued for, and since no part of 1931 could possibly be in 1935, excepting through an overlap, actual or claimed, and since this overlap was the very thing which was claimed to give to defendant a part of the ideal 1935 under defendant's deed to 1931, it is clear to a demonstration that this reference in the answer to the eleventh tract was intended to reach this very parcel, and to

present a claim that plaintiffs could not recover this parcel because it really belonged in 1931. Not only is this the natural, if not the inevitable, construction to be put upon this claim of title to the eleventh tract, after we know the conditions which make the situation intelligible, but to give it any other construction would be to make it meaningless and futile. With this construction, it is clear that the title to this parcel, as well as to all the other parcels claimed by the defendant, and which had not by earlier parts of the decree been awarded to the defendant, was left untouched by the decree, and the claim of res judicata must fail.

[3] It is said that to take this view of the later paragraph in the decree neutralizes what had, in the earlier paragraphs, been adjudged, and that, for this reason, such a construction cannot be right. To some extent this premise is true. So far as the general language of the decree awarded to plaintiffs all lands within the boundary not claimed by the defendant the Glen Mary Company, this general language remained operative; but the fact that the broad terms of the earlier part of the decree are inconsistent with specific provisions found later therein can cause no hesitation in giving to the specific provisions precise and full effect. The inevitable inference from the face of the decree in connection with the opinion and the pleadings would be that the draftsman of the decree, by mistake, made it too inclusive, and later corrected this mistake by apt words. This inference, which would be sufficiently supported by the record itself, is confirmed by the testimony showing that all these other parcels were, by agreement, withdrawn from the case in its early stages; that plaintiffs, in the lower courts, made no claim of title to them; that such claim of title was first urged in the Supreme Court, and by new counsel not familiar with the agreement; that the Supreme Court, in ignorance of the agreement, approved the claim of the new counsel; and that, as soon as this came to the attention of the former counsel, the blunder was corrected by the consent of everybody. The general phrasing of the earlier paragraph was allowed to stand for whatever benefit it might be to plaintiffs as against other defendants, but the Glen Mary Company fully protected itself by insertion of the amendment.

This view of the result of the litigation in the state court is made entirely consistent and natural by observing that the title to this 99-pole strip was not put in issue by the pleadings in that case, unless by that very eleventh paragraph of the answer which also serves to take it out of the decree, and by the inference—which we think a fair one—that McBurney did not care to litigate with the Glen Mary Company its claim of title to any of the tracts of which it was in possession, excepting as to those 4 tracts where there had been a severance of the coal in the ground from the surface fee, and where, therefore, he thought he might prevail against the statute of limitations; but on this, his only substantial theory, the Supreme Court held against him.

The decree is reversed, and the record remanded, with instructions to dismiss the bill.

In re CHAN FOO LIN.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2917.

1. ALIENS ⟸32(7)—PROCEEDINGS TO DEPORT—EXAMINATION OF DEFENDANT.
A proceeding to deport a Chinese person was of a civil and not of a criminal character, though it was the purpose of the government to proceed upon the hypothesis that the alien had entered the United States surreptitiously and in violation of Immigration Act Feb. 20, 1907, c. 1134, § 36, 34 Stat. 908 (Comp. St. 1916, § 4285), forbidding entry into the United States, except at specified places, and also that he was in the United States in violation of the Chinese exclusion laws, and hence there was no valid objection to the government calling the defendant to state the place of his birth and explain his presence in the United States, without calling other witnesses to show that he was unlawfully within the United States or was an alien.

2. ALIENS ⟸32(9)—PROCEEDINGS TO DEPORT—DENIAL OF FAIR TRIAL.
Where, in a proceeding to deport a person of Chinese descent, who claimed to be a citizen and introduced substantial evidence in support of this claim, the recommendation of deportation was based in part on statements of immigration inspectors received by the inspectors conducting the hearing, subsequent to the hearing, and the government never informed defendant that he would be given an opportunity to explain and meet these statements, nor even exhibited to him a photograph, by reference to which one of the inspectors making such statements identified defendant as a person formerly seen in Mexico, he was denied a fair hearing.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94.]

3. CONSTITUTIONAL LAW ⟸318—DUE PROCESS OF LAW—DEPORTATION OF ALIENS.
While the decisions of an executive officer, clothed with power to deport aliens, will not be subjected to technical tests, yet the guaranty of due process forbids deportation without according a full and fair hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949.]

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

Habeas corpus proceeding by Chan Foo Lin, alias Frank Chan. From a decree dismissing the writ, the petitioner appeals. Reversed and remanded, with directions.

John A. Cline, of Cleveland, Ohio, for appellant.

Joseph C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio, for appellee.

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

WARRINGTON, Circuit Judge. This is an appeal from an order dismissing a proceeding in habeas corpus. Petitioner, Chan Foo Lin, alias Frank Chan, claimed he was unlawfully deprived of his liberty by an inspector in charge of the immigration department of the Cleveland district of Ohio. The usual writ having been issued, the inspec-

tor answered that he was holding petitioner in virtue of a warrant for his arrest which had been issued by the Acting Secretary of Labor; that upon the matters involved in the warrant of arrest petitioner had been granted a fair and full hearing in accordance with law and with the regulations of the Secretary of Labor; that upon due consideration the Acting Secretary of Labor had by wire instructed respondent to convey petitioner to New York for deportation. Petitioner filed a reply, consisting of denials and a series of allegations of fact, among which it was stated that he was born in the United States, and that he had not been granted a fair trial. Discharge of petitioner was denied, and hence the appeal.

The question here must turn upon the issue whether petitioner was granted a fair trial prior to the suing out of the writ of habeas corpus. The warrant of arrest, bearing date June 19, 1914, is addressed to Inspector Fluckey and signed by the Acting Secretary of Labor. The warrant states:

"Whereas, from evidence submitted to me, it appears that the alien," petitioner, "who landed at an unknown port on or subsequent to the 1st day of July, 1911, has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons: That the said alien is unlawfully within the United States, in that he has been found therein in violation of the Chinese exclusion laws, and is therefore subject to deportation under the provisions of section 21 of the above-mentioned Act, and that he entered in violation of section 36 of the said act, thereby entering without inspection."

The command is that the inspector "take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law." It is to be observed of the warrant that petitioner is charged with the violation of both the Immigration Act and the Chinese exclusion laws. The section (36) of the former act so charged to be violated forbids an alien to enter the United States, except at "seaports" or at such "place or places as the Secretary of Commerce and Labor may from time to time designate." 34 Stat. 908, c. 1134, § 36, passed February 20, 1907 (Comp. St. 1916, § 4285). The amendment of March 26, 1910, mentioned in the warrant, does not affect section 36 (36 Stat. 263–265, c. 128 [Comp. St. 1916, § 4244]). The telegram (the "wire") mentioned in the inspector's answer shows that the portion of the warrant charging violation of the Chinese exclusion laws was intended to apply to section 6 of the act of May 5, 1892, as amended November 3, 1893 (27 Stat. 25, c. 60; 28 Stat. 7, c. 14 [Comp. St. 1916, § 4320]), and to section 7 of the act of September 13, 1888 (25 Stat. 447, c. 1015 [Comp. St. 1916, § 4308]), and "rule 1, Chinese Rules." Section 6, so referred to, in terms required Chinese laborers, at the date of the act or within one year thereafter, to apply to a collector of internal revenue for a "certificate of residence"; but in view of the date of the act (1892) and of petitioner's age, seemingly 22 years, the object of the charge made under this provision is not perceived. Section 7 exacts production of certificates of re-entry by Chinese laborers who, having previously entered this country and returned to China, seek to re-enter here; and rule 1, Chinese Rules, forbids a Chinese person to enter

the country, except at designated ports and under prescribed conditions.

The warrant of arrest appears to have been issued upon a statement made by the petitioner, June 1, 1914, to Inspector Francis at a laundry in Cleveland, and a further statement of the inspector in charge at Detroit, who from a photograph of petitioner concluded that he had seen him in Windsor, Ontario. The statement of petitioner was made in the form of answers to questions put by Inspector Francis through a Chinese interpreter and taken and transcribed by a stenographer. At the beginning of the examination the petitioner answered the questions with apparent frankness, giving his name as Frank Chan, and also as Chan Foo Lin, his age at 22 years, and the names of his parents, stating that he was born in San Francisco, that his mother had died there and his father in China, also that he had a birth certificate, but the so-called certificate is described in the record as a "red slip of Chinese paper, unsigned, stating that this boy was born on February 23, 1893; it does not state where he was born." Later, however, he seems to have thought the examiner was disinclined to believe him, and he refused to answer questions. The inspector sought in several ways to induce him to state in detail such facts and circumstances as might tend either to corroborate or discredit the claim that he was born in San Francisco, saying that if he would frankly answer the questions the inspector would give him "a square deal," but this elicited no answer except "I have nothing to say." Whatever else may be said of the examination, some answers were secured which apparently were not reconcilable with some of the petitioner's later statements. On June 25, 1914, and after issue of the warrant petitioner was arrested and ordered "to show cause why he should not be deported in conformity with law." A hearing was begun July 29th, before Inspector Francis, as examining officer; several delays having occurred upon request of petitioner's counsel. Inspector Francis and J. A. Fluckey, inspector in charge, with an interpreter and stenographer, also petitioner, with his counsel and a Chinese interpreter furnished by them, were present at each session of the hearing that ensued.

[1] Counsel for petitioner objected to Inspector Francis as the examining officer, for the reason that he had conducted the investigation upon which the warrant of arrest was issued, and would be expected later "to render final decision" in the case; also to any examination of petitioner, because the government had introduced no proof that he was unlawfully within the United States, or that he is an alien. We shall have something to say later of the first of these objections; but the last objection is untenable. If we assume that the purpose of the government was to proceed under the Immigration Act upon the hypothesis that petitioner had entered the United States surreptitiously and in violation of section 36 of that act (34 Stat. 908), and also that he was within the United States in violation of the Chinese exclusion laws, still the proceeding was of a civil and not of a criminal character (Low Foon Yin v. United States Immigration Comr., 145 Fed. 791, 793, 76 C. C. A. 355 [C. C. A. 9]; United States v. Tom Wah, 160 Fed. 207, 210, 211, and citations [D. C.], affirmed

163 Fed. 1008, 1009, 90 C. C. A. 178 [C. C. A. 2]; Siniscalchi v. Thomas, 195 Fed. 701, 703, 115 C. C. A. 501 [C. C. A. 6]), and hence we see no reason why the government could not rightfully call petitioner to state the place of his birth and explain his presence in the United States, since his right to remain here might depend upon such facts as he could give.

This, however, does not settle the question whether petitioner was accorded a full and fair hearing. The hearing was opened by the inspector's examination of petitioner, and it is plainly to be inferred from the questions put by the inspector that his purpose was to discredit petitioner. It soon became evident, if this was not so at the preliminary hearing, that petitioner was of Chinese descent, and that the defense intended to be relied on was that he is a native-born citizen. Testimony was offered, through petitioner and some of his witnesses, which, if true, shows that he was born in San Francisco; that his mother abandoned her husband and petitioner when the latter was between 3 and 4 years of age, and has not been heard from since; that owing to this abandonment, and the death of his father, petitioner was taken in charge by his former nurse, who had intermarried with a witness who testified here as petitioner's foster father; that this couple removed to Wahlee Island, which seems to be in the Sacramento river, near Stockton, and a few hours' ride from San Francisco, taking the boy with them; that the foster father maintained a store on this island for some 10 years; that the permanent population of the island was small and composed of Chinese, though during the season for gathering the crops, principally potatoes, large numbers of laborers were brought to the island; that petitioner lived with his foster parents on this island 10 or 12 years, when the foster mother died and the foster father removed to Cleveland, and subsequently removed petitioner to the same place; that petitioner had been in Cleveland and Akron some 4 years before his arrest; and that he had never been outside of the United States.

[2] This was met, as before indicated, by a sworn statement of Inspector Chatfield, of Detroit, that he had seen petitioner "about 9:25 p. m. on May 16, 1914, in Windsor, Ontario"; but in view of the testimony of a well-known teacher of Cleveland it is practically admitted that the inspector was mistaken. Next, the government presented two other statements, one by an inspector of El Paso, and the other by an inspector at Sacramento. The first inspector, Jose Salazar, upon being shown a photograph said to be one of the petitioner, stated that he had seen him in Juarez and in Chihuahua "many times" and that he knew him "very well." He first stated that he had seen petitioner "a little less than a year before," though he said, further, that he could not "just exactly give the right date; it has been a few months ago." This statement bears date August 11, 1914. The statement of the inspector at Sacramento, C. H. Hannum, is dated August 10, 1914, and is to the effect that he had made "such investigations as were possible concerning Wah Lee, Bolley or Polley Island"; that he had visited Chinatown, and "was informed by Chung Jung that Bolley Island was Bouldin Island, in the delta between the Sacramento and San Joaquin rivers, and that it had been flooded for 6 or 7 years, and no-

body had raised any crops on it during that time, although it had formerly produced two or three crops of potatoes on a portion of it"; that "this statement was verified by six or seven old Chinese," and, as he was informed at the office of the state engineer, "that in January, 1907, the levees reclaiming the island had washed out, and that the break was exceedingly deep; that since that time no effort had been made to reclaim any portion of it." He further states:

"This island is formed by the south fork of the Mokelumme river, Potato slough, and the San Joaquin river. I have passed the island, and know that the conditions are at present as described by officials in the state engineer's office and by Mr. Shinn, and which they claim have existed since 1907."

These statements were not presented at the hearing before Inspector Francis, they seem to have been taken after the hearing was closed, and complaint was made of them by counsel for petitioner at the oral argument here. It was insisted that the statements had been taken without notice to counsel, and that no opportunity had been given to cross-examine either Salazar or Hannum. Since the cause was submitted here the United States attorney has presented a motion for permission to introduce "certain records not hereinbefore filed and made a part of the record." The government supported the motion by affidavit, and counsel for petitioner contested it by brief. In view of some of the papers so sought to be introduced, we have concluded to grant the motion. It appears in one of these papers that counsel for petitioner received the statements of these two inspectors, Salazar and Hannum, on September 4, 1914; yet it nowhere appears that the government informed the petitioner that he would be given opportunity to explain and meet either of the statements, nor does it appear that even the photograph shown to Salazar was ever exhibited to petitioner or his counsel (much less that petitioner was confronted with Salazar—Backus v. Owe Sam Goon, 235 Fed. 847, 853, 149 C. C. A. 159 [C. C. A. 9]), and the photograph itself is not to be found in the record.

Considering the character of these proceedings, it was obviously necessary to a fair hearing that petitioner or his counsel be accorded at least seasonable opportunity to examine the photograph and to contest the statements so relied on, instead of being put to the burden of demanding the right to take further proofs, since, in view of the course the examining inspector was pursuing, there would seem to have been but slight reason to expect that such a demand would be granted. It is apparent from the statements themselves that Inspectors Salazar and Hannum, like Inspector Chatfield, may have been mistaken. We are not impressed by the statement of the former; and, in view of the confusion in names and location given to the island in question, it is possible, if not probable, that the parties were not speaking of the same island. Furthermore, none of the witnesses appeared before the trial judge; and, in a proceeding conducted as this one was, we regard such a fact as important. It is important to petitioner and such of his witnesses as testified to the place of his birth, and also to his environments prior to his removal to Cleveland. True, the petitioner and some of his witnesses made contradictory statements,

and some were otherwise contradicted; and yet there seems to be substantial testimony showing that petitioner was born in San Francisco and has never been outside of the United States, and, particularly in view of the corroborative effect of the testimony of the teacher of Cleveland, that petitioner is entitled to credence.

However, it is not meant to pass upon the credibility of any of these witnesses; for, in determining the question whether a full and fair trial was given, it is enough to know that on the vital issues the government secured the benefits of cross-examination of petitioner and his witnesses alike, while the petitioner has received no corresponding advantages and has been deprived even of the opportunity to meet and explain the ex parte statements mentioned of the government's witnesses. Surely, if the testimony of petitioner and his witnesses is not true, this ought to be shown by substantial evidence and under circumstances that would give to petitioner reasonable opportunity to meet it. It is true, as counsel claim, that the inspector who investigated into the conditions of petitioner's presence in Cleveland also sat in hearing of such testimony as was produced in the presence of both sides; and although he did not in terms recommend that petitioner be deported, his "summary" of the evidence is, we think, in material respects immoderate and calculated to create erroneous impressions. Inspector in Charge Fluckey made the recommendation to deport.

[3] It is a recognized rule that while a decision of an executive officer clothed with power to deport aliens will not be subjected to technical tests, yet the guaranty of due process forbids the deportation of a respondent without according to him a full and fair hearing. Lewis v. Frick, 233 U. S. 291, 300, 34 Sup. Ct. 488, 58 L. Ed. 967. We think this was not done here, and consequently that the case has sufficient analogy to the class of decisions like Whitfield v. Hanges, 222 Fed. 745, 756, 138 C. C. A. 199 (C. C. A. 8), to require that the decree be reversed, and the cause remanded to the court below, with directions so to modify the order from which the appeal was taken as to retain jurisdiction and custody of the petitioner, subject, however, to bail, and to hear and determine the case on its merits, de novo, on such evidence and proofs as the parties may offer under the warrant of arrest. We are the more content to adopt this course since a question of citizenship is involved here (Chin Yow v. United States, 208 U. S. 8, 13, 28 Sup. Ct. 201, 52 L. Ed. 369; United States v. Petkos, 214 Fed. 978, 980, 131 C. C. A. 274 [C. C. A. 1]; and see Ex parte Chin Loy You [D. C.] 223 Fed. 833, 839), and an order will be entered accordingly.

THEO. HAMM BREWING CO. et al. v. CHICAGO, R. I. & P. RY. CO. et al.
STATE OF IOWA v. THEO. HAMM BREWING CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917. Rehearing Denied May 31, 1917.)

No. 2369.

1. COMMERCE ⟸14—INTERSTATE COMMERCE—INTOXICATING LIQUORS.
Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699 (Comp. St. 1916, § 8739), prohibiting transportation of intoxicating liquor from one state into another, which is intended to be received, possessed, sold, or used in violation of any law of such state, does not simply forbid the introduction of liquor into a state for a prohibited use, but takes the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92.]

2. INTOXICATING LIQUORS ⟸111—STATUTORY REGULATIONS.
While Code Iowa, § 2419, prohibiting the transportation or conveyance of intoxicating liquors to any person within the state, was ineffective and invalid as to interstate shipments, in the absence of congressional authority, since the enactment of the Webb-Kenyon Act it is in full force, unless repealed by some later statute.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 121.]

3. INTOXICATING LIQUORS ⟸111—STATUTORY REGULATIONS.
Code Iowa, § 2419, prohibiting the transportation or conveyance of intoxicating liquor to any person within the state, was not repealed by implication by Code Supplemental Supp. 1915, § 2421b, requiring railroad companies transporting intoxicating liquor to keep a record thereof, and providing that no such liquors shall be delivered to the consignee until he enters his name and residence or place of business upon such record book, and certifies that the liquor is for his own lawful purpose or private consumption, since the purpose of the later act was to make more stringent regulations, and any inconsistency with section 2419 is explained by the fact that, when it was enacted, there was grave doubt whether the federal statute had effectually removed the impediment to the full operation and enforcement of section 2419.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 121.]

4. INTOXICATING LIQUORS ⟸112½, New, vol. 20 Key-No. Series—REGULATION —TRANSPORTATION.
Though Code Iowa, § 2419, prohibits merely the transportation or conveyance of intoxicating liquor, the receipt of the liquor from the carrier is a violation of the law, so as to bring the transportation of the liquor by an interstate carrier within the condemnation of the Webb-Kenyon Act, since, while the recipient of the liquor may not, as such, be a violator of the law, his receipt of the liquor from the carrier necessarily involves the violation of the law by the carrier.

5. INTOXICATING LIQUORS ⟸112½, New, vol. 20 Key-No. Series—REGULATION —TRANSPORTATION.
A carrier of intoxicating liquor has an interest therein within the Webb-Kenyon Act, prohibiting the transportation of intoxicating liquor intended by any person interested therein to be received, possessed, sold, or used in violation of any law of the state into which it is transported.

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

Suit by the Theo. Hamm Brewing Company and others against the Chicago, Rock Island & Pacific Railway Company and others, in which the State of Iowa intervened. From a decree granting a permanent injunction, the intervener appeals. Reversed and remanded, with directions.

See, also, 215 Fed. 672.

George Cosson and C. A. Robbins, both of Des Moines, Iowa, for appellant.

Frederick W. Zollman, of St. Paul, Minn., for appellees.

Before KOHLSAAT, MACK, and EVANS, Circuit Judges.

MACK, Circuit Judge. This is an appeal by the intervener, the state of Iowa, from a decree of the District Court making permanent its preliminary mandatory order directing the receiver for the Chicago, Rock Island & Pacific Railway Company to receive, transport, and deliver any beer or other fermented malt liquors, sold and consigned in Minnesota, Wisconsin, or Illinois by the complainants, the Hamm Brewing Company, the Heilman Brewing Company, and the Rock Island Brewing Company, or any other person similarly situated, to persons residing in the state of Iowa, who shall have purchased the liquor for their own lawful purposes and private consumption, whenever the purchaser shall in writing authorize the delivery of the liquor by the carrier to some designated person for the purpose of carrying it from the railway station to the residence of the purchaser, provided the writing certifies that the beer or fermented malt liquor is for the purchaser's own consumption.

After the granting of the temporary injunction, the state of Iowa intervened, alleging that shipments specified in the complainants' bill would be in violation of the Webb-Kenyon Law (Act Cong. March 1, 1913, c. 90, 37 Stat. 699 [Comp. St. 1916, § 8739]) of section 2419 of the Iowa Code of 1897, and sections 2421a–2421c of the Supplemental Supplement of the Iowa Code 1915. The essential parts of these acts are set out in the margin.[1]

[1] Section 2419 of the Iowa Code of 1897:

"If any * * * railway company * * * shall transport or convey to any person within this state any intoxicating liquors, * * * such company * * * shall, upon conviction, be fined in the sum of one hundred dollars. * * * The offense herein created shall be held committed and complete and to have been committed in any county in the state in which the liquors are received for transportation, through which they are transported, or in which they are delivered. * * *"

Webb-Kenyon Law:

"* * * The shipment or transportation * * * of * * * intoxicating liquor * * * from one state * * * into any other state, * * * which * * * intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state * * * is hereby prohibited."

Section 2421 of the Supplemental Supplement of Iowa 1915:

"(a) It shall be unlawful for any railroad company, * * * to carry any intoxicating liquor into the state or from one point to another within the state for the purpose of delivering, or to deliver same to any person, com-

In Bowman v. Chicago & Northwestern Railway, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, the power of the state of Iowa to prohibit the importation of intoxicants from another state was denied. A few years later, in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, it was held, contrary to the License Cases, 5 How. 504, 12 L. Ed. 256, that, in the absence of congressional permission, Iowa was powerless to interfere in any way with the movement of intoxicants in interstate commerce or with their sale in original packages thereafter.

In 1890 the Wilson Law (Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [Comp. St. 1916, § 8738]) provided that intoxicating liquor shipped into a state should be subject to the laws of the state upon its arrival therein. Thereby the state prohibitions were permitted to affect interstate shipments by forbidding the otherwise lawful sale of imported liquor in original packages. In re Rahrer, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572. But because the jurisdiction of the state attached only on arrival, and because arrival was construed not as arrival at the state line, but only at the point of destination within the state, and after delivery there to the consignee, the latter's right to receive an interstate shipment of liquor could not be prohibited by the state; section 2419 of the Iowa Code was therefore held invalid in so far as it conflicted with this right. Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088. See, too, Rosenberger v. Pacific Express Co., 241 U. S. 48, 36 Sup. Ct. 510, 60 L. Ed. 880, and cases there cited.

[1] In 1913, however, the right of the states was enlarged by the Webb-Kenyon Act. The recent decision of the Supreme Court in Clark Distilling Co. v. Western Maryland Railway Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, settles the consti-

pany or corporation within the state, except for lawful purposes." Section 2421a, Supplemental Supplement 1915.

"(b) It shall be the duty of any railroad company, * * * who shall for hire carry any intoxicating liquor into the state, or from one point to another within the state, for the purpose of delivery, and who shall deliver such intoxicating liquor to any person, company, or corporation, to keep, at each station or office where it employs an agent or other person to make delivery of freight and keep records relative thereto, a record book, wherein such carrier shall promptly upon receipt, and prior to delivery, enter in ink, in legible writing, in full, the name of the consignor of each shipment of intoxicating liquor to be delivered from or through such station, from where shipped, the date of arrival, the quantity and kind of liquor, so far as disclosed by lettering on the package or by the carrier's records and to whom and where consigned, and the date delivered. No shipment billed in whole or in part as intoxicating liquor shall be delivered to the consignee until such consignee upon such record book enters in ink, in legible writing, his full name and residence or place of business, giving the name of the town or city, and the street name and number where there is such, and certifies that such liquor is for his own lawful purposes or private consumption." Section 2421b, Supplemental Supplement 1915.

"(c) It shall be a misdemeanor for any railroad company, * * * to deliver any intoxicating liquor to any person other than the consignee, or without same having been receipted for as herein required, or where there is reasonable ground to believe that such liquor is intended for unlawful use. * * *" Section 2421c, Supplemental Supplement 1915.

tutionality as well as the broad scope of this legislation; the plea of interstate commerce no longer avails as against a shipment of liquor into a state "intended, by any person interested therein, to be received, possessed, sold, or in any manner used * * * in violation of any law of such state." As the Supreme Court says:

"That act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

The question before us, therefore, is: Did Iowa forbid the receipt or possession of intoxicating liquor?

[2] Section 2419 of the Iowa Code, which punishes the transportation or conveyance of intoxicating liquor to any person within the state, was ineffective and invalid as to interstate shipments in the absence of congressional authority. But when and to the extent that Iowa legislation was freed by the Webb-Kenyon Act from the restrictions that prevented it from regulating interstate commerce in liquors, earlier legislation falling within the now untrammeled state power, unless repealed by some later statute, would be in full force. In re Rahrer, supra; State v. Express Co., 164 Iowa, 112, 113, 145 N. W. 451. See note, 48 L. R. A. (N. S.) 349.

[3] While there is some force in the contention that section 2421b of the Iowa Supplemental Supplement of 1915 impliedly repeals section 2419 of the Iowa Code, in so far as it applies to the transportation of liquor for individual use, based upon the argument that, if the liquor is not to be delivered until the consignee certifies that it is for his lawful purposes and private consumption, the shipment and receipt for such purposes cannot be illegal, in our judgment, this is not the fair construction of the act or of its effect. Repeals by implication are not favored; and as the dominant purpose of the later act was to make more stringent regulations of the traffic in alcoholic beverages, a purpose to relax existing restrictions is not so clear or unequivocal as to justify the implication of the repeal of the earlier statute. Although section 2421b of the Supplemental Supplement of 1915 was enacted after the passage of the Webb-Kenyon Act, yet in view of the decisions in several state courts, as well as the holding in Adams Express Co. v. Kentucky, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, there was grave doubt at that time as to whether the federal statute did effectually remove the impediment to the full operation and enforcement of section 2419 of the Code. The 1915 legislation may well have been based upon the view that the impediment had not been removed; it was thus projected upon a background that had, however, actually ceased to exist. These facts only strengthen the conclusion that a repeal of the earlier act is not to be implied.

[4] What, then, is the sound construction of section 2419? In express terms, it prohibits only the transportation or conveyance to any person of intoxicants; it does not expressly prohibit their possession or receipt by him. But such a receipt necessarily implies a conveyance to, a delivery by, another. And while the recipient as such may not be a violator of the law, his receipt of the liquor from

the carrier necessarily involves a violation of the law by the carrier that illegally conveys it to him. The receipt, then, should fairly be deemed to be in violation of the law of Iowa, whether the carrier alone or the recipient as well be punishable therefor. And while the West Virginia act considered in the Clark Distilling Co. Case, supra, expressly forbade the receipt or possession of liquor, irrespective of the use to which it was to be put, the Iowa act, in our judgment, no less effectually covers the same ground.

Furthermore, both the carrier and the consignee to the carrier's knowledge intend that the receipt from the carrier shall be in violation of Iowa law; that is, they intend that the carrier shall convey to the consignee in violation of the express statutory prohibition, and thus shall effectuate the receipt of the liquor by the consignee in violation of the law.

[5] The interest of the consignee is clear. But the carrier, too, has an interest, both in the transportation and in the liquor itself; as bailee, it is vested with legal rights and subjected to obligations in respect thereto; it has possession, and if charges are not prepaid a lien therefor. No reason is apparent for requiring the "interest" of the person whose intention in respect to the receipt of the liquor is made controlling to be greater or other than that of a carrier or bailee.

Reference, however, is made to Van Winkle v. Delaware, 4 Boyce (27 Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104, in which the form of the bill as it was originally introduced was considered as demonstrating that the construction here adopted is unsound. The bill in its original form consisted of two sections. The first provided that the shipment or transportation of liquor from one state into another, which liquor "is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction," to be received, possessed, or kept, or in manner used in violation of any law of such state, "enacted in the exercise of the police power of such state," is prohibited, and any contracts pertaining to such transactions are declared to be null and void," and "no suit or action shall be maintained * * * upon any such contract or for the enforcement or protection of any alleged rights" based upon such contract, "or for the protection in any manner whatsoever of such prohibited transaction." The second section provided that any liquor transported into any state, or remaining therein for use, consumption, sale, or storage shall, upon arrival within the boundaries of such state, and before delivery to the consignee, be subject to the operation and effect of the laws of such state enacted in the exercise of its reserved police powers, to the same extent and in the same manner as though such liquor had been produced in such state. H. R. 17593, 62d Congress.

It should be observed at the outset that whatever argument may be made, based upon the changes that the text underwent in its course through Congress, in support of the proposition that the phrase "any person interested therein" refers exclusively and necessarily to one interested in the property other than as mere carrier or bailee, will with equal strength support the contention that the Webb-Kenyon Law prohibited the shipment of intoxicants "only when the liquor is intended

to be used in violation of the law of the state"—a contention which the Supreme Court, in commenting on Van Winkle v. State, said rested upon an entire misconception of the text of the act.

The importance of textual changes made during the progress of a bill through a Legislature can easily be overemphasized. Motives other than the conscious desire or deliberate intent of the legislative body thereby to obtain a distinctly different result are readily conceivable.

The Webb-Kenyon Law is not a criminal statute; if it were, the argument that only those acts clearly and expressly denounced as crimes could be deemed within its purview would be cogent. But when the manifest object of the federal law is to give a free rein to the several commonwealths to make effective experiments in accordance with the wishes of their respective communities in checking the liquor traffic and its attendant evils, the contention that the receipt of intoxicants cannot be deemed to be in violation of any law of the state by virtue of the fact that only the transportation and delivery of such intoxicants, the necessary complement of the receipt, is prohibited, cannot be sustained.

The object of the federal enactment was not to prohibit the personal use or the public sale of liquor, but to remove a federal incumbrance from the police power of the state and to deprive interstate shipments of intoxicants of the immunity and privilege which they had theretofore enjoyed. Each state could then determine the extent of regulation or prohibition deemed by it to be best suited to the needs of its people. Since the decision in Clark Distilling Co. v. Western Maryland Railway, supra, there can be no question that the Webb-Kenyon Act removes any impediment that the federal supremacy over interstate commerce would interpose to the exercise of this power by the state.

There is nothing in Adams Express Co. v. Kentucky, supra, contrary to the conclusion here reached. That case decided only:

"That, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited."

See Clark Distilling Co. v. West Maryland Railway, 242 U. S. 311, 324, 37 Sup. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218.

Attention should be called to the Postal Department Appropriation Act of March 3, 1917, and to Resolution No. 57 of March 4, 1917, postponing the effective date of section 5 thereof to July 1, 1917. This act forbids the interstate transportation of intoxicating liquors into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes.

The decree will be reversed, and the cause remanded, with directions to dismiss the bill.

MORGAN'S LOUISIANA & T. R. & S. S. CO. et al. v. ISAAC JOSEPH IRON CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2964.

1. COMMERCE ⇐98—INTERSTATE COMMERCE COMMISSION—FINDINGS—REVIEW.
A finding of the Interstate Commerce Commission that a through rate from Houston to Chicago was unreasonable, so far as it exceeded the sum of the local rates, will not be disturbed, when supported by evidence, though the local rate from Houston to New Orleans, used as a basis of comparison, applied only to shipments destined to points beyond New Orleans to which no through rates were published; no other rate from Houston to New Orleans being shown, and there being no attempt to show any reason for any distinction between Chicago and other points beyond New Orleans.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 148.]

2. EVIDENCE ⇐46—JUDICIAL NOTICE—ORDERS OF INTERSTATE COMMERCE COMMISSION.
Where, in an action to enforce an order of reparation by the Interstate Commerce Commission, a demurrer was sustained to an answer alleging that the Commission had rescinded such order, and an appeal was taken, the Circuit Court of Appeals may judicially notice subsequent proceedings of the Interstate Commerce Commission, resulting in the reinstatement of such order, though not brought to the attention of the court below, especially where they are practically admitted by counsel.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 68.]

3. APPEAL AND ERROR ⇐170(1)—REVIEW—MATTERS NOT PRESENTED BELOW.
Such later proceeding of the Interstate Commerce Commission would be passed on by the Circuit Court of Appeals, rather than to subject the parties to the delay and expense of taking further steps in the court below, especially since the question concerning the setting aside of the order of reparation becomes one of a moot character, in view of the later proceeding, and no attempt was made, and no purpose was expressed, by the railroads, either before the Commission or in the lower court, to offer evidence tending to overcome the prima facie effect of the order of reparation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1035.]

4. COMMERCE ⇐88—INTERSTATE COMMERCE—ORDERS—SUCCESS OF ORDERS.
Where the Interstate Commerce Commission made three reports on an application for reparation, the first of which granted reparation and was rescinded by the second report, and the last report affirmatively showing that it was supplementary to the other reports and designed to give effect to them, and provided for re-entry of the order for reparation, the three reports should be read together.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 139, 141.]

5. APPEAL AND ERROR ⇐719(9)—ASSIGNMENTS OF ERRORS—ALLOWANCE OF COUNSEL FEES.
The contention that an allowance of counsel fees in a judgment sustaining a demurrer was premature will not be passed on, where error is not assigned to this feature of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3490.]

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

Action by the Isaac Joseph Iron Company against Morgan's Louisiana & Texas Railroad & Steamship Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Fred H. Wood, of New York City, Denegre, Leovy & Chaffe, of New Orleans, La., and Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, for plaintiffs in error.

Harry C. Barnes, of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action to recover $682.34 with interest, as damages resulting from the exaction of an alleged unreasonable and unjustly discriminatory joint through rate for the transportation of certain shipments of scrap iron in carloads from Houston, Tex., to Chicago, Ill. An order of reparation for payment of this sum and interest had previously been made by the Interstate Commerce Commission on complaint of the present defendant in error, herein called the Iron Company, against the plaintiffs in error, here called the Railroads. The complaint was filed with the Commission May 14, 1914, and the report and order of the Commission finding such through rate to be unreasonable were entered November 2, 1915. The ground of this finding was that the rate charged exceeded the sum of the intermediate rates concurrently charged over the same lines between Houston and Chicago. An application made to the Commission on behalf of the Railroads for authority to continue higher through rates on scrap iron between the points mentioned than the sum of the intermediate rates was heard with the complaint of the Iron Company and was denied at the time the finding and award of reparation were made. The amount embraced in the Commission's order of reparation was the difference between the through rate exacted and a combination rate based on the intermediate rates. The petition alleges that the Railroads did not comply with the order of the Commission and that they refuse to pay the sum awarded. The answer of the Railroads is confined to an allegation that on March 16, 1916, the Interstate Commerce Commission set aside the order mentioned in the petition, and to a prayer for dismissal, with costs. The Iron Company demurred to the answer on the ground that it does not constitute a defense; and, upon the familiar rule that a demurrer searches the record, the Railroads insisted that the petition fails to state a cause of action. The demurrer was in terms overruled as to the petition and sustained as to the answer; and, the Railroads not desiring to amend the answer, judgment was entered for the Iron Company, with interest and costs, including an attorney's fee. The Railroads bring the questions here upon the writ of error.

The Railroads base their contention upon two grounds. One concerns a rate from Houston to New Orleans which was employed in making up the sum of the intermediate rates, and the other relates to the effect of the alleged setting aside of the reparation order. The contention in respect of the rate so employed grows out of this state of fact: A proportional rate of 9½ cents per 100 pounds in carloads

was at this time in effect from Houston to New Orleans, "when destined to points beyond to which no through rates" were published; and since the through rate in question of 30 cents per 100 pounds, or $6 per ton, prevailed between Houston and Chicago, via New Orleans, it is urged that the application of the proportional rate mentioned was restricted to points beyond New Orleans, between which and Houston no through rates had been published. No rate other than 9½ cents per 100 pounds from Houston to New Orleans is shown. As respects this rate and the through rate from Houston to Chicago the Commission said:

"We hold that the 9½ cents proportional rate was not so restricted or limited as to make it inapplicable as a factor in constructing a through rate to Chicago had there been no joint rate in effect. We find upon consideration of all the facts that joint through rate of 30 cents per 100 pounds was unreasonable to the extent that it exceeded the combination of intermediate [rates] concurrently in effect, i. e., $5.21 per ton."

This was in harmony with the holding of the Commission in Windsor Turned Goods Co. v. C. & O. Ry. Co. (1910) 18 Interst. Com. Com'n Rep. 162, 164, where it was said:

"* * * The fair measure of the reasonableness of a joint through rate that exceeds the combination between the same points via the same route is, and will hereafter be held to be, the lowest combination that would lawfully apply if the joint rate were canceled."

[1] Whether the conclusion so reached by the Commission was intended to be one of law, rather than one of fact, touching the application of the proportional rate of 9½ cents, is not entirely clear. Nor need we consider this feature of the case; for it is plain that the Commission's conclusion of fact that the 30-cent through rate was unreasonable, so far as it exceeded the sum of the proportional rate per 100 pounds from Houston to New Orleans and the existing local rate per 100 pounds from New Orleans to Chicago ($26^{1}/_{20}$ cents), is not without support in the evidence and must be accepted by us. The fact that the Railroads were willing to accept 9½ cents to New Orleans on traffic extending beyond New Orleans certainly had a tendency to show that this was a reasonable rate for all such traffic regardless of the destination; and there was no attempt to show a good reason for any distinction between Chicago and other points.

It remains to consider whether we are bound to conclude that the order of reparation was intended permanently to be set aside. It is true, as we have seen, that the answer alleges that on March 16, 1916, the Commission set aside the order, and that according to the transcript this was met simply by demurrer. We assume that if the Commission had intended to rescind its order permanently, for instance, as an improvident order, the demurrer to the answer should have been overruled;[1] but it appears that the Commission had no such intention.

[1] The question thus assumed, and not intended to be decided, pertains broadly to the rate-making power of the Commission, since the order so set aside involves, not merely reparation in the form of damages, but also the Commission's finding that the through rate in issue was unreasonable to the extent stated in the Commission's report and incorporated by reference into its reparation order; in other words, would permanent rescission of such

The learned counsel for the Railroads frankly stated in oral argument that the Commission thereafter reinstated the order. Further, counsel for the Iron Company sets out in his brief, without objection or denial of opposing counsel, what purports to be a copy of the alleged rescinding order; this is true, also, of a later report the Commission made upon the subject, June 29th following; and this report appears under that date in 40 Interst. Com. Com'n Rep. 525, 526. The rulings upon the demurrer were made below on July 5, and the judgment was entered August 8, 1916; and while it does not appear that the proceedings of the Commission had been called to the attention of the court below, yet, concededly, if this had been done either through pleadings or an approved report of the proceedings, a temporary setting aside and a reentry of the reparation order would have been disclosed.

[2, 3] However, since the Commission's adoption of the later proceedings is in practical effect admitted by counsel, we see no reason why they should not be judicially noticed and passed on here, rather than to subject the parties to the delay and expense of taking further steps in the court below. Butler v. Eaton, 141 U. S. 240, 244, 11 Sup. Ct. 985, 35 L. Ed. 713. And see A. J. Phillips Co. v. Grand Trunk Western Ry. Co., 195 Fed. 12, 16, 115 C. C. A. 94 (C. C. A. 6); Robinson v. Balt. & Ohio R. R., 222 U. S. 506, 512, 32 Sup. Ct. 114, 56 L. Ed. 288. Indeed, the question concerning the setting aside of the order of reparation becomes one of a moot character in view of the later admitted proceedings, and this of itself justifies their consideration (Keely v. Ophir Hill Consol. Mining Co., 169 Fed. 601, 605, 606, 95 C. C. A. 99, and citations [C. C. A. 8]); and above all (apart from the alleged rescission) no attempt was made and no purpose expressed by the Railroads, either before the Commission or in the court below, to offer evidence that would have tended to overcome the prima facie effect of an order of reparation like the present one (Meeker & Co. v. Lehigh Valley R. R., 236 U. S. 412, 430, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691; Darnell-Taenzer Lumber Co. v. Southern Pac. Co., 221 Fed. 890, 892, 137 C. C. A. 460 [C. C. A. 6]).

Turning then to a consideration of the Commission's action as it is reported in 40 Interst. Com. Com'n Rep. 525, 526, it appears that the report of June 29th was a "supplemental report," the Commission with one dissent stating (page 525):

"This case was reopened upon defendants' petition for further consideration upon brief. The original report appears in 37 Interst. Com. Com'n Rep. 591. * * * Orders were entered for reparation and denying relief from the aggregate of intermediates rule of the fourth section. When the case was reopened, the order for reparation was vacated and set aside, but the fourth section order was continued in full force and effect."

And further (page 526):

"We adhere to our previous decision, and will accordingly re-enter the order for reparation. The petition for rehearing was filed because certain

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an order be the substantial equivalent of an original finding that the through rate was reasonable, and so amount to a negative order within the meaning of Procter & Gamble v. United States, 225 U. S. 282, 292, 32 Sup. Ct. 761, 56 L. Ed. 1091? This precise question does not appear to have been involved in any decision that has come to our attention.

carriers construed our decision as a ruling that all restricted proportional rates were to be considered in determining whether or not the through rate exceeds the aggregate of the intermediate rates. It is to be understood that we are dealing only with the facts in this case, including the fact that the proportional rate in question was not so properly restricted or limited as to make its application definite, clear, or ascertainable, and what we have here held is not to be construed as applicable in cases where the use of proportional rates is properly defined."

[4] Thus it appears that the first two reports the one referred to in the petition and the other in the answer, were made in the same proceeding, and the last report, the one of June 29th, affirmatively shows that it is supplementary to the other reports and designed to give effect to them; and so we think the case falls fairly within the course sanctioned in Meeker & Co. v Lehigh Valley R. R. Co., 236 U. S. 412, 428, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, where, in respect of two reports made by the Commission in the same proceeding, the later one affirmatively showing that it was made to supplement and give effect to the original, it was held that they should be read together. Darnell-Taenzer Lumber Co. v. Southern Pac. Co., supra.

[5] It is objected in a supplemental brief of counsel for the Railroads, that the judgment is erroneous in its allowance of an attorney's fee as part of the costs of suit. The point made is that the statute allows such a fee only in a case where the petitioner shall "finally prevail" (Act June 18, 1910, c. 309, § 13, 36 Stat. 554, § 16 [Comp. St. 1916, § 8584]), and consequently that the fee was prematurely taxed; reliance being placed upon the decision in Missouri Pacific Ry. Co. v. C. E. Ferguson Saw Mill Co., 235 Fed. 474, 482, 149 C. C. A. 20 (C. C. A. 8). We are not, however, called upon to pass on the question, since error is not assigned to this feature of the judgment, though it may be observed that the practice pursued below has apparently received sanction in Meeker & Co. v. Lehigh Valley R. R. Co., supra, 236 U. S. 433, 35 Sup. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, and Mills v. Lehigh Valley R. R., 238 U. S. 473, 482, 35 Sup. Ct. 888, 59 L. Ed. 1414. And see Mills v. Lehigh Valley R. Co. (D. C.) 226 Fed. 812, 814. Although an additional fee is asked here, we think that, in view of the amount involved, as above stated, and of the fee awarded below, $500, no further allowance should be made.

The judgment will be affirmed.

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

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

No. 2910.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE ACT—RAILROADS—TELEGRAPH OPERATORS.

Hours of Service Act (Act March 4, 1907, c. 2939) § 2, 34 Stat. 1415 (Comp. St. 1916, § 8678), declares that it shall be unlawful for any common carrier to permit or require any telegraph operator or train dispatcher to remain on duty in towers, offices, or stations operated only during the daytime for longer than 13 hours, except in case of an emergency, when such

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

employés may be permitted to be and remain on duty for 4 additional hours in a 24-hour period, not exceeding 3 days in any week. Section 3 (Comp. St. 1916, § 8679) declares that any such common carrier, permitting or requiring any employé to remain on duty in violation of section 2, shall be liable to a prescribed penalty, but that the provisions of the act shall not apply in any case of casualty, or unavoidable accident, or the act of God. *Held*, that the exception contained in section 3 applies to telegraph operators, regardless of the proviso allowing them to be kept on duty for 17 hours in case of an emergency.

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

2. MASTER AND SERVANT ⊜13—HOURS OF SERVICE ACT—RAILROADS—TELEGRAPH OPERATORS.

At a station where the only employé was both agent and telegrapher, the pipe leading up from a pump through the bottom of a water tank used for engines sprung a leak, so that it could not be drained. The weather was extremely cold, and the agent, recognizing that, if water was allowed to stand in the pipe without any pumping, it would freeze and the system be disabled, communicated to his superiors and was directed to remain on duty during the night, keeping up steam and operating the pump at frequent intervals. It did not appear that it would have been impossible to have relieved the operator within the 17-hour period prescribed by Hours of Service Act, § 2. Section 3 of the act, prescribing a penalty for violation of the provisions of section 2, declares that such provisions shall not apply in any case of casualty or unavoidable accident. *Held* that, as a casualty or unavoidable accident, to take the case out of the emergency provision referred to in section 2, must be more than some occurrence of a more or less trifling nature, which might possibly be foreseen, it was a violation of the act to retain the agent and telegraph operator on duty for more than 17 hours; it not appearing that the opening of the leak was unavoidable.

[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. There was a judgment for the United States, and defendant brings error. Affirmed.

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 an action for the penalty for violating the Hours of Service Act (34 Stat. p. 1415), the court below directed a verdict in favor of the government, and the railroad company, defendant below, brings error.

The controlling facts are not in dispute. At a small station, named Sandyville, Hoover was the sole railroad employé. The station was open only in the daytime, and Hoover was both agent and telegrapher. In addition, it was his duty to operate, at intervals, a steam pumping engine, so as to keep full the water tank used for supplying engines.

Customarily this pump was not used at all during the night. January 13, 1914, was one of the coldest days in the winter. At 5:30 in the afternoon, near the end of his period of service, Hoover found that, because of a defect which had developed in some unknown way, the pipe leading from the pump to the tank could not be drained, and he knew that, if the water was allowed to stand in it without any pumping being done, it would freeze and the water supply system would be disabled. It thereupon became apparent that some one must stay during the night, keep up steam in the boiler, and run the pump for a few minutes at frequent intervals. He wired the division superintendent, and was directed to stay until relieved. He was not relieved until 6:30 a. m., January 14th, making nearly 24 hours of continuous service. It may be assumed that it was impossible to obtain any help or relief from the nearby village of Sandyville, and that after the report reached the superintendent's office there was no regular train, on which relief could have been sent from division headquarters or from any station where employés were available, until the train on which the relief was sent; but at Valley Junction, five miles away, three engines customarily lay overnight, and did so the night of January 13th.

[1] Those sections of the Hours of Service Act which are here involved are sections 2 and 3, and they are quoted in the margin.[1] It is plain that Hoover belonged in the class of telegraph operators, and that the proviso of section 2, considered by itself, was an absolute prohibition of his employment for more than 17 consecutive hours; but it is claimed that the proviso of section 3 contemplates certain instances where the act should not apply at all, and it is said that what happened here was a "casualty or unavoidable accident," and hence that service even for more than 17 hours was not, necessarily, a violation of

[1] Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty: * * * Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine-hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employés named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation: * * * Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen: Provided, further, that the provisions of this act shall not apply to the crews of wrecking or relief trains.

the law. In reply, it is urged that telegraphers and those of similar duties, and who are covered by the proviso of section 2, constitute a class by themselves, the burdens and exemptions of which are exhaustively covered by this section 2 proviso, and which class is wholly beyond the scope of the proviso of section 3.

We are constrained to think that the proviso of section 3 may apply to telegraphers as well as to other employés. The interrelation of the two sections compels this conclusion. Section 2 is the only section which undertakes to say what acts shall be prohibited, and section 3, as an independent section, has no office except to provide for the punishment of those who violate section 2. In its opening lines, it expressly refers to section 2, and there is no penalty for the employment of a telegrapher for more than 17 hours, excepting as section 3 prescribes a penalty. So it cannot be thought that, because the proviso is found within the limits of section 3, it does not apply to section 2 with percisely the same force as if it had been appended to section 2.

Further, the language of the proviso is all-embracing. It says "that the provisions of this act shall not apply in any case of casualty. * * *" To hold that in spite of this declaration some of the "provisions of this act" nevertheless did apply in case of casualty, just the same as if this proviso did not exist, it seems to us would be to ignore the plain terms of the law. The "emergency" provision itself, of section 2, is one of the things superseded when the "casualty" happens.

[2] If the "emergency" which will permit 17 hours' service under section 2, and the "casualty or unavoidable accident" required to invoke the proviso of section 3, were the same thing, there would be reason to say that the latter proviso did not cover the cases reached by the former; but there is not only a presumption of a difference in meaning from the fact that the words are selected and put into contrast, but they inherently imply distinction. Congress would naturally have foreseen that, in the course of railroad service, there would be a great number of unexpected conditions which would require the service of a telegrapher for a few extra hours, and which well might be termed emergencies, but which would not at all rise to the scope of an act of God, an unavoidable accident, or a casualty. While "casualty" and "unavoidable accident" are terms broad enough to cover many rather trifling things, yet their association in this section and their contrast with the "emergency" of another section indicate that they were not used in any such broad sense, but only with reference to those extremer cases which justify coupling them up with "act of God." This construction has been adopted by those Circuit Courts of Appeals which have passed on the question. United States v. Mo. Pac. (C. C. A. 8) 213 Fed. 169, 130 C. C. A. 5; San Pedro Ry. v. United States (C. C. A. 9) 220 Fed. 737, 136 C. C. A. 343; Denver Ry. v. United States (C. C. A. 8) 233 Fed. 62, 65, 147 C. C. A. 132.

With this view of the act, we cannot regard the accident which happened here as a thing justifying the exemption given by the proviso of section 3. It rather belonged, and distinctly so, in the class of "emergencies." The record does not disclose the precise nature of the

occurrence, but the pipe leading up from the pump through the bottom of the tank, up through the water and discharging near the top, in some way sprung a leak or broke off in that part which was submerged in the water in the tank, with the result that the pipe could not be drained at the pump without also draining the tank. No one knows why this occurred. It apparently was one of the ordinary defects which continually develop in the operation and use of any mechanical apparatus. It cannot rightly be called a "casualty," under this section, and, though it was an "accident," no one can say it was unavoidable. If this precise occurrence had occurred to the mind of the draftsman of the act, his very natural inference would have been that 4 hours of extra time was enough to allow for such a contingency. For definitions of "emergency," confirming or supporting our interpretation, see United States v. Denver Ry. (C. C. A. 8) 220 Fed. 293, 136 C. C. A. 275; United States v. So. Pac. (C. C. A. 8) 209 Fed. 562, 126 C. C. A. 384; United States v. Mo. Pac. (D. C.) 235 Fed. 944.

A consideration of some further facts shows that this construction does not put upon this railroad any such degree of hardship as to make us hesitate to adopt it. If it was not practicable to instruct Hoover to let the water run, even if it drained the tank, all that was needed was a man with the skill of an ordinary fireman. There were, at this time, three firemen, not on duty, only 5 miles away, and no reason appears why the necessary relief could not have been had from that source with the slight trouble involved in sending an engine 5 miles. If this was not practicable, the city of Canton was only 12 miles away, and, in the absence of proof, it was right to presume that relief could well have been sent from Canton.

The judgment below is affirmed.

KNUPP et al. v. BELL et al.

(Circuit Court of Appeals, Fourth Circuit. May 1, 1917.)

No. 1495.

1. VENDOR AND PURCHASER ⇐119—CONTRACTS—RESCISSION.

Complainants purchased land, paying part of the consideration, and executing notes and a deed of trust for the remainder. A year thereafter they asserted that defendants' title was defective, but, after submitting the question to an attorney, they paid the notes maturing at that time. When notes due two years after the execution of the contract matured, complainants demanded a rescission of the contract on account of the alleged defects, and refused to consummate their bargain. Defendants denied complainants' ground for rescission, and sold the property under the deed of trust. Eight years after their acceptance of the deed, complainants instituted a suit for rescission; a prior suit having in the meantime been dismissed. *Held* that, in view of their acceptance of the deed, complainants were not entitled to equitable relief, but were limited to relief on the covenants of warranty contained in the deed; this

being particularly true, as neither complainants nor the subsequent purchasers were disturbed in possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 212–214.]

2. EQUITY ⇐178—PLEADING—ANSWER IN COUNTERCLAIM.

In a suit to obtain rescission of a contract for the purchase of land, defendants, the vendors, who had taken up notes for the purchase money discounted at a bank, were entitled to set up in their answer as a counterclaim their demand for relief on the notes, equity rule No. 30 (201 Fed. v, 118 C. C. A. v) providing that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, for defendants' right to recover on such notes would be doubtful, did they not so claim relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 414.]

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

Suit by William J. Knupp and others against J. Frank Bell, administrator of Oliver D. Jackson, deceased, and others, in which Hugh M. Kerr and another counterclaimed. From a decree for defendants, complainants appeal. Affirmed.

William J. Breene, of Oil City, Pa., and Frank C. Miller, of Norfolk, Va. (P. A. Agelasto, of Norfolk, Va., and Edmond C. Breene, of Oil City, Pa., on the brief), for appellants.

Tazewell Taylor and Thomas H. Willcox, both of Norfolk, Va. (John L. Jeffries, of Norfolk, Va., on the brief), for appellees.

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

KNAPP, Circuit Judge. By contract of July 30, 1906, Jackson, Kerr, and Wolcott agreed to sell, and the appellant Knupp, with whom the other appellants were associated, agreed to buy, for $18,000 a tract of about 6,000 acres of timber lands in Carteret county, N. C. Of the purchase price $1,000 was to be paid on signing the contract, $5,000 on delivery of the deed, and the balance by interest-bearing notes at one and two years, secured by deed of trust upon the property. The contract recited the condition of the title at that time, and the steps which the vendors would take to enable them to convey, or cause to be conveyed, the lands therein described "by a deed of general warranty * * * free and clear from all incumbrances of whatsoever kind or nature." Accordingly there was a sale, under an outstanding lien, to the Jackson Corporation, a Virginia concern, and that corporation, by deed dated September 22, 1906, and containing the agreed covenants, conveyed the property to Knupp, who accepted the deed, paid the $5,000, and executed the notes and deed of trust as provided in the contract.

In the late summer of 1907, shortly before the one-year notes matured, Knupp put forward a claim of defective title, and employed Mr. Hughes, an attorney of Norfolk, to act for him in adjusting the matter. Wolcott, who represented the vendors, testified that it was

agreed between Hughes and himself to submit the question to a North Carolina lawyer by the name of Moore, selected by Hughes, and abide by his decision. Just what question was referred to Moore is the subject of dispute, but he appears to have made a report or written a letter which satisfied Knupp, at least for the time being, and he thereupon paid the 1907 notes, half at that time and half in the following January. In 1908, however, when the two-year notes were about to become due, Knupp asserted that the title was worthless, refused to make further payments, and demanded rescission of the contract, cancellation of the notes, and return of the $12,000 theretofore paid by him. Claiming the title to be good, as they still do, the vendors refused this demand, and instead procured a sale of the property under the trust deed securing the notes. It was bid in for their account for $1,000, which was applied, less expenses and taxes, on the unpaid notes, and subsequently sold again to the parties now in possession. In the meantime the National Bank of Commerce of Norfolk, which had discounted the 1908 notes, brought suit to collect the same in the state of Pennsylvania, where Knupp and his associates resided. They interposed a defense, and also, in 1910, filed a bill in the Eastern district of Virginia, the residence of the appellees, to enjoin the prosecution of the Pennsylvania suit, to rescind the contract in question, and to recover the moneys that had been paid thereon. Answer was made in due course, but for some reason the case was not brought on for trial, and the bill was accordingly dismissed in November, 1913, under equity rule 57.

The present bill, filed in January, 1915, alleges with much detail that the plaintiffs were induced to enter into the purchase contract by false and fraudulent representations, both as to the title to the property and the amount of timber on the tract. In effect, if not in terms, a conspiracy is charged to get from the plaintiffs a large sum of money by deliberate and intentional deceit. The relief prayed for is a rescission of the contract, cancellation of the unpaid notes, and recovery of the $12,000 which had previously been paid. The answer sets forth a full and circumstantial account of the transaction, and meets with explicit and positive denial every averment of fraud or misrepresentation. It also alleges that defendants Wolcott and Kerr own the 1908 notes, having taken them up from the bank, and demands judgment in their favor for the amounts due thereon. Upon consideration of the voluminous proofs submitted, oral and documentary, the learned District Judge dismissed the bill for want of equity, and ordered judgment against the appellants on the counterclaim set up in the answer.

In the view we take of the case, it may be disposed of without extended discussion. The decree appealed from necessarily involves a finding in favor of defendants upon the issue of fraud, and careful study of the record fails to convince us that this finding should be disturbed. True, the testimony of Knupp, chief witness for plaintiffs, makes out a case of purposeful and aggravated deception. On the other hand, Wolcott, who represented the defendants, maintains earnestly that the negotiations were carried on from first to last with honesty and fair dealing. Both these witnesses, and most of the others, were

examined in open court, where their credibility could be tested by personal observation. The experienced judge who presided at the trial evidently believed that defendants' version of the transaction was substantially correct, and no sufficient reason appears for disagreeing with his conclusion on this disputed question of fact. In this court, therefore, it must be assumed that there was no actual or intended fraud. Indeed, this seems to be virtually conceded by the appellants, as their brief states the fundamental question here, aside from the right to judgment on the counterclaim, to be whether the evidence "admitted and offered fairly establish that the validity of the title of Jackson, Wolcott, and Kerr was not free from reasonable doubt." In short, the case for rescission of the contract rests, not upon proof of a fraudulent purpose accomplished by intentional deceit, but solely upon the claim that the title conveyed to Knupp, though supposed to be good and so represented by defendants, was afterwards found to be seriously defective.

[1] The title in dispute is based upon a deed given in December, 1903, by the state board of education of North Carolina to one D. W. Morton, and an exhaustive argument is submitted, on the admitted and offiered evidence, to show that this was not a marketable title. To the opposing argument is added the fact, whatever its probative value, that the present owners, who hold under the same title, accepted that title in 1910 with knowledge of the objections raised by Knupp, and testified in substance that they had since been in undisturbed possession of the property and that no adverse claim had been made against it. We deem it unnecessary to decide the question. For the matter in hand it may be assumed that Knupp did not get a good title, because the state board of education had not acquired a good title, and therefore could not give one to Morton. On that assumption Knupp could have refused the deed tendered him by defendants, and compelled a return of the money paid on signing the contract. In the two months intervening there was nothing to prevent him from making the fullest examination. It was his right to have a marketable title to the property he had contracted to purchase, and he was not bound to accept the deed sent him, unless it conveyed such a title. But in point of fact he did accept it, without protest or objection, and such acceptance implied admission by him that defendants had complied with the terms of their agreement.

During the following year there was no interference with his possession, and no attempt by other parties to assert a superior title to the property. Some question was raised when the 1907 notes were about to mature, but whatever purpose Knupp then had to repudiate the contract appears to have been abandoned, on the report or opinion of Moore, and the notes were paid without further objection. Assuming he was unaware at that time of the imperfections of title on which appellants now rely, and that they were not embraced in the reference to Moore, he did know of them, at least in a general way, when the 1908 notes were coming due, and he made demand for a rescission of the contract. Although this demand was met with immediate refusal, and steps were promptly taken to sell the lands for nonpayment of

these notes, he waited some two years before bringing a suit to rescind; and the suit then brought was apparently allowed to stand without effort to have it tried until it was dismissed under the rule for want of prosecution. The subsequent suit, which resulted in the decree under review, was not begun until six years and more after the alleged fraud was discovered, and upwards of eight years after the deed had been accepted. We do not say that this long delay was sufficient of itself to destroy the right of rescission, which may have existed when the deed was offered, or even two years later, when the asserted defects of title became known; but we do say in the circumstances here disclosed that it cast a burden upon the plaintiffs which they are not shown to have sustained. After the acceptance of a deed which the grantor has contracted to give, and after payment of a large part of the purchase price, there must be a time when the grantee will not be permitted to rescind the contract on the ground of defective title, but will be left to the remedy of an action for breach of warranty. In our opinion that time had come when this suit was commenced; and this view seems to be confirmed by the fact that, although eleven years had passed since the state board of education conveyed the lands to Morton, it does not appear that any attempt had been made by legal proceedings or otherwise to recover possession of the property under claim of a paramount title.

We are therefore persuaded that plaintiffs have failed to make out a case for equitable relief. The controlling principles of law are familiar, and reference to a few of the leading decisions will suffice, without resort to quotation. On the issue of fraud the decree below is supported by Southern Development Company v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Hennessey v. Woolworth, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; Lalone v. United States, 164 U. S. 255, 17 Sup. Ct. 74, 41 L. Ed. 425; Redwood v. Rogers, 105 Va. 155, 53 S. E. 6. It is equally supported on the issue of laches by Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798; Shapiro v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Max Meadows Co. v. Brady, 92 Va. 71, 78, 22 S. E. 845.

[2] We are also of opinion that no error was committed in awarding judgment in favor of Wolcott and Kerr on the unpaid notes, which they had taken up and became the owners of before this suit was brought. It appears plain to us that these notes constitute a "counterclaim arising out of the transaction which is the subject-matter of the suit," and rule 30 (201 Fed. v, 118 C. C. A. v) provides that such a counterclaim "must" be stated in the answer. Indeed, it may be doubted whether the defendants named would not have waived the right to recover on these notes, if they had not set them up in answer to the plaintiffs' bill. Portland Wood Pipe Co. v. Slick Bros. Const. Co. (D. C.) 222 Fed. 528, and cases cited. The District Court had jurisdiction of the subject-matter and of all the parties in interest, and its authority to determine the whole controversy seems not open to question.

Affirmed.

FIDELITY TRUST CO. v. ALEXANDER et al.

ALEXANDER et al. v. FIDELITY TRUST CO.

(Circuit Court of Appeals, Third Circuit. June 19, 1917.)

Nos. 2233, 2245.

1. TRUSTS ⟸61(2)—TERMINATION.

A trust, created by an agreement of the trustee to hold property and accumulate the proceeds for the benefit of the cestuis, terminates on the death of the trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 84.]

2. EXECUTORS AND ADMINISTRATORS ⟸250—ADMINISTRATION—ORPHANS' COURT.

Plaintiffs' maternal grandparent devised property in trust for the benefit of plaintiffs and another brother and sister, who died unmarried. Under the Pennsylvania law, which governed plaintiffs' father, the testator was entitled to the shares of the children so dying; but he gave such shares to plaintiffs, and agreed to accumulate the proceeds of such shares for their benefit. At his death the testator disposed by will of such shares, which consisted of bank stock, to the exclusion of plaintiffs. *Held* that, on the administration of the estate, the orphans' court of Pennsylvania might have disposed, under its statutory powers, of plaintiffs' claim to the accumulations and the stock.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 893–895.]

3. TRUSTS ⟸359(3)—JURISDICTION—ADEQUATE REMEDY AT LAW.

In such case plaintiffs allowed administration to proceed, and the bank stock was accounted for and distributed before they instituted suit. *Held* that, in view of the distribution and of the delay, plaintiffs were not, as they had an adequate remedy at law, entitled to invoke equitable aid to recover the value of the shares or of the accumulations.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 566.]

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

Suit in equity by John S. Alexander and others against the Fidelity Trust Company. From a decree for plaintiffs ([D. C.] 238 Fed. 938), defendant appeals, and plaintiffs also appeal, seeking to increase the amount of the decree. Reversed, and bill dismissed, on defendant's appeal, and appeal of plaintiffs dismissed.

See, also, (D. C.) 214 Fed. 495; (D. C.) 215 Fed. 791.

H. Gordon McCouch and Harold B. Beitler, both of Philadelphia, Pa., for Fidelity Trust Co.

Frank A. Harrigan, of Philadelphia, Pa., and Henry A. Wise, of New York City, for Alexander and others.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Federal jurisdiction of this suit in equity depends upon diversity of citizenship. The bill was filed in February, 1915, and is founded on the assertion that the Trust Company,

as executor of John Alexander (hereafter called the testator), came into possession of a trust fund belonging, not to the testator, but to the plaintiffs, and should account therefor. The District Court sustained the bill, and awarded the plaintiffs about $8,200, with interest from July 24, 1896. 238 Fed. 938. The company's appeal raises two questions: (1) Whether an indispensable witness—John S. Alexander himself, one of the plaintiffs, a son of the testator, and one of the cestuis que trustent—was competent under the Pennsylvania act of 1887 (P. L. 158); and (2) whether, in view of all the facts, this bill in equity can be maintained—the company's objections being (a) the existence of an adequate remedy before other tribunals; and (b) the laches of the plaintiffs, the testator having died in February, 1895, and the filing of this bill having been deferred for 20 years. Without expressing an opinion about the competency of the witness, we shall assume for present purposes that all his testimony was properly received, and shall confine ourselves to the second question. On this assumption the facts are as follows:

The testator, who died in his ninetieth year, was married twice. By his first wife he had five children, Mary, John S., Archibald, Annie, and James; and by his second wife he had one son, Lucien, much younger than the others. George Jones, the father of his first wife, died in 1867, and devised certain property to the testator, to be held in trust for her five children, the income or the proceeds to be paid to them at such times and in such manner as the testator should think most beneficial. In October, 1868, James, one of the five, died intestate and unmarried, leaving a total estate of about $7,500. His brother, John S., became the administrator, but under the Pennsylvania law the testator, as the father of James, was entitled to the estate. Within a few weeks the testator and the four surviving children made a parol family agreement, by which the testator gave to these children all his interest in the estate of James. In December, 1868, pursuant to this agreement, John S., as administrator of James, bought 60 shares of the Corn Exchange National Bank with money of the estate, and had the certificate made out in the name of the testator as "trustee." The certificate was delivered to the testator, together with the remaining money belonging to the estate of James, and the testator agreed to hold the stock and the money, and also the undivided one-fifth interest of James under the will of George Jones, in trust for the benefit of the four surviving children; the terms of the trust to be similar to the terms laid down in that will. In November, 1869, Annie, another of the children, died intestate and unmarried, and soon afterward another parol family agreement was made, by which the testator gave to the three surviving children all his interest in Annie's estate, declaring that he would hold this interest also in trust for them under terms similar to those in the will of George Jones. All the dividends on the 60 shares, up to and including the dividend of May, 1877, were collected by the testator and divided among the children entitled thereto. Not long after May, 1877, the testator advised the three children to allow the dividends to accumulate in his hands "for a rainy day," and they agreed to this proposal. In May, 1878, the testator wrote

the following memorandum in a book kept by him, in which he recorded his financial transactions:

"May 9, 1879. Certificate 562, in name of John Alexander, for 60 shares of Corn Exchange National Bank stock, belongs to J. S., M. C., and A. A."

Between December, 1868, and the date of this entry, these shares had been transferred several times, and finally, on June 15, 1875, had been put in the name of John Alexander individually, and not as "trustee." The reason for this we do not certainly know (probably, that the stock might be used as collateral security); but there is no suggestion of wrongdoing by the testator. In July, 1894, he made a deed of trust to the Fidelity Company, transferring 90 shares of the Corn Exchange Bank stock (which included the 60 shares in question), a bond and mortgage, and some railway stock—the company to hold and administer this property until the testator's death, and then to transfer it to his executors for disposal under his last will. In February, 1895, the testator died, and the bank shares passed to his two executors, one of whom is dead; the Trust Company being the survivor. Immediately after the testator's death, John S. notified R. L. Wright, vice president of the Trust Company (who died in January, 1897), that his father's estate held some property as trustee, particularly 60 shares of the Corn Exchange Bank, and that these belonged to his sister, his brother, and himself. He inquired also of the bank with reference to the transfer of the 60 shares, but obtained little information in reference thereto.

Within a few days after the testator's death a caveat was filed on behalf of the three older children against the probate of the testator's will, alleging undue influence on the part of Lucien; but the caveat was overruled by the register on July 29, and the will was proved. No appeal was taken to the orphans' court from the register's decision until nearly three years afterward, and the contest was not finally disposed of until May, 1903, when the Supreme Court of Pennsylvania affirmed the decree of the orphans' court sustaining the will. Alexander's Estate, 206 Pa. 47, 55 Atl. 797. In the three-year interval between the register's decision and the appeal to the orphans' court, the executors went on with their duties, and filed their first account in the orphans' court; this being called for audit in April, 1896. One item in the inventory and appraisement of the estate was 319 shares of the Corn Exchange National Bank (which included the 60 shares now in question), and all the shares were accounted for by the executors in their first account. The present plaintiffs had notice of the audit, but made no objection to the account, whereupon the orphans' court entered a decree of distribution, under which 200 shares were sold at auction on July 23, 1896, and 119 shares (which included the 60 shares) were awarded to Lucien. On July 20, 1896, while the proceeding was still pending, John S. wrote to the Trust Company, protesting against the distribution on the ground that the attack on the will had not been finally determined, saying that Mr. Wright, the Trust Company's vice president, had assured the contestants that their interests would be protected, and declaring also that the will did not pro-

vide for the payment of the trust fund now in question and of one other fund. He stated that:

"The documents establishing these trusts have after much research been obtained and will be presented when the case comes up in the orphans' court."

To this letter the Trust Company replied on July 7, making several remarks concerning the contest of the will, and saying that the orphans' court had decided that no one could prevent the ordinary course of administration merely by entering a caveat, not followed by an appeal. The reply also stated that the company—

"* * * had no knowledge with reference to the trust funds of which you speak. If there were such funds, of course, the claim should have been made at the audit, and it may become necessary for you to file a bill of review, so as to prevent distribution. I beg to notify you to take steps at once in that direction, if you intend so to do. * * * To conclude, if you propose to continue the contest, it will be necessary that you take the proper steps in that direction at once, and also have the awards in accordance with the will as directed by the orphans' court set aside by a bill of review. And I again beg to advise you that this must be done at once, if you desire to prevent distribution."

The plaintiffs took no steps, however, except that in March, 1900, John S. wrote again to the Trust Company, saying, inter alia:

"I desire to give you this additional notice that sixty (60) shares of the Corn Exchange National Bank in the estate of my father, the late John Alexander, belongs to the estate of James C. Alexander, who died in 1868. As shown by the inclosed certificate of the register of wills, I was appointed administrator of the last-named estate. As such, I invested a part of the proceeds thereof in the said 60 shares of stock, and placed the same in my father's hands to be held in trust for the heirs, and it was so entered on his books. Shortly after my father's death, I gave you notice as custodian of the assets of his estate that the said stock was a trust, and am therefore surprised to recently learn from you that probably the stock has since been delivered to Lucian H. Alexander. The heirs of James C. Alexander, after my father's death, demanded of me this stock, and I expected my notice to you would have been respected, until the pending litigation over my father's estate reaches a conclusion.

"In view of the premises, I ask you to recover the said 60 shares of stock, and notify you that, if you refuse or fail to do so, I will hold you responsible for the value of the same and for all damages resulting from your acts or negligence in the matter."

In May, 1904, at the audit of the second account of the executors, which showed that the 319 shares had either been converted or distributed, the plaintiffs appeared by counsel and made no objection thereto.

At this point the matter rested until March, 1912, when the plaintiffs came into possession of an item of evidence concerning the 60 shares that seemed to them to be valuable and that apparently revived their interest. Three years later, they filed the bill now before the court. The estate is, and has always been, solvent, and it has not yet been fully settled. We are informed that sufficient assets are on hand to meet the plaintiffs' claim, if it should be established, either in whole or in part.

[1-3] The single question before us is whether this proceeding in equity should be sustained, and in our opinion the answer should be in

the negative, for reasons that may be briefly given. There is no doubt that the trust in controversy came to an end when the testator died in 1895. Freedley v. Security Trust Co., George Jones Estate (Del. Ch.) 84 Atl. 883. At that time, therefore, the three plaintiffs were entitled to an equal distribution of the fund, and of course they had the right to proceed at once in any appropriate tribunal by any appropriate form of action. The fund consisted of money received by the testator in the form of dividends, and also of 60 shares of stock. So far as the dividends were concerned, an action at law would have been an adequate remedy, and we see no reason, also, why the plaintiffs could not have adopted the alternative remedy of presenting the claim to the orphans' court at the audit of the executors' accounts. There is no evidence that the testator was to invest these dividends for the purpose of accumulation, and, even if theoretically the money be considered as in his hands, it was not ear-marked, but was simply there as an unidentified sum that he was bound to make good to the plaintiffs whenever the proper time should arrive. Essentially it was a debt that the testator owed, and his estate was bound to discharge it on the same footing as any other obligation for which he might be liable. The amount was easily ascertainable, and the testimony of John S. could have established the existence of the trust as readily at that time as in the present proceeding. But the plaintiffs had a claim also for the stock itself, and if the shares could then have been identified in the hands of the executors, it may well be that the plaintiffs might have maintained a bill in equity to recover the specific property, and in that proceeding they might also have recovered the dividends as an incident to the principal. They knew that the estate held 319 shares of the Corn Exchange stock, and, although on the face of the certificates all these shares were in the name of the testator individually, this did not prevent them from proving that 60 shares were in fact the property of the trust. The production of the testator's books of account could have been compelled, the transfer books of the bank could have been reached, and the testimony of John S. was available then, as now. Moreover, as we understand the decisions of the Pennsylvania Supreme Court (Moore's Estate, 211 Pa. 338, 60 Atl. 987; Crosetti's Estate, 211 Pa. 490, 60 Atl. 1081; Paxson's Estate, 225 Pa. 204, 73 Atl. 1114; Williams' Estate, 236 Pa. 259, 84 Atl. 848), this claim for the shares could have been presented and determined by the orphans' court, which could have disposed of the whole controversy in the exercise of its statutory powers. Assuming, however, that the plaintiffs were not confined to the orphans' court, but could have proceeded in any other court having jurisdiction of the parties and the subject-matter, the fact remains that no action of this or of any other kind was taken before any tribunal, and without objection or appeal the executors were allowed to go on with the settlement of the estate, and with the conversion or distribution of all the shares of stock under the decree of the orphans' court. Of this distribution the plaintiffs had actual as well as constructive notice, and after all the shares had thus been disposed of, either by conversion into money or by an award in specie, we think it clear that the claim became completely a claim for money. The dividends had always been money, and the shares themselves had now been transmuted into money, or

had been awarded to another person, so that the claim of the plaintiffs against the estate was now, not for the stock, but for its value, whatever amount that might prove to be. For such a claim an equitable remedy was no longer necessary; no accounting was required, except a mere arithmetical computation, and either a purely legal remedy or the remedy in the orphans' court was adequate. As we regard the matter, the orphans' court was the more satisfactory tribunal, and in practical effect the District Court was of the same opinion, as may be seen by paragraph 9 on page 962 of 238 Fed. In a word, we think that the ground for a bill in equity disappeared after the stock had been converted or distributed, and this is the only subject that concerns us now.

In No. 2233, the appeal of the Trust Company, the decree below is reversed, at the costs of the appellees, with instructions to dismiss the bill; but this order is without prejudice to the right of the appellees, either to bring such suit at law as they may be advised to bring, or to present their claim to the orphans' court of Philadelphia county, to be there considered and disposed of as that court may see proper.

The appeal of the plaintiffs, in No. 2245, which seeks to increase the amount of the decree below, is dismissed, at their costs.

DAVIDSON et al. v. AMERICAN BLOWER CO. et al.

(Circuit Court of Appeals, Second Circuit. May 25, 1917.)

No. 180.

1. CORPORATIONS ⊂=197—STOCKHOLDERS—RIGHTS OF.

The owners of a majority of the stock of a corporation cannot use their power to the prejudice of the minority stockholders, and a court of equity will enjoin all contracts or conspiracies intended to prejudice the rights of the minority stockholders and dissipate the property of the corporation, and for that purpose may enjoin the majority stockholders from voting their stock, although such relief will be granted only under imperative necessity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749–763, 764.]

2. CORPORATIONS ⊂=197—STOCKHOLDERS—PROTECTION OF MINORITY STOCKHOLDERS.

The individual defendants owned a majority of the stock of a corporation, and one of them had a controlling interest in a second corporation, which was engaged in the same line of business and in competition with the defendant corporation. The defendant corporation claimed patents to certain appliances, and was involved in litigation with the second corporation. One of the individual defendants had been urging a dismissal of the litigation and the gratuitous licensing of the second corporation during the time when he could not vote his stock because of voting trust created at the time the defendant corporation was organized. *Held* that, where the individual defendants had done nothing illegal and threatened nothing illegal, the rights of the minority shareholders who desired protection will be amply protected by enjoining the individual defendants from wasting the assets of the corporation or attempting to monopolize the business in which it was engaged, and they should not be enjoined from voting their stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 747, 749–763, 764.]

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

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

Bill by Samuel Cleland Davidson and others, suing on behalf of themselves and other stockholders of the American Blower Company similarly situated, against the American Blower Company and others. From a decree for complainants, defendants appeal. Modified and affirmed.

See, also, Sirocco Engineering Co. v. B. F. Sturtevant Co. (D. C.) 208 Fed. 147; 209 Fed. 624.

This is an appeal from an order of Judge Ray, in the District Court of the United States for the Northern District of New York, enjoining the individual defendants Foss and Gifford, who own or control a majority of the capital stock of the American Blower Company, from combining to waste its property, and from combining together or with others to monopolize the business of manufacturing or selling multiblade or propeller fans and blowers for exhaust or blowing, and from voting their stock, and also enjoining the defendant the American Blower Company, its officers, agents, and inspectors of election from permitting the stock of the said defendants to be voted.

O. F. Hibbard, of New York City, for appellant Foss.

William S. Haskell, of New York City (Millis, Griffin, Seely & Streeter, of Detroit, Mich., of counsel), for appellants.

Winthrop & Stimson, of New York City (Henry L. Stimson and George Roberts, both of New York City, of counsel), for appellees.

Angell, Bodman & Turner, of Detroit, Mich. (Henry E. Bodman, of Detroit, Mich., of counsel), for intervening appellees.

Wm. J. & Wm. C. Roche, of Troy, N. Y., for certain intervening complainants.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The manufacture and selling of the fans and blowers in question is a distinct and separate business of an interstate as well as intrastate character carried on by less than a dozen companies in this country. In the year 1899 the B. F. Sturtevant Company did and it still does the largest part of this business. Next to it was the American Blower Company, a corporation of Michigan. The defendant Foss owned a majority of the stock of each of these companies. In 1902 the complainant Davidson began to sell in this country a new multibladed fan patented by him, called the Sirocco fan. It was admittedly superior to any fan then manufactured for the same purpose, and Davidson incorporated his business in the year 1907 under the name of the Sirocco Engineering Company.

In 1907 the Sturtevant Company began to manufacture a similar fan, called the multivane fan, because of which the Sirocco Company began a suit against the Sturtevant Company for infringement of Davidson's patents. The defendant Foss in that year entered into negotiations with a view to consolidating the Sirocco and the Blower Company, which resulted in the formation of a new company, the American Blower Company of New York, one of the defendants in this suit. The incorporation took place early in January, 1909, and

of effect as between the parties as of January 1st. It was advantageous to each company, because it gave the Blower Company a better fan than its own and to the Sirocco Company much-needed capital.

The consolidation was carried through by an exchange of the new company's stock for the stocks of the old companies, and the defendant Foss continued to hold the majority of the stock of the new company. The complainants say that they did not know how much stock Foss owned in the old company, because it was not all in his name on the company's books; but because he did control the Sturtevant Company, and because of the pending infringement suit, they took precautions to prevent his influence from being detrimental to their interests. The corporate existence of the Sirocco Company was maintained to prevent the patent suit from abating, and it was made a part of the agreement that a majority of the stock of the new company should be put in a voting trust, two out of the three trustees to be stockholders of the Sirocco Company. This trust was to continue for five years, the longest term permissible under the laws of the state of New York. Furthermore, the granting of licenses under the Davidson patents was also put under the control of a board of three trustees who represented the Sirocco interests.

After the formation of the new company the defendant Foss continually advised the discontinuance of the patent suit against the Sturtevant Company and the granting of a license under the Davidson patents to that company and other manufacturers without royalty. The burden of his correspondence was that there should be an arrangement between the two companies for the purpose of regulating and raising prices. This the Blower Company steadily refused to do, and continued to conduct its business in competition with that of the Sturtevant Company and all other companies engaged in the trade with constantly increasing success. At the time the bill was filed the two companies did 70 per cent. of the trade in the United States, 40 per cent. by the Sturtevant Company and 30 per cent. by the Blower Company. October 9, 1913, the District Court handed down a decision sustaining the Davidson patents. Sirocco Engineering Co. v. B. F. Sturtevant Co., 208 Fed. 147.

January 1, 1914, the voting trust was to expire by limitation, at which time it would be within the power of the defendant Foss to elect a board of directors agreeable to him. The minority stockholders naturally feared such a board would terminate the pending patent litigation and grant a gratuitous license to the Sturtevant Company. January 20, 1914, was the date of the annual meeting of the Blower Company, but it was adjourned to February 19th, and thereafter from time to time, in pursuance of orders of the District Court. February 10, 1914, the complainants requested the board of directors of the Blower Company to file a bill such as the present bill, which request was declined.

February 26, 1914, the complainants brought this suit in equity, alleging that the defendants had combined to waste the assets of the Blower Company, to divert its business to the Sturtevant Company and to violate the Sherman Act of July 2, 1890, by raising prices and re-

straining competition in foreign and interstate commerce, and article 340 of the General Business Law of the state of New York in intrastate commerce. December 15, 1914, the Circuit Court of Appeals reversed the decree of the District Court and held the Davidson patents void for anticipation, as well as not infringed by the Sturtevant Company. Sirocco Engineering Co. v. B. F. Sturtevant Co., 220 Fed. 137, 136 C. C. A. 91. This decree removed the chief contention between the Blower Company and the Sturtevant Company as competitors. The District Judge decided this suit on all points in favor of the complainants and entered a decree as prayed for.

[1] There can be no doubt that the majority owners of stock of a corporation cannot use their power to the prejudice of the minority owners and that a court of equity will enjoin all contracts or conspiracies of the kind complained of in the bill. In proper cases they may be enjoined, even if only threatened. Vicksburg Water Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808. The District Judge assumed from the previous conduct of the defendants Foss and Gifford, and particularly from the letters of Foss, that he would be likely to carry out the plans complained of through a board of directors elected by them, and that the complainants should be protected against their doing so. To deprive stockholders holding a majority of the stock from voting it, and to turn over the control of a corporation to the minority stockholders, is relief to be given only under imperative necessity. Undoubtedly it may be done in a proper case, and has been done in some cases cited by the appellees. Milbank v. New York, Erie & Western R. R. Co., 64 How. Prac. (N. Y.) 20, in which the controlling corporation was enjoined from voting its stock in the controlled company because it was prohibited by statute from owning it; Dunbar v. American Tel. & Tel. Co., 224 Ill. 9, 79 N. E. 423, 115 Am. St. Rep. 132, 8 Ann. Cas. 57, which was on demurrer to a bill charging that the controlling corporation had purchased its stock in the controlled company for the purpose of restraining competition; Memphis R. R. Co. v. Woods, 88 Ala. 630, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81, where it was found that the controlling corporation had for its own interest oppressed and defrauded the controlled company; George v. Central R. R. & Banking Co. of Georgia, 101 Ala. 607, 14 South. 752, in which the court found that the controlling corporation had bought its stock in the controlled company to restrain competition and had used its control to waste the property of the controlled company; Steele v. United Fruit Co. (C. C.) 190 Fed. 631; Id., 194 Fed. 1023, 114 C. C. A. 666, in which the court found that the controlling company had bought its stock in the controlled company, used it to restrain competition, and subordinated the interests of the controlled company to its own.

[2] In these cases, and others that could be cited, the illegal acts complained of had been actually carried out or were admitted or were explicitly threatened. In the present case nothing illegal has been done, and nothing illegal has been threatened, although the complainants had reason to apprehend that the defendant intended to do these things if he could. We think the complainants will be sufficiently protected

if the defendants be enjoined, either severally or in combination from wasting or attempting to waste the Blower Company's property, or from restraining or monopolizing or attempting to restrain or monopolize the business of manufacturing and selling multiblade or propeller fans and blowers.

As so modified, the decree is affirmed, with costs of this court to the appellants.

DEVORKIN v. SECURITY BANK & TRUST CO. OF MEMPHIS, TENN.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2976.

1. BANKRUPTCY ⊂=414(1)—PROCEEDINGS FOR DISCHARGE—QUESTIONS OF FACT.
While in some cases a bankrupt's failure to keep any systematic books or records would of itself require the conclusion that this was done with intent to conceal, such conclusion is not generally inevitable, and the inference is one of fact, to be drawn from the proofs in a particular case.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720.]

2. BANKRUPTCY ⊂=180—FRAUDULENT TRANSFERS—SECRET TRUST FOR GRANTOR.
The law implies a fraudulent intent from a debtor's conveyance with a secret trust reserved for his benefit.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 252, 253.]

3. BANKRUPTCY ⊂=407(3)—DISCHARGE—GROUNDS FOR DENIAL—FRAUDULENT TRANSFERS.
In deciding whether a conveyance by a bankrupt hindered, delayed, and defrauded creditors, so as to defeat a discharge, it is of no controlling importance that the trustee has not been able to avoid it, or even that he has not tried to avoid it.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 740, 742–749.]

4. BANKRUPTCY ⊂=407(3)—DISCHARGE—GROUNDS FOR DENIAL—FRAUDULENT TRANSFERS.
The transfer by a bankrupt of an absolutely worthless equity of redemption is not a sufficient ground for refusing a discharge, even though the trustee might get something to which he was not entitled as a bonus for a release of the property by him.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 740, 742–749.]

5. BANKRUPTCY ⊂=414(1)—FRAUDULENT TRANSFERS—BURDEN OF PROOF.
A bankrupt owned a half interest in real estate, the whole of which was worth $10,000 or $12,000. His interest was incumbered by one-half of a mortgage for $5,000, and by a purchase-money lien for $1,000 and a mortgage or deed of trust for $3,000 on his half interest. His attorney, who procured the loan secured by this last mortgage, felt morally responsible for the loan, and, fearing that on a foreclosure sale or in the hands of the trustee enough would not be realized to pay this mortgage, took a conveyance of the real estate, and agreed to advance whatever funds were necessary to meet payments on the incumbrances and to give the bankrupt two years within which to redeem. *Held* that, under the circumstances, the trustee had the burden of showing that the creditors whom he represented might have been injured by this conveyance.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720.]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

In the matter of Nathan Devorkin, bankrupt. From an order sustaining the objection of the Security Bank & Trust Company of Memphis, Tenn., to the bankrupt's application for discharge, the bankrupt appeals. Reversed and remanded.

Leo Goodman, of Memphis, Tenn., for appellant.

H. R. Boyd, of Memphis, Tenn., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Devorkin was adjudicated a voluntary bankrupt, and directly thereafter filed his petition for a discharge. The Security Bank & Trust Company was a creditor, and supported opposition to the discharge by the specifications (1) that the bankrupt, with attempt to conceal his financial condition, had failed to keep the necessary books of account or records; and (2) that the bankrupt had transferred his interest in certain real estate with intent to hinder, delay, and defraud his creditors. The matter was sent to a referee, who heard proofs and found as facts that, while the bankrupt had wholly failed to keep books, this had not been done with intent to conceal his financial condition, and that the transfer of the real estate was a bona fide transaction, without intent to hinder, delay, or defraud.

The creditor treated the referee's report as that of a special master in equity, and challenged the result through exceptions. Upon the review thus invoked, the District Judge did not pass upon the first specification, but held that the real estate transfer had the inevitable effect to hinder, delay, and defraud, and that, therefore, the second specification should be sustained, and the application for discharge be denied. The bankrupt appeals.

[1] 1. We see no cause to disturb the finding of the referee that the failure to keep books was not with that intent which is made the basis for preventing a discharge. It appears that for three years, and since Devorkin had been the sole proprietor of the business, he had kept no books. The dealings were small and practically for cash; the debts proved were—largely—those left over from an old connection. Doubtless there are cases where the failure to keep any systematic books or records would, of itself, require the conclusion that it was done with the intent to conceal, but such conclusion is by no means inevitable. The inference is one of fact to be drawn from the proofs in a particular case. Sheinberg v. Hoffman (C. C. A. 3) 236 Fed. 343, 149 C. C. A. 475; Sherwood Co. v. Wix (C. C. A. 4) 240 Fed. 692, —— C. C. A. ——. Cases like Paper v. Stern (C. C. A. 8) 198 Fed. 642, 117 C. C. A. 346, and In re Hanna (C. C. A. 2) 168 Fed. 238, 93 C. C. A. 452, are not inconsistent with this rule.

[2] 2. Devorkin owned a half interest in a piece of business real estate, the whole of which had cost $10,000 or $12,000. His interest was incumbered by one-half of an old mortgage for $5,000 covering the entire title, by $1,000 unpaid lien for the purchase price of his half interest, and by a mortgage or deed of trust for $3,000 upon his half interest, given by him more than a year before to secure a cash

loan for money needed on account of old liabilities in which Devorkin was involved. This last loan had been secured for him through the favorable representations of Mr. Goodman, his attorney, and Mr. Goodman felt a measure of moral responsibility upon the loan. Shortly before bankruptcy, and with knowledge on Goodman's part that it was imminent, Devorkin made a deed to Goodman of his half interest, and it is this conveyance which is the basis of the second specification. The testimony is undisputed that this deed was made at Goodman's advice and request, and because the first mortgage was about coming due and some refunding and extensions would be necessary, or else it would be foreclosed, and it was apprehended that not enough would be realized to pay the $3,000 mortgage, and there would be a loss thereon for which Goodman would feel responsible. He also thought that, if Devorkin's title passed to a trustee in bankruptcy, any refunding or extension contracts would be impossible, and thus foreclosure and loss could not be avoided, while, if the title was put in his name, he could arrange the necessary extensions. He therefore agreed that in exchange for the deed, which would enable him thus to protect the existing junior mortgage, he would advance, personally, whatever funds were necessary to meet payments that must be made on the incumbrances, and would give Devorkin two years within which to redeem the property by paying whatever might thus accumulate against it.

It is entirely plain that this transaction, when thus fully stated, did not inherently involve any hindering, delaying, or dafrauding of creditors. It was, at most, a conveyance of Devorkin's equity of redemption by way of further security for existing debts; and the mere giving of a preference is no reason for denying a discharge. The trouble is that this trust was not expressed on the face of the deed, which (as we understand the record) appeared to be absolute and unconditional; and this situation suggests, if it does not reveal, a conveyance with a secret trust reserved for the grantor's benefit—a transaction as to which the law implies a fraudulent intent.

[3-5] This leads us to the question which counsel have chiefly argued—whether the equity thus conveyed was worth anything. In deciding whether a conveyance had the effect to hinder, delay, and defraud creditors, it is of no controlling importance that the trustee has not been able to avoid it, or even that he has not tried to avoid it, and, doubtless, in the absence of any proof, there would be some presumption that property conveyed by the bankrupt had value; but it is none the less certain that a deed cannot be intended to or have the effect to hinder, delay, or defraud creditors, unless it is a conveyance of something rather than of nothing, and we cannot regard the transfer of an absolutely worthless equity of redemption as a sufficient ground for refusing a discharge. If such conveyance releases a right of possession pending foreclosure, which would be of substantial value to the trustee, that would make a question on which this record is silent; but the mere fact that the trustee might get something for a release paid to him as a bonus, and not because he was entitled to it, but to avoid trouble—this mere fact we cannot think enough to give condem-

natory character to the transaction. We cannot escape the conclusion that the circumstances of this case—the cost of the property, the admitted incumbrances, the apparent fear of all parties that the property would not pay the incumbrances, and the character of the contract accompanying the transfer—were sufficient to put upon the trustee the burden of showing that the creditors whom he represented might have been substantially damnified. This burden was not met; but we are not inclined, for that reason alone, now to direct that the discharge be granted. The objecting creditor rested on a misapprehension. If the objecting creditor desires, there should be a further hearing on this issue; we decide now only that the making of the deed, under the circumstances shown, does not of itself necessarily bar the discharge. Lacking an application for such further hearing, made within 30 days after mandate, the discharge should be granted.

The order must be reversed, and the case remanded for further proceedings in accordance with this opinion.

THE TRANSFER NO. 15.

THE LANSING.

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

Nos. 241, 242.

1. COLLISION ⟸95(2)—STEAMSHIP AND MEETING TOW—INSUFFICIENT LOOKOUT.

A collision in the daytime on East River between a steamship, which was passing up on the deep water range, and one of two car floats alongside a meeting tug, *held*, on conflicting evidence, due solely to the fault of the tug in misunderstanding the steamer's passing signal of two whistles, which was justified by the positions of the vessels, probably because of not having a lookout in the bow, and so crossing the signal and turning to starboard across the course of the steamship, which at once stopped and reversed, but too late to avoid collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202.]

2. COLLISION ⟸99—PRECAUTIONS IN HARBOR—LOOKOUT.

It is incumbent on a vessel navigating New York Harbor and vicinity, even in the daytime, to maintain a vigilant lookout.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 211, 212.]

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

Suit in admiralty for collision by the Lansing Steamship Company, Incorporated, owner of the steamship Lansing, against the steam tug Transfer No. 15 and car float N. Y., N. H. & H. R. R. No. 41, the New York, New Haven & Hartford Railroad Company, claimant, with cross-libel against the Lansing, in which the Seaconnet Coal Company intervened. Decree against the Lansing, and the other parties appeal. Reversed.

Appeal in admiralty from decree dismissing the libel of the steamship Lansing against the steam tug Transfer No. 15, and sustaining

the libel of the steam tug against the steamship. The cargo of the Lansing belonged to the Seaconnet Coal Company, which intervened pro interesse suo in the action against the Transfer No. 15. The intervener also appealed.

James T. Kilbreth and Irving Miller, both of New York City, for the Transfer No. 15.

Robinson Leech, of New York City, for the Lansing.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett, of Boston, Mass., of counsel), for intervener.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. [1] The collision out of which these litigations arose occurred off the ferries at the foot of Whitehall street, Manhattan, on a fair afternoon (April 19, 1916), when the wind was light, the weather clear, and the East River tide still running ebb, although the tide had begun to rise. The Lansing is a steamer 250 feet long, originally built for traffic on the Great Lakes, and of very slow speed. The Transfer No. 15 is an able tug 125 feet long, and had in tow a loaded carfloat on each side, each float being 327 feet long. The Lansing was bound up the East River; the Transfer, with her floats, was coming down, intending to round the Battery and proceed to the New Jersey shore. There was no unusual amount of traffic in the neighborhood, and the evidence contains no suggestion that any vessel not proceeded against interfered with navigation. The collision was a violent one between the bow of the Lansing and the port side of the Transfer's port carfloat, about 50 feet abaft her forward end. That such a collision could happen in broad daylight is of itself almost evidence of negligence. The Tugboat No. 6, 170 Fed. 306, 95 C. C. A. 502.

On consideration of the pleadings and the testimony of those in charge of the navigation of the colliding vessels, we find it impossible to harmonize their statements or to arrive at any story of collision not somewhere denied in vital details. There are some points, however, so conclusively proven as to dominate, and from these controlling facts we deduce a result favorable to the Lansing. That steamer entered the channel between the Battery and Governor's Island upon the "deep water range." Such is the testimony of her master, while the captain of the Transfer admitted that when he first noticed the steamship (he being above Pier 7, East River) she was on that range. The Transfer and her tow, by the statement of her own master, "came down the East River to go under the Brooklyn Bridge, and proceeded down about in the middle of the river, favoring the New York shore." The tug master's intention was "to follow the middle of the river as near as possible, and as we proceed down we keep drawing in to the New York shore." The Lansing against the tide was making not over 3 miles an hour by the land, while the Transfer on her own testimony was similarly going at the rate of at least 9 miles an hour. The place of collision was off the ferries nearest to Pier 4 East River, and about 1,000 feet off the pier ends. This is the evidence of the master of a

tug which was lying off the ferries, who had a full view of the collision, and was introduced as a witness on behalf of the Transfer. The distance from the pier end given by him puts the place of collision on the "deep water range." The heading of the Transfer and her floats at the moment of impact is plainly testified to by her master, who, when asked how his boat was heading at the time they came together, replied:

"I should think that my boat was heading directly toward * * * the Staten Island ferry rack."

With the place of collision thus fixed, and the bearing of tug and tow also fixed within narrow limits, we next inquire as to the angle of collision. On this point there is practical unanimity among the witnesses—it was a right-angled blow—a statement amply confirmed in our opinion by the nature of the wounds. But if the blow was right-angled, the point of contact substantially on the deep water range, and the tug and carfloats heading for the ferry racks nearest Pier 4, the conclusion is mathematical that the Lansing at collision was on the range, and had never substantially altered her course from the moment she was first seen by the Transfer. Such is her evidence, which in our judgment is confirmed by the foregoing.

The hopeless conflict of evidence herein relates to the signals given and the relative bearings of the two vessels at the time of giving them. There is a fair preponderance of evidence that the Lansing blew first, giving a signal of two whistles. That the first signal was given by the Lansing is admitted in the Transfer's pleadings, but it is said to have been a signal of one blast. It is proved as a two-whistle signal, and we perceive no reason why it should not have been heard and understood by the Transfer, which undoubtedly replied with one whistle.

The vital point is whether, when the Lansing blew two whistles, she had the Transfer on her port or starboard bow. The testimony on this is utterly irreconcilable; but when it is observed that the vessels when not over half a mile apart were approaching each other at the rate of at least 1,100 feet a minute, that the collision occurred on the deep water range, with the port side of the Transfer's floats in the act of crossing the Lansing's bow, and the floats and tug heading for the upper ferry slips, we think it demonstrated that in order to produce collision the tug and tow must have come (under a port helm) from the Lansing's starboard side.

It is not thought that the Transfer was as far over to Brooklyn (or starboard), when the Lansing blew two whistles, as the captain of the steamer asserts; but she was enough to starboard of the Lansing's course to render a two-whistle signal (under the meeting rule) proper. This is in accord with the Lansing's evidence, and is very nearly admitted by the master of the Transfer when he assented to counsel's proposition that, if he had understood the Lansing's first signal as of two whistles, he could "have answered with two and safely gone down on her starboard side."

Thus we find that this disaster occurred through a misunderstanding of whistles, for which no excuse is proffered; as a result thereof

the Transfer ported and hard-aported, and so threw herself directly across the path of the Lansing, which immediately upon hearing the Transfer's single whistle stopped, reversed, and gave the alarm. The steamer was struck substantially on the deep water range; she did not change her course, and indeed scarcely had time so to do.

The reason for this misunderstanding of signals is largely found in the insufficiency of the Transfer's lookout. The master of that tug had a deckhand on top of the cars on the starboard float. His duties seem to have been for the most part to announce "small craft, gasoline boats, and rowboats." He must have seen the Lansing; should have heard her whistles and understood them and reported them. But (according to his captain) the only attention he paid to the steamer was, after the Transfer had put her wheel hard aport, to ejaculate, "I wonder where that fellow thinks he is going."

[2] We have recently insisted upon the necessity of a lookout, and a good one, even in the daytime. Delaware, etc., Co. v. Central R. R. Co., 238 Fed. 560, — C. C. A. —). The rule is equally to be insisted upon here, for it can hardly be doubted that a vigilant lookout would have announced the Lansing's signal which the master (who was solely in charge of a flotilla of the weight and capacity of a large ocean steamer) might easily misinterpret, as he unquestionably did.

Finding that the situation of these vessels when they were between a quarter and a half a mile apart was such that the Lansing had the Transfer on her starboard bow on a course which made a passing starboard to starboard proper within the meeting rule, it is ordered that the decrees below be reversed, with one bill of costs to the appellants in this court, and the cause remanded, with directions to dismiss the libel against the Lansing and sustain that against the Transfer No. 15.

HANSEN et al. v. UNIFORM SEAMLESS WIRE CO.

(Circuit Court of Appeals, First Circuit. June 15, 1917.)

No. 1259.

1. CORPORATIONS ⟸308(6)—OFFICERS—SALARY—AMOUNT.
   Where the general manager of a corporation abandoned all claim for salary at the rate fixed in a written contract for ten years, and it was understood between him and the treasurer of the corporation that the sums paid to him as salary should be in full for his services, in view of the corporation's financial condition, he had no claim against the company for additional salary, either on express contract or under a claim in quantum meruit.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1341, 1342.]

2. FRAUDS, STATUTE OF ⟸44(3), 139(1)—CONTRACTS OF EMPLOYMENT—TIME OF PERFORMANCE.
   The agreement under which such general manager was paid was not within the statute of frauds, as it did not cover any fixed period, and was fully executed by both parties.
   [Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 66, 334, 337.]

3. BANKRUPTCY ⇐60—ACTS OF BANKRUPTCY—APPLICATION FOR RECEIVERSHIP.

The directors of a foreign corporation voted to apply for a receivership or for bankruptcy, and a committee was appointed with power to act; but no action was taken pursuant to the vote, and the application for a receiver was made by four stockholders, three of whom were creditors, under Gen. Laws, R. I., c. 213, § 27, as amended by Laws 1909, c. 424, which authorizes the appointment of a receiver for a foreign corporation on the petition of any stockholder or creditor. *Held*, that the corporation did not apply for a receiver, thereby committing an act of bankruptcy, especially as, under the statute, the application could not have been made by the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80.]

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Petition by Charles E. Hansen, doing business as the Platinide Company, and others, to have the Uniform Seamless Wire Company adjudicated a bankrupt, in which Conley & Straight intervened. From a decree dismissing the petition (235 Fed. 616), the petitioning creditors appeal. Affirmed.

Peter C. Cannon, of Providence, R. I. (James T. Egan, of Providence, R. I., on the brief), for appellants.

E. Butler Moulton and J. Jerome Hahn, both of Providence, R. I. (Mumford, Huddy & Emerson, Hahn, Joslin & McCanna, and Charles C. Mumford, all of Providence, R. I., on the brief), for appellee.

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

BINGHAM, Circuit Judge. This is an appeal from a decree entered in the United States Court for the District of Rhode Island in favor of the respondent, the Uniform Seamless Wire Company, a Maine corporation, doing business at Providence, and Conley & Straight, interveners, dismissing a petition brought by Charles E. Hansen, doing business under the name of the Platinide Company, William H. Miller & Sons, J. M. Anthony & Co., and Joseph T. Boland, all of Providence, asking to have the Uniform Seamless Wire Company declared a bankrupt.

In the petition it was alleged that the petitioners were creditors of the Wire Company, whose claims amounted to more than $500, and that the company had committed an act of bankruptcy, in that, being insolvent, it had, on the 7th day of March, 1916, applied for the appointment of a receiver under the laws of the state of Rhode Island. In answering the petition, the respondents denied that the Wire Company had committed an act of bankruptcy, and that Boland was a creditor of the company. If Boland was not a creditor, the claims of the other petitioners did not equal the requisite jurisdictional amount. The application for the receiver alleged that the corporation was insolvent, in that it was unable to pay its debts as they matured. In re William S. Butler & Co., Inc., 207 Fed. 705, 125 C. C. A. 223; s. c., Palmenberg v. William S. Butler & Co., 231 U. S. 752, 34 Sup. Ct. 322,

58 L. Ed. 467; Maplecroft Mills v. Childs, 226 Fed. 415, 141 C. C. A. 245.

In the District Court, Boland was found not to be a creditor, for the reasons:

(1) That the contract purporting to be executed May 20, 1909, between the corporation and Boland, employing the latter as general manager of the corporation at a salary of $100 per week for the term of ten years from May 14, 1909, was not a contract in substance, but in form only, and was never assented to at any time by any person representing the corporation independently; (2) that Boland abandoned all claim for salary at the contract rate; (3) that Boland, by his failure for about six years to assert his claim for salary at the contract rate, and by his knowledge that no indebtedness for the claim was stated as a liability of the corporation, was estopped as against all other stockholders and all creditors from asserting his claim against the corporation; and (4) that, as the corporation was without funds with which to conduct its business unless its preferred stock could be sold, Boland, as owner of substantially all the common stock, was interested in creating and maintaining a credit for the company, and, through an arrangement with the treasurer, accepted sums from time to time in payment for his services as general manager, and thereby foreclosed any right he may have had to recover a larger sum on quantum meruit.

[1, 2] Various contentions are made; but we do not find it necessary to consider all of them, and in particular whether the court erred in holding that the contract of May 20, 1909, between Boland and the Wire Company was invalid, or in holding that Boland was estopped to assert his claim as a creditor, for it seems to us that the evidence fully warrants the finding of the court below that Boland abandoned all claim for salary at the rate named in the contract of May 20th, and that, in view of the financial condition of the company and his conduct in the premises, it was understood between him and Astle, the treasurer, that the sums paid to him as salary should be in full for his services, and that, having waived or abandoned his right to the salary stipulated for in the contract of May 20th, and agreed to accept the sums paid him in satisfaction for his services, he has no claim against the company, either on the express contract or under a claim in quantum meruit. The agreement under which he was paid for his services was not within the statute of frauds, for it did not cover any fixed period and was fully executed by both parties.

[3] We are also of the opinion that the petition could have been dismissed on the ground that the Wire Company, if insolvent, had not committed an act of bankruptcy as alleged in the petition. The allegation was that the corporation, being insolvent, on the 7th day of March, 1916, applied for a receiver of its property under the laws of the state of Rhode Island; and the question is whether the corporation, assuming it to have been insolvent within the meaning of the Bankruptcy Law (which it was not, if Boland was not a creditor), applied for a receiver. It appeared in evidence that, at a meeting of the directors of the corporation on March 6, 1916, it was voted to apply for receivership or for bankruptcy, and a committee, consisting of two of the direc-

tors, was appointed with power to act in the matter. No action appears to have been taken pursuant to this vote. The application for the receiver was made, not by the corporation, but by four of its stockholders, all of whom, but one, were also creditors of the corporation, pursuant to section 27, chapter 213, of the General Laws of the State of Rhode Island, as amended by chapter 424 of the Session Laws of 1909, which provides:

"Whenever any corporation incorporated under the laws of any other state, and having an estate or effects in this state, is insolvent, * * * the superior court may, upon the petition of any stockholder or creditor of such corporation incorporated under the laws of any other state, and upon such reasonable notice as the court may prescribe, appoint a receiver of its estate and effects in this state, and distribute the same in accordance with the equitable rights of the parties."

As the Wire Company was a foreign corporation, it could not, under the provisions of this statute, make an application for a receiver, and the weight of the testimony is that the application in question was not made in behalf of the corporation, pursuant to the vote of the directors, but, as stated in the application, in behalf of the petitioners as stockholders and creditors of the corporation.

The assignment of error relating to the refusal of the court below to reopen the case for further evidence raises no question of law. The petitioners, so far as the record discloses, had full opportunity at the trial to present their evidence. The case having been closed, it was discretionary with the trial judge whether he would thereafter reopen the same.

Entertaining these views, we think the court below did not err in dismissing the petition.

The decree of the District Court is affirmed, with costs to the appellee.

WHITNEY v. NEW YORK SCAFFOLDING CO.

(Circuit Court of Appeals, Eighth Circuit. April 2, 1917. Rehearing Denied May 16, 1917.)

No. 4766.

1. PATENTS ⊂=328—CONTRIBUTORY INFRINGEMENT—SCAFFOLD.
The manufacture and sale of the hoisting device of the Whitney patent, No. 1,114,832, *held* on the evidence not to constitute contributory infringement of the Henderson patent, No. 959,008, for a scaffold.

2. PATENTS ⊂=259—CONTRIBUTORY INFRINGEMENT—INTENTION.
The question in contributory infringement is whether or not the defendant made or sold his machine or improvement with the intent or purpose of aiding another in the unlawful making, selling, or using of a third person's patented invention, and the burden is on the plaintiff to establish the affirmative of this issue.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402.]

3. PATENTS ⊂=237—INFRINGEMENT—"MECHANICAL EQUIVALENT."
The term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous signification, while its

meaning is very narrow and limited when it conditions the construction of a patent for slight improvement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 374, 375.

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

4. PATENTS ⇐165—CONSTRUCTION—LIMITATION OF CLAIMS.

Where an inventor has pointed out and claimed in his patent the combination or improvement he claims as his invention, he disclaims and dedicates to the public any other combination or improvement apparent from his specification and claims, not a mere evasion of his own.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241.]

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

Suit by the New York Scaffolding Company against Egbert Whitney. From an order granting an interlocutory injunction, defendant appeals. Reversed.

See, also, 224 Fed. 452, 140 C. C. A. 138.

Robert H. Parkinson, of Chicago, Ill. (Wallace R. Lane and George Mankle, both of Chicago, Ill., on the brief), for appellant.

C. P. Goepel, of New York City, and Paul Bakewell, of St. Louis, Mo., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and RINER, District Judge.

SANBORN, Circuit Judge. This is an appeal from an interlocutory decree based on letters patent No. 959,008 to E. H. Henderson, which enjoins Whitney, the defendant below, from manufacturing or selling scaffold hoisting devices like those shown in patent No. 1,114,832 issued to Whitney on October 27, 1914, on the ground that such manufacture and sale constituted contributory infringement of Claims 1 and 3 of the former patent, which read in this way:

"1. A scaffold consisting in the combination of crossbeams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

"3. A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a crossbeam laid in and extending between each pair of such U-shaped bars, a floor laid upon said cross-beam, a drum rotatably supported between the upwardly extending side members of each of said U-shaped bars, and means for controlling the rotation of said drum."

This suit was originally brought against Whitney for an infringement of these claims by the manufacture and sale of hoisting machines like those described in letters patent No. 998,270 issued to him on July 18, 1911. In those machines Whitney used for his hoisting frames metal bars bent in the form of the inverted letter "U," hoisting drums rotatably supported on brackets on the vertical side members of the U-shaped bars, supporting rods of metal connected with and securely fastened to the lower ends of the vertical side members of

his U-shaped frames, upon which rods he supported crosspieces or putlogs upon which the planks or sheeting of the scaffold rested without fastening in any way the crosspieces or putlogs to the lower bars of the frames upon which they rested. This court was of the opinion that the making and selling of these machines by Whitney for use by third parties in combination with the crossbeams and floor pieces of the combinations of Claims 1 and 3 of Henderson's patent constituted an infringement of the latter, and it accordingly directed the issue of an injunction against their manufacture and sale by Whitney. New York Scaffolding Co. v. Whitney, 224 Fed. 452, 460, 463, 140 C. C. A. 138, 146, 149.

[1] After the court below had issued its injunction pursuant to that opinion, the scaffolding company made a motion in this case in the District Court for a similar injunction against the manufacture and sale by Whitney of hoisting machines like that portrayed in his patent No. 1,114,832. The latter machines were called by Whitney, and were known in the trade, as the "Little Wonder Machines," and for convenience they will be so styled, and the machines like that described in Whitney's patent, No. 998,270, will be called Whitney's first machines in this opinion.

The Little Wonder machine consisted of a rectangular frame and a hoisting device. The frame was made of two vertical metal side rods, which were connected by two metal bars fastened to the side rods, one at the top and the other at the bottom of the frame. Each of these bars was perforated by three holes, one at each end, through which the side bars respectively passed and in which they are fastened by nuts, and one in the center through which the steel wire cable suspending from above and bearing the frame, hoisting device, and scaffold passes and works. The hoisting device consists of two automatic clutches "adapted to engage a suspending cable, means for holding the clutches constantly in vertical alinement and for carrying a load suspended therefrom, means for working the clutches repetitiously toward and from each other in such alinement upon the cable, and means for releasing the clutches severally." These clutches are located in two alining clutch boxes, each box has a vertical peripheral split tubular wall, formed in duplicate wall sections marginally contacting with each other. Each box has a cap fitted over the top of its tubular wall and an inverted cap fitted under the bottom of its tubular wall. By means of these caps which are perforated in the center for the movement of the suspending cable, the wall sections are held together, and by means of terminal perforations in the caps for the vertical side rods of the frame the upper box is held in rigid engagement and the lower box in sliding engagement with the vertical side rods. Two duplicate vertically disposed semitubular jaws in each box mounted on springs, registering with each other face to face, held in position by transverse sliding arms working in transverse slots as the jaws approach to and recede from each other, but movable vertically in unison between anti-friction rollers interposed between the walls of the box and the jaws, constitute the clutch. The jaws have internal rib-like teeth to bite the cable which passes between them, and

each jaw has an external wedge-like projection on its back to produce and release the bite as the clutch is made to rise and fall in the box. When in their normal position both clutches grip and hold the suspending cable. The lower clutch, whose box has a sliding engagement with the side rods of the frame, is movable vertically by means of a lever. To raise the load a workman first lifts the free end of the lever, thereby releasing and raising the lower clutch box, and then forces down the lever, thereby bringing the lower clutch into action and releasing and lifting the upper clutch from which the load is suspended. By thus raising and lowering the lever, like a pump handle, he causes the machine with its load, the scaffold frame and hoisting machine, to climb the cable much as a sailor climbs a rope. The first and third claims of patent No. 1,114,832 describe very well the Little Wonder and, when compared with the first and the third claims of Henderson's patent and with Whitney's first machine, which has the U-shaped bar and the hoisting drum and means for operating it rotatably supported between the side members thereof, illustrate the similarities and differences between the Little Wonder and Henderson's machines and Whitney's first machine. Those claims read in this way:

"1. A hoisting machine of the specified class, comprising two automatic clutches adapted to grip alternatively a suspending cable, means for raising and lowering the clutches independently on the cable, and a suspended frame, upheld by the clutches alternately and provided with means for holding both clutches in vertical alinement."

"3. A hoisting machine of the specified class, comprising two automatic clutches, means for holding the clutches in vertical alinement and for carrying a suspended load, means for moving the clutches toward and from each other in such alinement, and means for releasing the clutches severally; each clutch having two coacting, spring-mounted, vertical wedge jaws between antifriction rollers, and being adapted to grip automatically a suspending cable and to be released from that cable."

On the argument at the former hearing in this court of the question of the validity of Henderson's patent and its infringement by Whitney's first machine, counsel for Whitney contended that Henderson's patent was anticipated by letters patent No. 854,959, issued to W. J. Murray on May 28, 1907, which disclosed an inverted U-shaped metal bar, a hoisting drum rotatably supported by the side members of this bar, and a crosspiece or putlog securely fastened to the lower ends of the side members of the U-shaped bar upon which putlog the planks or sheeting of the scaffold rested. Murray, however, had portrayed the members of the pairs of his machines set opposite each other for supporting a wide mason's scaffold with their edges to the wall of the building, with the lower ends of the side members of each pair securely fastened to the same crosspiece or putlog, so that neither of the machines could be knocked down for removal without removing the bolts, or rivets, or nuts, by which it was fastened to the crosspiece or putlog, and so that neither of them could be set up again without again fastening the side members of its frame thereto, nor could these machines without new or different crosspieces or putlogs be used broadside to the building—while the machines of Henderson

were fitted for use with their broadsides to the wall of the building. When Henderson's application for a patent was in the Patent Office, it was twice rejected on Murray's patent and was finally allowed on the argument of counsel that Claim 1 specified that the U-shaped metal bar extended around the under side of the crossbeam or putlog, so that the connection between the U-shaped bar and the crossbeam was absolute and positive, "and no connecting rivets or bolts or other auxiliary means" were employed. The majority of this court were of the opinion that Henderson's method of supporting his crosspieces or putlogs on the lower part of his frame without fastening them thereto so that his hoisting machines could be knocked down and set up again without removing or placing bolts, rivets, or nuts, and so that his machines were fitted for use broadsides to the building, permitted his patent to escape anticipation by Murray's and placed him in that large class of inventors who make slight advances in their art and accomplish the result sought with varying degrees of success, so that on that account each is entitled to his own combination or device as long as it differs from those of his competitors and does not include theirs. 224 Fed. 458, 140 C. C. A. 138. As Whitney's first machine embodied an inverted U-shaped bar, a drum, and means for operating it rotatably supported on brackets upon the side members of his bar, a metal rod fastened to the lower ends of the bar on which rod the crosspieces or putlogs might rest without fastenings, and as it was thus constructed so as to fit it for use broadside to the building, its manufacture and sale for use in Henderson's combinations was held to constitute contributory infringement and was enjoined. Does Whitney's manufacture and sale of the Little Wonder constitute a like infringement of the patent to Henderson and entitle the plaintiff to a like injunction?

1. It was indispensable to proof of such infringement that there should be substantial evidence that Whitney made and sold hoisting machines of the type of the Little Wonder with the intent or for the purpose of aiding others in the unlawful making, selling, or using of the patented invention of Henderson. There is no evidence in this case that Whitney ever made or sold a hoisting machine of the type of the Little Wonder which was fitted for or intended by him for use with an unfastened putlog. All the witnesses who disclosed knowledge of the method of construction of the Little Wonders that Whitney had put out testified that the putlogs in them which they observed had two holes in each of their ends at right angles to the length of the putlogs through which the vertical side bars of the rectangular frame of the Little Wonder passed, so that beneath these putlogs the lower bars of the frames of the Little Wonder, through holes in which the side bars extended, could be fastened in their places by nuts beneath them on the lower ends of the side bars. It is true that the witnesses testified that the holes in the putlogs were large enough to permit them to be held in yielding connection with the side bars. But the material, the controlling fact here, is not that they were fastened in their places on the side bars loosely, but that by means of the crossbars of the frames beneath them through which the side bars

extended, and by means of the nuts on the side bars beneath the crossbars under the putlogs, the putlogs were securely fastened in their places so that the machines could not be knocked down without removing, or set up without fastening together putlogs, crossbars, and side bars in the manner which has been described. The fact that the ends of the putlogs were perforated for the side bars with two holes at right angles to the length of the putlogs shows that they were made and fitted for use in a hoisting machine suspended edgewise and not broadside to the building, and that the putlogs were made and fitted to be securely fastened, when in use, to the side bars of the frames, and not to be placed on the lower bars or parts of the frames without any fastening. And as, even in the case of a hoisting machine consisting of a U-shaped frame and a drum and means for its operation rotatably supported upon the vertical sides thereof, the freedom of the putlog, when in use, from any fastening, and the intended use of the machine broadside to the wall, were deemed essential to infringement, the evidence in this case fails to convince that Whitney ever had any intent or purpose to make or sell the Little Wonders to aid any one in perpetrating such infringement. The testimony of one or two witnesses that the bottom bars of the Little Wonders were capable of supporting putlogs that were not fastened thereto fails to shake this conclusion, in the face of the fact that all the evidence is that all the lower bars and all the putlogs sufficiently observed by the witnesses to enable them to state whether or not they were fitted to be fastened or were fastened, shows that the putlogs were perforated for this purpose, and that those in use were securely fastened by means of the holes in them, the bottom bars of the frame, and the nuts beneath them to the side bars of the frames.

[2] The question in contributory infringement is whether or not the defendant made or sold his machine or improvement with the intent or purpose of aiding another in the unlawful making, selling, or using of a third person's patented invention. The burden is on the plaintiff to establish the affirmative of this issue. The facts that the plaintiff's machine or device is capable of use in such a way as to aid in the infringement of the patented invention, that it has been used in that way, that the defendant knew it had been so used and still continued to manufacture and sell it, and that he fitted it for such use, are competent evidence of such an intention or purpose. But the mere fact that it is capable of such a use, when it is at the same time capable and fitted for a rightful and innocent use, is not sufficient to establish such an intention or purpose where, as in this case, the evidence is that the machine and its parts were expressly fitted for use in a rightful way without aiding in any such infringement, and there is no evidence that the defendant ever knew of the use of the machine, or that it ever was sold or used in such a way as to aid others in infringing the patented invention.

2. There are, however, other reasons why Whitney's manufacture and sale of the Little Wonders failed to constitute an infringement of the patented combinations of Henderson. Henderson's patent is not for a new machine or device. It is for a new combination of old me-

chanical elements. The first claim is for a combination of (1) crossbeams and floor pieces of a scaffold, with (2) a hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotably supported by the side members of such bar. The third claim is for a combination of (1) a plurality of U-shaped bars arranged in pairs, (2) a crossbeam laid in and extending between each pair of U-shaped bars, (3) a floor laid upon said crossbars with (4) a drum rotably supported between the upwardly extending side members of each of the U-shaped bars, and (5) means for controlling the rotation of the drum.

[3] The absence of a single material mechanical element of a patented combination from the machine or combination that is alleged to infringe it is fatal to the claim of infringement. Two of the essential elements of the combinations of the first and third claims of Henderson's patent, the U-shaped bar and the drum rotatably supported between the side members of the frame, are absent from the Little Wonder, although they were both present in Whitney's first machine. In opposition to this view of this case, counsel argue that the rectangular frame of the Little Wonder built up out of two side bars and two end bars fastened together is the mechanical equivalent of the U-shaped bar of Henderson, and that the clutch mechanism which has been described is the mechanical equivalent of the drum and the means of operating it rotatably supported on the side members of the frame of Henderson. But the breadth of the signification of the term "mechanical equivalent" is proportioned in each case to the extent and character of the advance or invention evidenced by the patent under consideration. One who invents and secures a patent for a machine or combination which first performs a useful function is thereby protected against all machines and combinations which perform the same function by equivalent mechanical devices, but one who merely makes and secures a patent for a slight improvement on an old device or combination which performs the same function before as after the improvement is protected against those only who use the very device or improvement he describes, or mere colorable evasions thereof. In other words, the term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous signification, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight improvement. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 710, 45 C. C. A. 544, 561; Yancey v. Enright, 230 Fed. 641, 644, 145 C. C. A. 51; Mallon v. Wm. C. Gregg & Co., 137 Fed. 68, 78, 69 C. C. A. 48, 58; James Heekin Co. v. Baker, 138 Fed. 63, 65–66, 70 C. C. A. 559, 561–562; International Mfg. Co. v. H. F. Brammer Mfg. Co., 138 Fed. 396, 398, 399, 71 C. C. A. 633, 635–636; Simmons Mfg. Co. v. Southern Spring Bed Co., 140 Fed. 606, 607, 72 C. C. A. 174, 175; Columbia Wire Co. v. Kokomo Steel & Wire Co., 143 Fed. 116, 121, 74 C. C. A. 310, 315; Dunlap v. Willbrandt Surgical Mfg. Co., 151 Fed. 223, 227, 80 C. C. A. 575, 579; Maunula v. Sunell (C. C.) 155 Fed. 535, 541; Union Match Co. v. Diamond Match Co., 162 Fed. 148, 155, 89 C. C. A. 172, 179. The patent to Henderson falls far

within the second class. His was not a pioneer invention. His improvement was too narrow and limited to entitle it to protection by such a breadth of signification of the term "mechanical equivalent" as would make the rectangular frame built up out of four separate bars and the complicated clutch mechanism of the Little Wonder the mechanical equivalent of Henderson's U-shaped bar, the drum and the means of operating it rotatably supported on the side members of his bar. The application of a meaning of this term much more restricted would render the patent to Henderson void, for his hoisting machine with the U-shaped bar and the drum rotatably supported on its side bars as described in Murray's patent is much nearer to the mechanical equivalent of Murray's device than the Little Wonder with its rectangular frame built out of four separate bars and its complicated clutch mechanism is to the mechanical equivalent of Henderson's hoisting machine.

[4] 3. Again, the statute requires the inventor to "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." Revised Stat. § 4888; 8 U. S. Comp. Stat. 1916, § 9432, p. 10214. When under this statute the inventor has done this, he has thereby disclaimed and dedicated to the public all other improvements and combinations apparent from his specification and claims that are not evasions of the combination or device he claims as his own, and has estopped himself as against those who subsequently use them from claiming or securing any monopoly thereof.

"The purpose of a claim in a patent is to notify the public of the extent of the monopoly secured to the inventor, and, while it is notice of his exclusive privileges, it is no less a notice, and a legal notice, upon which every one has a right to rely, that he disclaims, and dedicates to the public, any combination or improvement, * * * not a mere evasion of his own, which he has not there pointed out and distinctly claimed as his discovery or invention. Every one has the right to use every machine, combination, device, and improvement not claimed by the patentee, without molestation from him." Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 451, 23 C. C. A. 223, 242; Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; Miller v. Brass Co., 104 U. S. 350, 352, 26 L. Ed. 783; McClain v. Ortmayer, 141 U. S. 419, 424, 12 Sup. Ct. 76, 35 L. Ed. 800; Dobson v. Cubley, 149 U. S. 117, 121, 13 Sup. Ct. 796, 37 L. Ed. 671; Stirrat v. Mfg. Co., 61 Fed. 980, 984, 10 C. C. A. 216, 220; McBride v. Kingman, 97 Fed. 217, 223, 38 C. C. A. 123, 129; Expanded Metal Co. v. Board of Education, 111 Fed. 395, 397, 398, 49 C. C. A. 406, 408; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 347, 72 C. C. A. 304, 311.

In each of Claims 1 and 3 of his patent, Henderson specifically claimed a combination with other mechanical elements of the crossbeams or putlogs of a scaffold and one or more hoisting devices, and expressly specified that each hoisting device he claimed consisted of a U-shaped metal bar and a hoisting drum rotatably supported by the side members of that bar. He might have described and claimed a hoisting device consisting of the U-shaped bar and the drum rotatably supported on the side members thereof and a rectangular frame built up out of four metal rods and the complicated clutch mechanism made by Whitney. He did not do so. He confined his claim to a hoisting device consisting of his U-shaped frame bearing a drum ro-

tatably supported on the side members thereof and thereby disclaimed, dedicated to the public, and estopped himself from successfully asserting a claim of a monopoly of the manufacture, sale, or use in his combinations of a hoisting machine which has neither U-shaped bar nor drum supported by the side members thereof, but consists of the rectangular frame and clutch mechanism of the Little Wonder.

For the reasons which have now been sufficiently stated, the evidence in this case does not, in the opinion of the court, sustain the conclusion that the manufacture and sale of the Little Wonder, whether used edgewise or broadside to the wall of the building, constitutes contributory infringement of either of the combinations described in Claims 1 and 3 of the patent to Henderson. The interlocutory decree granting the injunction against the manufacture and sale of that machine by Mr. Whitney must therefore be reversed, and it is so ordered.

GENERAL ELECTRIC CO. v. ELECTRIC CONTROLLER & MFG. CO.*

(Circuit Court of Appeals, Sixth Circuit. May 18, 1917.)

No. 2884.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONTROLLER FOR ELECTRIC MOTORS.
   The Carichoff patent, No. 763,658, for a controller for electric motors, claim 7, was not anticipated, and discloses invention, covering a meritorious improvement; also *held* infringed.

2. PATENTS ⟸230—INFRINGEMENT—"EQUIVALENCY."
   "Equivalency" in the patent law is not necessarily mutual, and whether the device of a defendant is the equivalent of that of complainant's patent depends upon the scope of the claim in suit.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 367.

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

3. PATENTS ⟸112(4)—INFRINGEMENT—PRESUMPTION FROM ISSUE OF LATER PATENT.
   The issue of a later patent raises no presumption of noninfringement of an earlier, and usually does not even tend to establish that conclusion.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 165.]

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

Suit in equity by the General Electric Company against the Electric Controller & Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

W. K. Richardson, of Boston, Mass., for appellant.

Karl Fenning, of Cleveland, Ohio, for appellee.

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

DENISON, Circuit Judge. The appellant filed in the court below the usual infringement suit, based upon claims 5, 6, 7, 28, 29, 30, 31,

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

* For opinion on application to modify mandate, see 243 Fed. 1007, 156 C. C. A. —.

32, 45, and 47 of patent No. 763,658, issued June 28, 1904, to the Sprague Electric Company as assignee of the inventor, Carrichoff. Upon the argument below, it relied chiefly, if not wholly, upon 5, 6, and 7. The bill was dismissed by a decree adjudging all the 10 claims void for want of invention. Upon this appeal, complainant assigns error in the conclusion as to each of these claims; but, by its brief in this court, it rests its appeal solely upon claims 6 and 7. It does this, coupled with an express disclaimer of acquiescence in the decree as to the remaining claims affected, but for the purpose, as it says, of simplifying the issue.

[1] The patent relates to a controller for an electric motor. Claims 5, 6, and 7 are given in the margin.[1]

We do not attempt any complete statement of construction or operation. The general aspect of these matters is familiar to counsel and to the parties, and to all who might be interested in patents involving the same subject-matter; to others they are not important. We do not undertake to achieve perfect accuracy either in the use of the technical terminology or with reference to operative conditions; we propose only so much of statement as to make our conclusions intelligible. The rotation of the armature of an electric motor, resulting from the current conducted thereto over the line from the source of power, creates a counter electromotive force which (so to speak) neutralizes or dams back a large part of the original electromotive force. The net resultant becomes the effective operating power, and the motor is so built as to be adapted and fitted for only this net resultant. For example, it may be supposed that the line will furnish 100 power units, and that the counter electromotive force, at the preferred motor speed, will be 80 units. The motor will then be so constructed that it will best operate under a net load of 20 units, but will be able to carry 40 without injury, while it will be destroyed by the total load of 100, and, indeed, will be liable to injury by much more than 40. Accordingly, the current is taken from the line to the motor through a series of

[1] 5. The combination with a motor, of an electrically operated controller for the motor, a master switch, a circuit from the master switch, a series of consecutively operating magnets for the controller, a throttle operated by the current through the motor, contacts in the master switch circuit which are controlled by the throttle, and a contact in the circuit through each magnet, except the circuit through the magnet first operating, which is closed by the magnet which precedes in operation, substantially as described.

6. The combination with a motor, of an electrically operated rheostat for the motor, a master switch, a circuit from the master switch, a series of consecutively operating rheostat magnets, a throttle operated by the current through the motor, contacts in the master switch circuit which are controlled by the throttle, and a contact in the circuit through each magnet, except the circuit through the magnet first operating, which is closed by the magnet which precedes in operation, substantially as described.

7. The combination with a motor, of an electrically operated rheostat for the motor, a master switch, a circuit from the master switch, a series of consecutively operating rheostat magnets, a throttle operated by the current through the motor, contacts in the master switch circuit which are controlled by the throttle, a branch circuit from the master switch through each rheostat magnet, and a contact in the branch circuit through each magnet, except the circuit through the first magnet operating, which is closed by the magnet which precedes in operation, substantially as described.

resistances, which, in this supposed case, allow only 40 to pass. As the motor speeds up, and the counter electromotive force develops, the net current will be reduced to 8 units, and the device will be inefficient. To avoid this result, as soon as the net current falls to 20, a section of resistance should be cut out, and the amount of current admitted from the line increased to 60, and, in the same way, the amount should be successively stepped up to 80 and 100. The device by which the resistance is thus cut out step by step, and the current controlled, is called a rheostat, and it consists of a switch maintaining at one pole a constant contact with the line and at the other end selective contact with the resistances. In its simplest form, this is manually operated, as in the familiar instances of the controller of the electric street car or automobile. For many uses manual control is not practicable, and automatic electric control becomes necessary.

Before Carrichoff's improvement, this automatic control had been accomplished with more or less success by three classes or types of apparatus. In the first or time limit class, some timing device was arranged to operate the successive resistance cut-outs at predetermined and fixed time intervals. This is so far from Carrichoff's system that it, together with the manual control type, needs no further consideration.

In the second type, the current generated by the motor and representing the counter electromotive force, is led through a series of switches, the solenoid magnets of which are so wound that the first will be operated when this current reaches 40 units, and will then cut out a section of resistance; the second, when it reaches 60, and will then cut out another section, etc. It seems to be clearly established that this system, under many and perhaps under usual conditions, is efficient, but that under other conditions which are not uncommon, and which, with certain installations, are to be expected, is not satisfactory. It has direct bearing upon Carrichoff's improvement only in one respect hereafter to be mentioned.

The third type touched Carrichoff more closely. Indeed, this system was exemplified in the patent to Sprague, issued when he and Carrichoff were both in the employ of the Sprague Company, and Carrichoff, in his specifications, expressly declares his invention to be an improvement upon the plan of this Sprague patent. The Sprague plan, as far as it pertained to this particular subject, involved two features, which may be called his primary and his secondary features, and the claims of his patent (whether valid or not) seem to be partly generic, as resting solely on this primary feature, and partly specific, as resting upon this secondary feature, when employed as a means of carrying out his generic thought. The primary feature consisted in the use of an automatic throttle to control the action of the successive resistance cut-outs. This throttle consisted of a solenoid magnet switch, interposed in the main circuit. So long as the current exceeded (e. g.) 20, the magnet remained energized and its switch contacts were held up and open. When the current dropped below this point, the contacts dropped, an independent circuit from the master switch and leading through these throttle contacts was closed, and current was carried

to and operated a resistance controller device, whereby some resistance was cut out, the line current admitted to the motor increased above 20, and the throttle switch contacts were again opened. This operation would be automatically repeated as often as the current fell below the predetermined point and until the resistances were all cut out.

For his secondary feature or specific form of controller mechanism, Sprague provided a revolving drum carrying contacts so arranged that, as it revolved, it would successively cut out the resistance sections. This part of the operation—the actual throwing of the switches which controlled the resistance sections—was as completely mechanical as if the drum had been revolved by hand; but he gave electrically automatic revolution to the drum by operating it with a small independent motor, called a pilot motor, and this motor was actuated by current through the throttle contacts, when they closed as above described. With each such closing of the throttle, the pilot motor would be operated until the drum had revolved enough to cut out one resistance, and so increased the line current in the motor and at the throttle, and so opened the throttle and stopped the pilot motor. As with reference to the system last described, this pilot motor drum system gave fairly good satisfaction, and was and is considerably used, but has certain comparative disadvantages.

We come, now, to the Carrichoff improvement. He adopted and employed what we have called the generic or primary part of Sprague's invention, viz., the solenoid magnet throttle, as the means of automatically sending out an electric messenger whenever the motor current fell to the point which called for an increased current from the line, which messenger should operate one step in the resistance-shunting process. For Sprague's pilot motor drum, Carrichoff substituted a series of solenoid magnet resistance shunting switches (which, for convenience, we will hereafter refer to merely as magnets 1, 2, 3, etc.). The current which is caused by the closing of the throttle contact, energizes magnet 1, whereby its contacts are raised and closed, one section of resistance is cut out, and the line current is shunted through this closed switch around that resistance section. The lifting of the core of magnet 1 at the same time lifts a plate, closing contacts in a circuit from the master switch through the magnet winding to the ground, whereby this magnet continues to be energized and so to cut out this section of resistance, regardless of the subsequent opening or closing of the throttle. The same lifting action also closes contacts between magnets 1 and 2, whereby there is completed a circuit from the master switch through magnets 2 and 1 to the throttle and ground, so that the closing of the throttle contacts thereafter will close this circuit and energize magnet 2. The same thing then happens as with magnet 1; another section of resistance is cut out, and a maintaining circuit for 2 is closed. The same steps occur in succession with the other magnets. The result is that, when the current in the motor circuit falls below 20 (continuing to use our arbitrary illustration), the throttle closes, the first magnet is energized, its section of resistance is cut out, it is released from control by the throttle, the next magnet is rendered subject to that control ready for the next step in the process, and so on.

With this description, the recited claims will be intelligible. It is evident that claim 5 is intended to be somewhat the broadest of the three, in that it uses the word "controller" in the place of "rheostat," and yet it is difficult to see how the structure necessarily required by its language can differ materially from the structure contemplated by claim 6; also it is to be observed that claim 6 calls for a contact "in the circuit through each magnet," while claim 7 specifies that there is a branch circuit from the master switch through the rheostat magnet, and calls for a "contact in this branch circuit." It is not readily apparent that there can be a circuit through each magnet, as called for by claim 6, which will not necessarily be the branch circuit called for by claim 7. The relative construction of the three claims in this respect has not been argued, and we do not see that it is material. If, in fact, the Patent Office has granted three claims which cannot be distinguished from each other, the defendant is not harmed by this duplication; and the government is not asking cancellation of the patent. We may fairly take the seventh claim as the one which should be considered, and its consideration may well be approached from the standpoint stated by this court in Dayton Co. v. Westinghouse Co., 118 Fed. 562, 566, 55 C. C. A. 390, 394, as follows:

"But it is still contended that, conceding the fact to be that no one had made these particular inventions, yet that, so much was known to men learned in the science or skilled in the art of the subject, it did not involve invention to devise these ways and means for accomplishing the desired result. As to this it must be said that the subject is one of the most abstruse and subtle of all the practical sciences, and its pursuit involves the exercise of the keenest intelligence and most patient research that gifted men can bestow upon it. We ought, therefore to be cautious, when a distinct and practical improvement is made in so useful an art, in denying to the author the reward which the law gives to meritorious inventions."

We find no sufficient reason in the record for denying to this claim the merit of invention. Its distinctive thought lies in the idea that a series of rheostat magnet switches for resistance shunting should be so related to a throttle that the first is controlled by the throttle, and that the operation of the first, under the influence of the throttle, brings the second of the series within the throttle control and frees the first therefrom; the operation of the second brings the third to a condition ready to be operated by the throttle and frees the second, etc. This idea was wholly novel in this art and has been extensively put into practical use. It is unquestionably an efficient and useful combination, and the patent monopoly granted therefor must be sustained.

We say this idea was wholly novel. Of course, this depends upon the breadth which the idea is thought to have, and we do not mean to question the existence of suggestions and analogies which in the light of the patent disclosure can be developed into a close resemblance. Indeed, the very wealth of material which defendant puts forward as "perfect anticipations" makes it difficult to choose those things which merit discussion.

[2] The opinion below indicates that the Sprague patent was defendant's chief reliance. We have already described this patent. It seems that complainant, owning also the Sprague patent, had brought a suit thereon against defendant, involving the same infringing device

here involved, and that, in that case, Mr. Bentley, the expert for complainant there and here, had testified that defendant's device, which responds to the description we have given of Carrichoff's structure, was the equivalent of Sprague. Whereupon defendant's counsel say that as soon as, in this suit, defendant's device is claimed to be the equivalent of Carrichoff, it follows that Carrichoff must be invalid, because he then, also, must be the equivalent of Sprague. This argument overlooks the fact that equivalency in the patent law is not necessarily mutual. Whether the device of defendant is the equivalent of that to which a plaintiff patentee has been granted a monopoly depends upon the scope of the claim in suit. The instant case well illustrates the fallacy which we noted in Curry v. Union Co., 230 Fed. 422, 429, 144 C. C. A. 629. Mr. Bentley's testimony in the Sprague Case, taken altogether, makes it clear that he was finding equivalency in defendant's device only from the point of view of the broad claims of the Sprague patent, which were not concerned with the details which distinguished defendant and Carrichoff alike from Sprague. It must be obvious, when our attention is drawn, that the defendant's device may be the full and complete equivalent of Sprague as to the thought on feature which was the subject of his generic invention above described, and yet that either Carrichoff or defendant, whichever was earlier, may involve additional and subordinate features of patentable merit, so that Carrichoff, if earlier, would dominate defendant. More concretely, when we consider merely the subject of a throttle which, by its successive opening and closing, cuts out successive sections of resistance, it may well be said that a pilot drum and a series of magnetic switches are equivalents; and yet the planning and arrangement of the magnets in their relation to the throttle and the way in which they shall be operated by it may be meritorious invention and may support a valid patent.

[3] In this same connection, it is to be observed that the defendant has a patent upon its form of device and insists upon the benefit of some presumptions from this patent. We do not need to repeat that the issue of the later patent raises no presumption of noninfringement, and usually does not even tend to establish that conclusion. The contrary claim confuses the presumption of patentable difference with the presumption of noninfringement.[2] Herman v. Youngstown (C. C. A. 6) 191 Fed. 579, 584, 112 C. C. A. 185; Curry v. Union Co., supra.

The Sprague patent is further relied upon as an anticipation because, in his specification, he says:

"Single or multiple magnets may be provided which operate rheostats or rheostat sections, either by single or stepped movements, to establish the particular connections."

Here is a suggestion that Sprague's system of throttle control could be used in connection with the type of apparatus which Carrichoff later

[2] Our attention is called to the language of this court in National Co. v. Ralston Co., 172 Fed. 393, 398, 97 C. C. A. 91, in which there is a casual reference to this presumption of noninfringement. There was in that case no occasion to observe the difference between the two presumptions, and the reference thereto cannot be taken as a deliberate judgment upon the point.

devised. This situation is united with the alleged testimony of Mr. Bentley that the chief merit of Carrichoff's invention lay in the conception that the thing could be done to make the argument that he invented nothing, since Sprague had disclosed the conception. This, again, overlooks the true substance of Mr. Bentley's testimony. It is not to the effect that Carrichoff's patent must rest on the conception that this ultimate result could be accomplished, but rather that its real merit lay in the conception that the throttle and successive magnets could be so arranged that they would operate in the manner pointed out in claim 7, and that, after this idea occurred to him, only ordinary skill was necessary to provide the apparatus which would carry it into effect. There is nothing to show that Sprague had this more specific idea. His suggestion is vague. It probably could be carried out more or less efficiently in more than one way besides that which Carrichoff devised.

Defendants also point out several old patents relating to a system of regulating the current furnished by a generator to a lamp circuit, and it is said that in this there is a throttle controlling a series of magnet resistance switches substantially as in Carrichoff. Likewise, the counter electromotive force system is said to point the way to—even if not to embody—the same combination. We think these things are too far away. Each of them shows a series of electro-magnetic switches adapted to cut out separate sections of resistance; but the latter has no throttle at all, and has a different principle of operation, while the former, though it has a regulating magnet, analogous in some respects to the throttle of Sprague and Carrichoff, does not disclose the idea that each magnet of the series can be in succession free from, subject to, and free from the throttle influence. The patents to Shepard and the second Sprague patent are said to show that it was old to use the throttle of Carrichoff for the operation of magnet switches for various motor grouping, instead of for throwing out resistance sections, and it is urged that there was no invention in the change, especially in view of the use of magnets for the latter purpose in the counter electromotive force system. It is enough to say of these patents that only by considerable elasticity of definition can their control devices in the main circuit be considered to be the throttle of Sprague and Carrichoff, and that they do not disclose Carrichoff's characteristic idea of having a series of magnets, each, except the first, successively (1) free from, (2) under, and (3) free from throttle control. If they rightly operate to limit somewhat the breadth of construction to be given to claim 7, that limitation is immaterial in this case.

Without further discussion of the many other earlier patents, we conclude that none of them are any closer than those which have been mentioned, and that they serve neither to anticipate Carrichoff nor to limit claim 7 in any essential degree. If it be thought that the maintenance circuit, whereby each magnet, after operation, remains free from the throttle control, is essential to an operative combination, but is not implied by the terms of claim 7, and cannot be read in, the only practical effect is that one of the other claims sued on, instead of claim 7, would be the proper basis for the decree.

In our view of the scope of this claim, infringement must be conceded. Defendant urges that the claim is confined to a device where the first magnet of the series does not have its circuit subjected to the throttle by the operation of a preceding magnet, and that the defendant does not infringe because, in its device, the first one of the rheostat magnets is put under the influence of the throttle by the operation of a preceding magnet. This reasoning is not satisfactory. The language of the claim refers only to the series of rheostat magnets, and it is quite obvious that the first one of this series cannot be affected by the earlier operation of any preceding magnet of the same series. In the defendant's device, the preceding magnet is foreign to this series; but when the critical time comes, when the combination of the Carrichoff patent is to be called upon to operate, it is found, in defendant's device, as in Carrichoff's, that the first magnet of this series has its circuit closed ready to be affected by the closing of the throttle, while the remaining magnets have not, but each, except the first, is put under the influence of the throttle only by the operation of the preceding one.

Neither do we think that infringement is avoided because the throttle takes only a measured portion of the motor current, instead of the whole, nor because the magnets have a slight, but inoperative, current of electricity passing through them before the throttle operates to pass current enough to make them work.

Much is made of a difference between the form shown in the patent and the defendant's form as to the relative slow and quick action of the throttle and the magnets. This feature is not found in the claim, unless so far as necessarily implied to make the claim operative, and to that degree, and in the sense involved in that implication, defendant's structure does not eliminate this feature.

We conclude that complainant was entitled to the usual decree on claim 7. Under the circumstances of this case, we see no object in determining the validity or infringement of any other claim involved. We have suggested that claims 5 and 6 may be substantially the same as claim 7; of the remaining seven claims declared upon, some seem to be broader and some narrower than claim 7, and yet this superficial appearance may be incorrect. If counsel think that the validity and infringement of other claims should be decided by us upon this record, we will consider suggestions to that effect filed before the mandate goes down; otherwise, and in view of the fact that complainant, in this court, has planted itself substantially upon claim 7, the decree to be entered below for injunction and accounting, will be based upon this claim alone, and, as to the other nine claims, will declare that no adjudication is necessary in order to dispose of the controversy. If, however, defendant desires to insist that any claim is void (for any other reason than because duplicative), so as to get the benefit of the rule that costs will not be awarded under a patent which is void until disclaimer filed (Cummer v. Atlas [C. C. A. 6] 193 Fed. 993, 998, 113 C. C. A. 611), the remanding will be without prejudice to the right of the court below to consider that matter.

Appellant will recover the costs of this appeal.

MELBER v. SCHOOL DIST. OF PITTSBURGH et al.

(Circuit Court of Appeals, Third Circuit. June 2, 1917.)

No. 2217.

1. PATENTS ⊜82—SUIT FOR INFRINGEMENT—DATE OF INVENTION—ESTOPPEL.
The acquiescence by the applicant for a patent in the citation against him of references by the examiner precludes him in a subsequent suit from carrying back the date of his invention to antedate such references.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 105–107.]

2. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—CONCRETE AND STEEL CONSTRUCTION.
The Melber patent, No. 660,518, for concrete and steel construction, as limited to meet citations by the Patent Office must be confined to a narrow range, and, as so limited, *held* not infringed.

3. PATENTS ⊜328—VALIDITY—CONCRETE AND STEEL CONSTRUCTION.
The Melber patent, No. 672,175, for concrete and steel construction, claims 8, 9, 10, and 11, relating to wall construction, in view of the prior art, *held* invalid, as too broad.

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

Suit in equity by Frederick Melber against the School District of Pittsburgh and others. Decree for defendants, and complainant appeals. Affirmed.

Frank H. Drury, of Chicago, Ill., and Edward A. Lawrence, of Pittsburgh, Pa., for appellant.

Kay, Totten & Powell, of Pittsburgh, Pa. (Robert D. Totten, J Rodgers McCreery, and John D. Brown, all of Pittsburgh, Pa., of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Letters patent Nos. 660,518 and 672,175 were issued to the plaintiff, Frederick Melber, on October 23, 1900, and April 16, 1901, respectively. The original application covered both patents and was filed August 14, 1899, but the Office called for a division, and this requirement was complied with on May 5, 1900.

[1] A few preliminary words may first be said concerning the date of the invention. In order to avoid certain references, an attempt was made to carry Melber's date back to September 14, 1897; but we think the attempt has failed. Without discussing the plaintiff's evidence on this subject, it is sufficient to say that these references were cited against the applicant by the examiner, and that Melber acquiesced in his decision, without any effort to antedate the invention. In our opinion this was a virtual abandonment of the September date, and prevents the patentee from relying on it now. Maier v. Bloom (C. C.) 95 Fed. 159; rule 75, Patent Office.

[2] Both patents are for improvements in cement and steel construction. The specification of No. 660,518, aided by Figs. 1 and 2, will explain its scope:

"My invention, generally speaking, consists in a new and improved construction, in cement, concrete, and like materials reinforced by the introduction of metal bars, whereby the strains consequent of heavy loads are taken up and injury to the construction avoided. I am aware that it is not new to imbed metal in cement or concrete construction to strengthen the same; but such metal has heretofore been imbedded in the cement without any regard to the lines of application of the resultants of the respective strains, thus confusing the calculation of the existing strains and rendering the accurate application of the formula of engineering impossible. These crude methods of introducing reinforcing metal also result in the requirement of a larger percentage of metal and cement than by the use of my invention. Thus the expense of manufacture is greatly increased; also many strains are thus undiscovered or unmeasured and accordingly unprovided for.

"By the use of my invention the minimum amount of cement and metal is required to produce the maximum amount of strength.

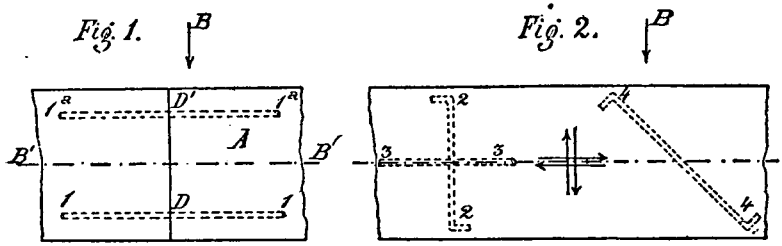
"The following is a detailed description of my invention, reference being had to the accompanying drawings, which make part of this specification:

"Figs. 1 and 2 illustrate my method of introducing the reinforcing metal. Suppose a construction—such as a girder, slab, or post *A*, shown in broken elevation—to be supporting a load *B*, applied from above, as indicated by the arrow in the drawings. This, of course, would cause compression strains to appear above the horizontal neutral axis *B' B'* and tensile strains below the same. I then calculate the tensile strains and the point of application of the resultant *D*, and through that point I imbed in constructing *A* a metal rod or bar of sufficient strength to take up and relieve the cement from the calculated resultant of the tension strains. This bar I have indicated by dotted lines in Fig. 1 and marked *1*. I may also calculate the resultant of the compression strains *D'* and imbed through the same rod *1'* of sufficient strength to take up said strains; but, as is well known, material such as cement or concrete is able to provide for ordinary compression strains successfully without the aid of reinforcing metal. If I should imbed bar *1* below point *D*, the point of application of the resultant of compression strains would correspondingly be raised toward the top of the construction *A*, thus causing an enlargement of the outer fiber strains, the limit of which is, of course, the determined factor of safety, and correspondingly if bar *D* were raised the point of the application of compression strains will be lowered toward the center of *A*. By a well-known rule of engineering, as the distance between the two points *D* and *D'* decreased, the force applied would correspondingly increase to maintain the 'couple,' so larger metal rods would be required to take up the increased strains. It will thus be seen that the only proper place for the rod *1* to be imbedded is through the calculated point of application of the resultant of the tension strains—namely, *D*. The resultant of tension strains, when applied at point *D*, is of course equal to the sum of the individual tension strains resulting from load *B*; but if the resultant were applied at any other point than point *D* an entirely new set of fiber strains would be produced, thus producing fiber strains at the point of the former neutral axis *B' B'*, and hence the formula used for calculating the strains could not be applied, and the strength of the girder would be an unknown quantity. It will be readily seen from the above that the sole point at which the metal must be placed is exactly through the points of application of the resultant of the fiber strains. In such case the exact strength of metal can be determined to take up the known resultant of the tension strains.

"To resist the calculated horizontal shearing strains, I introduce into the construction *A* the vertical metal rod *2*, Fig. 2, with sufficient cross-section to resist the calculated shearing strains. The vertical shearing strains I also take up by introducing a horizontal metal rod *3* of sufficient strength to take up the calculated vertical shearing strains. I also calculate the resultants of the known vertical and horizontal shearing strains, and at right angles to said resultant I imbed a metal bar *4 4* of sufficient strength to take up the known resultant strains. As these shearing strains are computable exactly, I imbed the rods at the exact point where the strains are exerted, and thus no excess or insufficiency of reinforcement is incurred, as must necessarily be

the case where the metal is introduced without careful calculation as to the exact position it is to be placed.

"It will readily be seen that where I have imbedded my metal rods in the material I have the equivalent of a vertical girder, *1* being the lower or tension chord, *1a*, or, if no rod be there imbedded, the cement representing the compression chord, and the horizontal component of rod *4* would transmit the horizontal shear strains as compression to the top and as tension to the bottom of the construction. By this method I am enabled to design the girder, slab, post, or other construction so as to avoid excess of cement or concrete by calculating the place of application and strength of strains and placing the material properly reinforced just where the load and strains consequent thereto demand."



The claims now in controversy are as follows:

"1. In cement or concrete construction, metal reinforcing bars, unattached at their ends to other metal reinforcing bars, imbedded therein transversely to the calculated shearing strains.

"2. In cement or concrete construction, metal reinforcing bars, unattached at their ends to other metal reinforcing bars, imbedded therein transversely to the resultant of the calculated shearing strains.

"3. In cement or concrete construction, metal reinforcing bars, unattached at their ends to other metal reinforcing bars, imbedded therein transversely to the calculated shearing strains, and other metal reinforcing bars imbedded in said construction to resist the tension strains.

"4. In cement or concrete construction, metal reinforcing bars, unattached at their ends to other metal reinforcing bars, imbedded therein transversely to the resultant of the calculated shearing strains, and other metal reinforcing bars imbedded in said construction to resist the tension strains."

"7. In cement or concrete construction, metal reinforcing bars, imbedded therein to resist the calculated shearing strains, and other metal reinforcing bars, imbedded in said construction to resist the calculated tension strains, all of said bars being mutually unconnected and two or more of said bars, resisting like strains, having their ends overlapping within the construction."

In their original form, the claims were too broad; e. g.:

"(1) In cement or concrete construction, metal imbedded therein in such a position as to resist the calculated strains."

"(3) In cement or concrete construction, metal bars imbedded therein transversely to the calculated shearing strains."

The examiner rejected these and other claims, citing the patents to Waite, No. 606,696, July, 1898; to De Man, Nos. 607,223 and 607,224, July 12, 1898; to Hennebique, Nos. 611,907 and 611,908, October 3, 1898; and to others. And, as the claims gradually became more limited, he continued to reject them, until they finally took on their present form. As the result of this process, the first four claims are now restricted, instead of fundamental, and must be confined to a narrow range. Claim 7 is even narrower than the first four; it not only requires all the bars to be mutually unconnected, but requires also

that any two or more that resist a like strain shall have their ends overlapping "within the construction." We see no need to pass upon the validity of these five claims, for, without taking time to discuss the evidence, we think it clear that the defendants have not trespassed on the particular domain to which alone these claims can assert an exclusive right. Melber concedes that he was not the first to discover strains in concrete, or to meet them by the use of metal; his criticism of the earlier construction is that the metal had been combined without regard to "lines of application of the resultants of the respective strains, thus confusing the calculations of the existing strains and rendering the accurate application of the formula of engineering impossible," the result being a wasteful use of metal and cement. He therefore puts much weight on his method of calculating the lines of strain and of locating them accurately, saying:

"It will be readily seen from the above that the sole point at which the metal must be placed is exactly through the points of application of the resultant of the fiber strains."

It is especially to this point that his patent is directed, and obviously his bars can be more readily placed if they are detached than if they are part of a fixed latticelike structure. In the defendants' construction these calculations have not been made, and the bars have not been laid on any such theory. On the contrary, the bars are laid near the surface of the concrete, being merely covered thereby for protection against fire. There are some other differences also that need not be dwelt upon; in our opinion the defendants do not infringe the specified claims of the first patent.

[3] The only claims of the second patent, No. 672,175, that are now insisted on, are Nos. 5, 8, 9, 10, and 11:

"5. In cement or concrete construction, two or more girders, metal rods imbedded in said girder along the lines of the tension strains, other metal rods, unattached at their ends, imbedded in said girders transversely to the shearing strains, and floor slabs connecting said girders."

"8. In cement or concrete construction, a wall of cement or concrete, brackets attached to said wall, and metal reinforcing rods imbedded in said construction.

"9. In cement or concrete construction, a wall of cement or concrete, brackets attached to said wall, metal reinforcing rods imbedded in said wall and said brackets, and means for anchoring said construction.

"10. In cement or concrete construction, a wall, brackets attached to said wall, flanges on said wall and said brackets, and means for anchoring said construction.

"11. In cement or concrete construction, a wall, brackets attached to said wall, flanges on said wall and said brackets, means for anchoring said structure, and metal reinforcing rods imbedded in said structure."

The new feature of claim 5 is the "floor slabs connecting said girders"; the other features belonging to the earlier patent. It is not easy to see the importance of the slabs, and so little attention has been paid to this claim in argument that we shall pass it without further comment. The other claims—8, 9, 10, and 11—relate to wall construction and cannot be sustained. In view of the prior art, they are too broad, and were properly declared invalid.

The decree is affirmed.

CARPER v. CROWN CORK & SEAL CO. OF BALTIMORE CITY.

(Circuit Court of Appeals, Fourth Circuit. June 1, 1917.)

No. 1493.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BOTTLING MACHINE.

The Carper patents, No. 1,012,984 and No. 1,120,596, each for a bottling machine, are valid and entitled to a fairly liberal construction; also *held* infringed as to various claims, but not infringed as to claim 1 of the second patent.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in equity by the Crown Cork & Seal Company of Baltimore City against Albert A. Carper. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 229 Fed. 748.

William F. Hall and Melville Church, both of Washington, D. C. (Edward N. Rich, of Baltimore, Md., on the brief), for appellant.

James Q. Rice, of New York City (A. E. Donaldson, of Baltimore, Md., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The Crown Cork & Seal Company, plaintiff below, being the owner by assignment of Carper patent No. 1,012,984, for bottling machines, dated December 26, 1911, and Carper patent No. 1,120,596, for bottling gaseous liquids, dated December 8, 1914, on or about May 25, 1915, filed its bill of complaint against the Carper Automatic Bottling Machine Company, of Baltimore, Md., and Albert A. Carper, for infringement of these patents, and made a motion for injunction pendente lite. The machine complained of as infringing the patents had been installed in the plant of one of plaintiff's customers, the Coca-Cola Bottling Company, in Baltimore.

This motion for injunction was heard by the court below on June 9, 1915, the witnesses being examined in open court. The motion was granted June 18, 1915. The case came on for final hearing October 25, 1915. The testimony which had been taken at the trial of the motion for preliminary injunction was stipulated into the record, and further examination of witnesses by defendants and by plaintiff in rebuttal was had. On December 29, 1915, the court below handed down a decision sustaining the patents in suit and holding the defendants to infringe. A decree was duly entered on January 10, 1916, from which the defendant Albert A. Carper appealed.

We have given much thought to this case, owing to the intricacy of some of the points involved. After fully considering the facts, as well as the law applicable thereto, we are satisfied that the court below was warranted in entering the decree that it did. The facts are fully and fairly stated by the court below, and, being in accord with the conclusions of law, we content ourselves by adopting the opinion of the lower

court as the opinion of this court—the same being reported in 229 Fed. 748.

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

SINGER v. AMERICAN DRUGGIST SYNDICATE.

(Circuit Court of Appeals, Second Circuit. May 25, 1917.)

No. 215.

PATENTS ⊜328—VALIDITY—INVENTION—CARTON AND DISPLAY DEVICE.

The Singer patent, No. 880,410, for a combined carton and display device, claim 1, *held* void for lack of invention.

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

Suit in equity by Joseph B. Singer against the American Druggist Syndicate. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 233 Fed. 266.

Robert B. Olsen, of New York City (Alfred C. Coxe, Jr., of New York City, of counsel), for appellant.

Goepel & Goepel, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an appeal from the decree of the District Court for the Eastern District of New York sustaining claim 1 of letters patent 880,410, for combined carton and display device, issued February 25, 1908, to Joseph B. Singer, assignor to Oscar H. Hersey, trustee.

We have heretofore sustained claims 2, 3, and 4 of this patent upon the opinion of Judge Mayer in Singer v. Lamont, Corliss & Co. (D. C.) 227 Fed. 462, and 227 Fed. 1022, 141 C. C. A. 654. The question of their validity was regarded as doubtful, but was resolved in favor of the patentee because of the commercial success of the device.

Claim 1 reads:

"1. The improved carton and display device comprising a body having folded ends and slots in the upper edge of said ends, a back display surface attached to said body, brackets on the said back display surface, and tongues on the said brackets engaging the said slots in the said ends."

The prior art is quite full of boxes made from folded carton blanks, some of which were also designed to display advertisements. The great advantage of Singer's invention was that his carton blank, though glazed and printed on one side only, could be folded into a box with a back and front display surface when the box was opened, viz. one on the inside of the cover and another on the outside of the front edge. When the box was closed, these surfaces were folded in so that they were not exposed to injury during transportation. This was his invention.

Claim 1 makes mention of the display surface on the back of the box, but says nothing about the front. The invention recognized in our prior decision was the production of two display surfaces by glazing and printing upon only one side of the carton blank. No doubt the mechanical features of the Singer box, as covered by claim 1, make it superior to any other box in the prior art, and the defendant uses it for this reason. Still we think no invention is indicated thereby. The process of folding a blank carton into a box has been a gradual one of improving here and there the mechanical details of the original conception. Nor does it involve invention to print an advertisement on the inside of the cover of such a box.

We think claim 1 is invalid for lack of invention, and therefore the decree is modified, and the court below directed to pronounce said claim invalid; costs of this court to the appellant.

E. G. LYONS & RAAS CO. v. DEUTSCHE DAMPSCHIFFFAHRTS-GESELSCHAFT KOSMOS et al.

(District Court, N. D. California, First Division. May 16, 1917.)

No. 15879.

ADMIRALTY ⊂=54—FOREIGN ATTACHMENT—APPEARANCE OF RESPONDENT.

The owner of a vessel seized under foreign attachment, who has not been served with process, is not required to give a stipulation for value as a condition precedent to entering appearance to defend the suit.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 443-447.]

In Admiralty. Suit by the E. G. Lyons & Raas Company against the Deutsche Dampschifffahrts-Geselschaft Kosmos, a corporation; and Olson & Mahony, a corporation. On motion by libelant for entry of default. Denied.

Andros & Hengstler and Golden W. Bell, all of San Francisco, Cal., for libelant.

Denman & Arnold and Wm. B. Acton, all of San Francisco, Cal., for respondent Deutsche Dampschifffahrts-Geselschaft Kosmos and others.

DOOLING, District Judge. The libel was filed August 25, 1915, and on the same day, upon order of the court, a citation and foreign attachment issued. The marshal's return on the process shows that he was unable to find the respondent in this district, and that consequently he—

"attached the steamship Serapis belonging to the respondent, at San Francisco, and took the said steamship into his custody without placing a keeper in charge thereof, on August 25, 1915."

The attachment with the return was filed in this court on August 30, 1915, after which nothing seems to have been done until April 20, 1917, when the following appearance was filed on behalf of respondent, the owner of the Serapis:

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

"Appearance of Kosmos Line.

"To the Clerk of the Above-Entitled Court, and to Libelant Above Named, and To Messrs. Andros Hengstler and A. Heynemann, Esq., Its Proctors:

"You, and each of you, will please take notice that Deutsche Dampschifffahrts-Geselschaft Kosmos, a corporation, one of the respondents named above, hereby appears in said action, through the undersigned, its proctors, and requests the clerk of said court to enter said appearance of record.

"Dated April 18, 1917. Denman and Arnold,

"Proctors for Deutsche Dampschifffahrts-Geselschaft Kosmos, a Corporation, also Known as Kosmos Line."

No stipulation was filed by respondent, nor does it ask that its vessel be released from the attachment. Libelant now moves that the default of respondent be entered, or that it be directed to file a stipulation for the amount claimed in the libel. The motion is resisted by respondent.

The theory upon which libelant makes this motion is not quite clear. No application for a default was made prior to the appearance above noted. It is quite true that the admiralty rule (Rule 4, 29 Sup. Ct. xxxix) provides that the attachment may be dissolved upon the defendant giving bond or stipulation to abide all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree. But if the respondent does not seek a dissolution of the attachment, it seems to me he may file his appearance and answer the libel as in other cases without filing such stipulation, letting libelant look to the attached vessel to satisfy any decree thereafter entered.

There does not seem to be anything in the rules which requires a respondent, who comes in to defend his goods taken by virtue of a foreign attachment, to secure the release of such goods by stipulation as a condition precedent to his right to defend them.

The motion will therefore be denied.

In re SAMET.

(District Court, D. Maryland. June 21, 1917.)

BANKRUPTCY ⊂⊃407(5)—DISCHARGE—RIGHT TO.

A bankrupt, who was indebted to a bank and desired to renew notes when they fell due, executed more than a year before adjudication a statement in writing as to his financial condition, which was false. The bank permitted him to renew obligations as they fell due, and at the time of adjudication the debt was less than at the time when the statement was executed. The bank, relying on the statement, did not apply to the debts due it the balance due the bankrupt on hand at the time the notes fell due, and by reason of its failure the bankrupt's debt was greater than it would have been, had such balance been applied. *Held*, that the bankrupt was not entitled to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761.]

In Bankruptcy. In the matter of the bankruptcy of August Samet, individually and trading as A. Samet & Co. On opposition to discharge. Discharge denied.

Edward Duffy, of Baltimore, Md., for objecting creditor.
Bernhard Cline, of Baltimore, Md., for bankrupt.

ROSE, District Judge. August Samet was adjudicated a bankrupt on the 14th day of March, 1916. He then was indebted to the Farmers' & Merchants' National Bank of Baltimore, which opposes the granting of his discharge on the ground that for the purpose of obtaining credit from it, on the 26th day of February, 1915, he made a statement in writing to it of his financial condition as of January 15, 1915, and thereafter obtained from it money on credit upon said statement, and that the statement was materially false.

There is no question that the statement was made, and none that it was false, and false to the knowledge of the bankrupt when he made it. Instead of having a stock of merchandise worth nearly $11,000, as the statement purported to show, he was well aware that he had less than $5,000. Instead of having good accounts receivable due from customers to the amount of over $9,800, he knew that he did not have half that amount, probably not a third of it.

The only question in the case is whether, within the meaning of the statute, he obtained money upon the faith of such statement. When he made it, he owed the bank $4,400. At the time he failed, that debt had been reduced to $3,600. It appears his indebtedness from first to last was represented by several promissory notes maturing at different dates. When one of these notes fell due, he offered for discount another note for the same or for slightly smaller sum, and gave his check for the amount of the old note. At the date of maturity of each of these notes he always had some money in bank. On several occasions he had, at the beginning of business on the day on which the note fell due, a balance large enough to have paid the note so falling due in full, and on one occasion he had such balance at the end of the day. The bank would have been able, on the day any one of the notes fell due, to have applied the balance in bank to the reduction or extinguishment of such a note. It did not do so because, while it regarded his condition as unsatisfactory, his statement led it to believe that such a drastic course of action was not required for the protection of its interests. In the aspect of the case most favorable to him, the effect of the bank's reliance upon this statement was that at the time he became a bankrupt he owed the bank upwards of $200 more than he would have owed it, had the bank earlier availed itself of the remedies within its power.

The question here presented was before me in the Case of Waite et al., 223 Fed. 853, on appeal Doyle v. First National Bank of Baltimore, 231 Fed. 649, 145 C. C. A. 535, and I there decided it adversely to the bankrupt. Doyle, one of the partners affected by that decision, took his case up on appeal. The Circuit Court of Appeals did not find it necessary to pass on the correctness of my ruling in the respect mentioned, it having reached the conclusion that Doyle had not knowingly participated in the making of the false statement there relied on. I have not had my attention directed to any subsequent cases in which this question has been raised. The point is undoubtedly a close one, as I fully recognized in the opinion in the Waite Case, but now, as then, it seems to me that the conclusion there announced was right.

It follows that the discharge must be denied.

FREY & SON, Inc., v. CUDAHY PACKING CO.

(District Court, D. Maryland. June 21, 1917.)

DAMAGES ⇐225—RECOVERY—AMOUNT.

In an action for damages for tortious injury, where plaintiff proved a loss of profits it would have made on resale of a commodity, had it been able to buy such commodity at the price other jobbers could obtain it from defendant, plaintiff can only recover for those damages suffered before the date of the filing of the suit, and is not entitled to recover those suffered between that time and verdict.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 567.]

At Law. Action by Frey & Son, Incorporated, against the Cudahy Packing Company, a corporation. On objection to the entry of judgment on so much of the verdict as ascertained the damages suffered by plaintiff subsequent to the date of the filing of suit. Judgment entered upon balance of verdict.

See, also (D. C.) 228 Fed. 209; (D. C.) 232 Fed. 640.

Daniel W. Baker, of Washington, D. C., and Horace T. Smith, of Baltimore, Md., for plaintiff.

Gilbert H. Montague, of New York City, and Washington Bowie, Jr., of Baltimore, Md., for defendant.

ROSE, District Judge. The defendant objects to the entering of the judgment upon so much of the verdict of the jury in this case as ascertained the damages suffered by plaintiff subsequent to the date of the filing of the suit. In the nature of things there is no reason why a jury should not be allowed to ascertain and award the damages suffered by plaintiff down to the time of trial, from wrongful acts of the same nature as those mentioned in the declaration. If such were the law, there would doubtless sometimes be difficulty in applying it; but, on the whole, much trouble and expense would be saved.

The general rule is to the contrary; perhaps because when it was first formulated the judges were interested in the fees paid to the chancery for the writs, and they did not care to furnish for the price of one the justice that from their point of view should be paid for by the suing out of two or more. However this may be, it has long been established that the plaintiff can recover only for such damages as were the consequences of what the defendant did before suit was brought, although it is immaterial whether the effect of what was done showed itself before or after the bringing of the suit, as, for example, where the thing complained of is a tortious injury to the person or property from some particular act, the plaintiff may recover for any damage which manifests itself up to the time of the verdict. On the other hand, where the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit. In Lawlor v. Loewe, 235 U. S. 536, 35 Sup. Ct. 170, 59 L. Ed. 341, the plaintiff was allowed to recover for the damage done to it by a secon-

dary boycott instigated by the defendant before the bringing of the suit, although some of the injury did not manifest itself until afterwards; but the authorities cited by the Supreme Court in support of its conclusion do not justify the assumption that it intended to modify the previously recognized principles of law.

In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date. The difference between cases in which the jury can give damages down to the date of the verdict and those in which it cannot may be illustrated thus: If the defendant had made some false and libelous statement against the plaintiff, which acquired general circulation, the damage from that false and libelous statement might well have continued long after the bringing of the suit, and long after defendant ceased to be in business at all. On the other hand, if the defendant in the case at bar had wound up its affairs the day after the suit was brought, no one would contend that plaintiff was entitled to recover damages caused by the refusal of defendant to sell its goods after that date, or to permit other persons so to do, because both the motive and the power to enforce such refusal or restraint ceased with the defendant's going out of business.

I wish the law were otherwise, but, as it is, I shall be compelled to set aside so much of the verdict as awards the plaintiff damages from the time of the institution of the suit to the verdict. Judgment in plaintiff's favor will be entered upon the balance of the verdict.

ST. JOSEPH GAS CO. v. BARKER, Atty. Gen., et al.

(District Court, W. D. Missouri, St. Joseph Division. July 28, 1916.)

1. PUBLIC SERVICE COMMISSIONS ⇐7—PUBLIC UTILITIES—CONTRACTS.
Notwithstanding contracts between parties engaged in producing, furnishing, or transporting public utilities, reasonable charges only will be allowed as against the public.

2. GAS ⇐14(1)—CHARGES—REASONABLE CHARGES.
In a proceeding to enjoin compliance with an order of the Public Service Commission of Missouri restraining complainant, which purchased natural gas from another company and distributed such gas to its patrons, from raising the rates of such gas, evidence *held* to show that the rate fixed as a reasonable rate at which complainant should obtain the natural gas was erroneous, and that the producing company was entitled to a rate equal, or nearly equal, to that fixed by the contract between it and complainant.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

3. GAS ⇐14(1)—RATES—PUBLIC SERVICE COMMISSION ORDERS—CONTRACTS.
The contract price per thousand cubic feet at which a producing gas company agreed to furnish natural gas to the second company, which distributed the same to its patrons, is prima facie evidence of the reasonable value of the gas.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

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4. GAS ⊂=14(1)—RATES—REASONABLENESS.
A rate of 60 cents per thousand cubic feet of gas, proposed to be charged by complainant gas company, which purchased gas from a producer of natural gas and distributed it to its patrons, *held* not unreasonably high; complainant being entitled to earn at least 7 per cent. on its investment used and useful in the business.
[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

5. GAS ⊂=14(1)—RATES—PUBLIC SERVICE COMMISSION—INJUNCTION.
Complainant purchased natural gas from a producing company under a contract whereby the producing company was to receive two-thirds of the rate charged. The producing company was in the hands of a receiver, and, though its receiver represented he would not demand the full two-thirds of the retail price to which he was entitled under the contract, the court appointing him had taken no action. The rate of 40 cents per thousand cubic feet of gas in force produced for complainant, the distributing company, as great an income as would the proposed rate of 60 cents in case the producing company demanded its full two-thirds. *Held* that, until the question of the abrogation or modification of the contract between complainant and the producing company should be presented to the court appointing the receiver, complainant was not entitled to have enjoined an order of the Missouri Public Service Commission prohibiting an increase of its rates, for such increase might only result in a detriment to its patrons, and not increase complainant's income.
[Ed. Note.—For other cases, see Gas, Cent. Dig. § 10.]

6. RECEIVERS ⊂=95—AUTHORITY—POWER OF RECEIVER.
A corporate receiver, unless authorized by the court appointing him, is without authority to make any binding agreement as to the modification or abrogation of the contract between the corporation of which he was receiver and a third person.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 173–175.]

In Equity. Bill by the St. Joseph Gas Company against John T. Barker, Attorney General for the State of Missouri, the Public Service Commission of the State of Missouri, William G. Busby and others, members, and others. On application for injunction. Application denied.

Culver & Phillip and William E. Stringfellow, all of St. Joseph, Mo., for plaintiff.

William G. Busby, of Carrollton, Mo., Alex. Z. Patterson and James D. Lindsay, both of Jefferson City, Mo., for the Attorney General and Public Service Commission of Missouri.

Charles L. Faust, of St. Joseph, Mo., for city of St. Joseph.

Before SANBORN, Circuit Judge, and CAMPBELL and BOOTH, District Judges.

PER CURIAM. The St. Joseph Gas & Manufacturing Company, the immediate predecessor of the plaintiff, was incorporated in 1885, and the St. Joseph Light & Fuel Company in 1890. Each company for a number of years owned and operated in the city of St. Joseph, Mo., a plant for the manufacture and distribution of artificial gas. In 1897 the physical assets of the Light & Fuel Company were sold under foreclosure, and its property was thereafter consolidated with that of the Gas & Manufacturing Company, and the name of the latter company

was changed to the St. Joseph Gas Company, the plaintiff in the present suit.

This company, a corporation of the state of Missouri, continued to own and operate its gas plant, and up to 1905 was delivering manufactured gas at the rate of $1 per thousand cubic feet. On August 13, 1905, the St. Joseph Gas Company entered into a contract, effective December 1, 1905, with the Kaw Gas Company, a corporation of the state of West Virginia (afterwards merged into the Kansas Natural Gas Company). This contract recited that the Kaw Gas Company was the owner of leases of natural gas producing lands, with gas producing wells developed, in the state of Kansas, and was desirous of marketing its natural gas product. Said contract recited further that the St. Joseph Gas Company was the owner of a system of pipes for the distribution of gas in the city of St. Joseph, Mo., and desirous of securing a supply of natural gas for said city. Said contract provided that the Kaw Gas Company should deliver natural gas to the St. Joseph Gas Company at a point at the city limits of St. Joseph, Mo., for a period of 20 years after December 1, 1905; and the St. Joseph Gas Company agreed to purchase, receive, and pay for the natural gas so delivered, as the gas should be demanded by its consumers, and to distribute the same through its system of pipes in the city of St. Joseph, the quantity of gas purchased to be ascertained by monthly readings of the meters in use by the consumers of such gas. The price was fixed for the consumer at the minimum rate of 30 cents per thousand cubic feet for five years, and at a minimum price of 40 cents per thousand cubic feet thereafter. Twenty cents per thousand cubic feet was to be paid by the St. Joseph Gas Company to the Kaw Gas Company during the period when the price to the consumers should be 30 cents for 1,000 cubic feet. The contract further provided that:

"The price of 20 cents per thousand cubic feet for natural gas to be paid by the St. Joseph Company is based on a general price of 30 cents net per thousand cubic feet to the St. Joseph Company's consumers; but should the St. Joseph Company at any time obtain a higher price for natural gas than 30 cents net per thousand cubic feet for any part or all of the gas purchased from the Kaw Company, then and in that event, the price to be paid the Kaw Company shall be, for all natural gas sold at the higher price, 20 cents per thousand cubic feet, plus two-thirds of the excess price obtained by the St. Joseph Company. In the event that any natural gas is sold at less than 30 cents per thousand cubic feet as hereinafter provided, to the St. Joseph Company's consumers, then the price to be paid the Kaw Company shall be 20 cents per thousand cubic feet less two-thirds of the reduction made by the St. Joseph Company from its regular price of 30 cents per 1,000 cubic feet. The Kaw Company shall receive two-thirds of the amounts collected from the consumers failing to take advantage of the discount allowed for prompt payment."

Pursuant to the terms of said contract, the St. Joseph Gas Company since about February, 1906, has been engaged in selling and distributing natural gas. The St. Joseph Gas Company did not dismantle or abandon its manufactured gas plant, but maintained and improved the same, for the purpose of being ready to supply any deficiency in the supply of natural gas, and at various times during the period after February, 1906, has delivered manufactured gas to its consumers when the supply

of natural gas for any reason has failed. During the years 1912 and 1913, especially, plaintiff was unable to procure an adequate supply of natural gas for its customers, and at various times during those years attempted to meet the deficiency by supplying manufactured gas.

In 1913 notice was given by the St. Joseph Gas Company to the public that, whenever it became necessary to manufacture gas in large quantities to supply the deficiency of natural gas, such manufactured gas would be charged for at the rate of $1 per thousand cubic feet net for the proportionate amount of manufactured gas each patron consumed. In February, 1914, a complaint was filed in the name of certain members of the city council, before the Public Service Commission of Missouri, against the St. Joseph Gas Company, in which it was alleged that the company had no authority to charge $1 per thousand cubic feet for manufactured gas at any price proposed, and prayed the Commission to restrain the charge of $1 per thousand cubic feet for manufactured gas; and by an amended complaint it was further alleged that the $1 rate was unreasonable. The St. Joseph Company in its answer alleged that the rate of $1 for manufactured gas had been the rate in force during the whole period of the Gas Company's life, and was a rate as low as would afford a reasonable return. It alleged further that the 40-cent rate which was then in force for natural gas was insufficient to afford any return upon its investment, and prayed the Commission to make such investigation as should be necessary in order to be advised as to what would be a reasonable rate for natural gas, which would afford the company a reasonable and fair return upon its investment, and to fix such rate. In July, 1914, the Commission issued its order directing the Gas Company to file certain reports, and directing an inspection of the company's books, and an inventory and an appraisal of its property by the accountants and engineers of the Commission.

The report of the engineers was filed May 28, 1915, and that of the accountants June 1, 1915. In the meantime, on account of its financial difficulties, the St. Joseph Gas Company on September 30, 1914, filed with the Commission a proposed new schedule of rates, effective November 1, 1914; the change to be effected by said new schedule being to raise the rate of natural gas from 40 cents to 60 cents per thousand cubic feet. The city of St. Joseph filed its objection to the 60-cent rate, and requested that it be suspended. October 19, 1914, the Commission issued an order suspending said rate to March 1, 1915, and thereafter by subsequent orders continued the suspension until September 1, 1915. The power of the Commission to make further suspension being then exhausted, the suspension was continued by agreement until November 29, 1915.

The three matters, namely, that of the $1 rate for manufactured gas, that of the valuation of the Gas Company's property, and that of the proposed 60-cent rate for natural gas, were, by consent of the parties, heard together as one case, and on November 27, 1915, the Commission handed down its opinion and order. The order, omitting the caption, is as follows:

"These causes being at issue upon complaint and answer filed with the application of the St. Joseph Gas Company for an increase of rates and

charges and the order of the Commission to ascertain and determine the fair present value of the property of the said St. Joseph Gas Company, due notice thereof having been given, and the three said causes having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed its report, containing its findings of facts and conclusions thereon, and having ascertained the fair present value of the said property as therein described, which said report is hereby referred to and made a part hereof: Now, upon the evidence in these cases and after due deliberation, it is—

"Ordered: (1) That the Commission, upon a full consideration of all the evidence in these cases, finds as a fact that the fair present value for determining reasonable and just rates of all the property of the St. Joseph Gas Company as described and set forth in the report of the Commission filed herein and made a part of this order, as of date March 1, 1915, and used and useful by the said company in the service of the public, considering said property and every part thereof as a going concern, and including engineering, supervision, and interest during construction, organization and general expenses, legal expenses, contingent expenses, insurance, general contractor's profit, working capital, and all other elements of value, tangible and intangible, as used in the public service in the manufacture, sale, and distribution of artificial gas, is the sum of $1,673,000, as used in the public service in the sale and distribution of natural gas, the sum of $1,324,000, and as used in the public service in the sale and distribution of natural gas with water gas as a reserve or stand-by service, the sum of $1,620,000, which said sums, respectively, are hereby fixed and determined by the Commission to be the fair present value of said property as of said date, for the purpose of determining reasonable and just rates.

"Ordered: (2) That the complaint of the city council and mayor of the city of St. Joseph be dismissed without prejudice.

"Ordered: (3) That the rates and charges for natural gas as shown in the schedule filed by the said St. Joseph Gas Company with the Commission September 29, 1914, to become effective November 1, 1914, and contained in the following tariff, viz., P. S. C. Mo. No. 1, 1st Revised Sheet No. 1, Canceling P. S. C. Mo. No. 1, Original Sheet No. 1, are unreasonable and unjust, and said company be and it is hereby ordered and required to cancel the same on or before November 29, 1915, and that the said St. Joseph Gas Company shall not put into force and effect the said schedule or any part thereof.

"Ordered: (4) That this order shall take effect on December 15, 1915, and that the secretary of the Commission forthwith serve a certified copy of this order and opinion filed herein on said St. Joseph Gas Company and the mayor and city council of the city of St. Joseph."

In the opinion accompanying its order, the Commission reached the following conclusions, among others: (1) That 26⅔ cents per thousand cubic feet, the rate paid by the St. Joseph Gas Company to the Kaw Natural Gas Company for natural gas delivered at the city limits in St. Joseph, was unreasonably high. (2) That 17 cents or 18 cents per thousand cubic feet was a reasonable rate to be paid for said gas so delivered, instead of 26⅔ cents. (3) That 60 cents per thousand cubic feet, the rate filed by the St. Joseph Gas Company, and proposed to be charged its customers for natural gas, was unreasonably high and unjust. (4) That 40 cents per thousand cubic feet for natural gas delivered by the St. Joseph Gas Company to its customers was not shown to be unreasonably low or unjust to the St. Joseph Gas Company.

On December 19, 1915, a motion for rehearing was filed by the St. Joseph Gas Company with the Public Service Commission of Missouri. January 15, 1916, the motion for rehearing was overruled. Meanwhile, on December 14, 1915, the St. Joseph Gas Company filed a mo-

tion in the district court of Montgomery county (the court controlling the receivers of the Kansas Natural Gas Company), setting forth the decision and order of the Public Service Commission of Missouri, and praying for an order requiring the receivers to supply gas to the St. Joseph Gas Company at 17 cents per thousand cubic feet. February 10, 1916, said district court of Montgomery county, Kan., denied said motion. February 19, 1916, the St. Joseph Gas Company filed a supplemental motion for a rehearing with the Public Service Commission of Missouri, setting forth the proceedings had before the state district court of Montgomery county, Kan. February 23, 1916, the supplemental motion for a rehearing was overruled.

The St. Joseph Gas Company has brought this suit against the Public Service Commission of the state of Missouri and the members thereof, the Attorney General of the state of Missouri, the attorney for said Commission, the prosecuting attorney for Buchanan county, and certain consumers of gas, residents of St. Joseph, Mo., to prevent by the injunction of this court, the enforcement of that portion of the order of the Missouri Public Service Commission, which held that the proposed rate of 60 cents for natural gas was unreasonable and unjust, and ordered and required the Gas Company to cancel the same. The injunction is sought on the grounds that the 40-cent rate for natural gas thus left in effect is unreasonable, noncompensatory, and confiscatory; that the new proposed rate of 60 cents is no more than is essential to avoid the confiscation of the plaintiff's property; that by said order of said Commission the plaintiff has been and is deprived of the equal protection of the law, contrary to the provisions of the Constitution of the United States.

After the commencement of the suit an application for an interlocutory injunction against the enforcement of said portion of said order of the Public Service Commission was made and has been heard, in accordance with the provisions of section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162) as amended (Act March 4, 1913, c. 160, 37 Stat. 1013), 2 U. S. Compiled Statutes 1916, § 1243, p. 1960. The Commission conceded in its opinion and decision that, on the bases of the valuation of the property and of the expenses of its operation which it adopted, the 40-cent rate was confiscatory unless (1) the complainant could and should in the future charge and collect for the free gas furnished to the state, the county, and the city, the proceeds from which would amount to less than $800 per annum; (2) increase the rates charged for natural gas for manufacturing purposes, but the quantity and the possible amounts obtainable by such increases are so small as to be negligible in the determination of the question here at issue; (3) refuse to pay the $4,800 per annum it has been paying for services and salaries of nonresident officers; and (4) reduce the 26⅔ cents per thousand cubic feet it was paying to the Kansas Natural Gas Company for its gas to 17 cents per thousand feet. The complainant asserts that the Commission's bases of valuation and of expense of operation were erroneous in many respects and that the four changes in operating expenses specified above ought not to be made. These assertions, the denials of them by the Commission, and the evidence on these issues have been read and considered. But the evidence con-

vinces that all of them, except the proposed change in the rate to be paid for the gas from 26⅔ cents to 17 cents per thousand cubic feet, are immaterial to the issue of whether or not the 40-cent rate is confiscatory, and to this issue of whether or not the 60-cent rate is unreasonably high. If all these issues were decided in favor of the Commission, the difference they would make in the bases of valuation and erpense of operation would not affect the result which the evidence upon the other issues compels. They are, therefore, here dismissed without discussion, further consideration, or decision.

[1, 2] The question of the reduction of the rate paid for the gas from 26⅔ cents to 17 cents is, however, crucial, and all the evidence upon that subject has been analyzed and has received consideration and reflection. The Commission found that, while the complainant maintains the 40-cent rate and pays 26⅔ cents for its gas, thus receiving for its share of the rate 13⅓ cents per thousand cubic feet, it obtains a return of less than 3 per cent. on the value of its property, but that, if it could obtain for its share of the 40-cent rate 23 cents per thousand cubic feet it would obtain a return of 6.6 per cent. upon the value of its property. The complainant was and is bound by a contract with the Natural Gas Company, which furnishes the gas, to pay to that company two-thirds of the gross amount it receives for the gas it obtains from that company. The Commission invoked the indisputable rule that, notwithstanding contracts between parties engaged in producing, furnishing, or transporting public utilities, reasonable charges only will be allowed as against the public (Steenerson v. Great Northern Ry. Co., 69 Minn. 353, 404, 72 N. W. 713; Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 345, 12 Sup. Ct. 400, 36 L. Ed. 176), and found that the charge of 26⅔ cents as an operating expense for obtaining natural gas at St. Joseph was an unreasonable charge and 17 cents was a reasonable one. The opinion of the Commission indicates that the facts that the Natural Gas Company was delivering gas chiefly derived from a place in Oklahoma about 240 to 270 miles distant, to Kansas City, Kan., Kansas City, Mo., and Topeka, Lawrence, Leavenworth, and Atchison, Kan., at about 25 cents per thousand cubic feet and receiving only about two-thirds of the proceeds of the sales of this gas, or about 17 cents per thousand cubic feet for the gas delivered, and that St. Joseph was only 40 miles further from the source of supply than Leavenworth, only 70 miles further than Kansas City, Mo., and only 20 miles further than Atchison, Kan., furnished the persuasive and probably the convincing reason and evidence for that conclusion, because (1) the evidence upon the reasonableness of that 25-cent rate to the consumers in the Kansas cities which convinced the Public Commission of Kansas that that rate was confiscatory of the property of the Kansas Natural Gas Company, and the evidence that convinced the members of this court, sitting in the United States District Court of Kansas in Landon, Receiver, v. Public Utilities Commission of that State, that no rate less than 32 cents to the people of those cities would prove sufficient on the basis of two-thirds of the proceeds of the sales, or 21⅓ cents per thousand feet to the Kansas Natural Gas Company to operate the business of that company and to yield it a fair income on the value of its property, because all this evidence has been intro-

duced in this court and has confirmed our conclusion in the Kansas case; and (2) because a higher rate to consumers and a higher rate for the delivery of gas at St. Joseph than at Kansas City and other cities as near or nearer the source of supply is indispensable to yield fair compensation to the Natural Gas Company on the basis of two-thirds to it and one-third to the local gas company.

St. Joseph is the most distant city supplied by the Natural Gas Company, and it is supplied by a pipe line running from one of the trunk lines of the company across the Missouri river for the express purpose of supplying that city. There is, therefore, property of greater value used to supply St. Joseph than is used to supply cities nearer the source of supply. The greater the distance gas is piped the greater is the leakage and the loss of gas thereby, and the greater is the pressure required to send it to its destination. An immense volume of gas is delivered at Kansas City, Kan., and Kansas City, Mo., and a very small volume comparatively at St. Joseph, and the larger the volume delivered at a given place the less the compensatory rate per thousand feet. The argument that the reasonable charge for the delivery of the gas to St. Joseph cannot be greater than 21⅓ cents per thousand cubic feet, the amount that the Gas Company at Atchison would presumptively pay under the 32-cent rate, is not persuasive, because that rate has not been determined to be compensatory anywhere, much less in Atchison (all that this court has declared as to the 32 cent rate is that it was convinced by the evidence in the Landon Case that no rate less than 32 cents would be found to be sufficient to compensate the Natural Gas Company for its gas on the basis of two-thirds of the proceeds to it and one-third to the local company), because the 32-cent rate suggested was not that particular rate to the consumers in each city which the Natural Gas Company supplies, wherever that city is located, but a suggestion of an average rate, and because it is patent that the reasonable rate to the consumers and the reasonable charge for obtaining gas at the city most distant from the source of supply is unavoidably higher per thousand cubic feet than it is at cities of the same size nearer to the source of supply.

[3] There can, therefore, be no doubt that 21⅓ cents per thousand cubic feet is not an unreasonably high charge by the Natural Gas Company for the delivery of natural gas to a city on its lines at an average distance from the main source of supply, that St. Joseph is the most distant city, that the gas is delivered to that city through a special pipe laid across the Missouri river by the Natural Gas Company for its special benefit, and that a reasonable charge for delivery of gas to that city is more than 21⅓ cents. Thus the question becomes how much more. The contract of the parties is that 26⅔ cents shall be paid when the rate is 40 cents, and that is prima facie evidence of the reasonable value of the service. Mr. Hays testified that no amount less than 26⅔ cents per thousand cubic feet would be sufficient to compensate the Natural Gas Company for providing and delivering the natural gas to St. Joseph. Mr. Wyer, an engineer of great learning and experience, prepared elaborate tables of the comparative cost of the delivery of the gas at the various cities served by the Natural Gas Company, and his opinion, as shown by these tables, was that it would

cost the Natural Gas Company 1.52 per cent. of the cost to it of delivering gas at Kansas City to deliver gas at St. Joseph, and the review of the entire testimony upon this subject has satisfied that at least as much as 26⅔ cents per thousand cubic feet is indispensable to fairly compensate the Natural Gas Company for providing and delivering to the complainant natural gas at the city of St. Joseph, and that that amount was not and is not an unreasonably high charge for the St. Joseph Gas Company to make as an operating expense for the purchase and delivery thereof.

[4] Now, assuming that whether the rate at St. Joseph continue at 40 cents or be advanced to 60 cents, in either event the receiver of the Kansas Natural Gas Company is only to take his share of the rate 26⅔ cents as at present fixed by the contract under the 40-cent rate, does the evidence show that an advance of the rate to 60 cents will not result in more than a fair return upon the reasonable value of the property now used and useful in the manufacture and distribution of gas at St. Joseph? It is contended by the defendant that the advance of the rate from 40 to 60 cents will result in such reduction in the use of gas, either in number of consumers or in reduction of quantity used per consumer, or both, as to render the net income of the company no greater at 60 cents than at 40 cents. Of course, if this contention were well founded, then no advantage would accrue to the company by the raise, and hence no injury result by reason of the order of the commission. In support of this contention certain affidavits giving the opinions of persons of more or less experience in such matters, generally based upon results in other places widely scattered, are put in evidence. To what extent, if at all, the conditions in the localities furnishing the data for such opinions are similar to those of St. Joseph does not appear. The evidence establishes that the future sales of gas at St. Joseph even at 40 cents for manufacturing or boiler purposes will be so small as to be negligible, if in fact any such gas be sold at all. It also appears that the lighting business is practically monopolized by the electric light company, and hence revenue from that source need not be considered. This reduces the present consumption to heating and cooking purposes. At present the gas company has about 1,100 customers who use gas for heating purposes, amounting to a consumption of a little more than 69,000,000 cubic feet per annum for such purposes. Other consumers of large quantities are the hotels, restaurants, and gas engine users, etc., using annually a little more than 148,000,000 cubic feet per annum, making a total of 217,000,000 cubic feet. This was about 30 per cent. of the total sales of domestic gas for 1915. Of course the other 70 per cent. must have been consumed for cooking purposes. For cooking and lighting purposes artificial gas at a rate of $1, where natural gas is not obtainable, will compete with other fuel. Therefore it must follow that for cooking purposes natural gas at 60 cents will displace other fuel and hence there should be no falling off in the number of consumers for cooking purposes, and no great reduction in the amount of consumption for such purpose.

Assuming, then, that all the aforementioned conditions except for cooking is lost, it will only result in a loss of about 30 per cent. of the consumption. We believe that the estimate of the witness Abel, that

the probable loss in consumption resulting from the advance to 60 cents will be 25 per cent. is well supported by the evidence. If that be true, then, based upon the total sales for domestic purposes in 1915. amounting to 724,899,500 cubic feet, the sales under the 60-cent rate would be that amount less 25 per cent., or 543,674,625 cubic feet. At 60 cents per thousand this consumption, with income for minimum bills, forfeited discounts, and miscellaneous earnings added, will produce $332,954.78. Based upon the experience of 1915, the annual operating expenses would be $246,841.21, leaving earnings over operating expenses $86,113.57. Taking as a basis of valuation the conclusion of the Commission that the value of the property of the company used and useful in the sale and distribution of natural gas with water gas as a reserve service is $1,620,000, the earnings over operating expenses, as above calculated, would furnish a return upon this valuation of but 5.31 per cent., with no allowance whatever for depreciation of the property. The company is entitled to earnings which will amount to a return of at least 7 per cent. upon the fair value of its property used and useful in the business. Therefore the proposed rate of 60 cents is far from being unreasonably high.

[5, 6] But are we justified in finding from the evidence before us that the receiver of the Kansas Natural Gas Company will not demand and receive two-thirds of the increase in receipts resulting from the advance to 60 cents, as would appear he might do under the contract in force between the Kansas Natural Gas Company and the St. Joseph Company when the receivership intervened in 1912, and under which the receiver and the St. Joseph Company have long been operating? If he should successfully make such insistence, resulting in his securing 40 cents as its portion of the 60-cent rate, the evidence offered by the St. Joseph Gas Company before the Missouri Public Service Commission, and now a part of the evidence before us, establishes that the receipt of the remaining 20 cents by the St. Joseph Company, under the changed conditions which the advance to 60 cents would bring about, would not result in any net gain over the 12⅓ cents received under present conditions. And of course, under such circumstances, as between the utility and the consumer, the just thing to do would be to let the rate remain at 40 cents. It is urged by counsel for the St. Joseph Company that reasons exist why that company is not bound to further abide by its contract with the Kansas Natural Company. But, even so, if it may now disregard the contract, then likewise the receiver of the Kansas Natural Company would be no longer bound to furnish gas at 26⅔ cents, or for that matter at any price. If the receiver should demand a compliance with the terms of the contract, or as an alternative refuse to furnish gas, then the advance to 60 cents would not avail the St. Joseph Company. What the receiver shall do in this regard when the question is presented must depend upon the instructions he shall receive from the district court of Montgomery county, Kan., of which court he is an officer. The evidence discloses certain assurances which the receiver and those assuming to speak in the matter have given the St. Joseph Company, that the receiver will be content with the 26⅔ cents per thousand cubic feet for gas furnished by him, even in case the rate of 60 cents at St. Joseph should

become effective. But, until the question of such modification or abrogation of the contract is presented to the court of which he is an officer, and determined by order of that court, neither the receiver nor any one for him is authorized to make any binding agreements with reference to the same. Therefore we cannot find from the evidence now before us that the St. Joseph Company will realize more than 20 cents per thousand cubic feet for the gas furnished, even if the rate is advanced to 60 cents, and in that event, as we have seen, such advance would not better its condition.

The application for the injunction must therefore be denied without prejudice to another application to this court on the evidence already introduced and other evidence of a substantial change in the situation; and it is so ordered.

THE STELLA.

THE VAUBAN.

(District Court, E. D. New York. April 26, 1917.)

1. COLLISION ⟸115—VESSEL IN TOW—TUG MASTER ACTING AS PILOT.
   The fact that the master of a tug, in charge of the towing and docking of a ship, also acts as her pilot, to comply with the statute requiring her to have a pilot on board, and is paid therefor, does not render the ship liable for those operations which are exclusively the actions of the towing agent.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247.]

2. ADMIRALTY ⟸79—SUIT FOR BREACH OF CHARTER—EFFECT OF JOINDER OF TORT-FEASORS.
   Where the owner of a chartered boat, injured in collision, in a suit against the charterer for breach of charter in failing to return the boat in good condition, also joins the vessel or others alleged to be in fault for the collision, the tort issues between libelant and the third parties were to be first tried; the charterer being liable only in case the damages cannot be recovered from the tort-feasors.
   [Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 592–594.]

3. SHIPPING ⟸54—CHARTER—LIABILITY OF CHARTERER FOR INJURY TO BOAT IN COLLISION.
   The charterer of a barge with her master for lighterage service left her temporarily at the end of a pier until she could discharge her load to a vessel in an adjoining slip, which was then filled with other lighters discharging. Three days later, after the slip had been cleared, so that her master could have her moved around inside, but while she still remained at the end of the pier, she was injured by collision with a vessel entering the next slip. *Held*, that the charterer could not be charged with negligence in so leaving her, which would render him liable to the owner for her injury.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 78.]

4. SHIPPING ⟸62—CHARTER OF BARGE AND MASTER—LIABILITY FOR ACTS OF MASTER.
   The master of a barge, employed by the owner and who goes with her when chartered, as between the owner and charterer, represents the owner in certain things, although the charter is a demise.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 83.]

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5. COLLISION ⇐72(2)—VESSEL LYING AT END OF PIER—MUTUAL FAULT.
A barge in charge of a master had been for three days lying at the end of a pier, with her bow extending in front of an adjoining slip, contrary to the provisions of section 879 of the Greater New York Charter, which made her liable to damages by a vessel entering the adjoining slip. Her master was notified to move out of the way to allow the entrance of a steamship into the slip, and was also signaled by the tugs in charge of the approaching vessel; but he made no move, and the barge was struck and injured by the entering ship. *Held*, that the barge was in fault, but, on the evidence, that the tugs were also negligent, and liable for half her damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247.]

In Admiralty. Suit by William S. Bartley, as owner of the boat Stella, against Frederick B. Dalzell, W. Freeland Dalzell, the Merritt & Chapman Derrick & Wrecking Company, and the steamship Vauban. Decree for libelant for part damages against Dalzell & Co.

Foley & Martin, of New York City, for libelant.

Haight, Sandford & Smith, of New York City, for F. B. and W. F. Dalzell.

Van Iderstine, Duncan & Barker, of New York City, for Merritt & Chapman Derrick & Wrecking Co.

Burlingham, Montgomery & Beecher, of New York City, for the Vauban.

CHATFIELD, District Judge. The libelant chartered the scow Stella to the Merritt & Chapman Derrick & Wrecking Company for ordinary lighterage service, upon oral request over the telephone, on or about the 29th day of October, 1915. The Merritt & Chapman Company took the Stella into their possession at Fifty-Fourth street in the North River, and the master or captain of the Stella, who was on board at the time and was hired by the libelant, went along with the boat. She was loaded with a cargo of machinery or engines for a steamer lying upon the north side of Pier 10, on the Brooklyn side of the East River.

Upon arriving in the East River, it appeared that the slip between Piers 9 and 10 was filled with boats delivering cargo to this steamer, and the Merritt & Chapman Company tug left the Stella at the outer end of Pier 9. This occurred upon Friday, October 29th, and the Stella remained at the end of this pier until Tuesday morning, November 2d. In the meantime she had had no opportunity to deliver her cargo to the steamship, and on the morning of November 2d, the captain of the Stella was told by the superintendent of the company in control of Pier 9, to drop his boat around the end of the pier and inside the slip, as information had been received that a steamer was to be docked in the slip between Piers 8 and 9. The captain did not see fit to follow this instruction, and at about 11 o'clock on that day the steamer Vauban appeared, proceeding through Buttermilk Channel and up the East River in control of four tugs.

The officers of the Vauban were on board and her captain was upon the bridge, but she was not under her own steam, and a captain from

one of the tugs was also upon the bridge, from which point he directed the towing and docking of the vessel. This operation was being done by contract with the firm of Frederick B. Dalzell & Co., who owned the four tugs in question. Of these the witnesses all agree that the C. P. Raymond (whose captain had been upon the bridge and in charge of the fleet as the boats came up through the Buttermilk Channel) was immediately under the port quarter of the Vauban, with her bow toward the side of the steamer. The W. F. Dalzell was immediately under the starboard quarter of the Vauban and with her bow toward the side of the vessel. The Fred B. Dalzell had a line from her stern to a cleat upon the port bow of the Vauban, and was towing upon this line, throughout the period which will be described later, at an angle of about 45 degrees to port from the line of the steamer's keel. The Dalzelline had a line from her stern to a cleat upon the port side of the steamer near the stern, and was pulling at an angle of about 135 degrees from the line of the keel, or nearly at right angles to the tow line of the Fred B. Dalzell.

[1] When the captain of the Raymond left the bridge of the Vauban, his place was taken by the captain of the W. F. Dalzell, who not only directed the subsequent operations, but received a fee of $5 from the captain of the Vauban, who thus complied with the statutes requiring the presence of a pilot upon the bridge of the steamer while navigating inland waters. The performance of this double function by the captain in charge of the towing and docking operations and his presence as pilot for the steamer does not render the steamer liable for those operations which were exclusively the actions of the towing agent. The steamer and its officers (as distinguished from the tug's) appear to have been guilty of no negligence. The captain of the C. P. Raymond left the bridge and went to his own tug, for the obvious reason that, as the steamer went into her pier with her port side along the dock, the Raymond would be the first tug to leave the vessel. Her captain therefore turned the control of operations over to the captain of the tug upon the opposite side of the vessel, who could remain in position until the operation was completed. No difference in responsibility arises from this change in command.

The facts show that all the way from Pier 30 up to Pier 10 an exceedingly strong wind was blowing. The Fred B. Dalzell and the Dalzelline were both holding the vessel away from the piers, and the Dalzelline was actually being dragged stern foremost. One of the captains stated that she was used as a sort of sea anchor. But, inasmuch as the dragging force was the wind, it is evident that the Dalzelline directed her course into the wind, instead of being dragged directly astern of the Vauban. When off Pier 10, various parties observed the Stella lying on the head of Pier 9, and with her bow projecting a few feet into the slip between Piers 8 and 9. The captains of the four tugs testify that they began a continuous blowing of alarm whistles, in the form of short toots, for the space of 20 minutes, in order to attract the attention of the Stella's captain and to cause him to move his boat. No fire boat or police boat or fleet of salvage tugs answered this prolonged alarm, and whatever may have been the duration of the operation, apparently every one in sight or hearing ascertained that the

blowing had to do with the docking of the boat, and no outside persons joined in observation of the occurrence.

According to the captains of the four tugs, a tremendous squall or wind of hurricane force bore down upon the Vauban at this time from the west. They all agree that this wind forced the Vauban steadily over, in spite of the efforts of the four tugs, until the Vauban brought up on the forward port corner of the Stella, at a point just aft of amidships on the starboard side of the steamer. These witnesses testified that the Vauban had been taken up the river by the tugs to a point where her bow was opposite Pier 8, and was actually carried back by this west wind, so that her bow swung clear of Pier 8 and into the slip, where she was placed in her berth along the southerly side of Pier 8, without injury to the steamer.

Pier 8, East River, on the Brooklyn side, is nearly opposite Fulton Market in New York, and the offices of the Dalzell Company are on the New York side of the East River at a point where a full view could be had of the occurrence on the Brooklyn shore. While the steamer was in contact with the Stella, Mr. Dalzell, who had just come into his office, observed her position and the difficulties caused by the heavy wind against which the tugs were struggling with the vessel. He went downstairs and sent another tug, the Guiding Star, which arrived in time to help place the Vauban at her dock. But Mr. Dalzell did not hear the whistling and did not see the movements of the vessel prior to the time when she came in contact with the Stella.

The servants of the company which occupied Pier 8, and to which the Vauban was consigned, had cleared the steamer's berth earlier in the day, and one of them had gone over to Pier 9 and gotten the captain of the Stella out of his cabin in order to tell him to make way for the Vauban. This witness testifies that the captain of the Stella appeared to be intoxicated. At any rate, the captain of the Stella, who testified that he was a teetotaler, even though his appearance in court would cast suspicion upon that claim, made some profane answer and went back into his cabin, where he apparently remained, and ignored or did not hear the whistles of the fleet of tugs, and was brought to a realization of the presence of the Vauban by the blow of the collision, which knocked him over, laid open his head, and would of itself be sufficient to account for his dazed condition from that time on. He evidently took no part in the movement of the steamer into the slip, but remained upon his vessel until she was towed away and ultimately taken to a dock for repairs. He has remained as captain of the vessel until a few days previous to the trial, and no explanation was given by either side as to the manner of his leaving that employment, nor as to the condition in which he appeared in court.

[2] The libelant brought his action against the Merritt & Chapman Company, as charterers, alleging a breach of their obligation to return the vessel in good order, except for reasonable wear and tear. The libelant included as respondent also the firm of Fred B. Dalzell & Co. charging them with a tort arising from their alleged negligent towing of the vessel. The libelant further made the steamer Vauban a party defendant, charging it with tort, upon allegations of responsibility for the collision.

It has often happened that an action by a boat owner against the charterer for alleged breach of contract results in a trial of a cause of action for tort, presented by the joinder of the alleged tort-feasors, under the fifty-ninth rule, upon the petition of the respondent. In some cases the libelant alleges, at the outset, the commission of a tort by a third party, for which, as surety or guarantor, the respondent is charged to be liable for a breach of the charter, and of his duty as charterer to return the boat in good order. In such cases the tort-feasors are treated as agents of the charterer, who is thereby charged with responsibility for the tort and alleged to be liable in contract therefor. But in the present action the libelant has alleged a cause of action in contract against the charterer and causes of action in tort against the alleged tort-feasors, who were outside parties, in no sense agents, and with no privity of contract or business relation with the charterer. The libelant has thus brought action on contract against the charterer, with whom he had the contractual relation, and has also alleged negligence against third parties, who might be brought in by the charterer under the fifty-ninth rule. In so doing he seeks to unite an action upon implied contract (as where there is an express agreement to return the boat in good order) with an action for tort. He thus unites the principal in the tort action (the alleged tort-feasor) with the charterer, who could be called upon only in case the tort-feasor fails to make good the damage caused by his own negligence. The libelant, while seeming to sue the charterer directly, has in reality named the charterer as a proper party, rather than one who is necessary to the maintenance of the tort action, and the issues of negligence must be tried out between the libelant and the third parties. The relations of the parties do not show any liability on the part of the charterer, Merritt & Chapman Company, for the consequences of any of the acts of the Dalzell Company or the Vauban, and the Merritt & Chapman Company could be held, therefore, in this case only if no negligence is shown on the part of the Dalzell Company or the Vauban. The libelant seeks, by a sort of subrogation, to stand in the shoes of the Merritt & Chapman Company with respect to an act of negligence to property in the custody of the Merritt & Chapman Company at the time.

[3] But it is also alleged that the Merritt & Chapman Company were guilty of some negligence in transporting the boat to the berth at the end of Pier 9 and of leaving her moored in that position, contrary to the provisions of section 879 of the Charter of the City of New York. Inasmuch as the boat was left there temporarily, in order to be at the disposal of other persons, and in order that the captain of the barge could put his boat at the disposal of the steamer when this was desired, it is impossible to hold that the Merritt & Chapman Company are liable for the consequences of a situation arising three days later, and after the slip had been cleared, so that the barge could have been carried around out of danger into the end of the slip. Wright & Cobb v. New England Navigation Co. (D. C.) 189 Fed. 809, affirmed 204 Fed. 762, 125 C. C. A. 129.

[4] But the act of the scow's captain in leaving her after warning, and after sufficient opportunity to take her from the end of the pier,

raises a question of another nature. In the first place, while the scow may have been demised (that is, completely surrendered to the charterer for the purposes of the charter, except in so far as the master of the scow represented the owner in looking after those matters which cannot be delegated from the owner to the charterer), such an oral charter does not make the captain the agent of the charterer in all respects, nor would a formal written charter, with the covenant to return in good order, make the captain of the scow the servant of the charterer in these matters. He was the servant or agent of the owner (that is, the libelant) in keeping the boat afloat, handling her lines, observing the method and amount of loading, and maintaining her in positions where she would not be endangered by matters which could be prevented through his activities. In so far as these very duties might concern the use of the scow, he would also be the agent of the charterer, but as between the owner and the charterer his authority is that of the owner. If, therefore, the captain of the Stella was intoxicated, or refused to observe obvious precautions, and if he neglected to look out for his master's property at a time when danger was apparent and imminent, and when care on his part would have protected the property, there would be reason for holding that his negligence would affect the right of the libelant to recover.

But beyond this is the proposition presented by the statute just referred to. The word "adjacent" means lying next to or adjoining. An "adjacent pier" to any particular pier must mean the next pier; that is, the pier on either side of the adjacent slip. The statute says that, if a boat is lying at a wharf, it shall be liable for damages by a vessel entering an adjacent dock or pier. As was said in the case cited, this does not make it illegal to lie at the end of a pier, nor can a vessel be held responsible for a collision out in a river with a boat which is not entering the adjacent slip.

[5] But in this case the Stella was certainly lying at a pier head (that is, a wharf) adjacent or next to the pier for which the Vauban was intended. Her captain was bound to recognize the danger of a large vessel entering that slip, particularly as the Stella projected several feet into the slip. We have, therefore, the situation of a vessel illegally maintaining a berth, where she received injury from the very matter prohibited by the statute. The Stella, therefore, was liable for the consequences of her own fault; but this did not absolve the Vauban, and the tugs which were handling the Vauban, from avoiding negligence on their own part.

The court finds from the testimony that the Dalzell tugs undertook to move the steamer up river at a time when, for the entire voyage, the wind was blowing at the rate of from 50 to 55 miles an hour. If the tugs were able to handle the Vauban on the voyage up the river, they could have proceeded further with the steamer in case it proved dangerous to enter the slip. The strong and sudden squall from the west caused the maneuver in question; but, according to the oral testimony and diagram made by the Dalzell captains, the direction from which they claim this squall came would have been the northwest. A west wind, as was inadvertently stated by the captain of the Raymond,

would blow against the port quarter of the Vauban, and not against her port bow, as would be necessary to drive her in the direction claimed by the witnesses. This leads the court to conclude that the wind did not overcome the control of the tugs, until they appreciated the fact that the Stella was not going to move, and until they decided, as the steamer gradually drifted in, to go ahead and to place the Vauban into the slip, without further loss of time and without waiting until a tug could be sent to move the Stella for them. The strong wind made it much more convenient to proceed at once into the slip, and as the captain of the Stella seemed to need to be aroused, and the Stella evidently was disregardful of the rights of the Vauban and of her own liability for damage by a boat entering the slip where the Vauban was going, the Dalzell tugs took the matter into their own hands and disciplined the Stella, but were evidently negligent in failing to avoid the infliction of unnecessary damage in so doing.

The libelant may have a decree for half damages against the owners of the Dalzell tugs. Inasmuch as the pilot on the Vauban did not interfere or prevent the maneuver, no costs will be awarded the Vauban, but the libel against the Vauban will be dismissed. The libel against the Merritt & Chapman Company will be dismissed, with costs.

WELLMAN v. BETHEA.

(District Court, E. D. South Carolina. May 30, 1917.)

1. EXECUTORS AND ADMINISTRATORS ⟸453(4)—ACTIONS—JUDGMENT—COLLATERAL ATTACK.

   In an action against an administrator, in which he pleads plene administravit, a judgment paid by him, which was regular in form and based upon the verdict of a jury, cannot be attacked, whatever inferences may be indulged regarding the bona fides of the account on which such judgment was recovered.

   [Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1897–1908.]

2. DEATH ⟸11—ACTIONS FOR CAUSING DEATH—NEW CAUSE OF ACTION.

   The statutory right to sue for wrongful death is a new cause of action, independent of any cause of action for the tort committed by defendant, which the deceased may have had during his life, or would have had, if he had survived the injury.

   [Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15.]

3. STATUTES ⟸181(1)—CONSTRUCTION—ASCERTAINING INTENT.

   In construing a statute, the court must ascertain the intention of the Legislature; but such intention must be ascertained from the words used in the statute and the subject-matter to which it relates.

   [Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259.]

4. STATUTES ⟸188—CONSTRUCTION—MEANING OF LANGUAGE.

   When words used in a statute have a well-settled legal meaning they will be given such meaning; but, when they have no such meaning, it will be presumed that the Legislature used them in the light of their usual and ordinary meaning.

   [Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276.]

5. EXECUTORS AND ADMINISTRATORS ⊂=261—PAYMENT OF CLAIMS—PRIORITY—"DEBT."

Under the South Carolina statute fixing the order of payment of debts and charges against the estates of decedents, by providing five classes, and specifying, as the fifth class, bonds, debts by specialty, and debts by simple contract, a judgment recovered against the administrator for wrongful death, founded upon a statute of another state, is not a "debt," and is not of equal dignity and entitled to prorate with a judgment upon a contractual cause of action, especially as it is doubtful whether Civ. Code S. C. 1912, § 3955, giving a right of action for wrongful death, gives any such right of action against the personal representative of the wrongdoer.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 944–974.

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

6. STATUTES ⊂=184—CONSTRUCTION—ANNULLING PURPOSE OF LEGISLATURE.

While, if a statute is open to construction, the courts will not construe its language so as to nullify its purpose, this rule is to be resorted to only for the purpose of ascertaining the Legislature's intention, and will not justify reading into the statute something not expressed by its terms.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262.]

7. EXECUTORS AND ADMINISTRATORS ⊂=111(6)—EXPENDITURES—COUNSEL FEES.

Where, at the time judgment was rendered against an administrator, his counsel exhibited an account by the administrator showing a balance in his hands of $380.40, and proposed to plaintiff's counsel that they take judgment for that amount, or that it would be turned over to plaintiff, which offer was not accepted, and subsequently the judgment was opened, and the administrator was permitted to plead plene administravit, on a showing that $380.40 was all the unadministered assets, the subsequent payment by the administrator to his counsel of $250, in addition to $250 previously paid, could not be justified.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 456.]

8. EXECUTORS AND ADMINISTRATORS ⊂=261—PAYMENT OF CLAIMS.

While, under the South Carolina statutes, a judgment recovered against an administrator for wrongful death is not entitled to share in the assets of the estate with debts due by simple contract, any balance remaining in the administrator's hands after the payment of such debts is subject to the payment of such judgment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 944–974.]

At Law. Action by Sarah A. Wellman against John C. Bethea, administrator. Judgment for plaintiff for a part of the amount sued for.

See, also (D. C.) 213 Fed. 367.

Mitchell & Smith, of Charleston, S. C., for plaintiff.
Gibson & Muller, of Dillon, S. C., for defendant.

CONNOR, District Judge. The pleadings, exhibits, and admissions of the parties, disclose the following facts:

On March 2, 1911, plaintiff, Sarah A. Wellman, in behalf of herself and her children, instituted an action in this court against defendant, "John C. Bethea, clerk of court, as administrator of the estate of John H. Bethea, deceased," for the recovery of $25,000 damages, alleged to

have been sustained by reason of the death of her husband, Ora E. Wellman, caused by the wrongful and unlawful act of defendant's intestate. The homicide occurred in the state of Delaware, and the suit was based upon the cause of action given to plaintiff by the statute in force in that state. Defendant, in his answer, denied the allegations contained in plaintiff's complaint. At a term of this court held on January 7, 1913, plaintiff recovered judgment against defendant, in his representative capacity, for the sum of $4,000. Execution was issued against defendant, in his representative capacity, for the sum of $4,000. Execution was issued against defendant administrator, and was returned unsatisfied, except for the sum of about $23.

Plaintiff, on June 28, 1913, instituted an action against defendant John C. Bethea, personally, and the Gulf & Atlantic Insurance Company, surety, on his official bond, for the recovery of the balance remaining due and unpaid on said judgment, alleging that defendant John C. Bethea, having failed to plead plene administravit, or insufficient assets, was liable personally for the full amount of said judgment. Defendant, in his representative capacity, on May 25, 1914, instituted a suit in this court, in equity, alleging that he had, prior to the rendition of the judgment of January 7, 1913, administered and disbursed the assets which came into his hands as administrator of John H. Bethea, except the sum of $380.40, and that since the rendition of the judgment he had disbursed, in due course of administration, this amount, less $35. He further alleged that his failure to plead plene administravit in the action against him was due to excusable mistake, etc. This cause, upon defendant's answer, came on for hearing, whereupon a decree was passed March 19, 1915, permitting the said John C. Bethea, administrator, to enter his plea in the original action. This decree was affirmed. 228 Fed. 882, 143 C. C. A. 280. The liability of defendant, as administrator, to plaintiff, is dependent upon his making good his plea—that he has fully, and in accordance with the statutes in force in South Carolina, administered the estate of his intestate. His accounts, filed in the probate court, show that, on November 27, 1910, he received, as administrator, $2,214.64. He disbursed in cost of administration and commissions, $115.24; counsel fees in the defense of plaintiff's action, $250; and action of Mrs. Medlin against him as administrator, $25.

On March 2, 1911, being the same day on which this action was instituted, Mrs. M. E. Medlin instituted an action in the court of common pleas of Dillon county against defendant, as administrator of John H. Bethea, and in her complaint she alleged that his intestate was indebted to her for "board and service" during the years 1904 to 1909, inclusive, at the rate of $20 a month, aggregating the sum of $1,440; that she had presented her account to defendant and he refused to pay same. Defendant, on April 5, 1911, filed his answer to the complaint, averring that he had not sufficient information to form a belief as to the truth of the allegation of the complaint, and therefore denied same. On October 26, 1911, the cause was brought to trial before the court and a jury, when a verdict was rendered against defendant for the full amount claimed by her, and judgment rendered accordingly. On December 1, 1911, defendant paid said judgment, together with $4 cost,

aggregating $1,444, leaving a balance in his hands, December 15, 1911, of $380.40. Of this amount defendant paid, December 15, 1911, $1 for filing return; January 1, 1913, to his attorneys for service rendered in this case, and another case of like character brought by Mrs. Williams, the sum of $250, $64 cost in this case, and commissions aggregating $94.40, leaving in his hands, January 3, 1911, $35. Plaintiff attacks the account in respect to the payment of Mrs. Medlin's judgment.

[1] Whatever inferences may be indulged in regard to the bona fides of her account, from the fact that her action was instituted on the same day upon which plaintiff brought her suit in this court, coupled with the rather indefinite character of her account, the judgment is not open to attack in this court, or in this action. It is regular in form, and based upon the verdict of the jury in the court of common pleas of Dillon county. In view of its effect upon the rights of plaintiff in this action, and Mrs. Williams, plaintiff in another action of like character, in which she recovered judgment, it would seem that, while under no legal obligation to do so, it would have occurred to the defendant to have notified them of the institution of the action. The sole question now open to plaintiff is whether the defendant, administrator, was not under legal liability to withhold payment of that judgment until the termination of this action, to the end that the assets in his hands should be divided pro rata between the judgments. The answer to this question is dependent upon the construction of the South Carolina statute, prescribing the method of administration of the estates of decedents. It is held by the Supreme Court of South Carolina that the status of the claims against the estate of deceased persons, in respect to their rank in the administration of the estate is fixed by reference to the date of the death, and is not affected by the date of the judgment fixing its validity and amount. Fraser & Dill v. City Council, 23 S. C. 373.

The South Carolina statute fixes the order of payment of debts and charges against the estates of deceased persons by providing five classes. It is manifest that neither plaintiff's nor Mrs. Medlin's debts are included in either of the first four classes. The fifth class includes "bonds, debts by specialty and debts by simple contract." The plaintiff insists that her claim, or cause of action, is of equal dignity and entitled to prorate with Mrs. Medlin's judgment, without regard to the cause of action or the date of the judgment. Defendant insists that plaintiff's cause of action or claim is not within the language of the fifth or any other class of debts directed to be paid by the administrator—that, in respect to the cause of action created by the Delaware statute, in favor of plaintiff, as the widow of her deceased husband, by reason of his death, caused by defendant's intestate, there is a casus omissus, a claim for which no provision is made. The question is of first impression. Neither of the learned and industrious counsel have called attention to any decided case in point.

[2] It is uniformly held that the right to sue for wrongful death, given by Lord Campbell's Act and the state statutes in this country, is a new cause of action, independent of any cause of action for the tort committed by defendant, which the deceased may have had during his life, or would have had, if he had survived the injury. 8 Am. & Eng.

Enc. 859; Osteen v. So. Ry., 76 S. C. 368, 57 S. E. 196; Beaver's Adm'r v. Putnam's Curators, 110 Va. 713, 67 S. E. 353. The claim, or demand for damages, did not exist against the defendant's intestate and could not, therefore, in any proper sense, be termed a debt due by contract. Whether a judgment rendered upon a claim for a tort, as for assault and battery, or a personal injury sustained by the negligence of defendant's intestate, would have been within the statute, is not involved here, and analogies do not aid in dealing with the question. It is manifest that, to bring plaintiff's claim within the terms of the statute, so that it may share with a contract debt, resort must be had to construction, sustained by the contention that such was the legislative intention.

[3] A well-settled rule of statutory construction imposes upon the court the duty of ascertaining the intention of the Legislature, with the restriction that such intention must be ascertained from the words used in the statute and the subject-matter to which it relates. "The spirit of the act must be extracted from the words of the act, and not from conjectures aliunde." Gardner v. Collins, 2 Pet. 58, 7 L. Ed. 347. Legislative intent, determining statutory construction, "is to be searched for in the words which the Legislature has employed," and there is no ground for construction where apt language is found. The Paulina v. U. S., 7 Cranch, 52, 3 L. Ed. 266. The general rule of statutory construction is that the intent of the lawmaker is to be found in the language he has used; and that language is always controlling, unless there are cogent reasons for believing that the language does not fully and accurately disclose the intent. United States v. Goldenberg, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394.

[4] When words found in a statute have a well-settled legal meaning, they will be given such meaning in seeking the legislative intention. When they have no such meaning, it will be presumed that the Legislature used them in the light of their usual and ordinary meaning. While not strictly analogous, the discussion in Louisiana v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936, indicates the trend of thought. The relators, Folsom and others, recovered judgment against the city for damages sustained by a mob; the right of action being conferred by a statute. At the time the injuries were sustained, and one of the judgments rendered, authority was vested in the governing body of the city to levy taxes to an amount sufficient to pay the judgments. Thereafter, by a change in the statute, the limit of the power to levy taxes was so reduced that the city had no funds out of which the judgments could be paid. The relator sought, by a writ of mandamus, to compel the governing board to levy taxes for the payment of the judgments, contending that the judgments were contracts within the provision of the federal Constitution, and that the act reducing the limit of taxation violated the obligation to pay. The Supreme Court, by Mr. Justice Field, said:

"The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the Legislature, and can be withdrawn or limited at its pleasure. * * * The obligation to make indemnity created by the statute has no more element of

contract in it, because merged in the judgments, than it had previously. * * * A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied when such legal obligation exists. It is on this principle that an action ex contractu will lie upon a judgment. * * * But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it."

In Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038, it appeared that a statute required certain corporations to make and file, within a fixed time, a report, which was required to be published, stating, among things, "the amount of its existing debts." Upon failure to make and publish such statements, the managing officers were made liable "for all the debts of the company then existing and for all that shall be contracted before such report shall be made." Plaintiff recovered a judgment against the corporation of which defendants were managing officers, upon a cause of action founded upon a trespass. The judgment was rendered before the time for filing the report. The report required by the statute was not filed nor published. Plaintiff sued defendants, basing his right to judgment upon the liability imposed by the statute. A demurrer having been sustained, the cause was brought to the Supreme Court, and Mr. Justice Matthews said:

"The liability is new and unknown to the common law, and is in terms limited to demands ex contractu. * * * Damage arising upon tort is not a debt accrued, within any reasonable construction of that term."

Blackstone says:

"Any contract, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract of debt." (Jones' Blk. book II, 1347.)

A statute permitted "mutual debts" to be used as a set-off. It was held that a claim for unliquidated damages could not be so used. "It must be a claim upon which an action of debt, or indebitatus assumpsit would lie." Lindsay v. King, 23 N. C. 401. A statute making it the duty of an administrator to pay all debts including taxes due means debts due by the intestate at the time of death, and applies only to debts which intestate owed. Langston v. Canterbury, 173 Mo. 122, 73 S. W. 151. In Cable v. McCune, 26 Mo. 371, 72 Am. Dec. 214, it was held that where a statute imposed the duty upon the directors of a corporation to publish the amount of "existing debts" against such a corporation, making the directors liable for a failure to do so, that a judgment recovered against the corporation upon a cause of action for negligence was not within the statute. The judge, writing the opinion, defined a debt as:

"A sum of 'money due by a certain and express agreement.' * * * The demand sought to be enforced in the present action is certainly not a debt in the legal acceptation of the term, and it is, to say the least, doubtful whether it could be so regarded in its popular acceptation."

This case was approved in Cable v. Gaty, 34 Mo. 573, 86 Am. Dec. 126; Heacbek v. Sherman, 14 Wend. (N. Y.) 58.

In Carver v. Braintree Mfg. Co., 2 Story, 432, Fed. Cas. No. 2485,

the question, as to the definition of the term "debt contracted" in a statute, would be held to include "dues owing" or "liabilities incurred" by a corporation. The question arose upon the competency of a witness, who was a stockholder in a corporation, in which, under a Massachusetts statute, the stockholders were made liable for the "debts contracted" by the corporation. Judge Story said:

"I confess that, with all the lights which have been thrown upon the question by the able arguments at the bar, I am not without some lurking doubts."

The action was for damages sought to be recovered against the corporation for infringement of a patent. A stockholder made liable for the debts contracted by the corporation was held incompetent as a witness, upon the theory that he would be personally liable for the amount of such judgment as might be recovered against the corporation. While any decision rendered by Judge Story is entitled to great respect and should be given careful consideration, in this instance it is manifest that he was in much doubt. As shown by cases cited, the Supreme Court has not adopted his views in construing statutes containing the same language.

In Manion v. Ohio Val. Ry. Co., 99 Ky. 504, 36 S. W. 530, it was held that a statute authorizing a guardian, with leave of the court, to settle and compound any debt or demand for his ward, did not authorize him to compromise a claim for damages sustained by a tort.

[5] The foregoing are only a few of the numerous cases in which the word "debt" has been defined. It must be conceded that there is not perfect harmony in the decisions. I am constrained to conclude that, while not free from doubt, the more natural construction, that which most strongly commends itself to the mind, excludes the claim of the plaintiff from the statute fixing the order of payment of the debts of a decedent. The case is singular; that is, unusual. It is probable that the Legislature did not have such a case in contemplation when drafting and enacting the statute. The learned counsel for plaintiff calls attention to the South Carolina statute providing that causes of action for injuries to the person shall survive both to and against the personal or real representative of the deceased persons and the legal representatives of insolvent persons. 1 Civ. Code, § 3963. It is also provided by section 170, Code Civ. Proc., that "no action shall abate by death * * * or other disability of a party." Neither of these sections of the Code are applicable to the plaintiff's cause of action. The last section applies to actions pending at the death of the defendant, and the other section saves the right of action against the personal representative which has accrued for or against the intestate during his life. It is not clear that the South Carolina statute (1 Civ. Code, § 3955, being substantially the same as Lord Campbell's Act) gives the right of action against the personal representative of John H. Bethea. This would seem to be the view held by the Court of Appeals of Virginia in Beavers v. Putnam's Curators, supra. If this be the correct view, the argument urged by the counsel for attributing to the Legislature the intention to include, under the words "debts by simple contract," a claim of the character involved here, is much weakened.

If no cause of action is given by section 3955 against the personal representative of the slayer of plaintiff's intestate, then no intention can be attributed to the Legislature to provide for the payment of a judgment recovered against him.

But, as said by counsel, plaintiff's action is brought under the provisions of the Delaware statute, which gives the right of action in such cases to the widow. 13 Laws Del. c. 31, § 2. By section 6 of the same statute the right of action is saved against the personal representative of the deceased. It is under this statute that plaintiff sues. The Virginia statute has a similar provision. This provision of the Delaware statute does not aid in ascertaining the intention of the South Carolina Legislature in regard to the order in which a decedent's debts are to be paid. Counsel say that, unless the payment of the claim arising out of the statutory right of action be provided for under the term "debts by simple contract," the statute giving the right of action in such cases is nullified—made of none effect.

[6] By a well-settled rule the court will not, if open to construction, so construe the words of a statute as to nullify the purpose of the Legislature. The rule, however, is to be resorted to only for the purpose of ascertaining the legislative intention, and will not justify reading into the statute something not expressed by its terms. Plaintiff's counsel suggest that, if the plaintiff's claim is not within the statute, the judgment cannot be paid at all, although the estate, after paying the debts provided for, is solvent. This question is not presented in the present aspect of the case. The sole question here is whether plaintiff's claim is entitled to share with debts for which provision is expressly made. It certainly is not free from difficulty. Courts should not, to meet hard cases, give strained construction to statutes. It is better to adopt a natural construction of language and leave to the Legislature the duty, as it has the power, to provide for cases not included in the statute.

[7] The plaintiff insists that the payment of $250 additional counsel fee, after the rendition of the judgment, was unauthorized and a devastavit. It appears in the record that, when the judgment in this case was rendered, on January 7, 1913, defendant's counsel exhibited in open court, on account stated by the defendant, as administrator, showing a balance in his hands of $380.40, and proposed to plaintiff's counsel that they could take judgment for that amount, or that it would be turned over to plaintiff. This offer plaintiff's counsel neither accepted nor rejected. See affidavits and opinion in the equity suit. Record pp. 44, 47, 49, 57. The account now filed shows that, on January 1, 1913, six days before the judgment was rendered, defendant paid to his counsel, on account of fee, $250. He had, theretofore, paid them for services in this litigation $250. It is manifest that, on January 7, 1913, defendant stated in open court and exhibited an account showing that he had in hand, after paying the debts and cost of administration to that date, $380.40, which he offered to "turn over to plaintiff."

It was upon this finding that the decree was rendered in the equity suit, opening the judgment and permitting defendant to file his plea. I am of the opinion that the payment of $250 after that date for coun-

sel fees was in derogation of the right of plaintiff. There were two suits of the same character, in which judgment for $35,000 was demanded. A fee of $500, if the estate had been of larger value, would not have been excessive; but, in view of the fact that defendant and his attorneys knew, certainly on January 7, 1913, that but $380.40 could be recovered, I am of the opinion that the payment of two-thirds of that amount to counsel was not justified. To say the least, it looks as if defendant had determined that the widows of the victims of his intestate's wrongful and unlawful act should receive nothing for the loss which they had sustained at his hands.

[8] While, for the reasons set forth, I am of the opinion that plaintiff's claim is not entitled to share in the assets with debts due by simple contract, provided for by the statute, I am of the opinion that, after these debts were paid, he held the balance subject to the judgment in this action.

Judgment may be drawn that the plaintiff, Sara Wellman, recover of defendant, John C. Bethea, personally, $250, with interest from January 7, 1913, and the balance of the cost incurred herein.

THE APPAM.

(District Court, S. D. New York. July 3, 1917.)

1. SHIPPING ⊂=154—LIEN FOR FREIGHT—NATURE.
A normal freight lien is possessory only under general maritime jurisprudence.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

2. SHIPPING ⊂=154—LIEN FOR FREIGHT—NATURE.
Under British law, if bills of lading providing that freight was due on shipment and should be considered as then earned and paid on demand, ship or goods lost or not lost, and that the owners should have a lien for the freight, gave a lien for freight payable, but unpaid in advance, it was inchoate when the ship and its cargo was captured by a German naval vessel, as the lien could not be exercised en route.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

3. WAR ⊂=25—CAPTURES AT SEA—ENEMIES' VESSELS AND GOODS.
The capture of a British vessel and cargo by a German naval vessel was lawful, and the captor succeeded to the rights of owners of both the hull and cargo, subject to the action of a competent prize court.
[Ed. Note.—For other cases, see War, Cent. Dig. §§ 111–113, 120–123.]

4. SHIPPING ⊂=154—LIEN FOR FREIGHT—LOSS.
The capture of a vessel by the enemy under the laws of war severed the contractual relations between the shipowners and the shippers, and abrogated any lien for freight then existing.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

5. SHIPPING ⊂=146—FREIGHT—AWARD OF FREIGHT PRO RATA.
In litigation on the instance side of the admiralty court over a British vessel, captured at sea by a German naval vessel and sent to an American port, where it was forfeited by the captor's violation of the American neutrality laws, the court could not disregard the severance of the contractu-

al relation between the shipowners and the shipper by capture, and award pro rata freight as in prize cases.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 508.]

6. SHIPPING ⟸154—LIEN FOR FREIGHT—LOSS.
In determining whether the owners of a British vessel, captured by a German naval vessel and forfeited by its captors by their violation of the American neutrality laws, have a lien on the cargo for freight, the personal liability of the shipper or consignees is immaterial.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

7. SHIPPING ⟸154—LIEN FOR FREIGHT—LOSS.
Where a British vessel was captured by a German naval vessel and brought within American waters, where it was forfeited by its captors' violation of the neutrality laws, and the vessel was restored to the possession of its original owners, the contract of carriage did not revive on repossession, so as to give the shipowners a lien on the cargo for freight.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

8. EVIDENCE ⟸43(1)—JUDICIAL NOTICE.
Where 14 months elapsed between the capture of a vessel sent into an American port and its restitution, on the ground that its captors had forfeited their rights by violating the neutrality laws, judicial notice will be taken that such time is less than might reasonably have been expected, in view of the certainty that the matters involved would be bitterly defended at law and by diplomatic action.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 62.]

9. SHIPPING ⟸102—CARRIAGE OF GOODS—LAW GOVERNING.
A British vessel, bound from Africa to Liverpool, was captured by a German naval vessel and sent into an American port, where the shipowners filed a libel for its possession, subsequently awarded to them for the captors' violation of the American neutrality laws. The owners of the cargo filed a libel, separately demanding such cargo, without objection from the shipowners. *Held*, that the voyage to Liverpool was totally abandoned, and, as the voyage ended in the United States, or was there abandoned intentionally, the rights of the parties were governed by the laws of the United States.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 400.]

10. SHIPPING ⟸154—LIEN FOR FREIGHT—LOSS.
The shipowners had no lien for freight on the cargo, as a carrier cannot preserve a lien for freight where he totally abandons the carriage of the goods, even though the abandonment is under force majeure.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 516–520.]

In Admiralty. Libel by the British & African Steam Navigation Company, Limited, against the proceeds of the cargo of the Appam. On hearing on exception to libel. Libel dismissed.

R. J. M. Bullowa, of New York City, for libelant.
James K. Symmers, of New York City, for claimant.

HOUGH, Circuit Judge. This pendant to the celebrated litigation over the Appam (243 U. S. 124, 37 Sup. Ct. 337, 61 L. Ed 633) seeks to raise the single question whether, under the facts shown and the law of Great Britain, a lien for freight exists in favor of the Appam's owners against the late cargo of that vessel or the proceeds thereof.

The action is in rem, and the res proceeded against is money producd by sale of cargo—a sale in part conducted by those to whom the

cargo was finally awarded, and in part a judicial sale pendente lite of so much of the lading as was confessedly perishable.

The present hearing is in form upon a peremptory exception to the libel; but by stipulation filed the court has before it all the facts shown by the records in the main litigation, a knowledge of how and by whom those causes were promoted, the decisions of British courts, and the views of text-writers of authority. It is really a final hearing.

The Appam loaded at sundry ports on the west coast of Africa, and (approximately) had accomplished about 2,500 miles of her voyage when captured by the German cruiser Moewe; she had still about 1,500 miles to cover before reaching her port of delivery, Liverpool, and when surrendered to her owners, pursuant to mandate of the Supreme Court of the United States, was at Hampton Roads, and about 3,000 miles from her original destination. Thus she had conveyed her cargo about 1,000 miles nearer Liverpool than it was on shipment, and three-fourths of the transport remained unaccomplished.

The first proceeding against or for the Appam was a strict libel of possession, brought by the present libelant as owner of the hull. Shortly after it was filed, the Appam's master, as agent for insurers of cargo consignees, filed an independent libel for possession of cargo. The underwriters had paid a total loss on proof of capture, and it is of course that they stand in owners' shoes. The manifesting of the vessel shows that the cargo was mostly consigned to shippers' order, but actual ownership at date of capture is unknown and immaterial.

The sale of perishable goods was by consent of proctors for both ship and cargo, but was without prejudice to any lien or right thereto on the part of the ship. No assertion of lien for freight was made in the main litigation, and on conclusion thereof in the District Court for the Eastern District of Virginia (234 Fed. 389) the proceeds of all cargo sales were deposited in New York, and this libel filed against the same. The theory of action is that the lading of the Appam was shipped in British possessions by British subjects to an English port on an English steamer, under bills of lading which specifically agreed that:

"Freight is due on shipment, and shall be considered as then earned, and shall be paid on demand, ship or goods lost or not lost."

It was further agreed that the shipowners—

"should have a lien and right of sale * * * over the goods shipped under this B/L, not only for the freight and charges due thereon, whether payable in advance, or not, but also for all amounts in any wise to become payable to them under the provisions of this B/L, although the same may not then be ascertained or payable."

The libel therefore asserts a conventional lien for the entire freight, none of which was in fact paid or demanded at, on, or after shipment and before capture. So far as this court knows, the present suit is the only effort at collection. Unless the lien insisted upon can be sustained, the shipowner cannot recover, for the Appam's voyage has never been completed, and right delivery tendered. I assume that the shippers are liable in personam on the bills of lading, and either at law or in admiralty, because they agreed to pay the freight, and upon a valuable consideration. On this point no difference is thought to exist

between our law and that of Great Britain. National, etc., Co. v. Internat., etc., Co. (C. C. A. 2d) 241 Fed. 861, —— C. C. A. ——.

[1] But the nature, under British law, of the lien sought to be created by these bills of lading, is not so clear. A normal freight lien is possessory only under general maritime jurisprudence (The Bags of Linseed, 1 Bl. 108), though frequently held to have survived even manual delivery, owing to circumstances, varying with every case, and showing intent expressly or by implication. No lien is created by the agreement to pay freight before fulfillment of voyage (How v. Kirchner, 11 Moo. P. C. 21; Kirchner v. Venus, 12 Moo. P. C. 361), and whether English law will recognize a lien for "something contracted to be paid in advance" is at least doubtful (Gardner v. Trechmann, 15 Q. B. D. 159).

It is obvious that this question of lien is wholly apart from that of personal liability, assumed by a consignee or indorsee of the bill, who demands delivery on the strength of the bill, assuming a document such as that issued by the Appam. To be sure, this distinction is rarely important, for to one who takes goods by virtue of the bill of lading contract it is immaterial whether he discharges a lien or pays on the contract; he pays just the same. But in this instance jurisdiction depends solely upon the asserted lien. The fact that there are persons individually liable (perhaps) in England or Africa is of no moment here.

[2] The Privy Council cases last cited, or their doctrine, have not met with entire acceptance (see Carver on Carriage by Sea, passim), but this much seems clear to me upon reason: The lien for freight payable (but unpaid) in advance certainly could not be exercised en route; the Appam could never have stopped at some convenient place and sold enough of her cargo to get what the shippers had agreed to pay before she sailed. In other words, the lien only ripened and became enforceable upon readiness to deliver, or at least arrival at destination, unless some other exception or proviso of the bills of lading excused performance on the part of the ship. The lien was therefore plainly inchoate when ship and cargo fell into German hands, and it is difficult to see how in its nature it differed from the common freight lien of maritime jurisprudence.

[3] These considerations seem to justify a statement of some legal propositions thought to be undoubted and which I think lie at the bottom of this case. The capture of the Appam and cargo was lawful; in a legal sense there was nothing wrong about it; ship and lading were prize, and the captor succeeded to the rights of owners of both hull and cargo; the captor's title was subject to the action of a competent prize court, and to that extent was inchoate. This ship and lading never got before a prize court. The captor's title and possession was forfeited, not for any violation of international law, but for an infraction of American law, and restitution decreed because of a violation of American neutrality; that is, of our own fixed ideas of what could and should be done in our own waters. The private owners of hull and cargo profited by the tort committed in the territorial waters of the United States and against the United States. This was the result of repeated rulings which Justice Story thought not wholly logical,

for he evidently inclined to the opinion that the sovereign alone could complain of such a public wrong as the prize crew from the Moewe committed when they overstayed their time in Hampton Roads. The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454.

As has been indicated, counsel seem to agree that the effect of this series of occurrences is to be ascertained by British law. If so, no more than analogies can be found, for no such transfer and retransfer of possession as that of the Appam and her cargo is known to have happened in the British domain.

Two analogies suggest themselves—marine disaster and recapture. To the first I will revert. The doctrine of freight upon recapture, as put by Lord Stowell in The Racehorse, 3 C. Rob. 196, The Martha, 3 C. Rob. 106, and especially The Friends, Edw. 246, has been applied during the present war to cases of seizure of enemy cargo on British vessels in The Iolo [1916] P. D. 206, and The Juno [1916] P. D. 169, and pro rata freight usually awarded.

These cases (and others new and old) rest, however, on the assumption that what is before the court is a seizure jure belli, that the case is one of prize, and that consequently all incidental matters arising between the parties in interest, not only may be adjusted but must be adjusted in the prize court, whose jurisdiction is exclusive, once the fact of prize is established, which fact also must be there adjudicated. The Siren, 7 Wall. 162, 19 L. Ed. 129. But whether full or pro rata freight is allowed, the award is ex æquo et bono, and not by virtue of any contract, for the contract between ship and cargo owners must be held to have "ceased by the act of unlivery." The Hoffnung, 6 Rob. 231; The Corsican Prince [1916] P. D. 195. Cf. [1916] 2 K. B. 202. Yet even in the prize court, if there was total defeat of the object of the voyage, as by sale of the goods, no freight at all was allowed. The Louisa, 1 Dods. 317.

[4] While unloading has thus been regarded as symbolic of severance of that relation in which "the ship is bound to her freight and the freight to the ship," what ends and abrogates the contract of affreightment cannot be the mere episode of unlading—it is the fact of capture, of seizure jure belli, which by more potent law severed the contractual or conventional relations of peaceful shippers and carriers. Curling v. Long, 1 B. & P. 637.

It would be absurd to assert that after the prize crew took over the Appam she was any longer fulfilling her contract to carry freight for hire; indeed, she was specifically excused from so doing by some of the oldest clauses of the historic bill of lading, and if the contract of carriage ends, the conventional lien embodied in and created by that contract falls with it, no matter whether such lien was at the moment of capture inchoate or perfected, or for freight moneys prepayable or otherwise.

Following the analogy of recapture, that occurrence does not permit the courts, either maritime or of common law, to make a new contract for the parties; no action will lie for a quantum meruit (St. Enoch, etc., Co. v. Phosphate, etc., Co. [1916] 2 K. B. 624; The Corsican Prince, supra; The Friends, supra), but the prize court may, jure belli

(so to speak), do the fair thing, because the contractual relation has ceased, and it often has done so, somewhat to Justice Story's discontent (The Nathaniel Hooper, 3 Sum. 542, Fed. Cas. No. 10,032).

[5] All the litigation over the Appam has been on the instance side; this court cannot disregard the severance of contractual relation by capture, not condemnation; nor has it in this case any right to award pro rata freight as in prize; nor in any other way, for there is no proof of a contract or agreement therefor.

[6] I am therefore compelled to the opinion that by British law, it is (1) doubtful whether a lien differing from that ordinarily growing out of the carriage of goods would be allowed by reason of the wording of the Appam's bills of lading; (2) if such lien was created it rested solely upon a contract which was abrogated by capture; (3) the personal liability of shippers is immaterial as is any similar liability of consignees; (4) there being no lien, there is no jurisdiction, and the libel fails.

[7] It is argued that the contract of carriage revived on repossession; no authority sustains this view, nor does the analogy of recapture assist. If a recaptor delivered the goods at destination, or permitted the shipowner so to do, subject to salvage, freight was due. But if the recaptor made delivery the shipowner did not fulfill his own contract, and no more did he do so if he tendered the cargo with a burden of salvage attached. The freight was due, no matter who delivered, if the goods were in good order; but the contract was not fulfilled. Ex parte Cheesman, 2 Eden, 181, holds no more than this; its dicta are inconsistent with later and greater authority.

The foregoing is my opinion on the matters raised in argument; subsequent reflection upon this novel case has led to the view that it does not depend upon British law, but is a matter to be settled by our jurisprudence in favor of the claimants. The Appam entered our harbor in lawful possession of her captors; by a subsequent infraction of American law, and in accord with rulings thought to be peculiarly American, the owners of hull and cargo severally regained their respective properties. It was proximately due to the law of the United States that this good fortune fell to them.

If by our law they severally got back what had once been their own, then by our law their respective rights to what they got must be admeasured, unless the obligation of a contract good where made is to be respected and enforced. These claimants, as libelants (practically), separately demanded the cargo as their own; these libelants never objected, yet such asserted and ultimately granted right of possession was wholly inconsistent with any existing or continuing relation between ship and cargo or the owners thereof. The evidence of that relation was the bill of lading, which as against the prize master was nothing; in truth and in law the Appam had become a mere receptacle in which the captor respondent kept what he had taken both from the carrier and the cargo owner; the latter got his own cargo; the former acquiesced in the proceedings; certainly he got back nothing but his ship.

[8] It is too clear to require more than statement that the efforts to recover Appam and cargo were serious matters, sure to be long contested, certain to be bitterly defended at law and by diplomatic

action, and of most doubtful issue. Fourteen months elapsed between capture and restitution, and judicial notice is taken that such time is less than might reasonably have been expected as the life of such a litigation.

[9] These facts raise the question whether a year and more ago there was any intention on the ship's part to continue the voyage and deliver the cargo. I think but one answer is possible: There was no such intent; the voyage to Liverpool was totally abandoned. If such is the fact the analogy of recapture is not nearly as close as that of marine disaster. The Appam was much more like a derelict restored to owners free of salvage through misconduct of salvors (a thing barely possible) than she was like a recaptured vessel. It clears the matter somewhat to stay on the instance side of the court.

To be sure there was no physical injury to the ship, but the disaster to the joint interests of hull and cargo was quite as great as that wrought by many a storm. If in fact the voyage was ended in the United States, or the original voyage there abandoned, and so ended or abandoned, by intent, the rights of parties are adjusted by our law and The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406, applies, a case which, however, proclaims its adherence to English precedent.

[10] Let the lien agreed upon be given as wide a scope and great a force as can be contended for, and it is still true that no carrier can preserve any lien for any freight against any cargo, if even under force majeure he totally abandons the carriage of the goods intrusted to him; and this is what I think the Appam did—indeed, it was the only possible thing to do under the circumstances.

The result is the same, and the libel must be dismissed, with costs.

THE OLYMPIA.

(District Court, E. D. New York. April 28, 1917.)

1. EVIDENCE ⊂=383(8)—EFFECT OF BOOKKEEPING ENTRIES.

A book entry charging repairs to a boat against the charterer is not conclusive, where other evidence shows that credit was in fact given to the boat, and that the bill was sent to the charterer at the request of the owner.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1669, 1670.]

2. SHIPPING ⊂=54—INJURY TO CHARTERED SCOWS—LIABILITY.

A towing company used two dump scows, orally chartered from libelant, in the execution of a contract with the owner of a dumping platform to furnish scows to remove material from a subway excavation. The manner of loading was by dumping the material from the platform into the pockets of the scows, and the contract provided that the scows should always lie afloat, and that no stones larger than could be handled by two men should be dumped into them. There was evidence that it was customary to dump soft earth into the pockets before dumping in stones, to prevent injury to the planks. During the work libelant's scows were injured a number of times by having planks broken, and one by grounding

while being loaded, and libelant paid for their repair. Libelant brought suit against the towing company for breach of the implied condition of the charter, by failing to return them in good order, and respondent brought in the dump owner under the fifty-ninth rule. *Held*, on the evidence, that the injury to the scows was caused by the negligence of the dump owner in loading and the unsafe condition of its berth, and that it was liable therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221.]

In Admiralty. Suits by James Shewan & Sons against the dumper Olympia, with the Moran Towing & Transportation Company, impleaded, and by Harriet H. Healey, owner of the dumpers Olympia and Atlanta, against the Moran Towing & Transportation Company, with the Cranford Company, impleaded. Decree for libelant against the Olympia in the first suit, and for libelant against the Cranford Company in the second suit.

Foley & Martin, of New York City, for James Shewan & Sons.

Alexander & Ash, of New York City, for the Olympia.

James J. Macklin, of New York City, for Moran Towing & Transp. Co.

Grout & McKinney, of New York City, for Cranford Co.

CHATFIELD, District Judge. These actions have been tried together in the sense that the witnesses have been examined but once. The issues are distinct, and each action must be discussed from the standpoint of its own parties, and with careful discrimination between the occurrences upon which the two suits are based.

The first action is for repairs to the scow Olympia. It appears that the Olympia was chartered by a conversation over the telephone, in which the Moran Company asked the owner of the Olympia if he had a scow available for use. Upon receiving an affirmative answer and information as to the place where the Olympia was moored, one of the Moran tugs, upon the 3d day of September, 1916, took the scow from her mooring, with her captain on board, and proceeded to a dumping board of the Cranford Company at Ninth street in Brooklyn, where the scow was used to receive dirt from the subway excavation in Flatbush avenue, Brooklyn.

The scow Olympia has six pockets, each with sloping sides terminating in two gates opened and closed by means of two chains running to a windlass upon the deck of the scow. These chains are located at opposite ends of the pocket, and terminate in bridles, of which an arm runs to each of the two gates, which open downwardly and close up to a line running fore and aft of the vessel. The dumping board consists of a ramp and a platform, with tilting planes operated by machinery, from which the material, as the planes are tilted, is slid off and thus poured into the scows, which are placed under the dump and moved forward or back, according to the requirements, in order to direct the stream of earth into the desired pocket.

In the month of September, 1916, the Olympia required repairs upon three occasions. It appears from the record that she was surveyed on the 9th day of September, and that her injuries generally consisted of damages to two planks in the sloping side of the pocket, just aft of

the air chamber or central space in the scow. Again, upon the 13th day of September, 1916, the Olympia was surveyed, and it was found that she needed repairs because of damage causing leaks at the corners of the pockets, and also at a point in the bottom where the planks adjoined the opening or gate space of one of these pockets, and it appears from the testimony that three bottom planks had to be replaced and showed injury. Of these, two were broken intentionally by the dry dock men, in order to get the boat upon the dry dock and to let the water out of the boat, without going to the great expense of pumping it out, or holding the boat until it could drain out slowly. No fault is alleged in the method of making the repair, and it is necessary to assume, therefore, that the removal of these planks and their restoration was a proper item in repairing the damage caused by leakage.

Again, upon the 22d day of September, the Olympia was surveyed and repaired, when it was found that in the next pocket aft two planks had been broken upon the sloping outer side of that pocket, about halfway up from the gate. It also appears that while the boat was in the dry dock for repair of the leaks—that is, upon her second visit to the dry dock—certain extra repairs were found to be necessary and made at the request of the owner. These extra repairs had nothing to do with the so-called damage items covered by the survey. But it appears from the testimony that, at the request of the owner of the boat, the bill for all four items of repair was sent to the Moran Company, and the libelant seems to have made the first entry in its books in the form of a charge to the Moran Company at the time the bill was sent. Subsequently the Moran Company denied liability for these repairs, and in the meantime, apparently, the libelant had corrected its books, so as to show a charge for the repairs against the steamer or its owners, and had deducted the items from its bill against the Moran Company, leaving merely the notation that, at the request of the libelant, the bill had been sent to the Moran Company for payment.

[1] It is evident from the testimony that the libelant knew of the business relations between the owner of the Olympia and the Moran Company. But there is nothing to show that the Moran Company was a party to the arrangement in such a way that its credit, either as principal or as surety, took the place of the credit which evidently was given to the boat, and not to the boat's owner. The method of bookkeeping is not conclusive, when the presumption from the other facts is stronger than the presumption from an entry in the books, which would have saved labor if the Moran Company had paid the bill at the suggestion of the owner of the boat. The libelant, therefore, should have a decree against the boat, both for the specific items which were concerned with the use of the boat made by the charterer and for the bill for extras, with costs. The petition of the owner to bring in the Moran Company should be dismissed, but without costs, as the Moran Company would be responsible as charterer for all except the extras, if the failure of the Moran Company to bring in the alleged tort-feasor had not caused the bringing of a separate action by the owner of the boat.

[2] In the second action we have claims for damages to two boats, the Olympia and the Atlanta. The issue was suggested in the previous action as a defense to any claim against the Moran Company, but was not passed upon therein.

The Moran Company chartered, upon the 29th of July, 1916, the boat Atlanta, under substantially the same circumstances and form of oral charter as those previously considered in the case of the Olympia. Both of these boats were used by the Moran Company for the receipt of the subway dirt at the Ninth street dump, and as a matter of law the Moran Company, through implied contract, was bound to return the boats in good order, except for reasonable wear and tear. Any actual negligence or tort of a third party, which would create a cause of action in favor of the owner of the boat, can be brought in under the fifty-ninth rule by the charterer, if the libelant sues the charterer under such circumstances that a breach of the implied conditions of the charter is shown.

In the present case the libelant charged the Moran Company in contract with this breach of the implied conditions of the charter. The Moran Company by petition brought in the Cranford Company, and thus changed the cause of action from contract to tort. It is evident that, unless the Moran Company can satisfactorily substantiate the charge of tort against the Cranford Company, the Moran Company would be liable for the damages, if these be not shown to be caused by the acts of the captain of the scow, as indicated above with reference to the previous cause of action.

In the present case there was some attempt to show that the captain of the scow was not on board at the time some of the alleged damage occurred. There was also some evidence that it was customary to place a layer of mud over the side of the scow pocket, before stones were dumped upon the exposed plank. It is evident that the captain of the scow could neither catch any stone which might cause damage, in the act of being dumped, and prevent its striking until a layer of mud could be placed beneath it, nor would he have anything to say about the size of rocks which might be concealed in the loads of earth which were dumped upon the tilting board.

This is not a case where damage resulted from a continued use of the scow in a dangerous manner, nor from the loading of improper material after the matter had been brought to the attention of those responsible for the safety of the scow. The accidents happened, so far as the injuries were inflicted, by stones falling from the dump, through a single blow from some one stone larger than could be received with safety, or from a stone which, by its velocity, shape, or manner of striking, happened to inflict the damage. So far as the charter is concerned, therefore, the owner cannot be held responsible for the injuries, and the charterer can pass on the cause of action by bringing in, under the fifty-ninth rule, the alleged tort-feasor. We must therefore consider first whether the Cranford Company was negligent; that is, was responsible for the injuries to the boats.

It appears that the Atlanta was injured by the fall of one of these stones, and that this stone became wedged in the side of the pocket

through the breaking of two planks. The stone was large enough, so that it remained imbedded in the planking and could not be removed by the captain. The boat proceeded to sea, where the cargo of mud was dumped, and came back to the upper harbor, when she was taken to the dry dock and the stone removed by four or five men, who put it back on the boat after she was repaired. It was then taken to sea with the next load of mud and dumped into the Atlantic Ocean. We must take the evidence of its size from those who saw it at the dry dock, and it evidently was a stone of considerable weight.

The contract between the Moran Company and the Cranford Company was to the effect that the Moran Company would furnish seaworthy boats and that the Cranford Company should dump from the dumping board no stones larger than what is called two-man size; that is, those which could be handled by two rather than three or more men. According to the testimony, the stones which could pass through the bottom of the dump wagon and through the hopper of the hoisting apparatus, would not be greater than two-man size. If this particular stone exceeded, to some extent, the average size, it is possible that it had been placed in the material through the fault of some of the Cranford Company's servants, and in that case they would be liable. But if the stone was not larger than the prescribed size, then the Cranford Company was still responsible for the manner of delivering the material into the scows. The provision with respect to the size of stone was an additional obligation for the security of the Moran Company, but did not absolve the Cranford Company from careless conduct with respect to material which was proper in size. If any obligation to dump soft earth, as a bed for stony material, rested upon any one in connection with the use of the scow, the Cranford Company would be bound to see that the material was in position before stones, even of small size, were deposited where they might do damage. In the case of the Olympia, the occurrences which have been described in the previous action are also alleged as faults against the Cranford Company, and in two instances, viz., the occurrences upon September 9th and 22d, the dumping of stones which would seem not to have been larger than two-man size, but which were apparently dumped under circumstances indicating negligence of the Cranford Company, caused the damage in question. Upon the third occasion, when the bottom planks of the boat had to be replaced, the testimony shows that a small stone was wedged under the end of one of these bottom planks. It is apparent that such a stone could not have reached this position from being dumped into a pocket, and in the absence of other explanation it is necessary to conclude that this stone was forced into the seam from the outside; that is, when the boat was aground.

It is also apparent that the leakage in the corners of the pockets and the opening of the seams, which had to be repaired, was caused by excessive strain. It appears from the testimony that upon the 14th day of September, the Olympia went aground when under the Ninth street dump, that notice of this was given to the Moran office, and a tug was sent to pull the boat off the ground. The testimony of the men making the survey and the repairs is to the effect that the boat's inju-

ries had been caused by strain when she was resting upon the bottom. The contract of the Cranford Company called for the loading of boats in deep water, and no other situation from which the injury might have resulted has been suggested.

It would appear, therefore, that the Cranford Company was liable for the unsafe condition of its berth. This they seek to avoid by showing that the Olympia and the Atlanta were old, that their bridle chains broke, and that part of the load was lost in the slip upon several occasions, and that one of these dumpings of material occurred while the Olympia was under the dump, upon the day before she stranded. The Moran Company terminated the charter after the third claim of damage from the dumping of stones into the boats, and it is apparent from the correspondence and testimony of the witnesses that much dispute arose over the alleged responsibility of the Cranford Company for what happened to the boats which the Moran Company had furnished.

It is evident that the Moran Company had the option to supply other and stronger boats, and thus to avoid dispute, even if the Olympia and the Atlanta were seaworthy and strong enough to comply with the terms of the contract between the Moran Company and the Cranford Company. It should be noted that these boats were furnished to the Cranford Company under an extension of contract, made partly by letter and partly by oral agreement, and that the terms of the contract were contained in a previous written agreement, which was changed only as to the price. It is contended by the Cranford Company that the new oral agreement embodied no restrictions, but the evidence indicates that the understanding of both parties was that the terms of the previous written contract were included in the new arrangement.

It would seem that, if the Olympia went aground while being loaded, the duty would rest upon the Cranford Company to keep watch of the conditions in their slip, and, even if the obstruction in the slip came from the very boat which went aground, it would not relieve the Cranford Company from its duty to remove the boat, instead of subjecting it to the strain produced as the tide fell, or as the boat was further loaded. In fact, the testimony shows that the Cranford Company, prior to dredging out the berth, did remove the loaded boats at low tide and put in empty boats for loading until the tide raised to a point where a sufficient depth of water could be had. If the grounding of the Olympia was sufficient to cause damage, the Cranford Company cannot allege as a fault that the Moran Company towed the boat into deep water, instead of waiting for the Cranford Company to procure a tug for this purpose. Nor is there any evidence in the case that the method of towing was negligent, or that the tugboat caused the damage, in dragging the scow from the bottom.

It would seem that the small stone which was found in the bottom seam might have gotten in during this grounding; but there is nothing from which a finding could be made that the proximate cause of the leak resulting from the opening of the seam into which this stone was forced could be negligent hauling off of the boat by the Moran tug. On the contrary, the pressure of the boat when aground, and the consequent opening of seams, show the presence of an obstruction for

which the Cranford Company was responsible. The boats were evidently seaworthy, and even under the terms of the written contract between the Moran Company and the Cranford Company, if the Cranford Company found that their methods were likely to cause damage, they should have refused to use the scow and held the Moran Company for breach of contract, rather than to have so loaded the scows which were furnished as to cause damage through employment of methods in their control, from which the damage would be expected to result.

The libelant, therefore, should recover damages for the injuries to both boats against the Cranford Company, and should have his costs as well. The Moran Company brought in the Cranford Company, and was then forced to defend itself against the charge that it had furnished unseaworthy boats; but, inasmuch as the libelant recovers costs against the Cranford Company directly, no other costs will be allowed in the second action.

In re MILLER et al.

(District Court, E. D. New York. May 14, 1917.)

1. BANKRUPTCY ⊂=484—COMPENSATION OF RECEIVER—EFFECT OF COMPOSITION.
Under Bankruptcy Act July 1, 1898, c. 541, § 48d, 30 Stat. 557 (Comp. St. 1916, § 9632), providing that receivers shall receive commissions not exceeding those therein specified, but that in case of the confirmation of a composition such commission shall not exceed one-half of 1 per cent. of the amount to be paid creditors, and section 48e, providing for additional compensation to trustees or receivers for conducting the business, but further providing that, in case of the confirmation of a composition, such commissions shall not exceed one-half of 1 per cent. of the amount to be paid creditors, if a composition is offered after the appointment of a trustee, the receiver, who has completely earned the amount of his compensation, may be allowed such amount as the court sees fit to allow, up to the regular percentage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896.]

2. BANKRUPTCY ⊂=272—COMPOSITION—SECURITY FOR COSTS.
After an offer of composition by the bankrupt, the expense of conducting the bankruptcy proceeding for the purpose of the composition, instead of for the liquidation of the estate, should be secured by the bankrupt, and, if necessary, paid out of the amount deposited for the purposes of the composition; the creditors being entitled to a distribution of the amount available for that purpose without diminution by the bankrupt in his efforts to effect a composition, unless they consent to or approve of expenses for rent, wages, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 572, 573.]

3. BANKRUPTCY ⊂=484—FEES OF RECEIVERS—EFFECT OF COMPOSITION.
If a receiver has already accounted, and his allowance has been fixed or paid, before composition is offered, the confirmation of the composition will not reduce his allowance, nor compel the restoration of any of that already paid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896.]

4. BANKRUPTCY ⊂=484—FEES OF RECEIVERS—EFFECT OF COMPOSITION.
Under Bankruptcy Act, § 2, subd. 5 (Comp. St. 1916, § 9586), empowering courts of bankruptcy to authorize the business of bankrupts to be conduct-

ed for limited periods by receivers, "if necessary in the best interests of the estates," and sections 48d and 48e, limiting the fees of receivers in case of a composition, though, upon presentation of an offer of composition while the estate is in the hands of a receiver, the amount of his commissions as receiver may be immediately reduced, so far as the possible maximum is concerned, to one-half of 1 per cent., he can be called upon to do nothing thereafter, except to hold the property, and if, for the benefit of the bankrupt, he continues to conduct the bankrupt's business, the expense of so conducting it is a legitimate disbursement to be paid by the bankrupt, and not compensation to the receiver, within section 72 (Comp. St. 1916, § 9656), providing that the receiver shall not receive, nor shall the court allow, any other or further compensation for his services than that expressly authorized and prescribed therein.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896.]

5. BANKRUPTCY ⊂⊃474—COSTS AND FEES—PERSONS OR FUNDS LIABLE.
Where a bankrupt, offering a composition, has made a deposit for his attorneys, the amount thereof will be used to meet the expenses of the composition and of the bankruptcy proceedings, if necessary.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884.]

6. BANKRUPTCY ⊂⊃484—FEES OF RECEIVERS—EFFECT OF COMPOSITION.
A receiver, when conducting the business of the bankrupt for the bankrupt after the offer of a composition, should be paid only in a corresponding way to what he would be paid if acting for the benefit of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896.]

In Bankruptcy. In the matter of David Miller and another, individually and as members of David Miller & Son, and the copartnership of David Miller & Son, alleged bankrupts. On application for award of compensation to a receiver. Ordered in accordance with the opinion.

CHATFIELD, District Judge. The court appointed a receiver upon the 13th day of March, 1917, and at the request of the attorney for the petitioning creditors authorized him to continue the business. The Bankruptcy Law (section 2, subd. 3) gives the court authority to appoint a receiver to take charge of the assets until election of a trustee. The compensation of such receiver is fixed at a certain percentage, unless a composition be confirmed, in which event the percentage of the receiver for taking charge of the property cannot exceed one-half of 1 per cent. of the amount paid to creditors. Section 48, subd. "d." The evident purpose of the last provision is to assist bankrupts by keeping down expenses, if they are able to take the estate out of liquidation and preserve their business name. Under section 2, subd. 5, such a receiver or trustee can be authorized to conduct the business of the bankrupt "for limited periods," and by section 48, subd. "e," compensation for these services may be allowed by way of commissions upon the money disbursed or turned over in connection wtih the conduct of the business. But, again, it is provided that, if a composition be confirmed, such commission shall not exceed one-half of 1 per cent. of the amount to be paid creditors.

[1] It is apparent that if a composition is proposed before adjudication, and ultimately confirmed, the receiver's fees will be cut down. If a composition should be offered after the appointment of a trustee,

the compensation to the trustee will be cut down if the composition be confirmed. But in the latter case the receiver would have completely earned the amount of his compensation, and to such amount as the court should see fit to allow the actual services could be paid for, up to the regular percentage. Section 72 forbids the receiver or trustee from receiving in any form or guise any other or further compensation for his services than that expressly authorized and prescribed in the act, and also forbids an allowance by the court of any other compensation. This emphasizes the mandatory character of the language in the previous sections and also forbids evasion of the rule. It thus frequently happens that, in contemplation of an offer of composition, a receiver or trustee is urged to continue the business for long periods of time, and devotes his own services and business ability to the preservation of the assets as a going concern, only to be met, when the composition is offered, with the proposition that he is limited to one-half of 1 per cent. upon the actual amount to be paid to creditors and an additional one-half of 1 per cent. on the same amount for running the business.

In the present case adjudication has been had. No trustee has been appointed as yet, but subsequent to adjudication, and while the property was still in the possession of the receiver, an offer of composition was made, and the amount to be distributed to creditors is $3,577.96. One-half of 1 per cent. is $17.89. The receiver will therefore have given his personal attention to the conduct of a business of considerable extent for a period of at least two months, and his maximum compensation, as figured by the bankrupt, would be $35.78. The receiver has performed these services at the request of the attorneys for the petitioning creditors and of other creditors, and also at the request of the attorneys for the bankrupt.

[2] It is a well-established proposition in this district that, after an offer of composition by a bankrupt, the expenses of continuing the bankruptcy proceeding for the purpose of the composition, instead of for liquidation of the estate, should be secured by the bankrupt, and, if necessary, paid out of the amount deposited for the purposes of the composition. The creditors are entitled to a distribution of the amount which is available for that purpose, without diminution by the bankrupt in his hope to effect a composition, unless the creditors consent to or approve of a reasonable amount of expenses by the bankrupt therefor. Such items as rent, wages, and the various larger expenses, where an offer of composition drags over a period of several months, are not allowed to be incurred out of the estate without notice to the creditors. In the same way, after an offer of composition is once made, the receiver does not conduct the business for the benefit of the creditors, and there certainly is still less reason why the receiver should be expected to conduct the business for the benefit of the bankrupt, at the reduced maximum compensation which the court can allow, if the property is taken away from the receiver and turned over to the bankrupt at the termination of the composition.

[3, 4] If a receiver has already accounted, and his allowance has been fixed (and possibly paid) before composition is offered, certainly

the mere confirmation of the composition while the estate is in the hands of the trustee would not be sufficient to revert back and reduce the receiver's allowance, nor could he be compelled to restore any of that already paid. In the same way, upon presentation of an offer of composition by a bankrupt while the estate is in the hands of the receiver, the amount of his commissions as receiver may be immediately reduced, so far as the possible maximum is concerned, to the one-half of 1 per cent. rate; but he can certainly be called upon to do nothing thereafter, except to hold the property—that is, to continue to safeguard the property, pending the composition. If the bankrupt wishes to use the estate, or to prevent loss, he must give security therefor, and take the responsibility of the business himself, or he must ask that the receiver be authorized to conduct the business for him, and all expense of so conducting the business is a legitimate disbursement, to be paid by the bankrupt, and is not compensation to the receiver for what has gone before.

[5] In the present case the bankrupt has voluntarily deposited for his attorneys and for the attorney for the petitioning creditors an amount exceeding the total maximum fees of the receiver on any basis which might be proposed. The bankrupt must first pay the expenses of those who are entitled to payment out of the estate, including the allowance to the attorney for petitioning creditors, before the composition is approved, and, if necessary, the amount agreed upon by the bankrupt for his attorneys will be used to meet the expenses of the composition and of the bankruptcy proceedings. The receiver is clearly entitled to one-half of 1 per cent. both for acting as receiver and for continuing the business up to the time of presenting the offer of composition. He is clearly entitled to compensation at the hands of the bankrupt for the services which he has rendered to the bankrupt in conducting the bankrupt's business, without the necessity of security by the bankrupt and so as to prevent loss, in just the same way that the extra rent of the store should be charged against the bankrupt as a part of the amount deposited to cover the necessary expenses of the bankruptcy proceedings.

[6] While, therefore, the receiver is entitled to such compensation, and this allowance would not be contrary to the provisions of section 72 (inasmuch as section 72 is limited to running the business when "necessary in the best interests of the estate"—section 2, subd. 5), nevertheless an unlimited maximum of payment would be contrary to the spirit of the law, and the receiver, when acting for the bankrupt, should be paid only in a corresponding way to what he would be paid if he were acting for the benefit of the estate.

Upon the estimate of expenses and returns from running the business until the date of confirmation, the value of the stock, horses, proceeds of sale, etc., which have passed through the receiver's hands, it would appear that a total payment over and above the amount of the commissions, making his aggregate compensation $150, would be a fair adjustment, and the clerk will be directed to pay the receiver this amount on confirmation of the composition.

The attorneys supporting the composition have at all times expressed a willingness to recompense the receiver, so far as they had money to do so, but considered themselves prohibited by the language of section 72.

THE CORA P. WHITE.

(District Court, D. New Jersey. May 17, 1917.)

1. MARITIME LIENS ⊜1—REQUISITES—STRICT CONSTRUCTION OF LAW.
A maritime lien, as it may operate to the prejudice of general creditors, will not be extended by analogy or inference.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 1.]

2. MARITIME LIENS ⊜24—SUPPLIES—"FURNISHED TO VESSEL."
A corporation owned and operated a factory where it manufactured fish products and in connection therewith a fishing fleet. For a number of years it had purchased from the various libelants supplies, consisting of coal, provisions, and fishing appliances. These were all shipped and charged to the corporation, were taken to its factory, and there stored for use at the factory and on the vessels as occasion required. While the libelant who furnished fishing appliances knew from their nature that they were probably intended for use on the vessels, and certain of them were in fact used on the vessel on which it claimed a lien, no vessel was designated in the orders therefor. *Held*, that none of such supplies were furnished "to a vessel," within the meaning of Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (Comp. St. 1916, § 7783), and that none of libelants were entitled to a maritime lien thereunder.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 30.
For other definitions, see Words and Phrases, Furnish a Vessel.]

3. MARITIME LIENS ⊜64—PLEADING—LACHES.
Defense of laches, in libel to enforce maritime lien, not raised by the pleadings, cannot be considered.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 102.]

4. MARITIME LIENS ⊜61—LACHES—WHO MAY PLEAD.
Where the proceeds of the sale of a vessel are insufficient to pay the uncontested liens, defense of laches as to one lien can be raised only by one having a lien.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 99.]

In Admiralty. Libels against the steamer Cora P. White. On exceptions to commissioner's report. Exceptions sustained.

Howard M. Long, of Philadelphia, Pa., for Pusey & Jones Co., exceptant.

Norman W. Harker, of Philadelphia, Pa., for libelant, Wm. King & Co.

Clarence L. Goldenberg, of Atlantic City, N. J., for libelants, Linen Thread Co. and Pennsylvania Coal & Coke Co.

RELLSTAB, District Judge. On November 1, 1915, the steamer Cora P. White was seized at the instance of certain mariners for unpaid wages due them for services rendered on said vessel. At that time it was owned by the Fifield Fish Oil & Fertilizer Company, a corporation of New Jersey, whose business was to catch fish, manu-

facture them into oils and fertilizer, and sell said products. This extraction, etc., were carried on by said company at its factory situated at Manhaden, N. J. This steamer was used by said company during the fishing season of the years 1914 and 1915 in catching fish for said purposes. On November 15, 1915, the company was put into bankruptcy, and its property, other than the proceeds derived from the sale of its vessels, is in the course of administration in the bankruptcy court in this district. The proceeds derived from the sale of this steamer are insufficient to satisfy all the libels filed against it.

The Pusey & Jones Company, one of the libelants claiming a maritime lien for repairs made and supplies furnished to this steamer, during said years, interposed answers to the libels filed by the Pennsylvania Coal & Coke Company, Wm. King & Company, and the Linen Thread Company, who likewise claim maritime liens for supplies furnished to said steamer, in which said answering libelant denies their right to participate in such of said proceeds as remains after payment of the wage claims.

The claims thus drawn in issue are: The Coal Company's for two shipments of coal made in 1915; the King Company's for divers shipments of food, groceries, and culinary supplies, made in the same year; and the Thread Company's for shipments of parts of fishing tackle made in the years 1914 and 1915. Each of these libelants claim a maritime lien on said steamer under the act of June 23, 1910, c. 373 (7 U. S. Comp. Stat. Ann. 1916, p. 8229), and the only question to be decided is whether they were furnished to said vessel or to its owner.

Considering, first, the testimony common to all of these claims, it shows that these supplies, in response to orders of the Fertilizer Company, were all consigned to it before the institution of said bankruptcy proceedings; that all of these libelants, for a number of years prior to the deliveries of these commodities, antedating 1910, had furnished said Fertilizer Company with like supplies on its credit, and for which they had been fully paid; that at no time during said years did the Fertilizer Company direct that any of said supplies be shipped to the steamer, or advise libelants that they, or any part of them, were for any of its vessels; that all these libelants knew the nature of the business that was being carried on by said Fertilizer Company, and that it had a factory and vessels which were used in carrying on said business; that none of them kept any accounts with said steamer or any other vessel of the said Fertilizer Company, or made any consignments to any of them; none of them charged any of said supplies against a "vessel" account, but each charged them to a general account, which they severally kept with the said company; that the Fertilizer Company did not keep any separate account with any of its vessels, but charged all of said supplies against its business generally.

Considering next the testimony applicable only to one or the other of these claims, it shows:

First, as to the libel of the Pennsylvania Coal & Coke Company, that the coal was furnished under a yearly contract to supply the Fertilizer Company with coal as needed, and each shipment was from the mines f. o. b. the piers at Port Richmond, Pa. From there it was taken by

the Fertilizer Company, on boats furnished by it, to its place at Manhaden, N. J., where it was put in a pile, from which it supplied its steamer or factory as it was wanted. The Coal Company understood that some of the coal so shipped would be used at the factory and some on the boat, but it did not know the proportions. Upon delivery of the coal at the piers the Coal Company's responsibility ended, and it was then entitled to the price at which such coal had been sold. Some of said coal was sold by the Fertilizer Company to individuals, and some of it was on hand at the time it went into bankruptcy and was sold by the receiver.

Second, as to the libel of Wm. King & Company, that the food and culinary supplies furnished by this company were shipped f. o. b. Philadelphia, Pa., to Leesburg, N. J., a railroad station near to Manhaden, on mail orders usually received weekly from the Fertilizer Company. From there they were taken by the latter to its factory at Manhaden, where they were put in a storehouse, and used in feeding the men employed on said steamer and at its factory, as occasion required. The King Company also understood that some of the supplies so shipped would be used at the factory and some on the boat, but it did not know in what proportions. Similar supplies were occasionally purchased by the Fertilizer Company from other dealers, and a like use made thereof, but these were very small in quantity as compared with those bought from the King Company.

Third, as to the libel of the Linen Thread Company, that the seine was made up and forwarded in 1914 by the Thread Company on specifications previously furnished by the Fertilizer Company. Other seines had been previously sold said company by this libelant and used on other vessels of said company. This particular seine, and the other articles mentioned in this libel, were sent f. o. b. the places from where shipped, to Leesburg. From there they were taken by the Fertilizer Company to Manhaden and installed on said steamer Cora P. White shortly after they were received, whereupon they became a part of its necessary equipment.

It is to be noted that the articles shipped by the Thread Company were from their very character—parts of fishing tackle—limited to use on a fishing vessel, while the coal, food, and culinary supplies furnished by said Coal and King Companies, respectively, were usable on either a vessel or at the factory, or both,

On the testimony, the commissioner found that, of the quantity of the coal furnished by the Coal Company and used by the Fertilizer Company, three-quarters was used on the steamer; that, of the food and culinary supplies furnished by the King Company, two-thirds was used thereon. He concluded that to that extent these libelants, respectively, had a maritime lien on said steamer, and that the Thread Company had a maritime lien for the entire amount of its claim. The commissioner's findings of fact as to said proportions are not seriously challenged by exceptant, and if the deliveries as made by these libelants are a furnishing to this steamer, as distinguished from a common-law sale and delivery to the owner, his conclusions must be sustained.

[1] A maritime lien is a jus in re, and, as it may operate to the prejudice of general creditors, it will not be extended by analogy or

inference. The Yankee Blade, 19 How. (60 U. S.) 86, 89, 15 L. Ed. 554.

The authority of the master to bind the vessel itself for supplies, etc., grew out of the necessities of maritime commerce, the business of the ship was to go on. If she found herself in a foreign port, where neither the owner nor master were known, or had individual credit, the right to pledge her for the wherewith to proceed was early recognized as a necessity, and for that reason a lien was accorded him whose labor or capital enabled the vessel thus situated to accomplish the purpose of her being. In such a case the furnisher, in the absence of evidence showing that the supplies were not furnished on the credit of the vessel, was considered as contracting with the vessel herself. The Grapeshot, 9 Wall. (76 U. S.) 129, 19 L. Ed. 651; The Alligator (C. C. A. 3) 161 Fed. 37, 88 C. C. A. 201; The H. B. Foster, Fed. Cas. No. 6,291.

The act of June 23, 1910, extended said lien to domestic vessels, and made it unnecessary to allege or prove that credit for the supplies, etc., was given to it, but it did not obviate the necessity to allege and prove that said supplies were in fact furnished to the vessel. This does not mean that the materialman must personally see that the goods are actually put on the vessel. If the supplies are furnished on the orders of the person to whom its management has been lawfully intrusted at the port of supply, and which pursuant to the orders of such person were forwarded in the manner indicated to a designated place, from which they were taken by such person to the vessel where it was at work, such supplies are furnished to it within the meaning of the act of 1910. The Yankee (C. C. A. 3) 233 Fed. 919, 147 C. C. A. 593.

Nor did this act change the law that a lien does not exist when the supplies are furnished on the mere credit of the owner. Ely v. Murray & Tregurtha Co. (C. C. A. 1) 200 Fed. 369, 118 C. C. A. 520. The agreement or understanding as to whether credit was given to the vessel, or the owner alone, may be inferred from acts and circumstances as well as from express language. Cuddy v. Clement (C. C. A. 1) 115 Fed. 301, 53 C. C. A. 94; The Lucille (D. C.) 208 Fed. 424.

No case has been cited, and none has been found, where a maritime lien has been allowed, where the supplies were furnished on the order of the owner, which did not indicate that they were for a vessel's use, because the goods or some of them were subsequently used on said vessel. There are cases which sustain such a lien where the goods or services were ordered for several vessels, and all of the goods or labor were actually furnished or rendered to said vessels. The Kiersage, Fed. Cas. No. 7,762; The Murphy Tugs (D. C.) 28 Fed. 429; McRae v. Bowers Dredging Co. (C. C.) 86 Fed. 344; The Yankee (Claim of the Glen Brook Coal Co.), supra. In these cases the value of the supplies and services was proportioned and liens allowed on said vessels respectively.

The difference between those cases and the instant one is radical. In those the supplies were furnished or the services rendered to the vessels on orders so to do. In the case at bar the goods were ordered by the general manager of the Fertilizer Company without mention that they were intended for use on a vessel. They were not delivered or

consigned to any vessel by the furnishers, but to the owner, as had been the practice for years.

In the case of coal, food, and culinary supplies, these were stored by the owner at its factory. Their arrival there was not a mere arrest or stoppage in transitu, but, so far as their delivery is concerned, they had reached their final destination. If the goods are furnished to the vessel in good faith, the materialman is not answerable for their misapplication. The H. B. Foster, supra. If not furnished to the vessel, their subsequent use thereon will not create a lien, as the furnisher's right to a lien arises, if at all, from what occurred at the time the supplies were ordered or furnished, not from what may have been subsequently done in regard thereto.

It was not because the vessel was away from her supply port and under necessity of immediate provisioning that any of these goods were ordered or furnished. They were ordered on the owner's general order to be held in store for use at its convenience, as its business should subsquently require.

In the case of the seine and parts of the fishing tackle furnished by the Thread Company, these articles, from their very character, as before noted, carry the intelligence that they were probably for use on a fishing boat. Does this distinction entitle them to a lien? On the hearing I was rather impressed that it did, but further reflection has convinced me that the distinction is not controlling.

The evidence establishes that in the sale of these goods, as well as in the sale of the goods embraced in the King and Coal Company's libels, none of these libelants considered this steamer, or any other vessel for that matter, as a factor in accepting the orders or in the delivery of said supplies, but that the Fertilizer Company, one of their old and up to that time reliable customers, alone was considered in those transactions, and that said commodities were furnished to it, and it alone, and on its sole credit. The claim of the Thread Company for parts of fishing tackle is similar to that of Atwood's for a "net-lifter," denied a lien in The Bethulia (D. C.) 200 Fed. 877. This net-lifter was for use on a fishing vessel. It was purchased by the Boston Fisheries Company, the owners of the Bethulia, and on the order of Atwood was forwarded to it direct from the manufacturers. This machine was subsequently installed on said vessel. The owners of that vesssel had previously purchased a machine from Atwood, which it used on another of the company's vessels. The district court in that case laid stress on the facts that this lifter had not been ordered specifically for the Bethulia, nor delivered to that particular vessel.

[2] By the general maritime law before the act of 1910, when supplies were ordered for a vessel by the owner, in the absence of evidence showing that they were furnished on the credit of the vessel, the presumption was that they were sold on the credit of the owner, and a lien was denied. The St. Jago de Cuba, 9 Wheat. (22 U. S.) 409, 416, 417, 6 L. Ed. 122; The Valencia, 165 U. S. 264, 271, 17 Sup. Ct. 323, 41 L. Ed. 710; Prince v. Ogdensburg Transit Co. (C. C.) 107 Fed. 978; New York Trust Co. v. Bermuda-Atlantic S. S. Co. (D. C.) 211 Fed. 989, 999. For other cases, see note 46, 26 Cyc. 778. By this act, when the supplies are furnished to the vessel on the order of the owner or

his authorized agent, this presumption is nullified, and a prima facie lien is given. When, however, as in the instant case, the evidence discloses that no vessel was mentioned in the ordering, shipping, or billing of the goods; that they did not reach the libeled vessel as a part of the transportation begun by the vendor; that the circumstances attending said furnishing in no respect differed from the course of dealing between these libelants and the Fertilizer Company carried on for many years; that the said company was carrying on a business in which vessels were but one kind or class of instrumentalities used in its promotion; that at no time was a vessel named as the recipient of said supplies by either said company or the shipper, and that the vendor had theretofore always looked to that company for payment—the furnishing of the supplies embraced in these libels must be held to be common-law sales and deliveries, made on the sole credit of the vendor, and not maritime contracts, for which a lien is given by the act of 1910.

The exceptions are sustained, and the libels of the Pennsylvania Coal & Coke Company, Wm. King & Co., and the Linen Thread Company are dismissed, with costs.

[3, 4] As to the contention of Wm. King & Co. that the Pusey & Jones Company and some of the other libelants cannot have a lien for repairs, etc., made before the year 1915, it is sufficient to say, first, that laches is not raised by the pleadings; and, second, that, as the proceeds of the sale of this steamer are insufficient to pay the uncontested liens, such a challenge can be made only by one who has a maritime lien on said vessel.

THE PROCIDA.

(District Court, S. D. New York. March 3, 1917.)

1. COLLISION ⊜95(2)—VESSEL IN TOW—FAULT OF TUGS.
Three tugs were engaged in taking a steamship from dry dock in Erie Basin to a berth outside. In passing from the basin, one was in the lead with a hawser, another was made fast to a quarter, and the third, for the proper execution of the maneuver, should have acted as rudder by hanging to the stern with a line until the ship had passed through the entrance, but, instead of doing so, it made fast by three lines to the other quarter, and the ship, having no motive power of her own at the time, came into collision with some barges alongside another vessel. *Held*, on the evidence, that the third tug alone was in fault, and liable for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202.]

2. COLLISION ⊜16—TUGS CO-OPERATING IN HANDLING TOW—DUTIES.
When several tugs are co-operating in the movement of a ship, it is the duty of each to obey the orders of the one in control of the operation, and to assume that the others will render proper assistance.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 15.]

3. COLLISION ⊜115—LIABILITY OF TOWING CONTRACTOR FOR NEGLIGENCE.
While tugs are liable in tort for a collision through their fault, by which their tow is injured, the contractor, who has undertaken to render

the service, may also be liable personally for failure to properly perform his contract.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247.]

4. COLLISION ⊜115—INJURY TO TOW—LIABILITY—MASTER OF TUG ACTING AS PILOT.

Respondent contracted to move a steamship from one berth to another, and for the purpose used one tug owned by him and two which he hired. The operation was under the direction of the master of his own tug, who, as customary in the port, also went on board the ship and acted as pilot, for which he was paid $5 by the ship. Through his negligence and the fault of one of the hired tugs there was a collision, in which the ship was injured. *Held*, that the fact that the ship was required to have a pilot did not make such pilot her agent, in such sense as to relieve respondent of liability for his negligence.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247.]

In Admiralty. Suit by the Navigazione Generale Italiana against Edward M. Timmins and the tugs McCaldin Bros. and Edward G. Murray for collision with the Procida. Decree for libelant against the Murray and respondent Timmins.

The libel is for a collision between the Procida, while in tow of three tugs, and certain barges alongside the steamer Winnebago in the Erie Basin. The Procida had been in dry dock and was without steam; she wished to go to her berth in the North River, and for that purpose she called up the respondent Timmins and asked to be taken by tugs from the Basin to her destination. Timmins sent his own tug, the J. J. Timmins, and hired the McCaldin Bros. and the Edward G. Murray, each belonging to another owner. On arriving, Keene, the captain of the J. J. Timmins, ordered the Murray to put a line on the Procida's stern and pull her out into the Basin, and then to come alongside on the port quarter, either after the Procida had left the Basin or as soon as she was pulled out into the Basin (which of these was the order is in dispute). Keene next made his own tug fast to the starboard quarter of the Procida and went on the bridge. The Murray pulled the Procida out stern first, till she was about 125 feet clear of the dry dock, and then straightened her out to be pulled through the mouth or Gap of the Basin to the river. Keene then ordered the McCaldin Bros. to lead the flotilla with a hawser, which she did, being at the time of the collision the only vessel under way. At some period not altogether certain, but a substantial time before the collision, the Murray came alongside the Procida on her port quarter and made fast with three lines. Thus, as the flotilla approached the Gap, the McCaldin led and the other two tugs flanked the Procida's quarters. The Winnebago and her outlying barges the Procida would have passed safely to port, except for reasons not altogether clear, necessarily resting, however, in faulty navigation of some kind, because there is no tide in the Basin and the wind was light. Instead of this, the Procida was allowed to sag to port, and touched her port quarter about 150 or 125 feet from her stern, with enough momentum to break in one of her plates and do much damage to her newly installed refrigerating plant. Just before the collision the Murray, seeing herself likely to be crushed between the barges and the Procida, slacked the backing line to the steamer and fell back till the Procida's headway had been stopped. After the collision the Murray resumed her position, and the flotilla passed through the Gap without further accident, where it was met by a fourth tug, with which all vessels went to the Procida's berth in the North River.

Keene sent a bill to the steamer for $5 as payment for his services for pilotage on the day in question, and this was paid in addition to $120 charged for the hire of the tugs. It appears that the practice of charging and paying $5 to the captains of tugs, who go upon the bridge of steamers under such

conditions as these, is universal in the harbor. If there be a pilot proper on the steamer, no tugboat master goes on the bridge.

Homer L. Loomis, of New York City, for the Procida.
Chauncey I. Clark, of New York City, for the J. J. Timmins.
T. Catesby Jones, of New York City, for the McCaldin Bros.
James A. Martin, of New York City, for the Murray.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is the universal testimony in the case that proper navigation under the circumstances was for the Murray to act as rudder for the ship and hang on at the rear on a hawser till the flotilla had emerged from the Gap. Even Delamater, the Murray's captain, admits this, and gives as his excuse only his orders from Keene. The failure to observe this method was the direct cause of the collision, and in my judgment the sole cause, and those tugs which shared in it are certainly at fault. The Murray's fault is the most obvious, because she was clearly out of position, as her own master concedes. Her excuse is twofold—that she acted under orders, and that the fault was that of McCaldin Bros. As to the first, she had no right to surrender herself to improper orders, and she is liable in tort if she did. The Anthracite, 168 Fed. 693, 94 C. C. A. 179. She might, it is true, have remained in a position where she could have nosed off the Procida, if need arose; but she could not do this with three lines out, and I can therefore see no excuse for her.

[2] The McCaldin Bros. was not at fault. Her hard astarboard wheel is complained of, but I think unjustly. She allowed the bows of the Procida to come very close, perhaps too close, to Beard's Stores before she changed her wheel; but that was not her fault. It cannot, of course, be possible for each tug to use her own discretion, or the whole command disappears. When she did starboard, she starboarded hard, which was all she could have done. Though it was obvious then, as Howe concedes, that the Murray must nose off the stem, he had the right to assume that the Murray would do so. It would violate the very foundation of good seamanship for the McCaldin Bros., by speculating on her own account, to vary from the orders received. The only possible liability is from entering the maneuver with the Murray in the wrong position. As to that, I think that it has not been proved that, when the McCaldin Bros. started ahead on the hawser, the Murray was already alongside the Procida. The Murray's mate says that was after the flotilla was under way. If so, I do not think a tug is at fault which, though she is herself in proper position, fails to stop a maneuver of which she has no charge or direction, because she sees that another tug has changed to an improper position. Obviously this would be impossible under most circumstances, because it would be much more dangerous to abandon the maneuver already under way than to go on. While I am not sure that the McCaldin Bros. could not have stopped without danger, I am not sure that she could. It can only be in the clearest case that a tug is bound to break up such a maneuver once started. No doubt, instances can be put where that would be her duty; but I do not think that this is one. It always remained possible

for Keene to direct the Murray to nose away the stem if it became necessary. There is no evidence that Howe saw that the Murray had out three lines. The position of the Murray was not so obviously perilous to the Procida as to call for such extreme conduct. Therefore I find the McCaldin Bros. without fault.

[3] The liability of the tug J. J. Timmins needs no consideration. Not only was she not at fault in any respect, being where she should have been, doing all that was required of her; but she has not even been sued. The libel is against Edward M. Timmins personally, and he has not yet limited his liability. While the liability of the tugs in such a case is in tort, and they must be found at fault (The W. G. Mason, 142 Fed. 913, 918, 74 C. C. A. 83), Timmins personally undertook to perform the towage service for the Procida, and his personal liability, whether it sounds in contract or in tort, does not depend upon the misconduct of his tug, taken as a mere instrument of navigation. That liability—the question of limitation may await its exercise—depends, first, upon whether Keene performed the obligation undertaken by Timmins to transport the Procida safely from berth to berth; and, second, whether his negligence, if any, in that performance, may be imputed to Timmins. As to Keene's personal fault, I think it is proved, whether he ordered the Murray to go alongside inside or outside the basin. If he ordered her to go alongside while she was still inside the basin, no more need be said; if he did not, he was liable for failing to enforce his orders. On his own statement, he knew that the Murray was alongside for some time before the collision occurred, long enough to make use of her. The evidence is not contradicted that she came alongside soon after the McCaldin Bros. began to tow; just when it is quite impossible to tell. Salvadori's testimony, on which Mr. Clark relies to show that her change of position was a surprise, refers to her slacking off and falling back at the moment of collision. She had had time to put out two added lines and take in her original towing line, and she must have been alongside, in my judgment, at least five minutes. The most reasonable assumption is that, as soon as she finished towing, she turned about and came up, and, as the motion of the Procida was at all times very slow, it is apparent that she must have got there a substantial time before the flotilla reached the Gap. Of course, she did not start behind as a rudder, and change her mind in the midst of affairs and come up. Whether she followed orders, or mistook orders, she meant always to go alongside at once, and that she did. This being assumed, it follows that Keene was not keeping a watch upon his vessels, or he would have seen her in season, assuming he did not. Nothing prevented his stopping the McCaldin Bros., and, if necessary, stopping the Procida, too, until the Murray took her right place. His failure strongly suggests that he had ordered her there at the outset, as does the fact that she resumed her position after the collision, but before the flotilla had passed the Gap. His judgment to allow her to continue her position was not in extremis; the wind was light, there was no tide, the Procida's motion was very slow, and there was no other shipping in motion; he had ample time and space.

[4] The last question is whether Timmins is responsible for Keene's negligence. Had Keene given his directions from the tug, no question could arise. Had he, for his own convenience and without any request, gone on the bridge, it would be the same. The fact which causes any doubt is that he was paid $5 as a pilotage fee, and that he says he was asked to go upon the bridge; evidence which I accept in the sense that it was expected that he should, and that the situation amounted to an invitation. Whether he was actually asked to come on board and be the pilot, I do not decide. Judge Holt held, in The Leader (D. C.) 166 Fed. 139, that the tug of such a master was not liable, and, indeed, he could not have held otherwise, because the tug was not at fault. He did not hold that, if the "pilot master" had been sent by the tug's owner to "transport" the Russian Prince, the owner would have been without liability. This distinction is fundamental (The Syracuse [C. C.] 36 Fed. 830), and amply explains Judge Holt's decision. Keene was Timmins' agent, deputed for the express purpose of performing the obligation. To succeed, the respondent must maintain that, by the payment and the invitation, the Procida meant to release the principal from his obligation, and to accept the agent to perform on his personal account for them. Regarded merely as a matter of contract, and so of intention inter partes, there can be no doubt that by accepting Keene as pilot the Procida never meant anything of the kind. They had employed Timmins to transport the vessel, and Keene came as Timmins' agent. He was Timmins' choice, not theirs, and the mere fact that they paid him certainly did not signify any purpose to accept him in place of his principal. Rather the ship must have meant to hold both principal and agent for any negligence. Judged, therefore, by principles of common law, the supposed release of the respondent is untenable.

However, it is insisted that, regardless of intent, the requirement that the Procida should have a pilot imposes him upon the ship for all purposes, and imputes to the ship all consequences of his negligence. This is supposed to follow from The China, 7 Wall. 53, 19 L. Ed. 67, and the cases following The China. That doctrine has been misapprehended; it depends altogether upon the theory of the admiralty that the ship may be regarded as itself a wrongdoer (reus). That theory, moreover, applies only when the question is of a maritime lien for tort, and of process in rem appropriate for such liens. The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954. Where the legal relations are necessarily personal, and no question can arise of a maritime lien, or of a res as wrongdoer, the owner is not responsible for the conduct of a compulsory pilot. Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U. S. 406, 21 Sup. Ct. 831, 45 L. Ed. 1155. This case, arising upon a personal obligation against Timmins, depends only upon the intention of the parties. So regarded, Keene's negligence will not be imputed to the libelants, even though a lien might have arisen against the Procida, had the Standard Oil barge been injured.

The decree will therefore go against the Murray and Timmins equally up to the value of the Murray, and against Timmins for the balance, unless he shall limit his liability.

PENNSYLVANIA R. CO. v. GOLDEN et al.

(District Court, D. Massachusetts. May 23, 1917. Opinion on Costs, August 10, 1917.)

No. 711.

1. TOWAGE ⇐12(2)—STRANDING OF TOW—LIABILITY.

The stranding of a loaded coal barge, while being towed up the Taunton river, Mass., by a steam lighter employed by respondents, who were consignees of her cargo, and were having the barge taken up from Fall River, *held* to have been due to the fact that the lighter was not of sufficient power, and also to faults on the part of both vessels; the lighter being in fault for using too long a line for towing in a narrow and winding channel, and the barge in that her master, when passing around a bend to starboard, starboarded his wheel, and, the lighter being unable to control her, ran the barge into the opposite bank.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 29.]

2. ADMIRALTY ⇐122—COSTS—RECOVERY OF PART DAMAGES.

Under the established rule in the First circuit, where libelant alone has sustained damage, and there is no cross-libel or counterclaim, in the absence of peculiar circumstances the libelant is entitled to recover full costs, even though he recovers only half damages.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 797–827.]

In Admiralty. Suit by the Pennsylvania Railroad Company against Michael C. Golden and Henry A. Noyes, doing business as the People's Coal Company. Decree dividing damages.

Burlingham, Montgomery & Beecher, of New York City, and Edward S. Dodge, of Boston, Mass., for libelant.

D. Gardner O'Keefe, of Taunton, Mass., for defendants.

HALE, District Judge. The libelant is the owner of barge P. R. R. No. 720, and seeks to recover damages sustained by that barge, resulting from stranding off Peters Point in Taunton river, while in tow of the steam lighter Kelpie, June 10, 1911. The barge is a coal-carrying vessel of 500 tons' capacity, 150 feet long, 22 feet beam, 8⁹/₁₀ feet depth of hold. The Kelpie is a steam lighter of 43 gross tons, constructed for carrying freight. She has, however, been used for towage purposes. At the time in question she was drawing 7½ feet of water. The tug was drawing 5 feet 2 inches to 6½ feet of water. The Kelpie was hired by the respondents, the consignees of the cargo of coal on the barge. The libelant contracted with the New England Transportation Company, owner of the tug Resolute, to tow the barge as far as Fall River; she being one of several barges used in conveying coal from South Amboy to Taunton. At Fall River the responsibility for towage on the part of the New England Transportation Company ceased. It was then agreed that the respondent should have the privilege of discharging all the barge's cargo at Fall River, or lighten her at that point, and, if they chose, tow the barge from Fall River to Taunton and return. Towage from Fall River to Taunton was to be furnished by the respondents. The duty, then, was on the respondents to provide towage, as in Thompson v. Winslow (D. C.) 128 Fed. 73, affirmed 134 Fed. 546, 67 C. C. A. 470.

On June 11, 1911, the tug Archer took the barge in tow from the dock of the respondents at Fall River, and towed her a short distance above the Dighton Stove Works. The barge was brought back, however, and left at the Dighton Stove Works on the same day. On the morning of June 10th, by arrangement with one of the respondents, the Kelpie came to the wharf at the Dighton Stove Works, where the barge had lain overnight. The Kelpie took the barge in tow, with the purpose of towing her to her destination at Taunton. One of the respondents contracted to have Capt. Fred Staples take charge of the Kelpie in towing the barge up the river. Capt. Staples was not the master of the barge, but was placed in charge of her on this trip, although Capt. Yutz, the regular captain, of the barge, was on board. Capt. Staples was an experienced navigator, 83 years old, and has been retired from active service for some years. By direction of Capt. Yutz of the Kelpie, the line was passed from the tug and was made fast to the barge, bridle fashion, leading through the chocks on both bows. The hawser was estimated, by the master of the barge, to be from 25 to 40 feet long; the two vessels were about 18 to 20 feet apart. The first turn above the Dighton Stove Works was a turn to port. The tug and tow proceeded around this turn without difficulty. The next bend in the river was a turn to starboard at Peters Point. Here the barge stranded on the port side of the channel. The libelants allege that the tug was in fault for having too long a hawser, and also that she was not a suitable vessel to undertake the tow, in that she did not have the necessary power, and that, on account of such lack of power, she failed to keep steerageway, while making this turn. A sharp contention is made upon these two points. Other faults are also alleged against the tug. The respondents urge that the stranding was caused by no fault of the tug, but for the reason that, at this turn in the river, the master of the barge put his wheel hard-astarboard, instead of putting it hard-aport, as he should have done to follow the tug.

It is not necessary to recite all the evidence relating to the stranding. The testimony makes it clear that, when the tug and tow arrived at the sharp turn to starboard, at Peters Point, they were proceeding very slowly. The tug there lost control of the barge. This loss of control was, I think, due, at least in part, to the low power of the tug, which made it necessary to use a longer hawser than can safely be used in a river where there is a narrow channel and where turns are encountered. In such a locality the evidence in the case, and the experience of mariners, make it clear that there ought to be very little chance given for a towed vessel to swing. If this tug had been towing with a very short hawser, I am satisfied from the evidence that it could have kept the barge under control. I think she could have done this, regardless of what the barge captain did with his wheel. There is some evidence tending to show that the barge had been towed by the same tug, over this same course from Fall River to Taunton, on some previous occasion, but that the towage was then done with a short hawser. Having undertaken to tow the barge through a narrow and dangerous channel, the tug was bound to know the danger, and to use the care and the appliances necessary for the purpose of avoiding it. The tug was the

controlling agency. She had the responsibility for the movements of both vessels. If she had not power enough to take the barge safely up the river, she should not have attempted the service. If, on account of her low power, she was required to use a longer hawser than safety would permit, in the narrow, bending river, it must be held to be at fault for such use. I must come to the conclusion that, if the tug had been a higher powered vessel, and been using a very short hawser, she could have controlled the barge. I think these faults on the part of the tug were causes contributing to the disaster.

Was the barge also at fault? The respondents say that the tug headed straight for Peters Point and passed 40 or 50 feet outside of it, the barge following straight after. She was under very little headway. When the tug had got by the point, the barge was close to the point, and a little to the eastward of the middle of the channel, but in the best water. At this time the captain suddenly threw his wheel two-thirds of the way over to starboard. The barge took a sheer to the port. The captain of the tug sung out to the barge captain, "Steady the wheel or you will go ashore." There was no response from the barge. Substantially this account is given by Capt. Yutz and by Capt. Haskins, an impartial witness who was in a rowboat pulling an eel trawl about 150 or 200 feet from where the barge went ashore. Capt. Savage, of the barge, says he put his wheel aport. He denies putting it to starboard, as the witnesses for the respondents say he did; but it must be said that Capt. Savage's statements since the disaster have not been altogether consistent. Fifteen minutes after the disaster the rudder was found hard to port.

On the whole, the preponderance of evidence leads me to the conclusion that, when the tug and tow arrived at the turn, the captain of the barge, appearing to think that he was too near the shore on the easterly side, put his wheel to starboard, and thereby contributed to the injury. The vessels were then proceeding with very little steerageway. At the time Capt. Yutz shouted to the barge captain to steady the wheel, if the tug had been towing with a short hawser, she could have handled the barge, I think, and have prevented a sheer.

I think both the tug and tow must be held to have been at fault. It is not necessary to decide whether one negligence supervened upon the other. Thompson v. Winslow, 134 Fed. 546, 67 C. C. A. 470. It is apparent that there were two faults concurring at the time of the disaster.

With this view, I direct that the damages be divided, apportioning to each party one-half of the damages and one-half of the costs. The case is referred to Albert T. Gould, Esq., Boston, Mass., to assess the damages and report to this court.

Opinion in the Matter of Costs.

[2] This libel is brought by the owner of a barge to recover damages sustained by the barge resulting from stranding, while the barge was in tow of a steam lighter. There was no cross-libel and no counterclaim. The barge sustained injury. There was no injury sustained by the tug. I held that there were two faults concurring at the time

of the disaster. The libelant alone suffered damages. I directed that the damages be divided, and, at first, apportioned one-half of the damages and one-half of the costs to each party. Upon having my attention called to the practice in this circuit I have changed my decree in this respect. I think it proper that, under the circumstances, the libelant shall recover full costs. I find nothing in this circuit which changes the rule of Judge John Lowell, in The Hercules in 1884. (C. C.) 20 Fed. 205. In The Mary Patten, 2 Lowell, 196, Fed. Cas. No. 9,223, Judge Lowell stated the reason of the rule:

"It is the ordinary case of a prevailing party recovering less than he asks for; and if there has been no tender or offer of amends, and no equity peculiar to the individual case, it is according to the sound and reasonable law of all courts that he should recover costs."

In 1902 Judge Francis Lowell followed this rule in an unreported case. Nantaskett Beach S. S. Co. v. Steamship Yarmouth. In his opinion, he cites The Hercules, and says that case must be taken to determine, in this circuit, where there is neither cross-libel nor counterclaim, that the libelant will, in the absence of peculiar circumstances, recover full costs, even though he recover one-half damages.

Other circuits have observed a different rule and have divided costs in all cases where damages are divided. This has not been the general practice in this circuit, although it is true that there have been instances where costs have been divided in cases of this sort, it being obvious that the matter had not been called to the attention of the court; but I feel compelled to follow the rule which has generally been followed by courts in this circuit since 1884, so far as the matter has been called to my attention.

Of course, it is not disputed that the court has discretion in each individual case to regulate costs, according to the equity in that case. For this reason the general rule is of less consequence than it otherwise would be.

In The Horace B. Parker, 76 Fed. 238, 22 C. C. A. 418, the Court of Appeals in this circuit divided the costs, although there was no cross-libel, but only a counterclaim. It is apparent that the Court of Appeals did not intend to overrule Judge Lowell's opinion in The Hercules.

In The Gladiator (D. C.) 223 Fed. 381, a counterclaim was filed after the assessor's report was returned to this court, and the costs were divided accordingly.

In this district, in Union Ice Company v. Crowell, 55 Fed. 87, 90, 5 C. C. A. 49, Judge Webb followed the practice of this circuit, and gave full costs, although dividing the damages, there being no counterclaim, no cross-libel, and no injury suffered except by the libelant.

Before changing my decree in regard to the costs, I called the learned proctors in this case before me and heard full arguments touching the matter; after such arguments and full consideration of the question, I am of the opinion that I must be bound by the practice in this circuit, and must follow the general rule in cases of this character, that, if the loss is all suffered by the libelant, in the absence of peculiar circumstances, that party will recover full costs, even though he shall recover but one-half damages.

As I have said, the court has full power to regulate each case according to the facts disclosed in the case. I find no facts disclosed in this case which should vary the general rule.

The order may be entered that the libelant recover full costs.

NATIONAL SURETY CO. et al. v. WASHINGTON IRON WORKS et al.

UNITED STATES, for Use and Benefit of WASHINGTON IRON WORKS v. PEDERSON et al.

(District Court, W. D. Washington, N. D. February 28, 1917.)

Nos. 114, 117.

1. COURTS ⊜302—FEDERAL COURTS—JURISDICTION—CITIZENSHIP OF PARTIES.
One, contracting with the government to furnish certain machinery for a public improvement, contracted with the W. Company to furnish such machinery. The contract had been performed, but the government was withholding from the final payment about $10,000 of the contract price, because, as alleged, of the failure, neglect, and dereliction of the W. Company. The contractor and his surety brought suit against the United States and the W. Company, alleging that the amount deducted on account of the dereliction of the W. Company was $5,411.83; that the contractor in like manner withheld such payment from the W. Company; that such company refused to recognize the right to make such deduction, and was threatening to sue the contractor and his surety; that, if it had any just claims against them, the contractors had the same claim against the United States; and that it was necessary to have a full accounting between the contractor, the W. Company, and the United States. It prayed that all matters in controversy should be heard, settled, and fixed, and that, if it was adjudicated that the retention of such sum by the government was justified, then that the contractor have judgment against the W. Company for the sum so retained and withheld, and his damages in addition. *Held*, that the relation between the contractor and the W. Company was an independent relation, to which the United States was a stranger, and, they being citizens of the same state, the court was without jurisdiction, under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091 (Comp. St. 1916, § 991).

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 843, 986.]

2. UNITED STATES ⊜74—CONTRACTOR'S BONDS—RIGHT OF ACTION BY SURETY.
There was a misjoinder of parties plaintiff, as the surety had no cause of action against either defendant.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 57.]

3. UNITED STATES ⊜74—CONTRACTS—ACTION BY CONTRACTOR—PARTIES.
There was a misjoinder of parties defendant, as there was no joint liability between defendants.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 57.]

4. ACTION ⊜50(5)—JOINDER OF CAUSES—ACTIONS ON CONTRACT.
There was also a misjoinder of causes of action, as plaintiff was asserting a claim against the W. Company for $5,411.83, and one against the United States for the difference between that sum and $10,000.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 529.]

5. COURTS ⊜262(2)—EQUITY JURISDICTION OF FEDERAL COURTS—EFFECT OF REMEDY AT LAW.
Both asserted claims were legal rights, and, as it did not appear that plaintiff had no plain, adequate, and complete remedy at law, equity had

no jurisdiction, under Rev. St. § 723 (Comp. St. 1916, § 1244), providing that suits in equity shall not be sustained in the courts of the United States, where a plain, adequate, and complete remedy may be had at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798.]

6. ACTION ⇐22—NATURE—LEGAL OR EQUITABLE ACTION.

Under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), requiring government contractors to give a bond, and authorizing persons supplying the contractor with labor and materials to sue thereon in the name of the United States, and providing that only one action shall be brought, and any creditor may file his claim therein and be made a party thereto, the suit is one in equity.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124–139, 143, 145.]

In Equity. Suit by the National Surety Company and another against the Washington Iron Works and another, with a suit in the name of the United States, for the use and benefit of the Washington Iron Works, against Hans Pederson and another. On motion by defendants in the first action to dismiss, and motion by the defendants in the second action for a stay and an abatement. Motion to dismiss granted; motion to stay and abate denied.

Roberts, Wilson & Skeel, of Seattle, Wash., for National Surety Co. and Hans Pederson.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for Washington Iron Works.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash., for the United States.

NETERER, District Judge. These actions involve the same subject-matter, and the motions were submitted together. The plaintiff Surety Company, a nonresident, and plaintiff Pederson, a resident, have commenced an action (No. 114) in equity against the Washington Iron Works, a resident corporation, and the United States, and allege, in substance, that in September, 1914, Pederson agreed to furnish to the United States certain machinery, etc., for the Lake Washington Canal, a public improvement; that the Surety Company became a surety for the use and benefit of all persons furnishing labor, etc.; that Pederson secured the Washington Iron Works to furnish "said machinery," etc., "as shown by specifications, * * * and as fully itemized and set forth in said written agreement between Hans Pederson and Washington Iron Works"; that the contract between plaintiff Pederson and the United States has been fully performed and accepted by the United States, and certified as completed on the 25th day of June, 1916; that the United States withheld from the plaintiff Pederson from the final payment a sum amounting to the sum of "about $10,000" of the contract price, which fund is still withheld and in the possession of the United States under "a claim of right to withhold the same, the said United States having asserted and is now asserting its right to lawfully and justly withhold and retain said fund from the plaintiff Pederson, and to retain and withhold the same for the use and benefit of the United States, and has declined and declines to distribute said fund, or any part thereof, either to Hans Pederson, or his

creditors, or claimants to said fund"; that the same was withheld because, it is alleged, of the failure, neglect, and dereliction upon the part of the defendant Washington Iron Works; that the amount deducted on account of the dereliction on the part of the Washington Iron Works is $5,411.83; that Pederson in like manner withheld said payment from the Washington Iron Works; that the Washington Iron Works refuses to recognize the right of the United States to make said deductions, and is threatening to institute an action at law against the said Pederson and his bond for the recovery; that, if the defendant Washington Iron Works has any just or valid claims against the plaintiffs for and on account of the moneys withheld by the United States, then the plaintiff Pederson has by right in equity the same lawful claim against the United States for any and all such amounts; that it is necessary, in order that justice and equity may be done to all parties, that a full, true, and correct accounting be had between the plaintiff, the defendant Washington Iron Works, and the United States, and a prayer for judgment is then made:

"That all matters in controversy * * * shall be fully heard, * * * and the rights and liabilities of the various and respective parties on account thereof * * * settled and fixed, and that a full, true, and correct accounting be had, * * * and judgment rendered and entered in accordance therewith, and that, if finding shall be made that the United States was * * * entitled to retain * * * the fund by it retained, it be held and adjudicated that said retention was justified through the fault and neglect of the defendant Washington Iron Works, and that this plaintiff, Hans Pederson, have judgment against the Washington Iron Works for all such sums so retained and withheld, and in addition thereto, his damages in the sum of $7,000. * * *"

The defendants, United States and Washington Iron Works, have severally moved to dismiss on the ground that the court is without jurisdiction, and that the plaintiff does not state a cause for equitable relief.

[1] A reading of the complaint discloses that the contention is primarily between Hans Pederson and the Washington Iron Works, both residents of the state of Washington, and as between these litigants this court is without jurisdiction. The primary cause of the litigation is a fund of money in the possession of the United States, a balance alleged to be due on a contract for a public improvement of Lake Washington Canal; the deduction being made from the contract price between the United States and Pederson. It is alleged by Pederson that the default, if any, is due to the Washington Iron Works, who assumed the burdens of the contract between Pederson and the United States, to which contract the United States is not a party. No judgment is prayed against the United States directly in this proceeding, but it is sought to have the court examine into the entire matter and to adjudicate between the respective parties as the right may appear. It is manifest that the relation between Pederson and the Washington Iron Works is an independent relation, to which the United States is a stranger. They being citizens of the state, the court is without jurisdiction. 1 U. S. Comp. Stat. 1916, § 991; Judicial Code, § 24.

[2-5] I think it is likewise apparent that there is a misjoinder of parties plaintiff, as well as parties defendant. The National Surety Company has no cause of action against the defendant Washington

Iron Works or the United States; nor is there a joint liability by the defendants. There is likewise a misjoinder of causes of action. The plaintiff asserts a claim against the Washington Iron Works of $5,411.-83, and one against the United States for the difference between this sum and $10,000. Both asserted claims are legal rights, and it does not appear that the plaintiff has not a plain, adequate, and complete remedy at law. Section 723, Rev. Stat. U. S. (Comp. St. 1916, § 1244), provides:

"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."

Following the commencement of this action, the Washington Iron Works, in the name of the United States, for its use and benefit, commenced an action (No. 117) against Hans Pederson and the National Surety Company, for $11,281.53, alleging the furnishing of labor, machinery, and material for the Lake Washington locks, on which there is an unpaid balance due in said amount, and caused notice to be given pursuant to Act Feb. 24, 1905, in which provision is made for bonds of contractors for public works, and it is provided that any person entering into a contract with the United States for the construction of any public work shall execute a bond, with surety, etc., and giving a party, six months after the completion and final settlement of said work, "a right of action and shall be, and are hereby, authorized to bring suit in the name of the United States in the Circuit Court of the United States of the district in which said contract was to be performed and executed * * * for his or their use and benefit, against such contractor and its sureties, and to prosecute the same to final judgment and execution." Upon the filing of this complaint, order was entered directing notice, pursuant to the provisions of this act, to creditors.

Hans Pederson and the National Surety Company have filed a "motion for stay and a plea in abatement," praying "an order staying this proceeding until a hearing can be had" upon the issues tendered in an equity proceeding, cause No. 114, and that upon a hearing this action be abated. The Surety Company and Hans Pederson rely upon Illinois Surety Company v. United States, 212 Fed. 136, 129 C. C. A. 584. I do not think that this case helps the plaintiffs in the equity (No. 114) proceeding. The Illinois Surety Company Case, as the Washington Iron Works Case, was predicated upon the act of 1905, supra, and not upon an original equitable proceeding. The only point decided in that case was whether the proceeding under this act of Congress was a proceeding in equity or an action at law. The Illinois Surety Company contended that the complaints were in equity, and not at law, and the trial court overruled its objection. The Court of Appeals (212 Fed. at page 139, 129 C. C. A. at page 587) said:

"We see in this amendment an intent on the part of Congress to substitute, for a number of independent actions at law, in which vigilant had a priority over nonvigilant creditors, a suit in which all creditors shall be given notice and an opportunity to intervene and share ratably in a fund intended for the equal protection of all. This provision, which is not adapted to, nor indeed available in, actions at law, distinctly marks the proceeding as equitable"

—and reversed the trial court.

[6] The proceeding on the bond in the name of the United States is a proceeding in equity (Ill. Surety Co. v. U. S., supra), expressly authorized by act of Congress of 1905, supra. It is designed to afford a speedy remedy for all parties. The United States has no liability or responsibility, except as fixed by the contract. It recognizes no subcontractors. There is no privity between subcontractors and the United States. The primary liability to the United States is by Pederson; the primary liability from the United States is to Pederson; the liability to subcontractors is from Pederson and the plaintiff bonding company; and special statutory provision having been made for the issue which is here presented, and the court being without jurisdiction, and a misjoinder of parties and causes of action appearing in cause No. 114, the motion to dismiss will be granted, and the motion to stay and abate the proceedings denied.

FORBES v. WILSON et al.

(District Court, N. D. Ohio, E. D. June 7, 1917.)

No. 358.

1. EQUITY ⇐363—PRACTICE—PLEADING.
Under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), abolishing demurrers and pleas, and providing that every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of facts to constitute a cause of action, which might heretofore be made by demurrer or plea, shall be made by motion to dismiss or in the answer, a motion to dismiss a bill for insufficiency in law being a substitute for a general demurrer, all facts must be taken as true.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768.]

2. CORPORATIONS ⇐320(7)—SUITS BY STOCKHOLDERS—APPEAL TO CORPORATE AUTHORITIES.
Equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) declares that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be properly asserted by the corporation, must be verified, and must set forth with particularity the efforts of the plaintiff to secure such action as he desired on the part of the managing directors or trustees, and if necessary on the shareholders, and the causes of his failure to obtain such action or the reasons for not making such effort. Complainant's bill alleged facts showing that the corporate defendant was organized by the individual defendant, who became its president, for the purpose of marketing a dental specialty manufactured by the president; that the president agreed at the expiration of two years to furnish such specialty to the corporation at the actual cost of manufacturing, but that he greatly overcharged the company. The bill further alleged that the president and his family held 60 per cent. of the stock of the corporation, and the contract between the president and the corporation made extensive provisions to enable the president to keep the formula of the dental specialty a secret, providing that nothing should obligate the president to submit his books or records for inspection, or to furnish detailed information which in his judgment would lead to an exposure of his secret process. *Held* that, as the bill alleged a refusal on the part of the president to submit his books or records for inspection, and as it was shown that he dominated the corporation, the bill, which sought a discovery and accounting as to the actual cost of producing

the specialty, was not subject to attack on the ground that it failed to disclose an effort on the part of complainant to induce the corporation to act; it being obvious that such effort would have been futile.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1433.]

8. CORPORATIONS ⟸320(4)—ACCOUNTING AND DISCOVERY—STOCKHOLDER'S ACTION AGAINST OFFICERS.

In such case, notwithstanding the contract provisions designed to keep the formula a secret, and to require the corporation to accept as conclusive the verified statement by the president as to the cost of producing the specialty, complainant is entitled to relief by discovery and accounting, though such procedure might possibly reveal the secret formula, for otherwise the president, by increasing his charges, might readily absorb all of the corporate earnings.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1429, 1431.]

In Equity. Bill by George M. Forbes against Odell Wilson and another. On motion to dismiss the bill. Motion denied.

Frederick A. Henry, of Cleveland, Ohio, for complainant.
Carl W. Schaefer, of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. This case is before the court on defendant's motion, under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), to dismiss complainant's bill for insufficiency in law. The motion is based on two grounds, namely: (1) Complainant, being a stockholder of the corporation defendant, does not show compliance with new equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv). (2) The facts alleged are not sufficient to constitute a valid cause of action in equity.

[1, 2] This motion is a substitute for a general demurrer, and, in consideration of it, all of the facts therein pleaded must be taken as true. The outstanding facts may be briefly stated:

The defendant the Corega Chemical Company was promoted and organized by the defendant Odell Wilson. In consideration of a transfer from Wilson to this corporation of certain rights to sell a dental specialty known as "Corega," all of the stock was issued to Wilson. The contract was agreed upon either at or prior to the organization of the corporation, and at the time the contract was adopted and made by the corporation Wilson was the owner of substantially all of the stock. A part of the agreement required him to transfer to the corporation 6,000 of its 20,000 shares, and these shares, thus transferred, were from time to time to be sold to provide capital for the corporation thus organized. Complainant is now the owner of some part of this stock. His entire holdings, it is stated, are 30 per cent. of the total outstanding, and he has invested therein, or advanced to the corporation, an aggregate of $24,000.

The defendant Wilson, and members of his family, are now the holders of 60 per cent. of the capital stock. The board of directors, it is alleged, is and always has been composed of five persons, of whom Wilson, his sister, and his personal lawyer constitute a majority. Wilson is and has been president and manager of the corporation. The absolute control of the corporation is alleged to be in him.

The product known as "Corega" is produced according to a secret formula devised by Wilson. He had devised and was producing and selling it before the organization of the corporation. The contract between him and the corporation provides for the manufacture and delivery by him of this product to the defendant corporation, in packages ready to be sold and delivered to the trade. The contract fixes prices at which Wilson was to furnish this product during the first two years. At the end of the second year, the price for the preceding year was to be adjusted on the basis of actual cost to Wilson of producing the same. It is alleged that Wilson represented the prices fixed in the contract were the actual cost to him of manufacturing and delivering the product, ready for sale and distribution.

The bill alleges that the prices originally fixed in the contract, and the prices set forth in Wilson's statement of the actual cost of manufacturing and production during the second year, are grossly in excess of the true cost; that the actual cost is substantially not more than one-third of that fixed in the contract; that on October 16, 1914, an accidental discovery was made of the overcharge, and voluntary restitution was made in part by Wilson, but that there still remains large excess charges, both as to the first and second year's cost; that the statement of actual cost for the second year submitted by Wilson is false and misleading, and grossly in excess of the true cost; and that the defendant Wilson refuses to furnish his books or records for inspection, or to give detailed information, because so doing would, in his judgment, disclose the secret formula according to which the product "Corega" is made.

The contract in question contains careful provisions for safeguarding the secret formula, devised by Wilson, and according to which this product is made. It is expressly agreed that he shall not be obliged to disclose the same. A presumptively correct copy of this formula was, pursuant to the agreement, placed in trust, subject to the joint control of Wilson and of the defendant corporation. The contract provides that, in case of death or other incapacity of Wilson, this formula should be turned over to a trustee to be selected by a four-fifths majority of the board of directors, which trustee and his successors should continue to supervise its manufacture and preserve the secret thereof inviolate for the benefit of both parties.

The contract also provides that nothing therein contained is to oblige Wilson to submit his books or records for inspection, or to furnish detailed information of any kind, which, in his judgment, might lead to exposure of the secret process. The actual costs to Wilson, the contract provides, should be determined by him after careful inventory, and from his sworn statement furnished to a board of directors.

The foregoing is not an exhaustive, but in my opinion a sufficient, statement of the controlling facts. On the basis thereof, complainant seeks a discovery and an accounting as to the exact cost to Wilson of manufacturing and delivering his product to the defendant corporation. Certain additional allegations are made, tending to show why application to the board of directors or to stockholders for relief would be useless and unavailable.

I am of opinion that the allegations of the bill are a sufficient compliance with equity rule 27. If they do not set forth with sufficient particularity the efforts made by complainant to secure action from the managing directors and shareholders, they do clearly set forth sufficient reasons for not making any further effort than is alleged. The relations of Wilson to the corporation from its organization to the present time are themselves sufficient reasons why an application to a board of directors or to a meeting of stockholders would be a vain and useless thing. The board of directors or the meeting of stockholders, which he controls, would have to seek relief from Wilson himself. He is the alleged offender and wrongdoer, against whose action all relief is sought. These considerations bring the case within the rule of Doctor v. Harrington, 196 U. S. 579, 588, 25 Sup. Ct. 355, 49 L. Ed. 606; Delaware & Hudson Co. v. Albany, etc., R. R. Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862.

The rules invoked by defendant's counsel are properly applicable only when the parties against whom relief is sought are not those in control of the corporation itself. In that situation, the directors and stockholders properly represent the corporation and are entitled to exercise a judgment and discretion in determining whether the interests of the corporation require action or litigation. In this situation, however, those in control of the corporation are not in a position to determine fairly and impartially whether the interests of the corporation require legal action. These considerations alone are sufficient reasons for not requiring further effort than the bill alleges has been made to obtain relief from the directors and stockholders of the defendant corporation.

[3] If the allegations of the bill are true, a good cause in equity for discovery and accounting is made. The principles sustaining the jurisdiction of equity, upon the facts set forth, are familiar and need not be reviewed. See 1 Cor. Jur. 616, 617, 716, 717; Morris & Co. v. Whitley, 183 Fed. 764, 106 C. C. A. 206.

The contract provisions designed to keep secret Wilson's process for making Corega, and to require the corporation to accept, as conclusive, his sworn statement of cost, furnish no adequate legal reason why complainant should be denied the relief he seeks. This is not an action to reopen an account for fraud or mistake; but, if it were, the allegations of the bill would be sufficient. See 1 Cor. Jur. 716, 717. The situation here is an agreement imposed by the defendant Wilson upon a corporation promoted and organized by him, and places in him a power adequate to absorb all the earnings and capital of that corporation; indeed, there is no limit, except his conscience, to his ability to raid its treasury. If his contract right to keep secret the process for making Corega conflicts with the corporation's right to a discovery and an accounting of the exact cost, the latter would have to prevail. It does not necessarily follow that both rights cannot be adequately protected. That contracting parties cannot oust the power in this respect of a court is established by B. & O. R. R. Co. v. Stankard, 56 Ohio St. 224, 46 N. E. 577, 49 L. R. A. 381, 60 Am. St. Rep. 745.

Many considerations have been urged upon me by defendants' counsel, both orally and in brief. All of them have been duly weighed and considered, even if not adverted to in this memorandum. Counsel

will, of course, understand that the expressions herein apply only to the bill as framed, and the admission, for the purposes of this motion, that its allegations are true, and that if, after answer and upon a hearing, a different situation is created, it will be promptly recognized.

In re REYNOLDS.

(District Court, N. D. New York. July 5, 1917.)

1. BANKRUPTCY ⟸143(10)—TRUSTEES—RIGHTS OF.

While, under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that the trustee of the estate of a bankrupt, upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt to all documents relating to his property interests and patents, powers which he might have exercised for his own benefit, property transferred by him in fraud of his creditors, and property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold by judicial process, the surplus income accruing under a testamentary trust created for the support of the bankrupt does not pass to the trustee, yet such income may be reached by the trustee under section 47, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), providing that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied, for the act must be interpreted as a whole, and the unamended language of section 70 cannot neutralize the amendment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 224.]

2. TRUSTS ⟸151(2)—INCOME—POWER OF STATE.

Real Property Law (Consol. Laws, N. Y. c. 50) § 98, subjecting to creditors surplus income accruing out of a trust, is valid; it being competent for the Legislature to change the law and subject to the claim of creditors such property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 195½.]

3. BANKRUPTCY ⟸143(10)—TRUSTEE—RIGHTS OF.

Real Property Law N. Y. § 98, declares that, where a trust is created to receive the rents and profits of real property and no valid direction for accumulation is given, the surplus of such rents and profits beyond a sum necessary for the education and support of the beneficiary shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution. Section 100 declares that, except as otherwise prescribed, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiaries shall not take any legal estate or interest, but may enforce the performance of the trust; while section 103 declares that the right of a beneficiary of an express trust to receive the rents and profits of realty and apply them to the use of any person cannot be transferred by assignment or otherwise. Personal Property Law (Consol. Laws N. Y. c. 41) § 15, provides that the right of the beneficiary to enforce the performance of a trust, to receive the income of personal property and apply it to the use of any person, cannot be transferred by assignment or otherwise. Bankr. Act, § 47, as amended in 1910, gives the trustee the right of a judgment creditor. *Held*, that Real Property Law, § 98, applies to personal property, and so a trustee in bank-

ruptcy may, where the bankrupt was beneficiary under a testamentary trust and entitled to support out of the income arising from the land and funds constituting the corpus of the trust, reach any surplus income.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 224.]

4. BANKRUPTCY ⟸143(10)—TRUSTEES—RIGHTS OF—STATUTE.

In such case, the right of the trustee cannot be denied on the theory that Bankr. Act, § 47, operated as an amendment to the New York Real Property Law, by giving the trustee the rights of a judgment creditor, though no such judgment had been recovered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 224.]

In Bankruptcy. In the matter of the bankruptcy of Florence I. Reynolds. Application, on return of order to show cause, for an order making permanent, or until the application of the bankrupt for discharge should be determined, an order staying suits and proceedings by the trustee to reach the surplus income, if any, to which the bankrupt might be entitled under a trust created under the last will and testament of Matthew H. Bender, now deceased. Order as granted vacated, and injunction denied.

By "surplus income" is meant the income accruing under the trust not necessary for the suitable support and maintenance of the bankrupt.

Mills & Mills, of Albany, N. Y. (Borden H. Mills, of Albany, N. Y., of counsel), for bankrupt.

Prior & Aufsessor, of Albany, N. Y., for trustee.

RAY, District Judge. By his last will and testament, Matthew H. Bender, now deceased, gave and bequeathed to Charles C. Bullock, Jr., as trustee, in trust, a considerable sum of money and property, much of which is in real estate, he—

"to receive the rents, issues and profits thereof and after defraying all taxes and other lawful charges upon the same to semiannually pay the net income thereof in equal shares to Florence Irving Reynolds [the now bankrupt] and Frederick R. Bender during their natural lives."

There are provisions in the will as to the disposition of the trust fund, etc., on and in case of the death of either or both of these beneficiaries of the trust. It is claimed, and facts appear showing it probable, that there is a considerable sum of income in the hands of such trustee under the will, and that, as the income becomes due and payable from time to time, there will be a surplus of income over and above what is necessary for the suitable and proper support and maintenance of such bankrupt, and that this will be applicable to the payment of her debts.

[1] It is contended by Florence I. Reynolds, the bankrupt, one of the beneficiaries of the trust referred to, that under the provisions of section 70 of the Bankruptcy Act, relating to "title to property," the surplus income of a trust fund does not pass to the trustee in bankruptcy. This is undoubtedly true, and it was so decided prior to the amendment to section 47 of the Bankruptcy Act in 1910. By the amendment to section 47, above referred to, there was inserted in the section the following language:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

The surplus of a trust fund going to the beneficiary of the trust does not come into the custody of the bankruptcy court, but the amendment declares that the trustee in bankruptcy—

"shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

[2, 3] In section 98 of the Real Property Law of the state of New York, it is provided:

"*Surplus Income of Trust Property Liable to Creditors.*—Where a trust is created to receive the rents and profits of real property and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution."

I think the case decided by the Court of Appeals of the state of New York, Brearley School, Limited, v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912B, 251, settles the proposition that it was competent for the Legislature of the state to subject surplus income of trust property to the claims of creditors. In that case it was held:

"It is a general rule of constitutional law that a citizen has no vested right in statutory privileges and exemptions. Such a statute is not a contract between the judgment debtor and the state, and hence an amendment thereof, altering the exemptions by lessening them, does not impair the obligation of the contract. The state retains the right, which exists in regard to remedial legislation generally, to change the remedy in favor of the creditor of a cestui que trust. Hence an execution under section 1391 of the Code of Civil Procedure, as amended by chapter 148 of the Laws of 1908, taking effect September 1, 1908, can be lawfully issued against 10 per cent. of the income derived from a trust fund, although the fund was created by a will probated prior to the passage of that act."

In Jenks, as Trustee of the Bankrupt Estate of Buchanan, v. Title Guarantee & Trust Co., as Trustee, etc., under the Will of William Buchanan et al., 170 App. Div. 830, 156 N. Y. Supp. 478, it was held:

"Section 98 of the Real Property Law, making the surplus income of trust property liable to the creditors of the beneficiary, though in terms applicable only to real estate, applies equally to trusts of personal property. Congress, in its plenary power upon the subject of bankruptcies, has vested a trustee in bankruptcy with the powers and rights of a judgment creditor by the amendment made in 1910 to clause 2 of subdivision "a" of section 47 of the Bankruptcy Act. By virtue of the power so conferred a trustee in bankruptcy may maintain an action against the trustee of a spendthrift trust to reach the surplus income of the beneficiary who has gone into voluntary bankruptcy. Where the annual income of a spendthrift trust is upwards of $23,000, and the beneficiary, who has been discharged in bankruptcy, has no family depending upon him for support, excepting a wife, and it is found that $9,000 per year will be sufficient for the support of himself and wife, a decree that the balance of the income be paid to the trustee in bankruptcy pursuant to section 98 of the Real Property Law is properly rendered."

That section 98 of the Real Property Law applies equally to personal property was held also in Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 N. Y. 617, 1 N. E. 251; Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752; and Dittmar v. Gould, 60 App. Div. 94, 69 N. Y. Supp. 708.

The Circuit Court of Appeals in this (the Second) circuit, in In re Morris, 204 Fed. 770, 123 C. C. A. 220, 30 Am. Bankr. Rep. 319, held as follows:

"The amendment of Bankr. Act July 1, 1898, c. 541, § 47a(2), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that as to all property not in the possession of the bankruptcy court a trustee shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, qualifies a trustee to maintain a suit under the New York law to reach surplus revenue to which the bankrupt will be entitled under a testamentary trust for the benefit of all the creditors; and since such right will be unaffected by the bankrupt's discharge, a judgment creditor is not entitled to an order postponing such discharge to enable him to prosecute such a suit for the benefit of judgment creditors only."

The court adverted to the fact that the amendment to the Bankruptcy Law already quoted is incorporated in section 47 of the act, and not in section 70, which latter section in the act itself describes what property of the bankrupt passes to the trustee. The Circuit Court of Appeals said, however:

"That circumstance, however, is immaterial. The act must be interpreted as a whole, and all its parts harmonized. It cannot be assumed that Congress would have added this amendment to section 47, if the unamended language of section 70 were to operate to neutralize the amendment."

It is true that under section 15 of the Personal Property Law of the state of New York it is provided that:

"The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise."

And section 100 of the Real Property Law of the state of New York provides:

"Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust."

Section 103 of the Real Property Law provides:

"The right of a beneficiary of an express trust to receive rents and profits of real property, and apply them to the use of any person, cannot be transferred by assignment or otherwise."

In construing various sections of the statutes referred to, they must all be read together, and on a reading of section 98, already quoted, it is evident that the surplus income in this case, if any, is liable to the claims of the creditors of the bankrupt, in so far at least as it accrued due and payable prior to the bankruptcy.

[4] It is urged that:

"If the amendment of 1910 to the Bankruptcy Law was intended to give to trustees in bankruptcy the rights of judgment creditors under section 98 of

the Real Property Law, it is in effect an amendment of the Real Property Law and is unconstitutional."

I cannot agree with this contention made in behalf of the bankrupt. The Real Property Law of the state of New York has itself provided that surplus income of trust property—

"shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution."

Prior to the amendment of the Bankruptcy Act there was no provision in the Bankruptcy Law whereby the trustee in bankruptcy could avail himself of this provision and reach the surplus income arising from a trust fund created and existing for the benefit of the bankrupt; but when Congress expressly provided that as to all property not in the custody of the bankruptcy court the trustee should be deemed vested with all the right, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied, the right was clearly and expressly given to a trustee in bankruptcy to reach the surplus income of trust property in the same mode and manner and by the same proceedings that are available to a creditor having an execution unsatisfied. It is immaterial that the creditors of the bankrupt have not obtained judgment and may be prohibited from obtaining judgment. It is also immaterial that execution cannot issue.

I do not need dwell upon the grounds on which the decisions in In re Morris, supra, and Jenks, as Trustee, v. Title Guarantee & Trust Co. et al., supra, rest. In general, I concur in the views there expressed, and find no case or decision which would justify me in refusing to follow the Circuit Court of Appeals in the Morris Case. It is certain that this court ought not, by injunction or otherwise, to interfere with the right of the trustee in bankruptcy of Florence I. Reynolds, this bankrupt, in any court of competent jurisdiction to reach so much and such part of the surplus income of the trust fund referred to as he may be entitled to.

It follows that the preliminary or temporary injunction heretofore granted must be and is hereby vacated, and that the injunction prayed for must be and is denied.

In re REYNOLDS.

(District Court, N. D. New York. July 16, 1917.)

BANKRUPTCY ⇐136(2)—COURTS—POWER OF.

A trustee in bankruptcy asserted a claim to income arising under a testamentary trust in favor of the bankrupt on the ground that it was surplus income not necessary for her support and maintenance. The bankrupt entered into an ex parte application for an order directing the trustee to accept her bond with sufficient sureties conditioned to pay the amount in controversy, should it be determined the trustee was entitled thereto, and to require the trustee in bankruptcy to withdraw his claim or consent to payment of the fund to her. *Held* that, in the absence of specific statute authorizing the procedure, and as the amount in controversy could be paid into court and the rights of the parties then determined, the application for the order must be denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 235.]

In Bankruptcy. In the matter of the bankruptcy of Florence I. Reynolds. Ex parte application by the bankrupt to require her trustee in bankruptcy to accept bankrupt's bond and withdraw a claim to a fund claimed by both trustee and bankrupt, or consent to payment of such fund to bankrupt. Application denied.

See, also, 243 Fed. 268.

This is an application for an order directing the trustee in bankruptcy of Florence I. Reynolds to accept a bond of the bankrupt with sufficient surety conditioned in effect that if it be adjudged in any action or proceeding that such trustee is entitled to a sum of money amounting to about $1,004 now in the hands of one Chas. C. Bullock, Jr., as trustee under the will of one Matthew H. Bender, deceased, alleged surplus income arising from a trust fund in the hands of said Bullock as trustee, and which surplus accrued due in part January 1, 1917, and in part July 1, 1917 (this of July 1, 1917, after the bankruptcy), and which sum is claimed both by the trustee in bankruptcy and the bankrupt, said bankrupt will pay such sum and all costs to the trustee in bankruptcy. This contemplates that, if such bond is accepted, the trustee in bankruptcy will either withdraw his claim to the fund or consent that the said trustee under the will pay said sum in question to said Florence I. Reynolds, the bankrupt. This application is made ex parte.

Mills & Mills, of Albany, N. Y., for petitioner.

RAY, District Judge (after stating the facts as above). The trustee under the will of Matthew H. Bender is now holding this sum of money, conceded to have been earned and in his hands and ready to be paid to the one entitled thereto, but he is confronted with the conflicting claims thereto of Florence I. Reynolds and of her trustee in bankruptcy. The bankrupt claims her trustee in bankruptcy has no claim to the money and no interest therein. The trustee, on the other hand, claims it is surplus income applicable to the payment of her debts existing prior to such bankruptcy, and that title passed to the trustee in bankruptcy, or at least, that the trustee occupies the position of creditors with execution, and may enforce the claim of the creditors of Florence I. Reynolds to this fund.

We have the case of two claimants to the fund now in the hands of Mr. Bullock, Jr., as trustee under the will of Mr. Bender, and who makes no claim thereto, but is perfectly willing to pay it to the party entitled thereto. Assuming the fund to be a specific one, it would seem that it might be paid into court, leaving the two claimants to bring action and determine title. It may be necessary to have Mr. Bullock a party to any suit brought. But, however this may be, I do not see that this court has any power or jurisdiction to compel or direct the trustee in bankruptcy to forego his claim as such trustee to the money, accept a bond, and consent that the money be paid by the trustee under the will to Florence I. Reynolds on the giving of such bond. I am not pointed to any statute authorizing such an order. In the absence of some specific statute authorizing it, I am of the opinion such an order and bond would be nullities. Clearly the trustee under the will, in face of these two conflicting claims and demands, ought not to pay over the money, except on the judgment or decree of some court of competent jurisdiction, or on the consent of the claimants. Either the trustee in bankruptcy is entitled to this money or he is not, and if he is that fact

can be determined in an appropriate action or proceeding and judgment rendered accordingly. Generally the court has control over a trustee in bankruptcy in dealing with the assets of the estate, but I do not think this power of the court is broad enough to authorize an order directing him as trustee to consent that the money in dispute be paid to the adverse claimant, and that he accept the bond of such claimant, with surety, to pay an equal amount, with interest and costs, if it be determined that the money did not belong to the one to whom it was paid. If the money is paid to Florence I. Reynolds with the consent of the trustee in bankruptcy, whom will the trustee sue? What will be the form of action? It seems to me such a proceeding is unauthorized. The law and equity has given a remedy in such a case, and I do not see that the bankruptcy court has power to create a new one.

Application denied.

MAUSER et al. v. UNION PAC. R. CO.

(District Court, S. D. California, S. D. June 25, 1917.)

No. 532.

1. COURTS ⟸7—JURISDICTION—TRANSITORY ACTIONS.

A transitory action follows the person, and may be brought wherever defendant can be found, whether it is an action ex delicto or ex contractu.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22–31.]

2. CORPORATIONS ⟸668(5)—RAILROADS ⟸33(1)—FOREIGN CORPORATIONS—DOING BUSINESS—SERVICE OF PROCESS.

A railroad, though having no line of railroad in California, had four or five offices where passenger and freight business was solicited, and employed a great many servants, having from 15 to 20 in one of its offices. D. had supervision of one of its ticket offices, in which from 2,000 to 2,500 tickets a year were sold, and had charge of all employés and superintended their work. Its receipts from business secured in California, largely through the efforts of its employés, amounted to more than $100,000 a year. Hundreds of its freight cars came into California over the rails of other railroads, for which it received a rental from the other railroads. *Held*, that it was doing business in California, and D. was its managing or business agent, within Code Civ. Proc. Cal. § 411, providing that, in a suit against a foreign corporation doing business and having a managing agent within the state, a summons must be served by delivering a copy to such agent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520, 2521, 2611.]

At Law. Action by Emil D. Mauser and another against the Union Pacific Railroad Company. On motion to quash the service of summons. Motion denied.

E. B. Drake, of Los Angeles, Cal., for plaintiffs.

James E. Kelby, of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. This action was commenced in the superior court of the state of California, and removed here by the defendant. Prior to removing the case, defendant entered a special ap-

pearance and moved to quash the service of summons upon the following grounds:

"I. That the Union Pacific Railroad Company is a corporation organized and existing under the laws of the state of Utah, and is a resident of said state.

"II. That said defendant has no line of railroad within the state of California, has not complied with the laws of the state of California authorizing foreign corporations to do business in said state, as provided by section 405 et seq., chapter 6, Civil Code of California, and that it does no business in said state; that the said W. J. Doran is neither a managing nor a business agent of said defendant Union Pacific Railroad Company.

"III. That by virtue of the pretended service of summons, together with a copy of the complaint, delivered to the said W. J. Doran on the 28th day of November, 1915, no jurisdiction was conferred over the person of the defendant in this action."

The return of service shows that the summons was served upon one W. J. Doran, alleged by the return to be the general agent of the defendant in the state of California. The proof shows that all the facts that existed in the case of Denver, etc., R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, concerning the right to serve process on the defendant in this state, exist here, and, in addition to the facts in that case, the proof shows that the defendant employs a great many servants in this state. In Los Angeles alone it has 15 or 20, and defendant has four or five offices in the state. Doran, on whom the service was made, has charge of all these employés and superintends their work. He has supervision of the ticket office in Los Angeles; in that office defendant sells from 2,000 to 2,500 tickets a year. Receipts of defendant from business secured in California, largely through the efforts of its employés, amount to more than $100,000 per year. Hundreds of freight cars of the defendant come into California and are run over the rails of other roads, for which the defendant receives a rental from the other roads.

Preliminary to the further discussion of the case, it will be noted that there is no showing made as to the contents of the articles of incorporation of the defendant. The only showing in this regard is a recital of Doran in his affidavit to the effect that the defendant is a corporation organized and existing under the laws of the state of Utah.

The motion of the defendant primarily was addressed to the court, to defeat the jurisdiction of the court by reason of the provisions of section 405 et seq. of the Civil Code of California. These provisions of the Civil Code relate to the service of process upon foreign corporations, and provide for the service upon a person designated by the foreign corporation, and the provision is that, if it does not designate such a person, service may be made upon the secretary of state.

Strong reliance was primarily made by the defendant upon the following decisions of the Supreme Court of the United States: Old Wayne Mutual Life Association v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345, and Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. These decisions relate to the question of whether or not service upon the secretary of state is due process of law, and, as the service in this case was not made in that way, the

cases are not in point. The defendant, however, claims that in those cases the Supreme Court made a distinction between actions ex delicto and actions ex contractu. The defendant claims that the Supreme Court decided in those cases that an action ex delicto could not be maintained against a corporation, except in the place of its residence.

[1] In the discussion of the statutes involved in those cases, the Supreme Court referred to the distinction between actions ex contractu and actions ex delicto, and decided that the statutes did not authorize service of summons as provided by said statutes in actions ex delicto. The court never intended by those decisions to modify the common-law rule that in transitory actions the defendants might be sued where the defendants could be found. The rule concerning the right to institute transitory actions has no relation to the residence of the defendant. A transitory action follows the person, and this is so, whether it is an action ex delicto or ex contractu.

In the case of Philadelphia & Reading Ry. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710, decided March 6, 1917, the court expressly stated that it expressed no opinion concerning the right to sue a foreign corporation in the state where that suit was brought. The case at bar is quite different from the facts stated in the case last cited, and also quite different from the cases to which that opinion refers, viz. Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and Peterson v. C., R. I. & P. R. R., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

[2] The section of the Code cited by the defendant, viz., 405, Civil Code, is not the provision of the statute in question. The provision in question is section 411, Code of Civil Procedure of the state of California, which reads as follows:

"The summons must be served by delivering a copy thereof as follows: * * * If the suit is against a foreign corporation * * * doing business and having a managing or business agent, * * * to such agent. * * *"

The question for this court to determine is whether or not the defendant is doing business in this state and whether W. J. Doran is the business agent of defendant. The Supreme Court of the United States has said:

"A long line of decisions in this court has established that, in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. [Authorities.] * * * This court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. 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 has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process." St. Louis v. Alexander, 227 U. S. 218, 226, 227, 33 Sup. Ct. 245, 247, 248, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

In the case just cited the Supreme Court upheld the jurisdiction and right to serve. The defendant there was not doing as much business in the state of New York as the defendant here is doing in the state of California.

This question has come before the Circuit Court of Appeals of this circuit, wherein the court construed the identical statute here before the court. Denver & Rio Grande R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77. The case before the Circuit Court of Appeals was not as strong a case showing defendant was doing business in California as the case at bar, and it is the duty of this court to follow that decision.

The case of Denver, etc., R. Co. v. Roller et al., was relied upon as authority in the Supreme Court of the United States by one of the litigants in the case of Green v. Chicago, Burlington & Quincy Railway Co., 205 U. S. 530–533, 27 Sup. Ct. 595, 596, 51 L. Ed. 916. In that case the Supreme Court said:

"The question here is whether service upon the agent was sufficient and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver, etc., R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, and Tuchband v. Chicago, etc., Railroad, 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the action was brought in the state courts, and the question was of the interpretation of a state statute and the jurisdiction of the state courts."

It seems to me that the language used by the Supreme Court above is an approval of the doctrine laid down in Denver, etc., v. Roller, supra. I cannot sustain the contention of the defendant without disregarding the opinion of the Circuit Court of Appeals of this circuit, nor, in my opinion, can the defendant's contention be upheld without deciding that the provision above quoted from the Code of Civil Procedure of California is unconstitutional. If a state has a right to enact such a statute, then certainly this is the kind of a case to which such a statute should apply. While this is an action ex delicto in substance, nevertheless it grew out of the business transacted by the defendant in this state.

The motion of the defendant to quash the service will be denied.

SAMPLINER v. MOTION PICTURE PATENTS CO. et al.

(District Court, S. D. New York. June 4, 1917.)

CHAMPERTY AND MAINTENANCE ⇐5(6)—PURCHASE OF CLAIMS FOR DAMAGES BY ATTORNEYS.

While a claim for treble damages by a person injured by a violation of the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209) is assignable, where a lawyer, for services that he was willing to settle for $5,000 cash, took an assignment of a claim which he thought was worth at least $75,000, the transaction was champertous, and he could maintain no action on the assigned claim, as it was taken for purposes of speculation.

[Ed. Note.—For other cases, see Champerty and Maintenance, Cent. Dig. §§ 36–44.]

Action by Joseph Sampliner against the Motion Picture Patents Company and others. On motion for a directed verdict. Motion granted.

Plaintiff claimed to be the assignee of the Lake Shore Film & Supply Company, of Cleveland, Ohio, against defendants for triple damages under the Sherman Anti-Trust Act. The defendants set up the defense of champerty, and that issue was tried separately under the provisions of Code N. Y. § 973, before judge and jury.

Rogers & Rogers, Gustavus A. Rogers, and Saul E. Rogers, all of New York City, for plaintiff.

Charles F. Kingsley, of New York City, for defendants Motion Picture Patents Co., Jeremiah J. Kennedy, and Harry N. Marvin.

Coudert Bros., Samuel Seabury, and Charles B. Samuels, all of New York City, for defendants Pathé Frères and Jacques A. Berst.

Robert H. McCarter, of Newark, N. J., and George F. Scull, of New York City, for defendants Thomas A. Edison, Inc., Frank L. Dyer, and William Pelzer.

R. O. Moon, of Philadelphia, Pa., for defendant Kalem Co.

Dwight Macdonald, of New York City, for defendant Percival Waters.

Samuel O. Edmonds, Samuel Seabury, and William M. Seabury, all of New York City, for defendants Albert E. Smith and Vitagraph Co. of America.

MAYER, District Judge. Both sides having moved for a direction of a verdict, I find as a fact that the plaintiff purchased this cause of action with intent to sue thereon. I find, as a fact, also, that the so-called assignment, Plaintiff's Exhibit No. 1, was executed by the Lake Shore Company, through its officers, pursuant to action at a special meeting of the board of directors. Having thus disposed of the facts, I proceed to express, briefly, my views of the law of the case.

The Sherman Anti-Trust Law was enacted by Congress with the fundamental purpose of redressing what Congress regarded as grievous wrongs visited upon persons by those combinations or monopolies which the statute denounced. It provided, broadly speaking, two kinds of remedies: One was a suit in equity at the instance of the government to dissolve unlawful combinations, and in that manner to destroy conspiracies directed against what Congress regarded as the appropriate conduct of the business of this country. The other remedy which was afforded was to give to the person injured in his business or his property an opportunity to recover damages for injury to his business or his property, and Congress provided that, whatever the damage was which the jury might find, that damage should be trebled—the theory being that the injured person should be recompensed in a manner so exemplary that it would be a lesson to others.

Now, the courts have held that that provision does not provide for a penalty, but must be regarded as in the nature of damage compensation. It certainly never could have been the intent of Congress that so important a remedy, having to do with the appropriate con-

duct of the business of the country, should be the subject-matter of bargain, sale, and speculation at the hands of attorneys. Judge Hough has held, and I am bound to follow his holding, in the Imperial Film Case, 244 Fed. 985, that such a cause of action is assignable. I must therefore start off with the assumption that, as a matter of law, the cause of action could be assigned, and it is probably true that, if the courts thus hold, it will be because they feel that in a proper case a merchant who, or a corporation which, has been injured, may so avail of the cause of action as to be serviceable to creditors, or perhaps to other persons. But I have a strong conviction that it never will be held in a federal court, either in a court of original jurisdiction or an appellate court, that such a cause of action is merchandise, to be availed of by an attorney.

I personally, and every gentleman in this case on both sides, have a very deep regard for the profession to which we belong. It is a profession which insists that its purposes are noble and its practices are useful. It is the duty of the lawyer to render services, to advise, to assist and aid those whose life or liberty or property is in one manner or another in peril. But the moment a lawyer steps down from that high place to be a speculator in lawsuits, he is absolutely violating every tradition of the profession, and the courts have persistently frowned on that sort of thing. The case is entirely different from one where a lawyer, for services rendered, takes an assignment of some thing in action, clearly and unquestionably to recompense himself for such service.

Now, what is this case? In this case a lawyer, for services that he was willing to settle for $5,000 cash, takes an assignment of a claim which he himself thought was worth at least $75,000, and which, trebled, makes over $200,000. He then proceeds, later to bring a lawsuit in which he makes these damages $101,000, which, trebled, means $303,000, and then he comes into this jurisdiction with a claim of $250,000, which, trebled, makes $750,000. If that is not the rankest kind of speculation, I never heard of a case in my life that involved speculation. More than that, little things in a lawsuit are of great service, and, in response to Mr. McCarter's final cross-examination, I noted that the plaintiff said, "The time I bought the claim"—that is unquestionably what he did; if he could get a settlement, well and good; if he could not get a settlement, then he could speculate upon what damages he could obtain.

Now, these defendants, if they were guilty of wrongs, could have responded in a lawsuit to the true plaintiff. This plaintiff's attorney would have had the right to say, "I will take this lawsuit for you on a contingency, dependent on recovery;" and if he had done that he would not have violated the law in any respect, as I understand it. But he was ready to take this claim, and pay money out of his own pocket, which is champertous in itself, for the disbursements necessary to prosecute this lawsuit to an end.

Now, both sides have presented many authorities. I think the case is not one which requires much citation of authority, and I shall content myself with quoting, as part of my opinion that I am now

delivering orally upon this record, the significant words of Chancellor Kent, in a case where perhaps the facts were a little different, but where the principles were stated with the clarity and the firmness that characterized his judicial career. He put the matter in language that any man may understand, and he said:

"The purchase was avowedly made as a matter of speculation, and at a time when this attorney knew, from previous disclosures made to him in his character of attorney, all the facts on which the foundation of the claim so purchased rested, and which created a belief in his mind that the value of the wine could be recovered. Such a purchase, by such an officer, and under such circumstances, cannot be sustained. It is champerty, for the unlawful maintenance of a suit, and the contract was therefore unlawful, as well by common law, as by the statute."

And he continued, and I am quoting from Arden v. Patterson, 5 Johns. Ch. (N. Y.) 44:

"The purchase of a lawsuit by an attorney, in a case like this, is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge he acquires in his professional character, to speculate in lawsuits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community."

Adopting those clear and unquestioned statements as the doctrine to which every lawyer and judge who loves his profession must subscribe, I grant the motion and direct a verdict for the defendants.

SORENSEN v. ALASKA S. S. CO.

(District Court, W. D. Washington, N. D. February 20, 1917.)

No. 3429.

1. MASTER AND SERVANT ⟸203(1)—INJURY OF SERVANT—ASSUMPTION OF RISK.
A servant assumes all of the ordinary risks of his employment, and also those which reasonable care would disclose, but not those created by the master's negligence, nor such as are latent, and not discovered until the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538–540, 542.]

2. MASTER AND SERVANT ⟸224—MASTER'S LIABILITY FOR INJURY TO SERVANT —NEGLIGENCE.
Libelant, with other seamen, was sent into the between-decks to trim a quantity of coal, which had been dumped through the hatchway above. In doing the work they dug a hole through the hatch leading into the hold below, which had also been filled with coal, except a small space at the top. Libelant passed down into the hold, and on being handed a lantern an explosion occurred, by which he was injured. The explosion, in view of the recent filling of the hold, was unusual. *Held* that, since the men had been given no instructions to go into the hold, the vessel was not chargeable with negligence which rendered the owner liable for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 654.]

3. SEAMEN ⊂⊃11—INJURY IN SERVICE—RIGHT TO MAINTENANCE AND CURE.
It is the uniform rule of admiralty that a seaman injured in the service of the ship is entitled to maintenance and cure, and wages, at least to the end of the voyage, irrespective of the question of negligence.
[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39–44, 187.]

In Admiralty. Suit by Henry Sorensen against the Alaska Steamship Company. Decree for libelant.

James B. Metcalfe, of Seattle, Wash., for libelant.
Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for respondent.

NETERER, District Judge. The testimony shows that, several days previous to the 21st day of February, 1916, the steamship Victoria was lying at Boat Harbor, British Columbia, Canada, loading coal in the hold of the vessel from bunkers by pouring it through hatch No. 2, whence it fell through similar hatchways in the steerage deck and on the deck above the lower hold; that the hatchways were of the same size and located one directly above the other; that the coal was poured through the hatches continually to the lower hold, where 15 men were stationed around the hatch, and shoveled the coal to the sides of the vessel and around the hatch, until all of the space from the sides of the vessel and around the hatch had been filled, so that the coal rolled to a line immediately below the sides of the opening of the hatch, whereupon the men came to the between-decks and permitted coal to pour through the hatch into the lower hold until the hatch was filled and was sealed by the professional sealers, who were in charge of loading the coal; that at the time the hatch was sealed a circular V-shaped opening was formed around the hatch, about five feet wide at the top and about four or five feet deep at the deepest point. When the lower hold was filled and the hatch sealed, about 20 or 25 tons of coal was dumped into the hatch; the apex of this coal reaching to a point above the level of the steerage deck. This apex was trimmed down, and the steerage hatch cover placed over the hatch, and the vessel proceeded thence to Seattle. On the morning of the 21st of February, 1916, at 7 o'clock a. m., libelant was ordered by the boatswain into the between-decks with other seamen to trim this pile of coal into the wings of the 'tween-decks, and aft of the hatch of the 'tween-decks, leaving a small space for an additional cargo.

Libelant testified that they were directed to do the work in the best way they could. The boatswain testified that the order was "to go into the 'tween-decks and trim the coal into the wings and aft." The testimony further shows that electric lights were furnished on the boat, and that lanterns were also furnished. These lanterns were trimmed and lighted by persons employed on the vessel, and placed in suitable positions for use; that no specific order was given to take the lanterns, instead of using the electricity. The lanterns were taken by libelant and his fellow servants into the 'tween-decks and hung at places suitable to shed light upon the place where they were working. The coal, instead of being thrown to the sides of the vessel in the 'tween-decks, was thrown to a point about half way between the hatch and the side of the vessel, and, when the place to which it was thrown had been filled to the steerage deck, the coal rolled back to the place from which it had

been shoveled. An open space still remained, from the sides of the ship to the place where the coal was thrown, of some six or eight feet for the full space between-decks. The libelant and fellow seamen, instead of shoveling the coal to the sides of the vessel and filling the wings and aft, dug a hole through the hatch leading to the V-shaped opening in the hold of the vessel, and the libelant, being the smallest man of the seamen, went through this opening thus made into the open triangular space, and, while there, asked that a light be handed him, whereupon a light was passed to him by a fellow seaman, and, when taken into this space, the explosion followed. There is some testimony with relation to the defective ventilation of the hold of the ship. The testimony further shows that an explosion from coal gas within the time that this coal was loaded upon the vessel was an "unusual and unheard-of occurrence." In view of the conclusion which is forced from the testimony which is before the court, it is not necessary to discuss the ventilation of the hold of the ship.

[1] It is fundamental that a servant assumes all of the ordinary and usual risks and perils incident to which he has accepted employment, and also risks which reasonable care would disclose to exist. The servant does not assume risks that are created by the master's negligence, nor such as are latent and not discovered until the time of the injury. The Themistocles, 235 Fed. 81, 148 C. C. A. 575.

[2] It is contended by the libelant that, the explosion being unforeseen and unexpected in its nature, and occurring in the manner in which this transpired, negligence would be presumed, if unexplained, and the burden is cast upon the respondent to satisfactorily explain. Beall v. Seattle, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892, 61 L. R. A. 583; Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. The contention of the libelant would have force, if the libelant was at a place where he was directed to be. The testimony, I think, is conclusive that the trimming of the lower hold had been fully completed by professional trimmers at Boat Harbor. I think all of the circumstances confirm the positive testimony of the respondent that no authority was given to the seamen to disturb the lower hold. The acts with relation to the sealing of the lower hold having been done by professional sealers, men engaged for that special service, and the condition of the space in the lower hold being a small V-shaped opening, in which but little coal could be placed, in the absence of testimony of any direction to the men to go into the place, I think the fact is conclusively established that no direction can be attributed to the order of the boatswain, any reasonable construction of which would lead a man into the lower hold, and this is further confirmed by the large space into which the coal could be placed on the 'tween-decks. The act of libelant in going into this small space in the hold of the ship was an act purely voluntary, without suggestion on the part of his superiors, and libelant is not entitled to recover an indemnity for negligence of the master upon this occasion.

[3] Recovery, however, may be had for maintenance and cure. It is the law of the sea that recovery may be had for wages, maintenance, and expenses of cure by a seaman injured on a vessel in the service of which he is engaged. The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47

L. Ed. 760. It is the uniform rule of admiralty that a seaman, injured in the service of a ship, is entitled to maintenance and cure, and wages. at least to the end of the voyage, irrespective of the question of negligence. The Santa Clara (D. C.) 206 Fed. 179. Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. 1916, § 8337a), is merely a provision fixing the status of injured seamen in command of vessels with relation to other employés on the ship, and provides that "seamen having command shall not be held to be fellow servants with those under their authority."

No recovery can be had for indemnity, and the only liability which exists is for any unpaid wages, and for maintenance and cure.

HANSEN v. PACIFIC COAST ASPHALT CEMENT CO.

(District Court, S. D. California, S. D. July 2, 1917.)

No. 9786.

1. REMOVAL OF CAUSES ⟸44—PERSONS ENTITLED TO REMOVE—EFFECT OF CROSS-COMPLAINT.

Where the defendant in an action filed a petition and bond to remove it to the federal court, and contemporaneously therewith, or subsequently, but before the removal, filed an answer and cross-complaint, it was not entitled to remove the case under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1916, § 1010), authorizing the removal of actions by defendants, as by filing the cross-complaint it became the plaintiff and invoked the jurisdiction of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 88.]

2. REMOVAL OF CAUSES ⟸102—GROUNDS FOR REMAND—DOUBT AS TO JURISDICTION.

It is the duty of the federal court to remand a cause removed from a state court, where there is doubt as to whether the case was properly removed.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 224.]

At Law. Action by Clelia M. Hansen, née Muscio, against the Pacific Coast Asphalt Cement Company. On motion to remand. Motion granted.

B. F. Thomas, of Santa Barbara, Cal., for plaintiff.

Canfield & Starbuck, of Santa Barbara, Cal., and C. W. Durbrow, of San Francisco, Cal., for defendant.

TRIPPET, District Judge. This action was commenced in the superior court of the state of California, in and for the county of Santa Barbara, and the proceedings therein progressed until a decree was entered June 26, 1916. Thereafter defendant applied, under section 473 of the Code of Civil Procedure, for leave to answer; the application having been made within a year after the rendition of said decree.

[1] The court made an order on February 7, 1917, allowing the defendant to answer within 10 days from that date. On February 13,

1917, the defendant filed a petition and bond to remove the cause to this court. On the same date, to wit, February 13, 1917, defendant filed an answer and cross-complaint, seeking a personal judgment against the plaintiff. The record presented to this court shows that the answer and cross-complaint appear in the record following the petition and bond for removal. The court cannot assume from this fact that the cross-complaint was filed subsequent to the petition for removal. The parties have discussed the case as though it were filed subsequent to filing the petition and bond. It does not seem to make any difference whether it was filed contemporaneous with the petition and bond or subsequently. It would seem, however, that the court should consider that all three of the papers were filed at the same time.

Only the defendant has a right to remove a case from a state court to this court. Judicial Code, § 28. The question presented upon this motion to remand is whether or not the case was removed here by a defendant. The only difference between a counterclaim and a cross-complaint, so far as the record here is concerned, in the California practice, is that, in a cross-complaint filed by a defendant, the plaintiff is required to answer. No answer is necessary to a counterclaim. C. C. P. §§ 437, 438, 442, 626, 666.

There is a conflict of authority concerning the right of removal by plaintiff, where defendant files a cross-bill or counterclaim. Authorities are collected in 2 Foster's Federal Practice (5th Ed.) § 542, at page 1808. Some of the cases which deny the right of a plaintiff to remove assign as the reason that the plaintiff invoked jurisdiction of the court, knowing that a counterclaim or cross-bill might be filed. These cases are distinguished, where it is said that, if the federal court did not have jurisdiction of the cause of action which the plaintiff filed, the principle just stated did not apply, and therefore that the plaintiff could remove the case, where the cross-complaint was such as to give the federal court jurisdiction, because he had become a defendant. Price & Hart v. Ellis (C. C.) 129 Fed. 482; Hagerla v. Miss. River Power Co. (D. C.) 202 Fed. 771. The principle involved in these cases is the same principle involved in this case. A cross-complaint is the assertion of a new and different cause of action from that asserted in the complaint. The defendant becomes a plaintiff to all intents and purposes by filing a cross-complaint. When the action is removed, it carries the whole record. That would bring with it the action which the defendant instituted, and, if he is allowed to remove under such circumstances, it would be allowing the plaintiff to remove an action, instead of limiting the right of removal to a defendant. By filing this cross-complaint, the defendant became a plaintiff, and invoked the jurisdiction of the court, and thereby deprived itself of the right to remove. Texas & Pacific Ry. v. Eastin, 214 U. S. 153, 29 Sup. Ct. 564, 53 L. Ed. 946. The defendant claims he was compelled to file cross-complaint in order to preserve his rights. That, however, is not true, because the defendant could have removed the case without filing any pleading at all in the state court.

[2] It is the duty of the court to remand, where there is doubt as to whether the case has been properly removed. Simkins, Federal

Equity Suit, 803, and authorities there cited; Nash v. McNamara (C. C.) 145 Fed. 541.

An order will be made remanding the case accordingly.

MURRAY v. ÆTNA LIFE INS. CO.

(District Court, D. Montana. November 13, 1916.)

No. 178.

1. INSURANCE ⟸527—POLICIES—ACCIDENT POLICIES.
An accident policy, providing for payment for the loss of the entire sight of an eye, if irrevocably lost, should be reasonably interpreted; and the sight of an eye will be deemed lost, where there is no ability to distinguish and recognize objects, though light from darkness can be distinguished.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313.]

2. INSURANCE ⟸646(8)—ACCIDENT POLICIES—BURDEN OF PROOF.
One seeking to recover the indemnity provided in a policy for the entire loss of the sight of an eye within a stipulated time has the burden of establishing his loss of sight within such time.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1665.]

3. INSURANCE ⟸527—ACCIDENT INSURANCE—EVIDENCE—SUFFICIENCY.
Where a policy provided for an indemnity in case of the irrevocable loss of the entire sight of an eye, a physician is not entitled to such indemnity, though he suffered such impairment of the sight of one eye that he was unable to use such eye to any advantage, either in reading for a considerable period of time or operating, where he could normally distinguish objects before his sight would fail; it being the loss of sight as a man, and not as a professional man, which the policy covered.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1312, 1313.]

At Law. Action by Thomas J. Murray against the Ætna Life Insurance Company, a corporation. On motion for new trial after verdict for plaintiff. Motion granted.

E. B. Howell and Walker & Walker, all of Butte, Mont., for plaintiff.

H. A. Frank and R. F. Gaines, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. In a trial upon a policy providing for payment amongst other things, for "loss of entire sight of one eye, if irrevocably lost" as the result of and within 90 days from accident, the jury was instructed that, though the injured eye could "distinguish light from darkness, or perceive objects temporarily, for brief intervals," yet, if "all useful and practical sight was irrecoverably lost," it was within the policy and plaintiff was entitled to recover. Verdict for plaintiff, and defendant moves for a new trial, for error in said instruction and for insufficiency of the evidence.

[1] It is believed the instruction is the law. The indemnity is virtually for the loss of the benefit of sight or vision. The latter may be defined as the ability to perceive, distinguish, and recognize objects, and the former as satisfaction of will, need, or pleasure. If this abil-

ity is so far destroyed that what remains will not to practical and useful extent confer any of this benefit, entire sight, within the construction of analogous terms in insurance law, is lost. So would it be in popular phrase or sense. The interpretation must be reasonable and relative, not literal. The ability to perceive light and objects, but no ability to distinguish and recognize objects, is not sight, but blindness. So would it be, though there were intermittent flashes of the latter ability. To no practical or useful extent would it serve the will, need, or pleasure. See Travelers' Ass'n v. Rogers (Tex. Civ. App.) 163 S. W. 421; Casualty Co. v. Wynne, 36 Okl. 325, 129 Pac. 20; Moore v. Ætna, etc., Co., 75 Or. 47, 146 Pac. 151, L. R. A. 1915D, 264, and cases therein cited.

[2, 3] But it is also believed the evidence is insufficient to sustain a finding or verdict that of his injured eye plaintiff has lost the entire sight as herein defined. [The evidence is set out at length, omitted for brevity, the nature of which is sufficiently disclosed by subsequent comment.] Remembering the burden is on plaintiff to prove that within the 90-day period he lost the entire sight, as hereinbefore defined, of one eye, the evidence fails. It is not enough that sight may be so far lost and the eye so impaired that he is disabled to perform major operations, or to read continuously, or that, when he closes the uninjured eye, the injured one loses vision, or that natural co-ordination and accommodation are lacking; for defendant did not contract to pay upon the happening of any or all these contingencies, but only when entire sight was lost—when all practical and useful sight for any purpose of will, need, or pleasure was lost.

The evidence is too lacking in facts and replete with ambiguous conclusions to support a finding that plaintiff has lost entire sight of the injured eye. The conclusions repeatedly testified to are that plaintiff can normally see objects but a "short time," and then vision fades out "in a very much shorter time," or "longer," dependent on his physical condition; that he cannot read, distinguish letters, "for any amount of time"—"not able to use the left eye to any advantage," and the like. But the facts testified to are he can normally see objects for a short time, and then, if very tired from the use of both eyes, when he closes the uninjured eye and subjects the injured one to the abnormal strain of excess nerve impulse, it fails of vision in a very short time, defined as 3 to 5 minutes. If not so tired, it may be 10 minutes before it fails; that his eyes are nearly normal for distant vision, and can comfortably be used with lenses for several minutes; that with his old lenses he can read the chart, distant, practically normally, for as much as 5 minutes, and after a few minutes' rest, "very likely within 10 minutes or 15 minutes," he can so read again; and that lenses will correct the lack of co-ordination and accommodation.

If, after plaintiff has become very tired from the use of both eyes, he still has power in the left eye to such extent that he can close the right eye and still see with the left eye thus abnormally burdened, for 3 to 5 minutes before its vision fails; if with lenses he can enjoy normal distant vision for several minutes at a time; if he can read the test chart, distant, for as much as 5 minutes, and then, after resting

10 to 15 minutes, can again so read it; if with the left eye alone, abnormally used, he could walk safely an indefinite distance on Main street, fair to infer a fourth mile, or as far as easily walked in 5 minutes (and all this is the testimony of himself and physician)—it cannot be said plaintiff has lost entire sight of the left eye. On the contrary, the proof is he has not. He has between a fourth and a half of its former vision, a substantial part, and which in respect to many needs and pleasures will render him practical and useful service, doubtless greater in a life of inactivity and leisure than in one active and professional. But it is loss of sight as a man, and not as a doctor, that this term of the policy applies to. That these conclusions in the testimony, considered alone by the jury, would support the verdict, is admitted, but that the jury could rightfully do so is not admitted. The facts in the testimony demonstrate the conclusions are mere erroneous estimates or opinions, or ambiguities explained by the facts, and not to be relied upon. The said facts are judicial admissions by plaintiff, against interest, and, not receded from, were bound to be given full weight by the jury. The jury could not ignore them, and consider only mistaken conclusions, and therefrom draw unreasonable inferences, but was bound to render a verdict in accordance with the facts. It did not.

The motion for a directed verdict should have been granted. As it is, the only remedy is a new trial. Granted.

Later the suit was settled.

In re STUCKY TRUCKING & RIGGING CO.

(District Court, D. New Jersey. February, 1917.)

1. CORPORATIONS ⟸484(1)—ULTRA VIRES ACTS—GIVING NOTE FOR STOCKHOLDER'S DEBT.

Where, on a sale by a stockholder of his stock in a corporation to a third person, the corporation executed to him its note for the purchase price, the transaction was ultra vires, especially as in one aspect the effect of the transaction was to constitute the seller a creditor of the corporation without it having received any benefit, while in another aspect it amounted to a loan to the buyer, in violation of Corporation Act N. J. (Laws 1896, c. 185) § 48, forbidding loans by corporations to stockholders or officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815.]

2. BANKRUPTCY ⟸339—CLAIMS—JUDGMENTS—COLLATERAL ATTACK.

Where a judgment on notes executed by a corporation to a former stockholder for the purchase price of his stock sold to a third party was obtained by default a few days before bankruptcy, without any effort by the company to defeat the action, the judgment could be collaterally attacked in bankruptcy proceedings, as collusion or fraud would be conclusively presumed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526.]

In Bankruptcy. In the matter of the Stucky Trucking & Rigging Company, bankrupt. On petition to review an order of the referee disallowing the claim of Joseph B. Stucky. Order affirmed.

See, also (D. C.) 240 Fed. 427.

Peter Bentley, of Jersey City, N. J., for claimant.
Samuel Heyman, of Jersey City, N. J., for trustee.

HAIGHT, District Judge. [1] That part of the claim in question which has not been reduced to judgment, and which is based on promissory notes given by the bankrupt, admittedly, for an indebtedness of a third party to the claimant, is unquestionably an unenforceable obligation against the bankrupt. It would be difficult, indeed, to imagine a more flagrant example of an ultra vires contract than that which resulted in giving the notes in question. They represent part of the purchase price of a certain amount of the capital stock of the bankrupt corporation which Allen individually purchased from Stucky, and for which the corporation received no benefit or consideration whatever. If a transaction of this kind were to receive legal sanction, there would be no security either in corporate investment or in the dealings between a corporation and those who might become its creditors. In addition, in one aspect, the legal effect of such a transaction would be to constitute Stucky a creditor rather than a stockholder of the corporation, without the latter having received any benefit therefor; and in another it would amount to nothing more nor less than the loan by the corporation of money to Allen, a stockholder and officer, which is specifically prohibited by section 48 of the New Jersey Corporation Act. This vice being inherent in all of the notes, the only remaining question is whether any additional validity has been given to such of them as were reduced to judgment.

[2] The judgment, admittedly, was entered by default a few days before the petition in bankruptcy was filed; no defense having been interposed nor any effort made by any of the officers of the company to defeat the action or question the legal right of the plaintiff therein to recover as against the corporation. It must be borne in mind that this is not a case where there has been a contest in another court respecting the enforceability of the notes and in which such court has pronounced a solemn judgment. While it is undoubtedly true that a judgment cannot be collaterally attacked, even by creditors or their representative, except for lack of jurisdiction, fraud, or collusion, I think it admits of no doubt that under the facts of this case, as above detailed, collusion or fraud in law must be conclusively presumed as respects creditors or their representative. Palmer v. Martindell, 43 N. J. Eq. 90, 10 Atl. 802. That such a judgment may be collaterally attacked in bankruptcy proceedings, on the grounds before mentioned, seems likewise to be clear. Chandler v. Thompson (C. C. A., 7th Cir.) 120 Fed. 940, 57 C. C. A. 230; In re Continental Engine Co. (C. C. A., 7th Cir.) 37 Am. Bankr. R. 102, 234 Fed. 58, 148 C. C. A. 74. It is urged, however, that the objections filed by the trustee to this claim were not sufficiently broad to raise the question just discussed. While they were not as specific as they might have been, I think they were broad enough to cover the kind of fraud which I think invalidates this judgment, especially in view of the conclusive presumption before mentioned.

The referee's order will accordingly be affirmed.

CHURCH v. SWETLAND et al.

(Circuit Court of Appeals, Second Circuit. June 4, 1917.)

No. 260.

1. CANCELLATION OF INSTRUMENTS ⟸37(2)—PLEADING—EXCUSES FOR LACHES.
Where the complainant, in a suit to avoid transactions on the ground of fraud occurring over three years prior to the filing of the bill, had in the meantime filed other bills for relief in which he did not plead fraud, if he did not know of the fraud when they were filed, and subsequently discovered it, he should have so alleged.

2. CONTRACTS ⟸270(2)—RESCISSION—TIME FOR RESCISSION.
A party loses his right to rescind on the ground of fraud by not availing himself of it within a reasonable time after he discovers it.

3. CONTRACTS ⟸270(2)—TIME FOR RESCISSION—LACHES.
A party, by waiting over three years before suing to avoid transactions on the ground of fraud, waived his right to complain thereof, especially where, in previous suits attacking the transactions, he did not suggest that they were in any degree affected with fraud.

4. FRAUD ⟸12—REPRESENTATIONS CONSTITUTING FRAUD—FACTS OR PROMISES.
As a rule false representations, to constitute fraud, must relate to some material past or existing fact, and not to mere promises or statements of intention.

5. PRINCIPAL AND SURETY ⟸7—INVALIDITY OF PRINCIPAL'S CONTRACT—RIGHT OF SURETY TO AVOID.
Complainant held bonds of the W. Co. as collateral security. S. requested him to loan the bonds to the company to enable it to obtain a loan and save it from insolvency, stating that this would liquidate all its pressing debts, and enable it to continue in business, and that if he made the loan he would take charge of the company, keep it on its feet, and not allow insolvency or bankruptcy proceedings to intervene. Complainant accordingly loaned the bonds to the company to be used as collateral for a loan wherever it might be secured. It was not alleged that any promises were made to complainant with no intention of fulfilling them, but it was alleged that thereafter S. made a loan to the corporation on the security of such bonds, and promised to make other loans necessary to save it from insolvency or bankruptcy on the same security, and that when the loan was made he secretly and fraudulently intended that the note should be immediately called under a provision thereunder making it due forthwith if bankruptcy proceedings should be instituted, and that shortly thereafter he procured a petition in bankruptcy to be filed and asserted the right to declare the note due. *Held* that, if the representations made with no intention of performing them constitute fraud, it nevertheless was a fraud on the company, and not on complainant, and gave complainant no right to avoid the loan and recover the bonds, as defenses personal to the principal do not operate in favor of a surety.

6. PLEDGES ⟸25—LOSS OF LIEN—TRANSACTIONS BETWEEN THIRD PARTIES.
Where a corporation, purchasing all of the stock of another company and all of its assets, assumed its debts and obligations, including notes held by a trust company and secured by bonds loaned to the maker of the notes by plaintiff, an agreement of the purchasing corporation that these bonds should be returned to plaintiff could not affect the right of the trust company to hold them until its debt was paid.

7. PLEDGES ⟸19—DEBTS SECURED—RENEWAL OF NOTE.
Where property is pledged to secure a note, the extension or renewal of the note does not, in the absence of a distinct agreement, affect the pledge, but it continues as a valid and effectual security until the debt is paid.

8. PLEDGES ⟸19—DEBTS SECURED—RENEWAL OF NOTE.
Where a corporation gave notes with bonds as collateral security, a renewal of the notes by a new corporation, which without consideration took over the assets and assumed the debts and contracts and even the name of the old corporation with slight alteration, did not release the collateral, as the new corporation was the successor of the old company, and the case was not one involving a discharge of an old debtor and an acceptance in its stead of a new debtor not otherwise liable.

9. PLEDGES ⟸38—ASSIGNMENTS OF PLEDGE OR DEBT—RIGHTS OF ASSIGNEE.
One to whom the holder of notes secured by collateral assigned the notes and the collateral acquired the same rights in all respects as those which the original holder possessed.

10. ASSIGNMENTS ⟸78—RIGHTS OF ASSIGNEE IN COLLATERAL SECURITY.
Where a pledgee assigns the principal obligation without assigning the pledge, equity will hold it a trustee of the collateral for the transferee.

11. PLEDGES ⟸38—ASSIGNMENT OF DEBT AND PLEDGE—RIGHTS OF ASSIGNEE.
That a transferee of notes secured by bonds pledged as collateral knew of an agreement by one assuming the pledgor's debts that the bonds should be returned to plaintiff, who loaned them to the pledgor, did not affect his rights in the collateral.

12. PLEDGES ⟸25—LOSS OF LIEN—TRANSACTIONS BETWEEN THIRD PARTIES.
The rights of the original holder of the notes and collateral security would not have been impaired in the slightest degree, even assuming that it was fully informed of such agreement.

13. TRUSTS ⟸343—CONSTRUCTIVE TRUST—WAIVER OF RIGHTS.
Where complainant loaned bonds to a corporation which pledged them to S. as security for a note on his promise to make other loans and keep it out of insolvency, if such promise was one upon which complainant individually could rely so that a failure to keep it entitled him to have S. declared a trustee for him in the bonds, he waived such right by assigning his interest and equity in the bonds with full knowledge that bankruptcy proceedings had been instituted.

14. ASSIGNMENTS ⟸64—RIGHT TO AVOID—FRAUD.
Complainant claimed the right to have S. declared a trustee for him in certain bonds. Without fraud and for a valuable consideration he assigned his interest and equity in the bonds to E. He alleged that S. had so complicated the legal situation and his legal rights that he was led to believe that he would be unable to secure possession of the bonds, and would be defeated if he brought action therefor, and that he was thereby induced to consent to the assignment, but it was not alleged that E. led him into any such belief, and it was expressly stated that he was not charged with any fraud. *Held* that, even though the general rule that misrepresentations of law do not constitute fraud did not apply, complainant had no right to avoid the assignment, nor were his rights enlarged by the fact that E. obtained the assignment with the intention of transferring the title to S., and did assign to S. the interest acquired.

15. PLEADING ⟸8(15)—CONCLUSIONS—FRAUD.
An allegation that an agreement was procured by fraudulent means and devices, without stating what means and devices were resorted to, was a mere conclusion of law, which must be disregarded, as in pleading fraud the facts relied upon as constituting the fraud must be set out, and not conclusions, and general charges of fraud or that acts were fraudulently committed are without avail, unless accompanied by statements of specific facts amounting to fraud.

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

Suit by Alfred W. Church against Horace M. Swetland and others. From a decree dismissing the bill as against certain defendants, complainant appeals. Affirmed.

See, also, 233 Fed. 891, 147 C. C. A. 565.

The complainant is a citizen of the state of Connecticut. The defendants Swetland and Ellis are citizens of the state of New York and are residents of the Southern district. The defendant Sheppard is also a citizen of the state of New York and a resident of the Southern district, and on March 12, 1912, was appointed receiver, and on November 22, 1912, trustee of Wyckoff, Church & Partridge, Inc., hereinafter called the Wyckoff Company. The Commercial Trust Company of New York City, hereinafter called the Trust Company, is a corporation organized and existing under the laws of the state of New York and is a resident of the Southern district of New York. The complainant and the defendant Swetland were members of the board of directors of the Wyckoff Company. The complainant for some time prior to February 14, 1912, is alleged to have been lawfully and legally in possession of $200,000 of first mortgage bonds which he was holding as collateral security. The bonds were issued by the Wyckoff Company, and were secured by a first mortgage upon long-term leasehold property situated in the city and county of New York, and was valued at $400,000. He was also lawfully and legally in possession of $250,000 of the preferred stock and of $450,000 of the common stock of the Wyckoff Company as collateral security for the payment of $450,000 to him by Clarence F. Wyckoff, the possession being pursuant to an agreement in writing dated April 1, 1909. No part of that sum has ever been paid. The District Judge, on motion, dismissed the bill as against all the defendants except Ellis on the ground that it failed to state a cause of action. As against Ellis the cause of action was remanded to the law side. The transactions complained of in the bill and the relief asked for are stated in the opinion of the court.

John M. Shedd and Hector M. Hitchings, both of New York City, solicitors for appellant.

Parker, Davis & Wagner, of New York City (Arnold L. Davis and N. Raymond Heater, both of New York City, of counsel), for appellee Swetland.

Lemuel E. Quigg, of New York City (George H. D. Foster, of New York City, of counsel), for appellee Commercial Trust Co.

Hays, Hershfield & Wolf, of New York City (Henry H. Kaufman, of New York City, of counsel), solicitors for appellee Sheppard.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The complainant heretofore filed a bill against the same defendants in the same court, which bill related to the same transactions of which complaint is made in the present suit. We dismissed the bill, after a consideration of its merits in a lengthy opinion, which concludes as follows:

"The complainant is wrong in supposing that he is entitled to bring one suit in equity and join all the defendants upon the theory that his separate claims arise from the same transaction, the failure of the bankrupt corporation. His claims do not arise from one transaction, as he asserts, but from a number of separate transactions, and they are not so connected with the failure of the bankrupt as to create 'a common right,' or a community of interest, within the meaning of the rule." 233 Fed. 891, 899, 147 C. C. A. 565, 573.

The present bill differs from the former not only in the fact that certain persons who were defendants in that suit are not made defend-

ants in this one, but that this bill makes specific allegations of fraud, whereas the first bill contained no charges of fraud against any of the parties. While all the transactions complained of in the present bill were included in the former one, certain transactions included in that are omitted from this. The bill covers 48 printed pages instead of 34 pages, which in the former suit sufficed to state the wrongs for which complainant sought relief.

It is observed, too, that this is the fourth complaint against the respondents in regard to the transactions herein involved. All the previous complaints were dismissed by the court on motion because they failed to state a cause of action either at law or in equity. For the same reason and on motion the court below has dismissed the present bill, except as against Ellis, the cause of action as to him being remanded to the law side, as before stated.

[1, 2] The present bill was not filed until November, 1916. It was then for the first time that complainant sought to avoid on the ground of fraud transactions which took place in February, 1912. No excuse is offered for this delay. It is not alleged that complainant did not know of the fraud at the time he filed the former bills, although if he then knew of the fraud he should have alleged it. If he did not then know of it, but has discovered it since, he should have so stated. For it is a principle of equity that a party loses his right to rescind on the ground of fraud by not availing himself of it within a reasonable time after he discovers it. In Grymes v. Sanders, 93 U. S. 55, 62, 23 L. Ed. 798, the Supreme Court declared that:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, * * * he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804, these words are quoted approvingly by the court, and it was said that, if the plaintiff in that case had the right to repudiate on the ground of fraud a settlement by which certain notes were surrendered, "it was his duty to do so as soon as advised of all the circumstances justifying such repudiation; and he also must have repudiated it in toto."

[3] While this case might be disposed of upon the ground that the complainant by his delay had waived his right to complain of fraud, if fraud in fact existed, and especially in view of the fact that in his previous suits attacking the transactions involved herein his failure to suggest that any of the transactions were in any degree affected with fraud might be deemed a waiver, still we are inclined not to dispose of the case upon a technicality, but to consider it upon its merits.

1. The bill asks that $200,000 of first mortgage bonds which complainant loaned to be used as collateral be delivered up to him by Swetland. If the said bonds have been in any way canceled or discharged or their lien value interfered with or destroyed by and through any act of Swetland's, the bill asks that in such case the complainant may be adjudged to have a just, equitable, and valid first lien against the leasehold property mortgaged to secure their payment. And the bill

avers that complainant is ready and willing to do and perform all acts and things and to pay such moneys as to the court shall seem just and equitable as a condition of the return of the bonds.

2. The bill asks the court to set aside certain contracts which are alleged to be illegal, unlawful, and fraudulent. The basis of the allegation does not grow out of the subject-matter of the contracts, and the illegality, if it exists, must be found in the facts alleged as to the manner in which the contracts were obtained.

3. Certain conduct of Swetland's is alleged which it is claimed amounts to a direct breach of trust. It grows out of the disregard of certain representations, promises, and agreements he is said to have made to and with the complainant. The court is asked, therefore, to declare Swetland a trustee and to require him to account as such.

4. The bill also asks that certain claims which complainant possessed against the estate in the hands of Sheppard as trustee in bankruptcy, and which had been released, may be re-established in complainant's favor.

Certain other relief is sought to which it is not necessary to refer specifically at this time.

It is alleged that the contract of February 14, 1912, by which the Wyckoff Company gave its note for $150,000 to defendant Swetland in return for $105,473.68 advanced by him to it when it was in financial embarrassment, was "an illegal, unlawful, and fraudulent agreement." It was to secure the payment of this note that $150,000 of the bonds now sought to be recovered were pledged. This makes it necessary to consider how Swetland obtained the note and the collateral.

It appears from the bill that some time in January, 1912, defendant Swetland and one E. S. Partridge, vice president of the Wyckoff company, requested complainant, in their capacity as directors, to allow the company to have the use of $150,000 of first mortgage bonds which complainant was holding as collateral for a debt owing to him by Clarence F. Wyckoff. This they requested him to do for the purpose of saving the Wyckoff Company from insolvency.

The bill states that they requested him to loan the bonds to the corporation "for the purpose of being used by said corporation as collateral security for the repayment of a loan to said company of about one hundred thousand dollars ($100,000), wherever said loan might be secured, and stated and represented to complainant that the said bonds would be forthwith returned to your complainant whenever said loan was repaid."

It also appears that, as an inducement to complainant to consent to this use of the bonds, it was stated by Swetland that he had carefully examined into the company's financial condition, and that, if it could secure a loan of $100,000 for one year, this would liquidate all the company's pressing debts and enable it to continue in business; that Swetland also stated that *if* he (Swetland) made the loan he would personally take charge of the management of the company, would keep and maintain it on its feet, and not allow insolvency or bankruptcy proceedings to intervene and destroy it; that complainant believed the statements so made, and relied upon them, and without consideration placed $150,000 of bonds with Wyckoff and Partridge, the president

and vice president of the company. This, of course, means that they were handed to the company, and with authority to pledge them as collateral for a loan to the company, "wherever said loan might be secured." Complainant did not turn them over to Swetland to secure a loan which he agreed to make; nor were they turned over to the company to be used only in case Swetland made the loan, or in case a loan was made on any specified condition. There are no allegations that there was any such understanding or agreement. There is no allegation that any representation made by Swetland to complainant at that time, and there is no allegation that any other interview occurred at which the subject was discussed between them, was false as to existing facts, or that any promises were made to complainant with no intention of fulfilling them.

Then it is alleged that on February 14, 1912, the Wyckoff Company gave the note for $150,000 to Swetland as a consideration for a loan of $105,473.68 made by him to it, and that the said note was payable one year after the date thereof, without interest, and that it contained a provision that it should forthwith become due and payable in case any judgment, assignment, or bankruptcy proceeding should be brought against the company. At the time the note was given the company turned over $150,000 in bonds loaned to it by complainant to be used as security for the repayment of the note. It was also agreed at that time between the company and Swetland that he should have the right to retain the bonds as collateral security for any and all further and future loans which he might make the company in case further loans became necessary to save it from insolvency or bankruptcy, "which said loans said Swetland then and there promised and agreed to make if same became necessary." It is, however, alleged that at the time the note was given to Swetland he secretly and fraudulently intended that the note should not run for a year, but should be immediately called. And that within a month thereafter he procured a petition in bankruptcy to be filed against the Wyckoff Company by another company of which he was at the time president, and that through that proceeding he asserted and claimed the right to at once declare due and owing the $150,000 note which he had received from the company.

It may be remarked that immediately after the interviews which took place some time in January between complainant and Swetland the complainant left New York for Illinois, and was brought back ill early in February, and taken to a hospital, where an operation was performed upon him, which confined him there until after February 14th, and the bill states that he had no opportunity to and did not obtain any information in regard to the affairs of the company until after Swetland made his loan. Whatever representations Swetland made to the company at the time of the loan, therefore, were unknown to complainant and could not have influenced his conduct.

[4, 5] As a rule, false representations, to constitute fraud, must relate to some material past or existing fact. And it has been frequently held, therefore, that a charge of fraud cannot be predicated upon a mere promise, nor upon a mere statement of intention not amounting to a binding promise. Jordon v. Money, 5 H. L. Cas. 185; Citizens' Bank v. New Orleans First National Bank, L. R. 6 H. L. 352; Knowl-

ton v. Keenan 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282; Norfolk, etc., Hosiery Co. v. Arnold, 49 N. J. Eq. 390, 23 Atl. 514; Hodsden v. Hodsden, 69 Minn. 486, 72 N. W. 562; Argall v. Cook, 43 Conn. 165. But many cases hold that the above rule does not apply if the promise is made to induce action and with the intention at the time not to perform the same. Ayres v. French, 41 Conn. 142; Sweet v. Kimball, 166 Mass. 332, 44 N. E. 243, 55 Am. St. Rep. 406; Laing v. McKee, 13 Mich. 124, 87 Am. Dec. 738; Chicago, etc., R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Goodwin v. Horne, 60 N. H. 486; Birmingham Warehouse, etc., Co. v. Elyton Land Co., 93 Ala. 549, 9 South. 235; Albits v. Minneapolis, etc., R. Co., 40 Minn. 476, 42 N. W. 394; Am. & Eng. Encyc. of Law, vol. 14, p. 51; Bispham's Eq. (8th Ed.) § 211. The reason given is that the promisor impliedly represents that he intends to perform his promise, and therefore falsely represents the condition of his mind, which is a representation of fact. In California it has been expressly declared by statute that a promise made by statute without any intention of performing it, and made with intent to deceive, shall constitute actual fraud. Civil Code of Cal. § 1572. See Cockrill v. Hall, 65 Cal. 326, 4 Pac. 33; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189. Some of the courts, however, insist that no representation which relates to the future can amount to fraud, no matter with what intention it may be made. Farris v. Strong, 24 Colo. 107, 48 Pac. 963; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Balue v. Taylor, 136 Ind. 368, 36 N. E. 269. In Gage v. Lewis, 68 Ill. 604, a retiring partner represented to a surety that, if he would become responsible to him for the payment of the partnership debts, he would forever retire from the business, and in no manner compete with the surety and the remaining partner, who were going into the same business. Relying upon the distinction between a misrepresentation of an existing fact and of an unexecuted intention, the court held a surety not bound, notwithstanding the representations were made for the purpose of deceiving him. We intimate no opinion as to whether we think that case was properly decided, and it is not necessary now to determine which of these conflicting doctrines seems to us to be supported by the better reason. For the representations which are alleged to have been made with no intention of performing them were not made to complainant, but to the company, and were made several weeks after the complainant had turned over the bonds to it to be used as collateral for a loan to the company "wherever secured," and so far as the record discloses to be used unconditionally. If any fraud was committed by Swetland, it was a fraud upon the company and not upon complainant. And neither the company nor the trustee in bankruptcy has ever complained that any fraud was perpetrated, and neither has sought on that or any other ground to avoid the transaction. Assuming that fraud was practiced upon the company, the right to avoid the loan was personal to it. Defenses do not operate in favor of a surety which are personal to the principal. Van Kirk v. Adler, 111 Ala. 104, 20 South. 336; McCabe v. Raney, 32 Ind. 309; Boone County v. Jones, 54 Iowa, 699, 2 N. W. 987, 7 N. W. 155, 37

Am. St. Rep. 229; McCormick v. Hubbell, 4 Mont. 87, 5 Pac. 314, 32 Cyc. 149.

[6-8] This brings us to inquire as to the circumstances under which Swetland acquired the remaining $50,000 of the $200,000 bonds which the complainant seeks to recover into his possession. These bonds had been deposited by Clarence F. Wyckoff with complainant as security for the payment of Wyckoff's debt to the latter, and were then loaned by complainant to a corporation known as Wyckoff, Church & Partridge, which was subsequently absorbed by the W. A. Wood Automobile Manufacturing Company. The latter company purchased all the capital stock of the former company as well as all its assets, and assumed all its debts and obligations, including notes for $50,000 held by the Commercial Trust Company. To secure the payment of these notes these $50,000 of bonds had been deposited by Wyckoff, Church & Partridge with the Trust Company as collateral. Then the name was changed, in accordance with the provisions of the statute of the state of New York, to Wyckoff, Church & Partridge, Inc. Now it is alleged that it was agreed, at the time of the assumption of the debts, that these $50,000 of bonds deposited as collateral with the Commercial Trust Company should be returned to the possession of the complainant. It is not alleged, however, that the Trust Company ever agreed to the return of the collateral without payment of the notes, and no agreement made between the Wood Automobile Company and Wyckoff, Church & Partridge could affect the right of the Trust Company to continue to hold the collateral until it received payment of its debt. Neither the Wood Automobile Company nor Wyckoff, Church & Partridge, Inc., ever paid the notes. When they matured, renewal notes were given by the latter company, and the Trust Company continued to hold the collateral as before. Where property is pledged to secure a note, the extension or renewal of a note does not, in the absence of a distinct agreement of the parties, affect the pledge, but it continues as a valid and effectual security until the debt is paid. Merchants' National Bank v. Hall, 83 N. Y. 338, 38 Am. Rep. 434; Cotton v. Atlas National Bank, 145 Mass. 43, 12 N. E. 850; Emmetsburg First National Bank v. Gunhus, 133 Iowa, 409, 110 N. W. 611, 9 L. R. A. (N. S.) 471; Omaha First National Bank v. Goodman, 58 Neb. 701, 79 N. W. 1062. In this respect a contract of pledge differs from that of a personal surety, since the extension or renewal of a note without the consent of the surety releases him. James v. Pike, 23 La. Ann. 477. We do not overlook the fact that it has been held that upon the renewal of a note by different parties the pledgee has no right to retain as security for the new note property of a third person, deposited as collateral for the old note, without first obtaining his consent. Merchants', etc., National Bank v. Masonic Hall, 62 Ga. 271. But in the instant case the new corporation of Wyckoff, Church & Partridge, Inc., which renewed the notes, is simply the successor of the old company of Wyckoff, Church & Partridge, which gave the notes that were renewed. In taking over without consideration the assets, and assuming the debts and contracts, and even the name with slight alteration, it became the successor of the original company, and would have been liable to pay its

notes even if there had been no express agreement to that effect. When the notes were renewed it was not the ordinary case of a discharge of an old debtor and an acceptance in his stead of a new debtor not otherwise liable, but was more nearly analogous, so far as its effect upon the collateral is concerned, to that of a renewal note given by an executor under an agreement to pay out of the assets of the estate. That it would release the collateral must be denied.

[9, 10] Swetland purchased the renewal notes from the Commercial Trust Company, and it at the same time surrendered to him the bonds held as collateral. The Trust Company had the right to transfer the notes and the bonds collateral to them. Swetland, as its assignee, acquired the same rights in all respects as those which his assignor possessed. The right was a right to hold until the debt was discharged. And if the Trust Company had not transferred the bonds, equity would have held it a trustee of them for Swetland; for if a pledgee assigns the principal obligation without the pledge, the assignor holds the collateral as a trustee for the assignee.

[11] But it is alleged that at the time Swetland purchased the notes and acquired the bonds he had full knowledge of the agreement made with the Wood Automobile Company that it assumed the debts of Wyckoff, Church & Partridge, and agreed to return to complainant the $50,000 of bonds which the Trust Company held as collateral. But granting that Swetland had full knowledge of that arrangement, it would not impair his right to acquire from the Trust Company whatever rights it possessed in the notes and in the collateral. The rights of the Trust Company in the notes and in the collateral were the same after the agreement as they were before its making. If the Trust Company had ever assented to that agreement, and then in violation of it had delivered the collateral to Swetland, the complainant would hardly have failed in this bill to have asked relief also against that company in some form. But there is not an allegation in the whole bill, although the Trust Company is a defendant, that it ever in any way wronged the complainant.

[12] It seems, however, to be assumed by the bill that because Swetland was a director in the Trust Company, and knew of the agreement above mentioned, that in some way his knowledge is to be imputed to the Trust Company, and that the latter's rights in the collateral became thereby affected. It is quite unnecessary to say that as a rule knowledge of a director is not imputable to a corporation unless it is shown that such knowledge has been communicated to the other directors or officers, or that the director in question was present at a board meeting when the transaction involved was officially acted upon; and not even then, if his interest in the matter is adverse to that of his corporation. For even if it be assumed that the Trust Company was fully informed of the agreement made, such knowledge would not have impaired in the slightest degree its rights in the collateral, the Wood Automobile Company not having paid the notes or the collateral as it promised. We conclude, therefore, that there is nothing in the manner in which Swetland acquired the possession of any of the bonds which entitles this complainant to demand their return before the debts for which they are held are paid.

The agreement under which the $150,000 of bonds were obtained by Swetland was not an agreement between complainant and Swetland, but an agreement between the Wyckoff Company and Swetland. In asking that all fraudulent contracts obtained by Swetland from complainant be vacated and set aside, the court is not asked to set aside the contract under which the $150,000 of bonds were obtained. And if such were the prayer the court could not grant it, if the agreement be assumed voidable, for the reason that complainant sues in his individual capacity and not as a stockholder to redress a wrong done to the corporation.

[13] This brings us to a consideration of the agreement of October 25, 1912, in so far as that agreement affects the right of the complainant in the bonds. Under that agreement the complainant assigned to Ellis his "interest and equity in bonds Wyckoff, Church & Partridge, Inc., par value $200,000." This was eight months after the Wyckoff Company turned over the bonds to Swetland, and seven months after the petition in bankruptcy was filed. If Swetland's alleged promise to the company to keep it out of bankruptcy and to advance to it additional funds which it might need was a promise upon which the complainant individually could rely so that the failure to keep it could be set up by complainant as a breach of trust—a proposition we deny—this agreement with Ellis, made with full knowledge that the bankruptcy proceedings had been instituted, amounted to a waiver of his right. All his equity and interest in the bonds at that time passed to Ellis, and from that time he has had no interest and no equity in said bonds. This assignment to Ellis the complainant asks this court to set aside on the ground that Ellis is in default in the performance of his part of that agreement. We disposed of that proposition in the first suit when we said:

"Under the options reserved to Ellis under that contract, complainant has not yet received what Ellis agreed to pay him; but that does not invalidate the contract, and Ellis is not in default under it, for in its fourth paragraph it was provided that Ellis might pay out of the proceeds of liquidation of assets which might be transferred to him by the receiver after the payment of the receiver, etc., and that has not yet occurred." 233 Fed. 891, 897, 147 C. C. A. 565, 571.

[14] Again referring to this assignment to Ellis, and seeking to escape from the effect thereof, complainant alleges that Swetland had "so complicated the legal situation and the legal rights of your complainant as to said two hundred thousand dollars ($200,000) of first mortgage bonds that your complainant was led to believe that he would be unable to secure possession of said one hundred and fifty thousand dollars ($150,000) of first mortgage bonds and said fifty thousand dollars ($50,000) of first mortgage bonds, and that he would, in all probability, if he brought action for the same, be defeated in said action," and was thereby induced to consent to the agreement with Ellis. It is not alleged that Ellis occupied any fiduciary relation to the complainant. He is a member of the bar, and the bill expressly states that he is not charged with any fraud in securing the assignment. And if Ellis procured this assignment without fraud and for a valuable considera-

tion, he obtained whatever interest and title in the bonds the complainant then had. If this assignment was obtained by Ellis without fraud, the fact that he may have obtained this assignment with the intention of transferring the title to Swetland, and the fact that he did assign to him the interest he acquired, does not in any way enlarge the complainant's rights. While the allegation is that complainant had been "led to believe," prior to this transfer, that if he brought an action to recover the bonds he would be defeated, he does not allege that Ellis led him into any such belief. So that it is not necessary to inquire whether circumstances exist which would take the case out of the general rule that misrepresentations of the law do not constitute fraud either at law or in equity, because every person is supposed to know the law. And while complainant relies throughout his bill on fraud, he is not in this court asking to be relieved on the ground of mistake. He does not allege that he mistook the legal effect of the agreement he made with Ellis.

[15] The bill states that at the time of this agreement the complainant was "believing and relying upon all the representations that had been made to him in regard to said bonds at the instance and instigation of said Swetland." But there is nothing stated in that connection as to what those representations were, whether they related to matters of law or matters of fact, or that they were false. If the representations meant were the representations which were made to complainant when Swetland induced him to let the Wyckoff Company have the use of the bonds, they already have been considered. A subsequent allegation, in another paragraph of the bill, that this agreement with Ellis was procured by Swetland, by "fraudulent means and devices," through Ellis, without stating what means and devices were resorted to, is a mere conclusion of law which must be disregarded.

In pleading fraud it is a well-established rule that the facts relied upon as constituting the alleged fraud must be set out, and not conclusions. A bill seeking relief on the ground of fraud must state the specific facts and circumstances constituting the fraud, and the facts so stated must be sufficient in themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are without avail, unless accompanied by statements of specific facts amounting to fraud. All through this bill may be found general charges of fraud. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed. An allegation that a thing is fraudulent is immaterial unless the allegation fits the facts to which it is applied. We have examined this bill with care. The facts are complicated, the amount involved is considerable, and from the earliest times down to the present wrongs accomplished through fraud have appealed with peculiar force to courts of chancery for redress. But a close scrutiny of the allegations of this bill has convinced us that the complainant is not entitled to the relief he seeks.

As the complainant has parted with all interest in the bonds, he is in no position to ask that Swetland be declared a trustee for him as respects the bonds, or that a lien to the value of the said bonds be established in his favor on the leasehold property, or that the transfer of

the leasehold property to Swetland by the trustee, Sheppard, be vacated and set aside.

As the agreement which complainant made with Ellis stands unimpeached upon the facts alleged, the complainant is not entitled to the relief he asks as respects his claim for $9,250 and the claim for $20,000.

The complaint was properly dismissed as to the Commercial Trust Company. The bill asks no relief as against it and charges it with no wrong.

The complaint was properly dismissed as to defendant Sheppard, who was and is an officer of the court, and in what he has done has carried out the orders of the court.

The complaint, for reasons already stated, was properly dismissed as to defendant Swetland.

All three of the above-named defendants are entitled to their costs in this court.

The action of the court below in remanding the cause as to defendant Ellis to the law side was a proper disposition to make of the allegations affecting him.

Decree affirmed.

WALLACE v. UNITED STATES.

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

No. 2336.

1. CONSPIRACY ⊂=43(6)—POISONS ⊂=4—INDICTMENT—SALE OF OPIUM.

Harrison Drug Act Dec. 17, 1914, c. 1, § 1, 38 Stat. 785 (Comp. St. 1916, § 6287g), requires any person proposing to handle opium or coca leaves, or any compound or derivatives thereof, to register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on, defining the place of business as the office, or, if none, then the residence, of such person. An indictment returned in the First district of Illinois charged that accused and another conspired to violate the act, and that accused aided and abetted such person, who was not registered with, and had not paid the tax to, the collector of internal revenue for that district, to dispose of the drugs. *Held*, that the act does not provide that one intending to deal in such drugs shall register at his place of business, but that he shall register at the place where such business is to be carried on, the statement of such person's place of business being for information; and hence the indictment was not defective in failing to allege that such person had not registered at his place of business, it alleging that he had not registered at the place where the drugs were disposed of.

2. CONSPIRACY ⊂=43(6)—INDICTMENT AND INFORMATION—SUFFICIENCY.

An indictment charging that accused and another, who was not registered in accordance with Harrison Drug Act, entered into, at Chicago, a conspiracy whereby accused's coconspirator was to dispose of drugs in violation of the act, and which alleged that he did dispose of such drugs, is sufficient to charge the conspiracy to sell such drugs within the First district of Illinois, within which accused's coconspirator was alleged not to have been registered; Chicago being in that district.

3. POISONS ⊂=9—SALE OF OPIUM—INDICTMENT—EXEMPTIONS.

Under the Harrison Drug Act, which excepts certain persons, and provides in section 8 (Comp. St. 1916, § 6287n) that it shall not be necessary

to negative any such exemptions in any complaint, information, or indictment, or writ or other proceeding, laid or brought under the act, an indictment charging a violation of the act need not negative the exemptions contained therein; the provisions of section 8 being applicable to all exemptions contained in the act, and such exemptions being separate from the other provisions of the act.

4. CONSPIRACY ⟸43(4)—INDICTMENT—SUFFICIENCY.
An indictment, charging that accused conspired with another to violate the Harrison Drug Act, alleged that accused's coconspirator, not being registered, unlawfully, knowingly, and feloniously did sell and dispose of prohibited drugs, and that accused unlawfully and knowingly did aid his coconspirator, sufficiently avers accused's knowledge of the unlawfulness of his coconspirator's act.

5. CRIMINAL LAW ⟸678(1)—PROSECUTION—ELECTION.
Under Rev. St. § 1024 (Comp. St. 1916, § 1690), declaring that when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, the government cannot, in a prosecution for conspiring to violate and for violating the Harrison Drug Act, be required at the close of its case to elect on which of the acts conviction would be sought; the several charges properly being joined in one indictment.

6. CRIMINAL LAW ⟸564(3)—VENUE—EVIDENCE.
Venue, like any other fact, may be shown by evidence, direct, indirect, or circumstantial.

7. CRIMINAL LAW ⟸564(1)—TRIAL—VENUE.
In a prosecution for conspiring to violate and violating the Harrison Drug Act, evidence *held* sufficient to establish the venue in the district laid in the indictment.

8. CONSPIRACY ⟸45—VIOLATION OF STATUTE—EVIDENCE—ADMISSIBILITY.
Where accused was charged with conspiring with another, who was unregistered, to violate and violating the Harrison Drug Act, evidence that accused's coconspirator had previously been prosecuted for violating the state drug acts, and that accused assisted him in obtaining bail and preparing his defense, is admissible to show the relations between the parties and the purposes of their acts, shown to have occurred since the Harrison Act went into effect.

9. CRIMINAL LAW ⟸507(1)—POISONS ⟸4—EVIDENCE—ACCOMPLICES—POSSESSION OF DRUGS.
Under the Harrison Drug Act, section 1 of which requires persons proposing to handle opium or coca leaves or their derivatives to register and pay the tax, and section 8 of which penalizes the possession of drugs by persons not having registered and paid the tax, one having possession of such drugs for his own use does not fall within the inhibition of the act, and hence a witness against accused, who purchased such drugs from accused's coconspirator, cannot be deemed guilty of an offense and an accomplice, so as to warrant a charge that the jury should scrutinize his testimony as that of an accomplice.

10. CRIMINAL LAW ⟸780(1)—TRIAL—ACCOMPLICE'S TESTIMONY.
There is no absolute rule of law preventing convictions on the testimony of accomplices, if juries believe them, and while it is better practice, where such testimony is relied on, for the court to direct attention to the complicity of witnesses, error cannot be predicated on refusal to so charge the jury.

11. CRIMINAL LAW ⟸510—EVIDENCE—ACCOMPLICE'S TESTIMONY.
A conviction may be had on the testimony of accomplices alone.

12. CRIMINAL LAW ⟸658—TRIAL—CONDUCT OF COURT.
In a criminal prosecution, where a witness, who had previously made contradictory statements under oath, on trial denied knowledge of facts tending to incriminate accused, the court was warranted in committing such witness to the custody of the marshal, and it was proper to allow the witness to subsequently change his testimony; the court cautioning the jury to examine carefully the conflicting stories.

13. CRIMINAL LAW ⟸351(8)—EVIDENCE—ADMISSIBILITY.
A witness, who had previously made statements under oath connecting accused with the offense on trial, first denied knowledge of any such facts, but, having been committed to the custody of the marshal, testified to them, and that accused had induced him to deny such knowledge. *Held*, that the testimony tending to implicate accused in the suppression of the evidence was admissible, and could be considered by the jury.

14. POISONS ⟸9—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution for violating the Harrison Drug Act, evidence *held* sufficient to sustain the conviction.

15. CRIMINAL LAW ⟸1147—APPEAL—DISCRETION OF COURT—PUNISHMENT.
The appellate court cannot substitute its own discretion for that of the District Court, and, though believing that lighter punishments than those imposed for violation of the Harrison Drug Act would have vindicated the law, the punishment imposed cannot be treated as excessive.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

William E. Wallace was convicted of a violation of the Harrison Drug Act, and he brings error. Affirmed.

Plaintiff in error was convicted under an indictment charging violation of the so-called Harrison Drug Act passed December 17, 1914, and by its terms effective March 1, 1915. Of the ten counts of the indictment, Nos. 1 and 2 charge plaintiff in error Wallace and one Davis with conspiracy to commit an offense against the United States by violating said act; count 1 charging the intended offense to be possession of such drugs by Davis, a person who sold and gave away the drugs, and not being registered with, and not having paid the tax provided in the act to, the collector of internal revenue for the First district of Illinois, and count 2 an intended violation of the act through sales of such drugs to be made by Davis, he not being so registered or having paid the tax. Counts 3 and 5 charge Davis with violating the act by unlawfully having in his possession the drugs, and counts 4, 5, 6, 7, 9, and 10 charge violation by Davis in unlawfully selling or giving away the drug, and in counts 3 to 10 Wallace is charged with having aided and abetted Davis in doing the unlawful acts charged against Davis in these counts, Davis not being so registered and not having paid the tax.

Wallace alone was tried, Davis having pleaded guilty. The jury found Wallace guilty under counts 2, 6, 9, and 10, and not guilty under the others. Wallace was sentenced to two years' imprisonment and $10,000 fine under count 2, and 5 years under each of counts 6, 9, and 10, the several terms of imprisonment to be concurrently served.

Section 1 of the act, which it is charged the defendants violated and conspired to violate, is in its material parts as follows: "That on and after the first day of March, nineteen hundred and fifteen, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on: Provided, that the office, or if none, then the residence of any person shall be considered for the purposes of this act to be his place of business. At the time of such registry and on or before

the first day of July, annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1 per annum." (Certain persons are exempted.) "It shall be unlawful for any person required to register under the terms of this act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the aforesaid drugs without having registered and paid the special tax provided for in this section. * * * That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this act into effect."

Sections 2, 3, and 5 make detailed provision for handling the drugs by persons registered, for making record of drugs received, and for sale or barter of same only in pursuance of a written order on blank forms for which provision is made, and for preservation of such orders and the accessibility thereof to inspection by officials of the Treasury Department, as well as to state and municipal officials who are charged with enforcement of laws or ordinances thereof regulating sale and distribution of such drugs. Section 4 makes it unlawful for any person not registered to ship or carry any of these drugs from one state to another, certain exceptions being enumerated. Section 9 prescribes that any person violating the act shall be fined not more than $2,000, or imprisoned not more than 5 years, or both.

Numerous errors are alleged. Those which we deem important will be stated with the discussion of them in the opinion.

William A. Morrow, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Benjamin P. Epstein, both of Chicago, Ill., for the United States.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] 1. As to each of the counts in the indictment it is contended that because it is not alleged that Davis had his office or residence in the first internal revenue district of Illinois and the allegation of his nonregistry and nonpayment of the tax is only as to said First district, the indictment does not sufficiently allege Davis' nonregistry and nonpayment of the tax. The argument is that, for anything to the contrary appearing in the indictment, Davis might have been registered in some other district, and would therefore have had the right under the act to handle the drugs within the First district of Illinois, without registering with, or paying the tax to, the collector of internal revenue therein. Does registry and payment of the tax in one internal revenue district of the United States entitle the registered person under such registry alone to handle the drugs in all other revenue districts in the United States as he may do in the district of his registry?

Section 1 requires a person proposing to handle the drugs to register "with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on," and it defines the place of business to be "the office, or if none, then the residence" of the person. Distinction is thus made in the act between the "place of business" and the "place where such business is to be carried on." The act defines the first in prescribing that it shall be considered the office, if any, and, if none, then the residence, of the applicant for registry. But evidently the place where the business is to be carried on may be anywhere in the United States,

and may be more than one place, as indicated by the use of the words "place" or "places." But the act does not provide that his place of business—i. e., his office or residence—shall be the place where he is required to register. It prescribes in effect that he shall state his place of business (so defined to be his office or residence) by way of information, doubtless for the more certain identification of the applicant for registry and to facilitate official supervision, and tracing of the drugs. For instance, if his office (his place of business, if any, and, if none, his residence) is in New York, unless he intends to carry on the business in New York, he need not register there; but if he desires to carry on the business of selling the drugs in the First district of Illinois, he must register in the First district, and when registering there he registers his place of business as New York, and will then further register the place or places wherein he expects to transact business in Chicago, and in such other places, if any, in which he intends to handle the drugs. But so registering these facts in the First district of Illinois does not entitle him to deal in such drugs in the various places other than said First district, which he may thus enumerate. In order to make sales in any of the other districts which may be so enumerated, the applicant must there register and pay his tax in such district, wholly regardless of whether within any district in which he registers he actually has an office or residence. If, therefore, without registering and paying tax in the First district of Illinois, Davis therein actually dealt in, sold, or gave away the drugs, he was carrying on such business in said First district contrary to the provisions of the act, even though he might have registered and paid tax in some other district. It follows that, with respect to the allegations of nonregistry and nonpayment of the tax, the indictment is sufficient.

[2] 2. It is urged that the conspiracy alleged in count 2 fails to charge a conspiracy to unlawfully sell the drugs within the First district of Illinois, within which alone Davis' nonregistry is alleged. The count charges the conspiracy to have been formed at Chicago, which is within such First district, and that in pursuance of the conspiracy Davis did deliver, sell, and give away drugs at Chicago to the various persons alleged in the different overt acts set forth in the count. Under the reasoning and conclusion of the Supreme Court in Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, we hold that count 2 sufficiently charges a conspiracy to commit at Chicago the alleged offense.

[3] 3. Another objection urged to the indictment is that the counts do not negative the exemptions from the operation of the act as therein created in favor of certain persons. The exemptions referred to consist in the enumeration of certain classes of persons who are excluded from the general prohibition of the act, which the act clearly and completely sets forth wholly apart from the specified exemptions. The rule applicable to such cases is stated by the Supreme Court in United States v. Cook, 17 Wall. 168, 173, 21 L. Ed. 538, in these words:

"If the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the

pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

The same rule was recently applied by this court in Grand Trunk Ry. Co. v. United States, 229 Fed. 116, 143 C. C. A. 392.

Section 8 of the act, which makes it unlawful without registry to have possession of the drugs, and which likewise specifies certain excepted persons, has this proviso:

"Provided, further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment or other writ or proceeding laid or brought under this act; and the burden of proof of any such exemption shall be upon the defendant."

It is claimed this has reference only to the exemptions specified in section 8. This might be so were it not for the words "any complaint, * * * indictment, etc., brought under this act," which indicate the intended application of the proviso to the entire act. Our conclusion is that under the stated rule of construction, as well as under this proviso, it was unnecessary in the indictment to negative the statutory exceptions.

[4] 4. Insufficiency of counts 6, 9, and 10 is urged, because in the allegations therein against Wallace, of aiding and abetting in the unlawful sales charged in these counts to have been made by Davis, it is not stated that Wallace knew that Davis had not registered or paid the tax. The counts charge that Davis unlawfully, knowingly, and feloniously did sell, etc., not having registered or paid the tax, and that Wallace "unlawfully and knowingly did aid and abet said John Davis unlawfully, knowingly, and feloniously to sell, * * * as in this count aforesaid." This question was dealt with in Coffin v. United States, 156 U. S. 432, 439, 15 Sup. Ct. 394, 39 L. Ed. 481, where similar language was held to be a sufficient allegation of the alleged abettor's knowledge of the unlawful character of the principal's act.

[5] 5. Complaint is made of the denying of motion for defendant, at the close of government's case, to require the government to elect upon which of the counts conviction would be sought. Section 1024, Rev. Stat. (Comp. St. 1916, § 1690), is as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This indictment is within the purview of that section, and election was properly denied. Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Rooney v. United States, 203 Fed. 928, 122 C. C. A. 230; McGregor v. United States, 134 Fed. 187, 69 C. C. A. 477.

[6, 7] 6. It is earnestly contended for plaintiff in error that the record fails to disclose any proof of the venue and that therefore there should be a reversal of the judgment. Careful perusal of the record reveals that no witness testified in so many words that the alleged conspiring and selling and giving away occurred within the Northern dis-

trict of Illinois. While direct testimony of such fact (in most cases easily available) is desirable for greater certainty, yet venue, like any other fact, may be shown by evidence, direct, indirect or circumstantial. On cross-examination Davis was specifically asked the various places in Chicago where he had lived, and he named different streets which in his own testimony, as well as in the testimony of other persons, were referred to in connection with the acts charged, one of the streets being the same one on which it was testified Wallace's drug store was located; indeed, Davis testified that one of the places where he lived in Chicago was in such close proximity to Wallace's drug store that from it he could see into the store, and that in the telephone booth of that store, and sometimes in the cellar, Wallace would pass to Davis cocaine which Davis was to dispose of. Defendant's character witness Whitaker testified he knew Wallace was in the drug business in Chicago, having visited him at his place of business at Thirty-Ninth and State streets. Taylor testified to working for the city of Chicago, and to getting packages of drugs from Wallace's drug store on his way to work. With the various streets thus identified by some evidence as being in the city of Chicago, it was not necessary, in order to prove the venue, that each of the witnesses who thereafter referred to the same streets in connection with incriminating acts occurring thereon must again identify the streets as being in Chicago. The record fully warranted the jury in finding that the venue of the offense was proved in Chicago, which is in the First revenue district of Illinois.

[8] 7. Evidence was offered by the government, and against objection was received, to the effect that prior to March 1, 1915, when the Harrison Drug Act took effect, Davis had been convicted in the state courts of violating state laws against the sale of such drugs, that he had then received the drugs from Wallace, and that Wallace assisted him in the matter of obtaining bail and in defending him against those charges. Various assignments of error attack the competency of such evidence. We think the evidence was competent as bearing on the relations between Wallace and Davis, and on their state of mind and motive in the handling of such drugs after March 1st. Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450, Ann. Cas. 1914C, 128; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; Thompson v. United States, 144 Fed. 14, 75 C. C. A. 172, 7 Ann. Cas. 62. In the court's charge the jury was admonished that the occurrences prior to March 1st had no bearing upon the case, except by way of indicating the relations between the parties, and the purposes of their acts shown to have occurred on and after March 1st.

[9] 8. The court having charged the jury that Davis was an accomplice, and cautioned them with respect to the credit to be given his testimony, defendant requested a similar charge respecting witnesses Gibson, Foster, Crawford, Taylor, and Moran, that "because of the fact that all were found in possession of the drug, which was in violation of the Harrison Act, and which made their offense intimately interwoven with the offense which it is alleged Wallace committed, and for that reason they are accomplices," and error is assigned for failure to charge the jury accordingly. All of those named were drug

addicts, whose possession of the drug as supplied by Davis appears to have been for their own use, save only that Taylor and Foster did not personally use all of the cocaine which they received through Davis. Section 8 of the act is directed against and penalizes possession of the drug by persons not having registered and paid the tax. But the Supreme Court held this section does not have reference to persons other than those included within the provisions of section 1, and that mere possession by one for his own use does not fall within the inhibition of the act. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061. From this it would follow that possession of the drug by these witnesses for their own use would not constitute them violators of the law, and they could not for such reason alone be considered accomplices.

[10] But, if it were conceded that all of them were accomplices, there is no absolute duty on the court to give to the jury the usual charge cautioning them to exercise circumspection with respect to the evidence of accomplices, so that failure to give it would of itself be reversible error. Where testimony of accomplices is relied on by the government, it is recognized as the better practice for the court in its charge to direct attention to the complicity of the witnesses, and to duly caution the jury respecting such testimony. But error is not predicable merely upon failure to so charge the jury. In its most recent pronouncement upon that subject the Supreme Court said in Diggs and Caminetti v. United States (Jan. 15, 1917) 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442:

"It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In Holmgren v. United States, 217 U. S. 509 [30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778], this court refused to reverse a judgment for failure to give an instruction of this general character, while saying it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them. 1 Bishop's Criminal Procedure (2d Ed.) § 1081, and cases cited in the note."

[11] 9. The last citation will dispose also of those assignments of error which are predicated upon the assumption that as to Wallace's participation in the alleged crime there was no corroboration of the testimony of Davis and Taylor, accomplices, by whose testimony alone it is claimed the complicity of Wallace was shown, and that, unless there is a corroboration of the testimony in this regard of these two, Wallace's guilty participation has not been established. The rule is, as above stated, that the testimony of accomplices will, if otherwise sufficient, alone support a conviction provided the jury believes it. Diggs and Caminetti v. United States, supra; United States v. Giuliani (D. C.) 147 Fed. 598; Ahearn v. United States, 158 Fed. 606, 85 C. C. A. 428; Wigmore on Evidence, § 2056.

[12-14] 10. It is contended that the record discloses no substan-

tial evidence showing Wallace guilty beyond reasonable doubt. If the jury believed Davis' testimony, they were warranted in finding from it that Wallace, knowing Davis to be a man who, before the passage of the Harrison Act, was extensively engaged in illicit traffic in narcotic drugs through disposing of them to drug addicts, had an understanding with Davis after the act was passed whereby, for mutual profit, they would violate the provisions of the act through Davis unlawfully selling to drug addicts the drugs supplied by Wallace; that, pursuant to such understanding, Davis made sales of cocaine received from Wallace, to the persons named in the counts under which conviction was had; that Davis, on receiving the price, paid Wallace his agreed share thereof—Davis, to the knowledge of Wallace being unregistered, and not having paid the tax, as required by the act, in the First Internal revenue district of Illinois, within which, as contemplated, the sales were made, both well knowing that, if Davis complied with the act, the sales to these unfortunates would be seriously hampered, if, indeed, not practically barred.

We cannot say that Davis' testimony is of itself so unreasonable and improbable that a jury was not justified in believing it. It is corroborated by Taylor, who testified to long acquaintance with Wallace, who was instrumental in procuring employment for the witness with the city of Chicago; that he frequently purchased such drugs from Wallace prior to the Harrison Act, and that since the act became effective, he had occasionally seen Davis in Wallace's store, and that one night the witness carried to Davis a package which Wallace gave him, and on another night he and Wallace delivered a package to Davis, both deliveries being at places distant from the store, and under circumstances indicating intended secrecy of the transactions; and that Davis thus received the packages, containing, as Davis testified, large quantities of cocaine, which he "planted" in various places for future sale.

As to this witness complaint is made that on the trial he first testified denying all knowledge of any such transactions after March 1, 1915, and that when it appeared he had made prior statements under oath of such subsequent transactions, the court ordered him in custody of the marshal, and that the next morning he testified as above stated in regard to these subsequent transactions, implicating Wallace in an attempt to have the witness omit any reference to them. From what is disclosed in the record, the action of the court respecting this witness was not unwarranted. The jury was cautioned by the court to examine carefully the conflicting stories told by this witness, and to determine the truth from all the evidence before them. The testimony that Wallace induced him to falsely deny these subsequent transactions was unquestionably prejudicial to the defense. But not more so in this than in any case where it is testified that a party to a transaction has attempted to suppress evidence bearing thereon. Evidence of such attempt is always admissible against the party making it, and is to be considered by the jury with all the other evidence, in determining whether or not that is true which was so sought to be suppressed or concealed. Wigmore on Evidence, § 278.

It cannot be said that the record is wholly barren of corroboration

of these witnesses. Hauber, Moran, Johnson, and Foster testified to seeing Davis in Wallace's drug store at various times after March 1, 1915. On one occasion in April, Johnson and Foster wanted an ounce of cocaine, which Davis told them would cost $21, and they watched him go into Wallace's store, coming back with a bottle containing the drug, which he gave them on payment of the money. From other witnesses it appeared that before March 1st Davis had been convicted at least twice of selling such drugs in violation of the laws of Illinois, which drugs he had procured from Wallace, and that Wallace, on learning of his arrest, procured a bond for him and advanced him money to pay for the bond and for his defense against the charge, from all of which the conclusion is warranted that Wallace was no stranger to schemes for the unlawful disposition of such drugs by Davis, and that Davis was during such time a frequenter of Wallace's store, with apparently no business there except in connection with this surreptitious and unlawful output of narcotic drugs.

There was practically no evidence offered to refute the testimony of Davis and Taylor. The defense consisted substantially in the testimony of several witnesses to Davis' bad reputation for truth, some others who testified to Wallace's previous good character, and two medical experts who testified that "dope fiends," on becoming addicted to the habitual use of narcotic drugs, have no conception of truth, and that their testimony is utterly unreliable—Davis, Taylor, Johnson, Foster, Gibson, Doss, E. B. Davis, Crawford, Moran, and Hauber, all witnesses admitting they were habitual users of cocaine or opium. It is upon such facts, personal to the witnesses, rather than upon any inherent weakness of their testimony incriminating Wallace, that reversal is asked on the ground of want of substantial evidence to show guilt.

However useful and beneficial to mankind the proper and scientific employment of such drugs has proved to be, if part of the price paid for their habitual use is the blunting or distortion of the moral sense, whereby the addict is less likely to comprehend or to state the truth, this fact, if appearing in evidence, is one from which, with all the other facts and circumstances appearing, the jury must determine where and what the truth is. If witnesses to prove unlawful sales of narcotic drugs are as a matter of law to be disbelieved and their testimony discarded from the fact alone that they are numbered among the unfortunate victims of the drug habit, it is readily perceivable how laws such as the act in question, having for their real object the due regulation of the handling of such drugs, would in many instances become practically inoperative through want of evidence to enforce them. While the necessities of a case, and the desirability of enforcing the law, must not in any event permit conviction upon evidence less conclusive than such as shows guilt beyond reasonable doubt, a due degree of caution to avoid such outcome does not demand absolute rejection of the testimony of witnesses solely because the drug habit may tend to impair their perceptions, or to stimulate or dull the faculty for accurate observation, recollection, or relation. Where the witnesses relied on for conviction are such as those here indicated, the jury must consider everything which the evidence re-

veals bearing upon the truth or untruth of their testimony, and as to such witnesses, as with all others, should credit what under all the circumstances appearing they believe, and reject what they disbelieve. Nothing here appears from which it may be inferred, or even suspected, that the jury did not so test these witnesses and this evidence, and we cannot conclude from the record that it discloses no substantial evidence upon which the jury might predicate the guilt of plaintiff in error.

[15] 11. Respecting the assignment of error challenging the sentence upon the ground that it is excessive, while it seems that a smaller fine and briefer term of imprisonment might sufficiently have penalized the transgression and vindicated the law, we may not substitute our own discretion for that of the District Court; and under all the circumstances we cannot find there was abuse of that court's discretion in this regard.

Finding no substantial error, the judgment is affirmed.

CROPPER et al. v. DAVIS.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1917.)

No. 4498.

1. CONTRACTS ⊜117(2, 7)—RESTRAINT OF TRADE—LIMITATION AS TO TERRITORY.
Plaintiff was engaged in a rating and collecting business, in which he solicited retail merchants, etc., as subscribers to a league, secured from such subscribers a list of unpaid accounts, and listed such debtors as did not pay when notified in a credit book or rating directory. In such business he used forms, the result of 17 years or more experience; the forms being changed from time to time. He employed defendant in such business for 5 years, under a contract by which defendant agreed to devote all of his time to such business, and during such time to work at no other employment and engage in no other business, except when plaintiff allowed him to withdraw for the purpose of entering a line of business or the employment of any individual, firm, or company not using the plan, forms, or plan and forms of plaintiff in competition thereof. *Held* that, it being possible to ascertain by evidence in what territory plaintiff did business, and whether another business of the same type would be in competition with him, the contract was limited as to territory, and moreover, in view of the peculiar character of the business, the contract would not be invalid, if unlimited as to territory.

2. EQUITY ⊜65(2)—GROUNDS FOR DENIAL OF RELIEF—UNCLEAN HANDS.
Though debtors who paid were not specially rated, where those who failed to pay were rated in accordance with a key whereby it was shown how many members had reported the debtor, whether the account was disputed or outlawed, whether the debtor was bankrupt, and whether letters to the debtor were returned, there was such a rating as, in the absence of fraud, complied with subscribers' contracts and prevented the denial of injunctive relief, on the ground that plaintiff did not come into court with clean hands, in that he had been guilty of false and fraudulent representations because his business was not collecting by rating, or a system of rating, and because there was no rating in connection with the plan.

Appeal from the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Suit by Will M. Davis against Walter L. Cropper and another. Decree for plaintiff, and defendants appeal. Affirmed.

Hugh A. Myers and Carl T. Self, both of Omaha, Neb., for appellants.

Irving F. Baxter, of Omaha, Neb. (Brown, Baxter & Van Dusen, of Omaha, Neb., on the brief), for appellee.

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

SMITH, Circuit Judge. Will M. Davis, the appellee and plaintiff below, is and has been for many years a resident and citizen of the state of Illinois, and Walter L. Cropper and the Mutual Rating & Adjustment Association are the appellants and defendants below, and they for several years have been residents and citizens of the state of Nebraska. The plaintiff has for between 15 and 20 years been conducting, with Chicago as his headquarters, a collection and so-called rating business throughout the North Central states under the name of the National Rating League. In connection therewith the plaintiff secured a copyright upon a book called "Collecting by Rating" in 1910. On February 7, 1910, the defendant Walter L. Cropper entered into a contract with the National Rating League by which he agreed to devote all his time during the next five years to the business of the League under its instructions, and during said time to work at no other employment and engage in no other business—

"except when the National Rating League allows me to withdraw for the purpose of entering a line of business, or the employment of any individual, firm, or company, neither of which uses the plan, forms, or plan and forms, used by the National Rating League, in competition therewith. The National Rating League, by allowing me to engage at such other employment or business, does not thereby forfeit its rights under this contract."

Cropper remained in the employment of the League until about March 18, 1912. Shortly after leaving their employ he, as owner and manager, started a substantially similar business to that conducted by the League at Omaha, Neb., under the name of the Mutual Rating & Adjustment Association. In his new business he used substantially all the forms devised by plaintiff, and embraced in his copyrighted book mentioned, and so far as can be told from the record copied the entire system of the plaintiffs. An agreed statement of facts was filed in the District Court, from which the following is taken:

(1) It is hereby stipulated and agreed that the allegations contained in complainant's bill of complaint, for the purpose of review, are to be taken and considered as true in all respects, and that the copy of the contract between complainant, Will M. Davis, and the defendant Walter L. Cropper, referred to therein as "Exhibit G" and attached to the said bill, is a true copy of the instrument signed by said parties upon the date it bears, and that all other exhibits attached to said bill of complaint are true copies thereof.

(2) Complainant transacted his business under the name and style of "National Rating League." The defendant W. L. Cropper and Bessie M. Cropper transacted their business under the name and style

of "Mutual Rating & Adjustment Association." Neither the League nor the Association were incorporated. The character or method of complainant's business was known to the business world by the term "Collecting by Rating." The defendants also used this term as descriptive of their business.

(3) That the general nature and plan of the business of the parties to this action is to secure contracts from retail merchants, doctors, and dentists, throughout the country, agreeing to become members and subscribers to said league and association, respectively, and at the same time, to secure from such subscribers a list of their unpaid accounts and take these up with such members and subscribers through a system of correspondence. These unpaid accounts, after notices to debtors, were printed in a rating book which is furnished to said subscribers. The solicitors are paid the compensation provided for under their contract—"Exhibit G"—according to the number of accounts they secure, when 10 or more of said accounts are turned in, either by the solicitor or the merchants; frequently the solicitor was paid in advance by his employer. Complainant and defendant received their compensation out of collections made upon accounts sent in; they receiving, per agreement with subscriber, the first $10 collected. The accounts, when turned into the office, were taken up by means of regular correspondence for the purpose of preparing and getting data for the rating book. If the accounts were received at the office, the debtors are notified to settle the same at once, if correct, as otherwise their name would appear in the rating book as owing the account. The solicitors were furnished with the blank forms referred to in the bill of complaint, together with the rating book, which shows what business the man is in, and whether or not the account is past due or disputed; and upon the listing blank the subscriber is supposed to list all such accounts so turned into the office and he is furnished a rating notice, a personal notice sent out by the subscriber to his debtor, and with a rating statement, which the subscriber uses to make report to the office when the account has been adjusted. The debtor is supposed to adjust the account directly with the subscriber. Complainant relied upon members making reports to his office of collections made from debtors whose names and accounts had been sent it.

(4) The forms used by complainant are the result of 17 years or more of experience and as the result of trying out different forms and changing them from time to time, but with few changes made during the past 6 years. Many of said forms were printed in the red book entitled "Collecting by Rating," attached to the bill as "Exhibit A." The book was duly copyrighted by complainant under the laws of the United States in the year 1910. No names were printed in the red guide credit book or rating directory, other than those sent in by the merchants to whom accounts or sums of money were due and owing by the parties therein designated. If, after sending notice to the debtor and his name was printed in the rating directory or credit book, he later paid the amount owing by him to the subscriber, the name was then omitted from such directory or record. The name of the book or directory used by the complainant, in which the names of delinquent debtors were listed, was "Red Guide and Credit Record";

the name of the book used by the defendants for the same purpose was "Rating Directory."

The District Court granted an injunction enjoining the defendants from carrying on the business in violation of the terms and conditions of the contract dated February 7, 1910, up to and including February 6, 1915, and enjoined the defendants—

"from in any wise using, giving away, or distributing in any business conducted by them, or either of them, the said book entitled 'Collecting by Rating,' and the book entitled 'Red Guide and Credit Record,' and from in any wise using, giving away, and distributing the forms, notices, and printed matter contained in said book, 'Collecting by Rating,' and that said defendants, and each of them, * * * their agents and servants, and all persons acting by or under their authority, be and they are hereby perpetually enjoined and restrained from in any wise making use in their business of the term 'Collecting by Rating.'"

A proper assignment of errors was filed in the District Court, but rule 24 of this court contains the following provision:

"2. This brief shall * * * contain in order here stated: * * * Second. A specification of the errors relied upon which * * * in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous."

In the appellants' brief there is nothing which is called a specification of errors, but there is a heading "Appellants' Contentions." The most liberal construction of the rule would reduce us to considering these "contentions" and no other. Under these headings the appellants set forth the following:

"(1) That the clause heretofore quoted in said contract is unreasonable, unenforceable, and void as against public policy, and in restraint of trade; that it is without limitation as to space; that it is unlimited not only to the United States, but as to the entire globe.

"(2) That the appellee should have no standing in a court of equity, for the reason, as is shown by the evidence in the exhibits, embodied within the abstract of the agreed statement of facts, that he was guilty of false representations in the conduct of his business."

It will be observed that there is no contention that plaintiffs did not copyright the book called "Collecting by Rating," that the same contained the forms used by the defendants and defendants thereby infringed the copyright, and that they were therefore rightfully enjoined from continuing to use the same, and these questions are not for consideration by us. It has been held, however, that a copying of any substantial part of a copyrighted book is an infringement. G. & C. Merriam Co. v. United Dictionary Co., 76 C. C. A. 470, 146 Fed. 354; Harper & Bros. v. M. A. Donohue & Co. (C. C.) 144 Fed. 491, affirmed by the Circuit Court of Appeals, 76 C. C. A. 678, 146 Fed. 1023; List Pub. Co. v. Keller (C. C.) 30 Fed. 772; Ford v. Charles E. Blaney Amusement Co. (C. C.) 148 Fed. 642; Brightley v. Littleton (C. C.) 37 Fed. 103.

[1] We will take up, then, first the plaintiffs' contention that the provision of the contract in question is invalid, because it is not limited in the territory to which it applies within the United States or the earth. The first defect in the contention made on this subject is that the facts alleged do not exist. The contract provides that, if the de-

fendant is released from his agreement to devote five years to the business of the League under its instructions to enter another line of business, it must be with an individual, firm, or company "neither of which uses the plan, forms, or plan and forms, used by the National Rating League, *in competition therewith.*" It being possible for the court to ascertain by evidence in what territory the plaintiff did business, and whether another business of the same type would be in competition with the plaintiff, the contract was clearly limited to the territory thus described, and defendant was precluded from engaging in the like business as the plaintiff as clearly as though it had done so by geographical description. There is therefore no basis in fact for this contention.

It appears from the bill and is admitted that the defendants were carrying on business in Nebraska, North and South Dakota, Iowa, Kansas, and Oklahoma, and this is a part of the territory in which according to the admitted allegations the plaintiff was doing business. It was first held in the fifteenth century that contracts of the character here referred to were invalid as in restraint of trade, but the lapse of five centuries has greatly modified the holding upon this subject. In Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, and United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, the Supreme Court construed the Sherman Anti-trust Law (Act July 2, 1890, c. 647, 26 Stat. 209) in accordance with the common law to require that the restraint to make it illegal should amount to unreasonable or undue restraint of trade as it held the common law had done. This change from the holding of the fifteenth century had been gradual. The first departure from the old rule was to hold that such contracts were valid if reasonably limited as to time and place. The contract here in question was limited as to time to the life of the contract and fully complied with the holdings of that period. About 1830 a second change began to be apparent in the rulings of the courts upon the subject and now the rule is that a restrictive contract should be tested by determining on the facts of the particular case whether the restriction upon one party is greater than is reasonably necessary for the protection of the other party. Hall Mfg. Co. v. Western Steel & Iron Works, 142 C. C. A. 220, 227 Fed. 588, L. R. A. 1916C, 620. In Prame v. Ferrell, 92 C. C. A. 374, 166 Fed. 702, it was held that, though there was no specific limitation as to territory in the contract, it was valid at least throughout the United States. In Harrison v. Glucose Sugar Refining Co., 53 C. C. A. 484, 488, 116 Fed. 304, 308, 58 L. R. A. 915, it is said:

"It is urged that the contract in question is one in restraint of trade because of the covenant that during the stipulated time of service the appellant would not, directly or indirectly, become interested in the specified business within a radius of 1,500 miles from the city of Chicago otherwise than under his engagement with the appellee. The doctrine of restraint of trade had its birth in conditions anciently obtaining, and now greatly changed. Then the area of trade was confined within narrow territorial bounds. Intercommunication has become largely extended, and trades anciently limited to a small locality have become national in their extent. The rule is bottomed upon the consideration whether such a covenant was broader than the covenantee required for his protection. The restraint must not be arbitrary, but should be limited. It must be reasonable with respect to time and to the

area within which the covenantee prosecutes his business. Beyond this, restraint is unnecessary and invalid."

In Knapp v. S. Jarvis Adams Co., 70 C. C. A. 536, 540, 135 Fed. 1008, 1012, it is said:

"With respect to the territory to which the restriction should apply, the rule has always been that it might extend to the limits wherein the plaintiff's trade would be likely to go. The changes which have marked the course of judicial decisions in modern times seem to consist in conforming the application of the rule to the constant development of the facilities of commerce and the enlargement of the avenues of trade. In Harrison v. Glucose Sugar Refining Co., 53 C. C. A. 484, 116 Fed. 304, 58 L. R. A. 915, a valuable case upon this subject, and having many analogies to the present, Judge Jenkins refers to several cases of high authority in which there was no territorial restriction whatever."

In Carter v. Alling (C. C.) 43 Fed. 208, 211, Judge Blodgett says:

"The only defense seriously insisted upon in the case is that this contract is void as a contract in restraint of trade. There is no difference between counsel as to the tenor and scope of the earlier English doctrine upon the subject of contracts like that now under consideration. It was held that they were contrary to public policy and void; but, as the later cases came before the court, this doctrine was much relaxed, and the first modification of the doctrine was the recognition of the validity of contracts of this nature where the restraint was limited as to space or time, and reasonable in its nature, and the reported cases are abundant in which an undertaking by one person not to carry on a given business within a limited area and within a fixed period of time has been sustained, and a breach of the undertaking enjoined, in a court of equity. In later years a further relaxation of the old rule has grown up both in England and America, and the courts have repeatedly recognized the validity of contracts in restraint of trade throughout an entire state or country, where such restraint was not unreasonable, in view of the nature and extent of the business of the covenantee."

In Gibbs v. Baltimore Gas Co., 130 U. S. 396, 409, 9 Sup. Ct. 553, 557 (32 L. Ed. 979), it is said:

"The decision in Mitchel v. Reynolds, 1 P. Wms. 181, s. c., Smith's Leading Cases (7th Eng. Ed.) 407 (8th Am. Ed.) 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable."

In the House of Lords in the case of Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company, [1894] Law Reports, Appealed Cases, 535, the whole history of this question was carefully examined, and it was held that under the modern rule a contract that a patentee and manufacturer of guns and ammunition for purposes of war, in connection with a sale of the business, that he would not for 25 years engage, except in behalf of his vendee, either directly or indirectly, in the business of a manufacturer of guns or ammunition, was valid and binding upon him, though the contract was unrestricted as to space, and that he could be enjoined from a violation of his contract in that regard. The opinions in that case are quite instructive as to the history

of this form of litigation and the development of the law pertaining thereto. In Joyce on Injunctions, p. 688, § 457, it is said:

"The former general rule was that, where an affirmative engagement of personal service could not be enforced by a decree for specific performance, a court of equity would not enjoin the breach of a collateral negative covenant by the obligee not to serve elsewhere during the period of the affirmative engagement; but, in later times, such negative covenants have been enforced by injunction, where the complainant shows sufficient equities."

In 14 Ruling Case Law, p. 388, § 88, it is said:

"Where a contract of employment provides for the rendition of services for a specified period and that the employé will not engage in the same business during that period, the right of the employer to an injunction, in aid of specific performance, is regarded as governed by the rules relating to the specific performance of contracts for personal service."

It should be borne in mind that a distinction must exist between compelling one to keep his contract of employment and forbidding him to work for his rival in the same line. The first would require involuntary servitude in violation of the Thirteenth Amendment to the Constitution, while the second would not be subject to that criticism. In view of the lapse of time there can be no question as to the injunction except as to the damages for its wrongful procurance. In view of the peculiar character of the business here involved, we are of the opinion that the contract would not be invalid if unlimited in the territory covered by it, but as already indicated we think the territory is accurately defined in the contract.

[2] Without assuming the correctness of the further propositions announced by the appellants, we deem the following sufficient answer thereto. It is said the appellee represented to his customers and to the public generally that he was carrying on a business of "Collecting by Rating" when as a matter of fact he neither made nor published a "rating of any individual or firm." It is true those who paid were not specially rated. They were treated upon the theory that the fact that a man's reputation was never called in question is a good rating. As to those who failed to pay they were rated in accordance with a key set forth in the "Red Guide and Credit Record." This key showed that those marked "B" had been reported by two members, and those marked from "C" to "I" had respectively been reported by three to nine members; those marked "z" were disputed accounts, "y" letters returned, "x" outlawed accounts, and "bk" bankrupt. This was such a rating as, in the absence of fraud, would comply with the League's contracts.

The defendants apparently rely on the proposition that he who comes into a court of equity must come with clean hands, and here chiefly rely on matters heretofore stated that by the publication or use of the copyrighted forms, together with the red book and credit guide and collecting by rating, the appellee has been guilty of false and fraudulent representations to the public in his business; that the appellee's plan of business is not collecting by rating, or system of rating, and there was no rating in connection with his plan. In Wilder Manufacturing Co. v. Corn Products Co., 236 U. S. 165, 172, 35 Sup. Ct. 398, 400 (59 L. Ed. 520, Ann. Cas. 1916A, 118), the court said:

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

In Talbot v. Independent Order of Owls, 136 C. C. A. 268, 220 Fed. 660, this court said:

"Nor does the evidence which is found in this record upon which the defendants rely to defeat the plaintiffs, and to bring this suit under the ban of the principle, 'He who comes into equity must come with clean hands,' sustain that defense. That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from obtaining full relief there who has not done inequity in the very transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays."

The decree of the District Court is affirmed.

KAWIN & CO. v. AMERICAN COLORTYPE CO.

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

No. 2289.

1. COURTS ⟸405(5)—CIRCUIT COURT OF APPEALS—JURISDICTION—CASES INVOLVING JURISDICTION OF DISTRICT COURT.
   Though the question of the District Court's jurisdiction was raised in that court by defendant and decided against it, defendant was not required to take the case directly to the Supreme Court, but could appeal to the Circuit Court of Appeals from the judgment against it on the merits, and have the question of jurisdiction certified by that court.
2. COURTS ⟸323—DIVERSITY OF CITIZENSHIP—ADMISSIONS—FAILURE TO TRAVERSE OR DENY.
   An allegation in the declaration as to diversity of citizenship was prima facie proof thereof, and unless it was traversed, and proof made to the contrary, it was established as by default, especially where defendant, an Illinois corporation, in its plea of set-off, alleged that plaintiff was a citizen of New Jersey; this amounting to an admission, in the absence of any plea or evidence to the contrary.
3. CORPORATIONS ⟸657(3), 661(7) — FOREIGN CORPORATIONS — CONTRACTS — RIGHT TO SUE.
   A state statute (Hurd's Rev. St. Ill. 1915–16, c. 32, § 67g) requiring the filing of reports, and providing that no suit may be maintained upon any claim, whether arising out of a contract or tort, in any court in the state, unless the statute shall be complied with, simply provides the penalty of exclusion from the state courts, and does not invalidate a contract on which a cause of action has arisen and become complete before the failure to file the report, and an action thereon may be maintained in the federal court.
4. EVIDENCE ⟸213(2)—ADMISSIONS—OFFERS OF COMPROMISE.
   The admission of an offer to pay an undisputed claim and get a full discharge was not erroneous, as the admission of an offer of compromise.
5. TRIAL ⟸82—OBJECTIONS TO EVIDENCE—GENERAL OR SPECIFIC OBJECTIONS.
   There was no error in admitting evidence over a general objection stating no ground of objection.

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6. WITNESSES ⟸275(1)—CROSS-EXAMINATION OF PARTY—SCOPE.
On the cross-examination of a stockholder in the defendant corporation, a wide latitude was permissible.

7. WITNESSES ⟸275(1)—CROSS-EXAMINATION OF PARTY—DISCRETION.
The court has a wide discretion in the matter of the examination of an adverse party.

8. CUSTOMS AND USAGES ⟸17—VARYING TERMS OF WRITTEN CONTRACT.
In an action for breach of a contract to purchase Christmas cards to be delivered as ordered, the admission of testimony as to the reasons why the cards were not cut and packed before they were ordered did not vary the written contract, where it tended to show a usage of the trade, known to the parties, and in the light of which the contract was made.

9. SALES ⟸387—ACTIONS FOR DAMAGES—QUESTIONS FOR JURY.
In an action for damages for a buyer's failure to accept Christmas cards under a contract for the sale of Christmas and New Year cards, where the evidence that the buyer had waived further delivery of New Year cards was clear, the court was justified in declining to submit this issue to the jury.

10. SALES ⟸81(5)—NECESSITY OF TENDER BY SELLER.
Under a contract for the sale of 4,500,000 Christmas cards, to be delivered as ordered and all to be taken by December 15th, the seller was not required to tender the entire quantity on or before December 15th, without orders from the buyer.

11. SALES ⟸81(5)—TIME FOR DELIVERY AFTER DEMAND.
Where 2,000,000 of the cards remained unordered and undelivered on December 14th, on which date the buyer asked prompt delivery of the balance of the cards, the seller was entitled to a reasonable time within which to deliver.

12. SALES ⟸340—REMEDIES OF SELLER—ACTIONS FOR PRICE.
Under the rule in Illinois, the seller, upon the buyer's refusal to accept goods tendered or ready for delivery, has the option to vest the buyer with title, notwithstanding its refusal to accept and sue for the contract price.

13. COURTS ⟸367—DECISIONS OF STATE COURTS—AUTHORITY IN FEDERAL COURTS.
The holding of the Illinois courts that, upon a buyer's refusal to accept goods, the seller may at his option vest title in the buyer and sue for the price, is binding on a federal court sitting in Illinois and adjudicating an Illinois agreement, as such court must follow the state decisions on matters of personal as well as real property.

14. COURTS ⟸372(4)—DECISIONS OF STATE COURTS—AUTHORITY IN FEDERAL COURTS.
Even though in Illinois the recovery of the purchase price of goods which the buyer refuses to accept is deemed merely the proper measure of damages for breach of the contract, and title vests only on satisfaction of the judgment, the federal courts, while not bound to follow the state decisions, nevertheless, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state court, if the question seems balanced with doubt.

15. SALES ⟸340—REMEDIES OF SELLER—ACTIONS FOR PRICE.
Where a buyer refused to accept Christmas cards, which at best were not marketable in any real sense until long after the breach, the seller was not compelled to keep them and recover the difference between the contract price and a highly uncertain market value, but might sue for the contract price.

16. SALES ⟸340—REMEDIES OF SELLER—ACTIONS FOR PRICE.
Where goods were tendered by the seller or ready for delivery and appropriated to the contract, the seller, upon the buyer's refusal to accept, may recover the purchase price under the common counts.

17. NEW TRIAL ⇐64—CORRECTION OF VERDICT—HARMLESS ERROR.
Where the jury rendered a sealed verdict, which contained data from which a properly worded verdict could be arrived at, but was irregular in respect to a definite finding of the amount of damages, the error, if any, in reimpaneling the jury to correct this technical irregularity, was a mere formality, and not ground for a new trial.

18. PLEADING ⇐173—REPLICATION—FORM—CONCLUSION.
Where the replication to a plea setting up plaintiff's failure to comply with statutes governing foreign corporations set up no new matter by way of inducement, but matters which constituted merely an admission of the matters of inducement alleged in the plea, it properly concluded to the country, instead of with a verification.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the American Colortype Company against Kawin & Co., a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

American Colortype Company, herein called plaintiff, a New Jersey corporation, brought this suit against Kawin & Company, defendant, an Illinois corporation, for failure of the latter to take and pay for certain Christmas and New Year cards ordered by the latter on July 12, 1911, to be delivered as ordered and all to be taken by December 15, 1911. The contract of purchase was by letter, and called for 4,500,000 Christmas and 500,000 New Year cards at $1.50 per thousand. The letter contained the phrase "same subjects as 1910." On December 14, 1911, there remained unordered and undelivered about 2,000,000 of the Christmas cards and about 150,000 of the New Year cards. On this day Kawin & Co. wrote a letter asking for prompt delivery of the balance of the cards. Plaintiff received this order on the 15th of December, 1911, and on the 16th sent a letter stating the goods would be sent at once, immediately sending on 320,000 of the Christmas cards, and on December 18th 800,000 more. On the 19th of December following, defendant wrote a letter declining to receive the 320,000 of cards, because there were no New Year cards, and that, the same not having been delivered by the 15th of December, it would receive no more cards under the contract. Defendant undertook to return the 320,000 lot, but on plaintiff's refusal to accept them placed the same in storage and notified plaintiff.

The suit was brought for the purchase price, on the theory that the cards were ready for delivery within a reasonable time after they were ordered, that they were appropriated to defendant, and that a sale was effected, so that defendant became liable for the contract price. The cause went to a jury, which rendered a verdict upon that basis. It appears in evidence that after the delivery of about 320,000 of the New Year cards, and on September 8, 1911, plaintiff advised defendant that its stock of New Year cards was exhausted, and inquired whether defendant would insist on the balance of the 500,000 New Year cards, which would involve the printing of a new edition of approximately 1,500,000 cards. Defendant replied that it would not require that to be done. On December 2, 1911, defendant claims to have asked plaintiff to look around and see if it could not find more New Year cards. Plaintiff replied that it did not have any. This was followed by the repudiating letter of December 19, 1911. A letter of December 7, 1911, from defendant to one of its salesmen, was admitted in evidence, from which it might appear, and the jury might have found, that defendant was then looking for an excuse to avoid taking the balance of the cards. With reference to the phrase "same subjects as 1910," it appears that during that year the same parties had made a contract whereby defendant was obligated to take and plaintiff agreed to deliver 20,000,000 New Year and Christmas cards, of which 14,000,000 had been printed when defendant asked to have the order reduced. Only 9,000,000 of these were delivered, plaintiff seemingly accepting the counter-

manding order, leaving 5,000,000 on plaintiff's hands. It seems from the evidence the jury was warranted in finding that these last-named cards were in mind and covered the "subjects" referred to in the contract letter of July 12, 1911. But that contract did not amount to a present sale of the 1910 cards, or to an agreement to deliver those specified cards that were then on hand. Those cards were in large sheets, which only required cutting up into cards as ordered, and were of designs selected by and printed for defendant, and suitable for any year. The evidence tended to show that upon receipt of the order of December 14, 1911, they were cut and packed for delivery. Defendant was familiar with the steps necessary to be taken to prepare them for delivery when cards were ordered.

The declaration consists of two special counts, and the common counts. Defendant filed six pleas: (1) Non assumpsit, to which a similiter was filed. (2) A plea of set-off, containing the common counts to set off certain commissions or percentages claimed on account of sales of pictures made by plaintiff to a third party, amounting to $2,000, to which plaintiff filed a replication of non assumpsit, to which replication a similiter was filed. (3) A plea setting up plaintiff's failure to comply with certain statutes of the state of Illinois requiring the filing of its charter, etc., before being qualified to do business in the state. A replication to this plea denied such failure and concluded to the country. To this a similiter was filed. (4, 5, and 6) Three pleas setting up failure of plaintiff to make report to the secretary of state of Illinois as provided by statute requiring corporations so to do, etc., and fixing penalties, such as the cancellation of its charter. To these pleas a joint demurrer was filed, and sustained by the court, which ruling was duly excepted to by the defendant. At the close of the evidence the cause was submitted to the jury, which was directed to bring in a sealed verdict. This verdict contained data from which a properly worded verdict could be arrived at, but was in respect to a definite finding of the amount of damages due to plaintiff irregular. After the verdict was rendered the jury disbanded. They were on the next morning reimpaneled and resworn, and proceeded to make their verdict plainer and more definite, rendering a verdict for $11,119.47, upon which the court entered judgment and ordered execution.

For error defendant assigns the following, viz.: The court sustained the demurrer to the fourth, fifth, and sixth pleas. It admitted in evidence certain offers of compromise and a letter to one of its employés written by defendant, over its objection. It refused the motion of defendant to instruct the jury to find for defendant. It instructed the jury that the contract in suit was separable. It refused to instruct the jury that plaintiff was not bound to deliver the cards in suit without an order before the close of business on December 15, 1911. It instructed the jury that the order in suit was severable. It refused to instruct the jury that no recovery could be had for want of mutuality. It refused to instruct the jury that, no damages having been proved, no recovery could be had. It refused to instruct the jury that, unless plaintiff was ready to deliver the whole of the cards on December 15, 1911, no recovery could be had. It charged the jury that plaintiff was entitled to a reasonable time in which to comply with the order of December 14th. It permitted the jury, after it was disbanded, to reassemble and amend its verdict.

Other facts appear in the opinion.

Jacob Ringer and Matthias Concannon, both of Chicago, Ill., for plaintiff in error.

John M. Zane, of Chicago, Ill., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] Plaintiff moved to dismiss the writ of error herein upon the ground that, defendant having raised the question of the jurisdiction of the District Court to render the judgment complained of, it fol-

lows that the case should have gone directly to the Supreme Court. We find no merit in the point. In United States v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87, it is said:

"If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified to by that court."

This we deem to be the law at this time applicable to the present case. We therefore deny the motion to dismiss.

[2] Defendant raised, as a question going to the jurisdiction, that it does not appear that diversity of citizenship exists between the parties. The declaration sets out the diversity of citizenship, but no evidence seems to have been taken on that matter. It is nowhere denied in terms, but defendant insists it was traversed by the plea of general issue. We regard this as without merit. The question was not raised by plea in abatement. In Illinois the common-law rules of practice prevail. There was no plea denying the citizenship of the parties as alleged in the declaration. That allegation was for the purposes of the present motion prima facie proof of the fact, and unless it was traversed, and proof made to the contrary, it was established as by default. We held in Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25, that, even when raised by plea in abatement, defendant had the burden of proving the lack of diversity of citizenship, when the proper averment appeared in the pleading by the plaintiff. This is approved in Every Evening Printing Co. v. Butler, 144 Fed. 916, 75 C. C. A. 657; Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633; Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Pike County v. Spencer, 192 Fed. 11, 112 C. C. A. 433; Water Works v. Ryan, 181 U. S. 409, 21 Sup. Ct. 709, 45 L. Ed. 927. Moreover, it was charged by defendant in its second plea that plaintiff was a citizen of New Jersey. In the absence of any plea or evidence to the contrary, this amounted to an admission.

[3] The assignment of error on the part of the court in sustaining the demurrers to the fourth, fifth, and sixth pleas is not well taken. The pleas concede that plaintiff had duly qualified to do business in the state of Illinois and was still so qualified, but allege that, after the contracts had been executed, the breaches thereof arisen, and the cause of action become complete, plaintiff had failed to file an annual report, which failure precluded it, under the terms of the statute of Illinois, from maintaining a suit, not only in the state, but also in the federal, court. The language of the statute, so far as pertinent, is, "No suit may be maintained either at law or in equity upon any claim, legal or equitable, whether arising out of contract or tort in any court in this state" (Hurd's Rev. St. 1915–16, c. 32, § 67g) unless the statute shall be complied with. It will be seen that the statute does not undertake to make the contract void, but simply provides the penalty of exclusion from the state courts. It appears that the contract was in force between the parties prior to the default alleged. Such default on the part of a corporation would not have retroactive effect. The

contention of defendant has been many times denied by the courts. David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; Building & Loan Ass'n v. Bedford (C. C.) 88 Fed. 7; Blodgett v. Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Groton Bridge Co. v. American Bridge Co. (C. C.) 151 Fed. 871; Johnson v. Breweries Co., 178 Fed. 513, 101 C. C. A. 639; Thomas v. Birmingham Ry. & Power Co. (D. C.) 195 Fed. 340; Cedar Works v. Buckner (C. C.) 181 Fed. 424; Loomis v. Peoples Const. Co., 211 Fed. 453, 128 C. C. A. 125; Bank v. Construction Co., 208 Fed. 976, 126 C. C. A. 64; Boatmen's Bank v. Fritzlen, 221 Fed. 154, 137 C. C. A. 514; Dunlop v. Mercer, 156 Fed. 545, 86 C. C. A. 435; Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

[4-7] The error based on the admission of Exhibits M and M^2 cannot avail. Exhibits M and M^2 amounted only to an offer to pay an undisputed claim and get a full discharge. Exhibit L was competent to show a tender. There was no prejudicial error in allowing all of these to go in evidence. When Exhibit Y was offered, the objection was general, and no ground of objection was stated. The letter was admitted as a part of the cross-examination of Pincus Kawin, a stockholder of defendant. In such a case wide latitude is permissible. In the present case the reasons for defendant's refusal to take the goods are not foreign to the cross-examination. The court had a wide discretion in the matter of the examination of an adverse party. We are satisfied from the record that the introduction of the letter did not prejudice defendant's case. It had a bearing also upon the alleged slump in the market price of these cards.

[8] We are not impressed with the assignment based on the admission of the testimony of the witness Sheridan. His testimony as to the reasons why cards were not cut and packed before they were ordered was not a departure from the rule with regard to varying written contracts. It tended to show a usage of the trade, known to the parties, and in the light of which the contract was made, and did not serve to modify or vary the contract.

There was no error in refusing to instruct the jury to find for the defendant. The record discloses no situation which would have warranted such a course.

[9-11] It is unnecessary to determine whether or not the contract is severable as to the Christmas and New Year cards, because of the waiver by defendants of any further delivery of New Year cards. The evidence of this waiver is so clear that the court was justified in declining to submit that issue to the jury. There was no default on the part of the plaintiff in the performance, in substance, of the terms of the contract of sale. Clearly the contract did not contemplate that plaintiff tender the entire quantity on or before December 15th without orders from defendant; and, when the order of December 14th was given, plaintiff was entitled to a reasonable time within which to deliver. Alwart Bros. Coal Co. v. Royal Colliery Co., 211 Fed. 313, 127 C. C. A. 599; 234 Fed. 20, 148 C. C. A. 36.

[12] Defendant assigns for error the fact that the trial court refused to instruct the jury, in effect, that there could be no recovery for

the 320,000 cards delivered, but not accepted, or for the 832,000 tendered on December 18, 1911, but not accepted by defendant, or for the 933,000 cards ready for delivery. The contract was an Illinois contract. Under the decisions of that state (Bagley v. Findlay, 82 Ill. 524; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869) plaintiff had the option, under the facts of this case, to sue for the contract price—in effect, to vest defendant with title, notwithstanding his dissent. This the plaintiff did. The cards had all been appropriated to defendant. In Star Brewery Co. v. Horst, 120 Fed. 246, 58 C. C. A. 362, there had been no appropriation, or order for delivery, and the contracts of purchase differed in other respects. But, if this case were not distinguishable, we should nevertheless apply the principle laid down in the state court.

There is a strong conflict in the authorities as to the right to recover the contract price, instead of the difference between the contract price and the market value. Williston, Sales, § 562; Habeler v. Rogers, 131 Fed. 43, 65 C. C. A. 281; Leyner Co. v. Mohawk Consol. Leasing Co. (C. C.) 193 Fed. 745. Contra, Malcomson v. Reeves Pulley Co., 167 Fed. 939, 93 C. C. A. 339; Fisher v. Newark City Ice Co., 62 Fed. 569, 10 C. C. A. 546; Denver Engineering Wks. v. Elkins (C. C.) 179 Fed. 922; River Spinning Co. v. Atlantic Mills (C. C.) 155 Fed. 466. See, too, where goods are not readily resalable, or where specially manufactured, Manhattan City Ry. Co. v. General Electric Co., 226 Fed. 173, 141 C. C. A. 171; Kinkead v. Lynch (C. C.) 132 Fed. 692; Fisher Hydraulic Stone Co. v. Warner, 233 Fed. 527, 147 C. C. A. 413.

[13] Under the Illinois decisions, the basis of recovery, in our judgment, is that the vendor may at his option vest title in the vendee, despite the latter's repudiation; it is therefore the duty of a federal court, sitting in Illinois and adjudicating an Illinois agreement, to follow the state decisions on matters of personal as well as real property. Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; In re Richheimer, 221 Fed. 16, 23, 136 C. C. A. 542.

[14, 15] But, even if recovery of the purchase price were deemed in Illinois merely the proper measure of damages for breach of the contract, and if title vested, not on plaintiff's exercise of the option, but only on satisfaction of a judgment, the federal courts, while not bound to follow the state decisions, nevertheless, "for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the state court, if the question seems to them balanced with doubt." Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Sin v. Edenborn, 242 U. S. 135, 37 Sup. Ct. 36, 61 L. Ed. 199. And for the reasons so well stated in Fisher Hydraulic Stone Co. v. Warner, 233 Fed. 527, 147 C. C. A. 413, we have no doubt that at least in such a case as this, in which the cards are at best marketable in any real sense only long after the breach, justice requires that the plaintiff be not compelled to keep them and to recover merely the difference between the contract price and a highly uncertain market value.

[16] There is no merit in defendant's contention that the purchase price could not be recovered under the common counts. When a contract has been fully performed by a plaintiff "and nothing remains

to be done under it but the payment of the compensation in money by the defendant, which is nothing more than the law will imply against him, the plaintiff may declare specially on the original contract, or generally in indebitatus assumpsit, at his election." Throop v. Sherwood, 9 Ill. (4 Gilman) 92. To the same effect are Lane v. Adams, 19 Ill. 167; Tunnison v. Field, 21 Ill. 108; Adlard v. Muldoon, 45 Ill. 193; Gibson v. O'Gara Coal Co., 151 Ill. App. 424; Shepard v. Mills, 173 Ill. 223, 50 N. E. 709.

[17] It is insisted by defendant that it was error to reimpanel the jury after it had rendered a sealed verdict, correct in substance, but irregular in form, for the purpose of correcting the technical irregularity of the first verdict. The jury made no change in the result of their verdict. The error, if such it might be called, was a mere formality, and it did not furnish good ground for a new trial. Practically the same practice was approved in Moore v. Loan & Trust Co., 70 Ill. App. 210, and is supported by the citation of authorities to the text shown at page 1893, 38 Cyc., and also by Nolan v. East, 132 Ill. App. 634–636.

[18] Defendant insists that it was error for plaintiff to conclude its replication to defendant's third plea to the country, instead of with a verification. The replication sets up no new matter by way of inducement. The matters set out in the inducement constitute merely an admission of the matters of inducement alleged in defendant's third plea. Had the replication concluded with a verification, defendant would have been required to file a rejoinder, which it could not have done without a departure from its plea or rejoining the same matter as alleged in the plea. In Chitty's Pleading, *621, it is said:

"The conclusion must, before the recent rules, in general have been with a verification unless where no new matter was stated by way of inducement, or where the traverse comprised the whole matter of the plea, in which case it might be to the country."

This rule is reinforced by Mr. Sergeant Williams, 1 Saunders, 103, cited at *1211 of Chitty's Pleading.

Finding no substantial error in the record, the judgment is affirmed.

ROBERTSON et al. v. SCHLOTZHAUER.

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

No. 2379.

1. FRAUDULENT CONVEYANCES ⟸162(1)—WHAT CONSTITUTE.
Where a deed is executed for a valuable and adequate consideration, without knowledge of the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose; hence a conveyance made under an antenuptial settlement, fraudulently designed by the husband to defeat his creditors, will not be annulled without proof of the wife's participation in the fraud.

2. FRAUDULENT CONVEYANCES ⟸301(2)—ACTIONS—EVIDENCE—SUFFICIENCY.
In a suit by a husband's trustee in bankruptcy to set aside, as a fraud upon creditors, a deed executed by the husband pursuant to an antenuptial

agreement, evidence *held* insufficient to show the wife's participation in the fraud.

3. FRAUDULENT CONVEYANCES ⟸76(2)—CONSIDERATION—VALUABLE CONSIDERATION.
Marriage is a most valuable consideration, and a conveyance made pursuant to an antenuptial settlement, the consideration of which was marriage, cannot be set aside as fraudulent as to creditors on the ground of want of consideration.

4. FRAUDULENT CONVEYANCES ⟸120(1)—TRUSTS—CREATION.
Where a husband entered into an antenuptial agreement to convey specific property to his wife, and the marriage was consummated in consideration of such agreement, a trust in favor of the wife was created, and a deed subsequently executed by the husband to effectuate such trust is not subject to attack on the ground that the wife was only a creditor and such conveyance preferred her.

5. BANKRUPTCY ⟸172—FRAUDULENT CONVEYANCES—RECORD OF CONVEYANCES.
Bankruptcy Act July 1, 1898, c. 541, § 47a, 30 Stat. 557 (Comp. St. 1916, § 9631), declares that trustees, as to all property coming into the custody of the bankruptcy court, shall be deemed vested with all rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor. A husband, pursuant to an antenuptial agreement, executed a deed conveying the property to his wife as agreed, which deed was executed only shortly before the filing of an involuntary petition in bankruptcy against the husband, and was not recorded until after the petition had been filed. The land was located in Indiana, in which state the parties resided. Burns' Ann. St. Ind. 1914, § 3962, declares that every conveyance or mortgage of lands shall be recorded in the recorder's office of the county where such lands shall be situated, and shall take priority according to the time of filing thereof, and that such conveyance or mortgage shall be fraudulent and void against any subsequent purchaser or mortgagee in good faith and for valuable consideration, having his deed or mortgage first recorded. *Held* that, while the trustee in bankruptcy is deemed a judgment creditor, his rights as such did not, a judgment creditor not being a subsequent purchaser or mortgagee in good faith for a valuable consideration, take priority over the rights of the wife under the deed.

6. HUSBAND AND WIFE ⟸129(3)—WIFE'S PROPERTY—ESTOPPEL TO CLAIM.
In such case, though the husband continued to control the land from the date of the marriage down to the date of the conveyance, which was less than a month before petition in involuntary bankruptcy against him was filed, the wife is not, though the husband continued to carry the lands conveyed as an asset belonging to him, estopped from setting up her rights, for, while she was charged with knowledge that the record title was in her husband, that fact alone furnished no basis for an estoppel on the theory that she consented to the husband's holding himself out to the world as owner of the property.

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

Suit by Harry A. Schlotzhauer, trustee in bankruptcy of Lane Robertson, a bankrupt, against Alma Maud Robertson and Lane Robertson. From a decree for complainant, defendants appeal. Reversed, with directions to dismiss the bill.

Appeal from decree setting aside, as in fraud of creditors of the bankrupt, antenuptial contract between appellants, and a deed made in pursuance of the contract. The contract is as follows:

"This agreement, made and entered into this 9th day of October, 1913, by and between Lane Robertson, party of the first part, and Alma Maud Smith, party of the second part, witnesseth: That whereas, the parties hereto desire to become husband and wife: Now, therefore, in consideration of the said party of the second part becoming the wife of the first party, the said first party agrees upon demand to convey to said second party the following described real estate in the county of Vigo, and state of Indiana: Forty (40) acres more or less in the northwest part of east fractional section five (5), township ten (10) north, range ten (10) west, commencing on the north line of said fractional section and the point where the levee and Darwin Road diverges to the southwest from said line; thence west, following said levee to the Wabash river; thence north with the meanderings of said river to the north line of said fractional section; thence east with said line to the place of beginning. Also south fractional section thirty-two (32), township eleven (11) north, range ten west, excepting eighteen (18) rods wide off the east end of said fractional section. Also lot number seven (7) in Hulman's subdivision of part of out-lot sixty-four (64) of the original out-lots of the town (now city) of Terre Haute. Also forty (40) by one hundred and forty-two (142) feet in the southeast corner of block one (1) of Freeman's subdivision of a part of out-lot sixty-five (65) of the original out-lots of the town (now city) of Terre Haute.

"In witness whereof," etc.

"[Signed] Lane Robertson.
"Alma Maud Smith."

"Acknowledged same date before Daniel V. Miller, notary public."

For about 20 years the bankrupt, Lane Robertson, was engaged in the business of selling at retail pianos and other general music merchandise. His main store was at Terre Haute, Ind., and he had five branch stores in different nearby cities; the business being carried on by him under the trade name of Indiana Music Company. For a number of years his business ranged from $150,000 to $175,000 annually. He carried a considerable stock, had many outstanding accounts, largely in the shape of piano leases, and his liabilities were likewise large. From time to time he acquired various pieces of real estate, consisting mainly of a home in Terre Haute, several houses and lots there, and a farm in the same county; the farm, home, and another piece of real estate in Terre Haute constituting the subject-matter of this controversy, and being alleged in the bill of complaint to have a value of $22,000, subject to mortgage liens thereon aggregating about $6,000.

Under date of May 21, 1914, Robertson made a deed of this real estate to his wife, Alma Maud Robertson, one of appellants, which deed was filed for record June 16, 1914, two days after the filing of the involuntary petition to have Lane Robertson declared a bankrupt. The contract was never recorded. The bill charged invalidity of the conveyance for want of consideration, and because made for the purpose of hindering, delaying, and defrauding the creditors of the bankrupt. February 16, 1915, defendants filed answer, setting up that the conveyance was made pursuant to the antenuptial contract, and denying the alleged fraud. On November 9, 1915, on motion that day made, the bill of complaint was by leave of court amended by adding another clause, wherein the complainant alleged the making of the antenuptial contract on the day it bears date, and charged that at the time of its making and continuously thereafter Robertson was insolvent, and that the conveyance to her of May 21, 1914, was made to defraud Robertson's other creditors, and for the purpose of preferring Mrs. Robertson as one of his creditors by thus paying her in full, and that she then well knew that thereby she would be preferred, to the detriment of other unsecured creditors. Appellants were married October 12, 1913, three days after the date of the contract.

Bingham & Bingham, of Indianapolis, Ind., for appellants.
Martin M. Hugg, of Indianapolis, Ind., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The District Court found in its decree that the contract and the deed made in pursuance of it "were both made and executed with the intent to hinder, delay, and defraud the creditors of said defendant Lane Robertson." If this be so, the relief awarded was proper. But does the record support the finding that the contract was entered into for such purpose?

The bill was filed evidently without knowledge on the part of the trustee that there was any such antenuptial contract. The salient facts then appearing, viz. a deed to the wife conveying a substantial part of the husband's estate, then manifestly insufficient if forced to sale, to discharge his debts, made a couple of days before petition in bankruptcy is filed, and recorded some weeks thereafter, for a recited consideration of "one dollar and other valuable consideration," invited closest scrutiny of the transaction, and clearly justified judicial inquiry to determine whether or not the transaction was free from that taint which these facts of themselves might tend to lend it. And when the existence of the antenuptial contract was discovered, it became the duty of the trustee to test the good faith of that transaction—primarily to know whether the instrument was what it purports to be—an antenuptial contract, made in fact before the marriage, or was part of a subsequently devised plan whereby such an instrument, antedated, was to be made a basis for rescuing this real estate from the creditors of the bankrupt, and, if in fact made before the marriage, whether or not it was a mere instrumentality then devised, and intended by the parties to it, eventually to cheat and defraud the creditors.

[1] If this contract was not in fact made before the marriage, the rankest perjury would be attributable to the four persons who testified in detail to its then making—Robertson, his wife, Mrs. Smith (his mother-in-law), and Daniel V. Miller, the lawyer who advised the parties who drew it. All these testified fully on the subject; and from their testimony, if true, it would follow that Mrs. Smith insisted on provision being made for her daughter before she would finally consent to her marriage, and that Robertson promised to convey the real estate to her, that they procured the license to marry, went to Miller's office, and that Miller drew the antenuptial contract, which they signed, and that she took it away and showed it to her mother a couple of days before the marriage. Nothing appears in the testimony of these witnesses to raise a suspicion of its falsity in this regard, and there is no contradictory evidence. Indeed the amendment to the bill charges as a fact that the contract was made and entered into before the marriage, and no one contends that the truth is otherwise. Was, then, this contract entered into for the purpose of defrauding Robertson's creditors, or, more accurately did Mrs. Robertson have such fraudulent purpose? For as stated in Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360, where, as here, an antenuptial contract was in issue:

"When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor. * * * And an antenuptial settlement, though made with a fraudu-

lent design by the settlor, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement."

[2] And does the record sustain the finding that Mrs. Robertson entered into this contract with such fraudulent intent? To all appearances Robertson was then a thriving business man. His large store at Terre Haute and the five branch stores would be strongly suggestive of his prosperity, especially to a woman without intimate knowledge of his business, who was sufficiently predisposed in his favor to seriously think of marrying him. It seems the mother, Mrs. Smith, was left a widow, with small resources, and three children to look after, and had made some sacrifice to give this daughter a good education, so that at 25 the daughter, after some further educational advantages, was about to resume her interrupted occupation of teaching, when Robertson insisted on marrying her. She agreed to marry him, subject to her mother's consent. The mother, believing him to be a man of very considerable means, insisted that in view of her own financial troubles, occasioned by her husband's death without provision having been made for her, some provision should be made for her daughter through settlement on her of some property. After long discussion between the three, Robertson agreed to do this, and in pursuance thereof the antenuptial contract was drawn by Lawyer Miller and duly executed by the parties in his presence. Both women testified unequivocally, not only to their entire want of knowledge of Robertson's financial difficulties prior to the marriage, but to their unqualified belief that he was a man of large means, well able to settle upon his prospective wife a substantial property. We find in the record no testimony and no facts or circumstances which tend to contradict this, and it surely is not inherently so unreasonable and unbelievable as to warrant the conclusion that the very contrary is the fact—a conclusion necessary to be reached before a finding of Mrs. Robertson's fraudulent intent in entering into the contract would be justified. The following from Prewit v. Wilson, supra, is applicable to this situation:

"There is no evidence that Mrs. Prewit was aware at the time of the amount of property he held, or of the extent of his debts, or that he had any purpose in the execution of the deed except to induce her to consent to the marriage. It is not at all likely, judging from the ordinary motives governing men, that whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure."

As to the antenuptial contract the record does not warrant the finding that Mrs. Robertson entered into it with fraudulent intent, as found in the decree.

[3] 2. That marriage is regarded in law as a proper and valuable consideration for the conveyance of property has been repeatedly held in Indiana, as well as elsewhere. Bunnel v. Witherow, 29 Ind. 123; Buffington v. Buffington, 151 Ind. 200, 51 N. E. 328; Mallow v. Eates, 179 Ind. 267, 274, 100 N. E. 836; State ex rel. Harrison v. Osborn,

143 Ind. 671, 677, 42 N. E. 921. In Magniac v. Thompson, 7 Pet. 346, 393, 8 L. Ed. 709, the United States Supreme Court said:

"Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value; and from motives of the soundest policy is upheld with a steady resolution."

And in Prewit v. Wilson, supra, the same court said:

"Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes that 'marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the state; by what money ordinarily buys, and by what no money can buy, to an extent which cannot be estimated or expressed, except by the word "infinite." To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth.' And also that 'marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value.' Law of Married Women, §§ 775, 776. Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an antenuptial settlement."

Thus it is apparent, not only that Mrs. Robertson entered into the contract in good faith, but also that she entered into it for a lawful valuable consideration by her rendered.

[4] 3. The amendment to the bill was drafted evidently on the theory that the antenuptial contract, being for a lawful consideration, and having been by the prospective wife entered into in good faith, constituted her a creditor of Robertson, and that through the conveyance to her of May 21, 1914, the debt to her created by the contract was paid by Robertson, and that at the time of such payment, so shortly before the filing of the petition in bankruptcy, Robertson being to her knowledge insolvent, the payment to her was preferential and void, and justified setting aside the conveyance. Without detailing the facts, it may be assumed that at this time Mrs. Robertson had reason to believe, and is chargeable with knowledge, that her husband was insolvent. If, therefore, her status under the contract was that of an unsecured creditor, and through the conveyance her unsecured debt due from her husband was paid, the conveyance should be set aside as preferential. But was Mrs. Robertson's status under the contract merely that of an unsecured creditor?

It is a rule of general application that where parties contract for a lawful valuable consideration for the conveyance to one of specific property then owned and possessed by the other, and the consideration passes, until actual conveyance the owner becomes a trustee holding the legal title in trust for the purchaser, who in the meantime is the equitable owner of the property. Story's Eq. Jur. (13th Ed.) § 1212; Pomeroy's Eq. Jur. (2d Ed.) § 1261; Beckwith et al. v. Clark, 188 Fed. 171, 110 C. C. A. 207. A situation showing facts strikingly similar in this regard to those here was considered in McKnight v. Kingsley, 48 Ind. App. 372, 92 N. E. 743, wherein the court said:

"The evidence clearly shows that the land was conveyed in pursuance of a contract made before marriage and for a valuable consideration. This agree-

ment was made and executed prior to any knowledge upon the part of appellee Mary C. Kingsley of any claim that appellant had against Alexander Kingsley. Said appellee learned of the claim a few days before the last conveyance. Had the deed been executed when the contract was made, there would have been no suggestion of fraud. From the time the marriage was consummated under the agreement Mary C. Kingsley became the equitable owner of said real estate. The fact that she intended, when she took the conveyance, that appellant was to have no part of the property, did not, although she knew of the pending suit, make her act fraudulent; for, under the evidence, the fact that she intended to prevent appellant from getting any part of the real estate would be immaterial. She was only securing what belonged to her."

In Mallow v. Eates, 179 Ind. 267, 100 N. E. 836, the court held that an antenuptial contract, executory in form, upon the marriage passes to the wife an equitable interest in the land thereby contracted to be conveyed to her. It thus follows that upon the marriage taking place Mrs. Robertson became the equitable owner of the property so contracted to be conveyed to her, and her husband a trustee, holding the legal title for her use, and that the conveyance of May 21, 1914, did not operate to pay Mrs. Robertson an unsecured debt, but invested her with the legal title to real estate which in equity was already hers, and had been from the time of her marriage nearly eight months before. In such case no question of preferential payment arises.

[5] 4. What is the effect of failure to record the deed in question until some days after filing the petition in bankruptcy? Section 47a of the Bankruptcy Act provides:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

In Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, it was held that the time as of which, under section 47a, the trustee's lien or rights would attach as though he were a judgment creditor, is when the petition in bankruptcy was filed. On June 14, 1914 (the day of the filing of the petition in bankruptcy), what right would a then judgment creditor of Robertson have had to satisfy his judgment out of this real estate of which Mrs. Robertson then held a deed which was not filed for record till two days thereafter? Registry of conveyances, and the effect thereof, is matter of state regulation. Section 3962, Burns' Ann. Stat. Ind., provides:

"Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance, mortgage or lease shall take priority according to the time of the filing thereof, and such conveyance, mortgage or lease shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration, having his deed, mortgage or lease first recorded, the same to be in effect on and after January 1, 1914."

As early as 1845 the Indiana Supreme Court, passing on a statute similar as regards any such question, said:

"The claim of the other defendants, who have judgments against Durbin obtained subsequently to the mortgage to the complainant, but before it was recorded, must yield to that mortgage, though it was not recorded in time. A mortgage of real estate, though not recorded in season, is a valid conveyance, except so far as its validity may be affected by statute; and the statute on the subject renders such conveyances not recorded in time void only as to subsequent purchasers and mortgagees for value, whose deeds are first recorded. It has no relation to judgment creditors. Perhaps a bona fide purchaser at sheriff's sale under such judgment might be protected by the statute, but that is a different case. 4 Kent's Com. 173." Sparks et al. v. State Bank, 7 Blackf. (Ind.) 469.

In the same volume, page 510, Doe, etc., v. Hurd et al., the court said:

"The answer to this is that the deed to the defendants was recorded before the sheriff's sale. The circumstance that the judgment was rendered before the deed was recorded is not material. Deeds of real estate are not void for not being recorded in time, except as to bona fide purchasers for value whose deeds are first recorded. A judgment creditor cannot be considered as such a purchaser; nor can a purchaser under the judgment hold, who has notice by the record of the prior conveyance."

This has been followed in Orth v. Jennings et al., 8 Blackf. 420; Runyon v. McClellan et al., 24 Ind. 165; Pierce v. Spear et al., 94 Ind. 127, 130; Hutchinson, etc., v. First National Bank, 133 Ind. 271, 281, 30 N. E. 952, 36 Am. St. Rep. 537; State Bank v. Backus, 160 Ind. 682, 694, 67 N. E. 512. A judgment creditor, not being a "subsequent purchaser, lessee, or mortgagee," as against whom alone, under the statute, the prior unrecorded deed is "fraudulent and void," could not, for the want of its recording, avoid the conveyance; neither can the trustee in bankruptcy do so.

[6] 5. It is urged that Robertson's continued possession and management of this real estate, after the marriage, continuing as before to carry it on the books of his business as an asset, entering on the books the income and the outlay, and in conversations with his creditors and others referring to the property as his own, without suggestion by record or otherwise of any contractual interest of his wife therein, constitutes not only a badge of fraud bearing on the good faith of the original transaction, but also raises an estoppel against Mrs. Robertson from asserting as against Robertson's creditors any interest under the contract. While it is quite true that such conduct would be consistent with an original fraudulent purpose in the making of the contract, such fact alone will not raise a presumption of fraudulent design. Besides, and as specially bearing on the contention of her estoppel, the record does not afford any proof that she had any knowledge of what appeared in his books nor of any statements regarding the property which since the marriage he made to his creditors or others. The fact alone that he, her husband, continued in the actual management of the property on her behalf, and had not during the eight months rendered her an account of the income therefrom was not so strange, unusual, or startling a circumstance as of itself to suggest to her that he was improperly representing the property as his own. She was of course chargeable with knowledge that the public records disclosed nothing to indicate any interest of her own in the property.

But this fact alone, unconnected with representations of conduct on her part, upon which others have to their substantial disadvantage been induced to act, would not raise an estoppel. State Bank v. Backus, 160 Ind. 682, 695, 67 N. E. 512. The bill was not drawn upon any theory that Mrs. Robertson by her conduct estopped herself as against Robertson's creditors from asserting title in this property, nor upon the theory that through the conduct or upon the representations of either or both of them after the marriage the creditors were misled to their material detriment; neither does the record disclose evidence which would support allegations so predicated.

We conclude, therefore, the record herein establishes (a) that the antenuptial contract was in good faith and without intent to defraud the creditors of the bankrupt entered into by appellant Alma Maud Robertson; (b) that thereby she became the equitable owner of the real estate here in question; (c) that the deed to her from the bankrupt was made in pursuance of such antenuptial contract and merely vested in her the legal title of real estate which was equitably her own; (d) that as against appellee she is entitled to hold the real estate so conveyed to her by the deed from her husband, of May 21, 1914.

The decree is reversed, with direction to dismiss the bill.

BOARD OF TRADE OF CITY OF CHICAGO v. WESTON.

In re GLAVIN.

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

No. 2396.

1. BANKRUPTCY ⊜3—STATUTORY PROVISIONS—VALIDITY.

Assuming that Congress, in passing a bankruptcy law, is without power to define property, or to declare what elements must be present to make property, Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1916, § 9654), providing that the trustee shall be vested by operation of the law with the title of the bankrupt to all property which the bankrupt could by any means have transferred, or which might have been sold under judicial process against him, does not attempt to make property out of things which are not such, but enumerates property having certain characteristics as subjects of devolution and administration in bankruptcy.

2. BANKRUPTCY ⊜143(4)—PROPERTY PASSING TO TRUSTEE—MEMBERSHIP IN BOARD OF TRADE.

The rules of a Board of Trade provided for the suspension and reinstatement of members for failure to comply with business operations, or with any award under the rules and regulations of such Board, and provided that all applications for membership should be referred to a committee, and that any male person of good character and credit and of legal age might be admitted to membership upon approval by the board of directors, and upon the payment of an initiation fee of $10,000, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules of the Board, and that every member should be entitled to receive a certificate of membership, and if he had paid all assessments due, and had against him no outstanding unadjusted, or unsettled claims or contracts held by members of the association, and the membership was not in any way impaired or

forfeited, it should, upon payment of $100, be transferable on the books of the association to any person eligible to membership, and approved by the board of directors. *Held*, that a membership in such Board of Trade, having a value of about $4,000, was property passing to the member's trustee in bankruptcy, under Bankr. Act, § 70a, though other members of the Board of Trade held outstanding, unadjusted, and unsettled claims against him, aggregating about $35,000, and protested or objected against the transfer of his membership.

8. BANKRUPTCY ⊂=305—PROCEEDINGS BY OR AGAINST TRUSTEE—DECREE.

In a decree adjudging that such membership was property, and that the right, title, and interest of the bankrupt had passed to the trustee, a provision that, in order to enable the trustee to sell and dispose of such membership for the benefit of the estate, the Board of Trade should issue to him, as trustee, a membership certificate, was not objectionable, as giving the trustee membership, regardless of the rules of the Board as to membership, as it was merely intended to invest the trustee with membership for the purposes of sale, and his membership would not carry with it the privileges ordinarily inherent in such a membership.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; F. A. Geiger, Judge.

In the matter of Charles F. Glavin, bankrupt. From a decree in favor of Thomas C. Weston, trustee, the Board of Trade of the City of Chicago appeals. Affirmed.

The following is the statement and opinion of Geiger, District Judge, in the lower court:

The bankrupt held a membership or seat in the Board of Trade of the City of Chicago. Its value is conceded to be about $4,000. Weston, trustee in bankruptcy, has filed a petition, asserting his succession to Glavin in and to said membership as property or a property right, and asking recognition thereof by the Board of Trade. The latter resists, on the ground that such membership or seat does not pass to a bankruptcy trustee. The jurisdiction of the court over the Board of Trade has been conceded, and, as I understand, no exception is taken to the procedure; the parties being desirous of litigating and obtaining an adjudication upon the merits of the question presented. There are no facts in dispute.

The respondent, Board of Trade, is a body corporate, by virtue of a special charter granted by the Illinois Legislature in 1859 (Priv. Laws 1859, p. 13), to enable its grantees and their associates and successors to establish and maintain a grain market in Chicago. It is empowered by such charter to admit or expel members in the "manner to be prescribed by the rules, regulations, and by-laws thereof." Among rules so in fact adopted and in force during the bankrupt's membership, and at the time of adjudication (it is admitted that at the date of adjudication the bankrupt was a member in good standing), are these:

Rule 4, Section 7: "When any member of this association has been duly convicted of failure to comply with the terms of any business obligation, or with the award of any committee of arbitration or committee of appeals, made in conformity with the rules and regulations of this association, he shall be suspended from all privileges of the Board of Trade of the City of Chicago until all his outstanding obligations to members of said Board of Trade shall have been settled, when he may, upon application to the board of directors, and upon stating under oath that he has settled all such outstanding obligations, be reinstated. Notice of all applications for reinstatement shall be posted upon a properly designated bulletin in the Exchange Hall for at least fifteen (15) days prior to the hearing of such application by the board of directors."

"Such reinstatement shall be a bar to any further discipline by the board of directors of the said Board of Trade on account of claims against such member maturing prior to his reinstatement."

Rule 10, Section 1: "All applications for membership in the association shall be referred to the committee on membership, who shall hold regular stated meetings for examining such applicants and their sponsors in person, under such rules and regulations as may be made by the board of directors. Any male person of good character and credit, and of legal age, on presenting a written application, indorsed by two members, and stating the name and business avocation of the applicant, after ten days' notice of such application shall have been posted on the bulletin of the Exchange, may be admitted to membership upon approval by at least ten (10) affirmative ballot votes of the board of directors: Provided, that three negative ballot votes are not cast against such applicant, and upon the payment of an initiation fee of ten thousand dollars, or on presentation of an unimpaired or unforfeited membership, duly transferred, and by signing an agreement to abide by the rules, regulations, and by-laws of the association and all amendments that may be made thereto."

Section 2: "Every member shall be entitled to receive a certificate of membership, bearing the corporate seal of the association and the signatures of the president and secretary; and if the member in whose name said certificate stands has paid all assessments due, and has against him no outstanding, unadjusted or unsettled claims or contracts held by members of the association, and said membership is not in any way impaired or forfeited, it shall, upon the payment of one hundred dollars ($100), be transferable on the books of the association to any person eligible to membership who may be approved by the board of directors, after due notice, by posting, as provided in section 1 of this rule. The membership of a deceased member shall be transferable on the books in like manner, by his legal representative. Prior to the transfer of any membership, application for such transfer shall be posted upon the bulletin of the Exchange for at least ten days, when, if no objection is made, it shall be assumed the member has no outstanding claims against him."

These are the only rules pertinent to the question presented. No rule exists giving to the respondent or its members the right to compel sale or other disposition of memberships, to pay debts of particular members, or reserving to respondent or its members any right of application of a membership against the will of a member, for the benefit of his creditors. Certain members of respondent, creditors of the bankrupt, who held "outstanding, unadjusted, and unsettled claims" (see rule above) against him arising out of Board transactions, and which claims aggregate about $35,000, have filed such claims with respondent, and with the same their objections or protest against the transfer of the bankrupt's membership. The claims are valid. Each of such creditors, save one, has also filed his claim in these bankruptcy proceedings. They, however, filed these claims, with a reservation of any rights possessed by them as members of the respondent, under the rules above quoted.

The Bankruptcy Act (Section 70a) declares that a trustee "shall * * * be vested by operation of law with the title of the bankrupt" as of the date of adjudication, to all (1) property which prior to the filing of the petition he (the bankrupt) could by any means have transferred, or (2) which might have been levied upon and sold under judicial process against him. It may be taken for granted that, upon general principles, as well as upon the construction given by the Illinois courts to its charter, a seat or membership in the respondent Board of Trade is not property such as is ordinarily subject to levy, or to other compulsory process. But is it property which is the subject, by any means, of transfer by the bankrupt? Now, in arguing a negative answer to this, it is suggested by counsel, among other things, that the constitutional authority to enact bankruptcy laws must be exercised subordinately to the power of states to regulate intrastate commerce; that it is no part of such legislation "to create property or to * * * declare the limits of property"; that the authority is limited to providing for a distribution of what is otherwise property; again, that "the right to declare what shall, within the statute, be deemed property, and what shall be the qualities and elements constituting that property, as respects any particular subject-matter, is essentially a part of the right to regulate intrastate commerce, and is ex-

clusively the right of the state. Congress may not, under its power to enact a bankruptcy law, or any other of its powers, interfere with this state right to define what shall be property or what shall be the elements of property. * * * Property, when rightly understood, contains the elements of exclusiveness, or exclusion. It consists of several elements—the right to use, the right to sell, etc."

[1] These suggestions, it seems to me, are hardly pertinent to the question presented. It may be that Congress, in discharging its constitutional authority, either in passing a bankruptcy law or otherwise, is without power to define "property"—in the broad sense—by declaring what elements must be present to make property. But I conceive that nothing of the kind has been attempted. Section 70a is merely a declaration, by way of enumeration or schedule, of the rights, privileges, or things which, being possessed or enjoyed by a bankrupt, and being property, shall, as respects their title, devolve, by operation of law, upon a trustee. It deals with property, as such. Instead of attempting to make property out of things which are not such, it enumerates, as subjects of devolution and administration in bankruptcy, property having certain characteristics, and therefore, being an enumeration of certain classes of property, is on its face a limitation within the larger field of property in general. It does not say that, in addition to a bankrupt's property, certain other rights, privileges, or things shall be deemed property, and shall vest in the trustee. Obviously, rights of a bankrupt which attach to him personally, such as the ordinary rights incident to his life, his liberty, or pursuit of happiness, valuable though they may be, could not be declared to pass to the trustee, because they are neither property nor property rights. Probably they could be declared such by neither national nor state legislative action. Those rights, as well as property and property rights subject to appropriation, exist and are recognized, respectively, under fundamental constitutional tests. Now, it would be strange if the dominant grant to Congress to legislate upon bankruptcy and insolvency, and which, when exercised, supersedes state legislation respecting these matters, should nevertheless be subordinate to the right of each state to determine what is or shall be property, subject to the terms of the Bankruptcy Act. But, as indicated, the case here presents no such broad question that need be considered to answer, first, whether the membership in the respondent Board is property in the ordinary sense upon application of ordinary tests—the very tests suggested by its counsel—nor to answer specifically whether it is property falling within any of the categories of section 70a.

[2] The rules of the Board of Trade, when read in the light of adjudicated cases dealing with section 70a, answer both of these questions; and in my judgment Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318, meets the present situation so fully that extended reference to other adjudications—e. g., Re Neimann (E. D. Wis., D. C.) 124 Fed. 738; Re Hurlbutt-Hatch Co., 135 Fed. 504, 68 C. C. A. 216 (C. C. A. 2d Ct.); O'Dell v. Boyden, 150 Fed. 731, 80 C. C. A. 397 (C. C. A. 6th Ct.); Re Gregory, 174 Fed. 629, 98 C. C. A. 383, 27 L. R. A. (N. S.) 613 (C. C. A., N. Y.); Re Currie, 185 Fed. 263, 107 C. C. A. 369—is unnecessary. That case presented a contest between a member of the Philadelphia Stock Exchange and his trustee in bankruptcy. The seat or membership had not been scheduled, but the trustee, after causing it to be appraised, petitioned the referee for an order of sale. The bankrupt opposed, claiming that the membership was not an asset. The rules of that Exchange in respect of election to, maintenance, transfer, forfeiting, suspension, or termination of membership, were much like those before us. They provided for suspension in the event of bankruptcy, for reinstatement upon a discharge from debts; for the sale under certain conditions of a deceased member's seat for the benefit of any creditor, fellow members, and certain other contingencies affecting such membership. Now, without giving here the detailed contentions respecting a possible exemption of the membership under the Pennsylvania laws, the Supreme Court, in dealing directly with the question whether the membership was property under section 70a, used this language: "We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to

election by the Exchange and some other conditions. It had decided value. The appellant paid for it, in 1880, $5,500, and he testified that the last price he had heard paid for a seat was $8,500. One or the other of these sums, or at any rate some sum, was the value of the seat. It was property, and substantial property, to the extent of some amount, notwithstanding the contingencies to which it was subject. In other words, the buyer took the risk of the contingencies; and they seem capable of estimation. The appellant once estimated them, and paid $5,500 for the seat in controversy; another buyer estimated them, and paid $8,500 for a seat. A thing having such vendible value must be regarded as property, and, as it could have been transferred by some means by appellant (one of the conditions expressed in section 70), it passed to and vested in his trustee. Whether it was subject to levy and sale by judicial process we need not consider, except incidentally in discussing the next contention."

Now, in opening discussion of this "contention"—the matter of exemption under the state laws—and with reference to the force to be accorded to decisions of the Supreme Court of Pennsylvania the court pointedly observes: "If those decisions are interpretations of the state statute, we must yield to their authority. If they are declarations of general law—mere definitions of property—we may dispute their conclusions, if their reasoning does not persuade." And, after conceding it to be entirely possible that a membership in a stock exchange may not be property subject to levy or sale upon ordinary fi. fa.—especially where through the attempted seizure and sale, conditions attaching in favor of fellow members were to be cut off—and after asserting that "undoubtedly the seat in the board was to be held and enjoyed subject to its limitations and restrictions," the court proceeds: "We expressed that limitation in Hyde v. Woods, 94 U. S. 525 [24 L. Ed. 264], but we decided nevertheless that a seat was property, and that if, upon its sale, any balance was left after paying the debts due to the members of the board, that balance could be recovered by the assignee in bankruptcy. This was not denied by the Supreme Court of Pennsylvania, and it may be that the court only intended to declare the priority of board creditors over general creditors. If so, the decision expresses no rule with which we need take issue or which is relevant to the pending controversy; nor, indeed, if the case (Pancoast v. Gowen, 93 Pa. 66) may be construed more broadly. The Bankrupt Law of 1898 has made its own rule. For the same reason it is not necessary to review the cases cited from other jurisdictions. Whatever is in them favorable to appellant's contention was based upon the inability that the respective courts found in the law to transfer a title which could be insisted upon and enjoyed against the consent of the association. But that consequence, in our judgment, affects the value of a seat in a stock board, not its existence as property. The contingencies which may defeat or affect its title, or its enjoyment, will be reflected in its price, and if, notwithstanding them, a seat has a vendible value of from $5,000 to $8,000, it would seem that the law should have some process to reach it for the benefit of creditors; and the Bankrupt Act supplies the process. A trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey; and the statute is something more than another mode of transferring property in invitum. It is a gift of privileges, and expresses the conditions upon which they are conferred."

Recurring to the case before us, the facts are that a membership in the respondent is attainable originally upon the payment of an initiation fee of $10,000 (rule 10, section 1); that it is transferable (rule 10, section 2), and the conditions will be referred to; that it passes to the legal representatives of a deceased member; that the present value of a seat is approximately $4,000; and that the herein bankrupt (so it is stated upon argument) offers no objection to assertion of title by the trustee. In my judgment, the pertinency of the suggestions quoted from the Edmunds Case is not open to contention. The question is not whether Weston, the trustee herein, if Glavin's right and title devolves upon him, will succeed in selling the seat or membership; nor whether the title of Glavin and the right to enjoy the membership, as and to the extent to which he enjoyed them, will in fact be conferred upon a pur-

chaser from the trustee, but whether Glavin's right or title, whatever it be, is reserved to him just because fellow members (creditors) may, if they see fit, protest its transfer by him. Obviously, the latter circumstance, as above stated, while it may operate to prevent a transfer, does not destroy the character of the right as being susceptible or capable of transfer. That provision of rule 10 confers upon such members a right which, if they choose to exercise it, may impede or obstruct the exercise by the member of his right of transfer. But it does not destroy the general right of transfer, nor the element of transferability. On the contrary, if there were no other evidence that it possesses such common attribute of property, that rule not only recognizes it, but, as I read it, formally imports it into and impresses it upon a membership. The matter must be viewed from the standpoint of the bankrupt, who under the law is obliged to surrender what to him is property. Therefore when, in connection with a valuable right or privilege having ordinary incidents or attributes of property, there are contingencies or conditions, the right none the less exists, though its freedom of exercise, and consequently its value, may thereby be greatly impaired. So, too, the degree of contingencies, the probability or certainty of their arising, cannot destroy the character of the right as a property right. The chances are not to be resolved for or against the bankrupt, to the end that he be allowed to retain the property if its value be small or negligible, and the trustee be required to take it if large. And it may be observed that, while creditors holding claims against the bankrupt which in amount greatly exceed the value of the membership have protested a transfer of the membership, that very protest concedes both salability and the capacity (on the part of some one, except for the protest) to sell. The size of the protesting creditors' claims cannot alter the status or character of the membership. Suppose, by way of illustration, that creditors, members of respondent, holding only $500 of claims against the bankrupt, protested a transfer; that the trustee had an opportunity to sell to one who was willing to pay the protesting creditors in full and to give the trustee $3,500, or suppose the trustee had an offer of $4,000, and suggested to the court that he be permitted to accept it on condition that he tender to the protesting creditors their claims in full, to the end that the obstacles otherwise in the path of effecting a transfer be overcome, and that in any event the purchaser assumed all risk of becoming a full-fledged member of respondent; would it not seem idle and absurd to say to the general creditors that, because no property or property right of the bankrupt had come to the trustee, the matter could not be entertained, even where, as in the case before us, the bankrupt is not resisting?

We are not concerned whether the trustee gets, or will get, much or little, but that the bankrupt's right, title, or privilege evidenced by the membership is property, and as such devolves by operation of law upon the trustee in bankruptcy, seems clear. The petitioner is entitled to an order or decree adjudging: That Glavin's membership in the respondent Board of Trade is property, and his right, title, and interest therein has passed to and is now held by Weston, trustee in bankruptcy, and that respondent be adjudged to recognize said trustee's succession thereto.

Henry S. Robbins, of Chicago, Ill., for appellant.
William E. Burke, of Milwaukee, Wis., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges

ALSCHULER, Circuit Judge. The facts under which arise the questions involved in this appeal are set forth in the statement by the District Court preceding its opinion rendered in the cause. The opinion of that court, which, with the statement of facts, is to be found on pages 18 to 26 of the printed transcript herein, in our judgment correctly applies the law to the facts, and has our entire concurrence.

[3] Complaint is made that, if the last paragraph of the court's

decree is sustained, and certificate is issued by appellant in accordance with the command thereof, the trustee in bankruptcy will thereby acquire membership in the Board for general purposes regardless of the provision of section 2 of rule 10 of its by-laws, requiring as a condition of transfer of membership that the transferring member "has against him no outstanding, unadjusted, or unsettled claims or contracts held by members," and requiring the person to whom membership is to be transferred to be approved by the board of directors. The paragraph of the decree is as follows:

"It is further ordered, adjudged, and decreed that, in order to enable said Thomas C. Weston, as such trustee, to sell and dispose of said membership for the benefit of said estate, said Chicago Board of Trade issue to Thomas C. Weston, as such trustee, a membership certificate, as provided for in section 2, rule 10, of the Articles of Incorporation, Rules, By-Laws, and Regulations of said Chicago Board of Trade."

It is clear from the paragraph that it was not thereby intended to invest the trustee in bankruptcy with membership in the Board of Trade, carrying with it the privileges which ordinarily inhere in such membership. Such conclusion is required not only from the very situation, but is plainly indicated from the purpose of the decree as therein expressed in the words "in order to enable said Thomas C. Weston as said trustee to sell and dispose of said membership for the benefit of said estate." The certificate of membership to be issued under the decree will be such only as will enable the trustee to take such steps looking to the sale, disposition, and transfer of the membership as Glavin himself, if not in bankruptcy, might have done, but without in any manner concluding, binding, or foreclosing appellant with reference to any rights or obligations it may have under the aforesaid section 2, rule 10 of its by-laws.

The decree of the District Court is affirmed.

HAIMOWICH v. MANDEL.

(Circuit Court of Appeals, Third Circuit. May 19, 1917.)

No. 2182.

1. BANKRUPTCY ⟸407(5)—DENIAL OF DISCHARGE—GROUNDS—FALSE FINANCIAL STATEMENT.

Under Bankruptcy Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839, providing for the denial of a discharge, if the bankrupt has obtained money or property on credit upon a materially false statement in writing made by him to any person, where the bankrupt made a financial statement to a mercantile agency in anticipation of general trade inquiries to be made from time to time in the future, and not in response to a particular trade inquiry, and thereafter one subsequently becoming a subscriber to such agency was furnished such statement by the agency, and was induced by its falsity to extend credit at a time when the bankrupt intended the statement to serve such purpose, a discharge was properly denied, as a mercantile agency is the representative of its subscribers, and a statement to the trade generally through the agency is made to it as an agent or representative of those who are then its subscribers, and those who become its subscribers

during the period through which the statement is intended to be used, and is in fact used, in obtaining credit.

2. BANKRUPTCY ⟸407(5)—DENIAL OF DISCHARGE—GROUNDS—FALSE FINANCIAL STATEMENT.

In the absence of any intervening changes in a bankrupt's financial condition, serving to abbreviate the period during which a financial statement to a mercantile agency is intended to be used in obtaining credit, the test of whether a false statement given upon one date, and communicated and acted upon on a later date, bars a discharge, is whether the agency was the representative of the prospective creditor when the statement was communicated to and acted upon by him, and whether at that time the statement was still in force, dependent upon whether the sale on credit was the proximate result of such statement, and whether its original falsity was the cause of the extension of credit.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of Jacob Haimowich, bankrupt. From an order (232 Fed. 378) refusing a discharge, opposed by David Mandel, Jr., trustee, the bankrupt appeals. Affirmed.

Wm. F. Berkowitz, Israeli & Blieden, and Samuel W. Salus, all of Philadelphia, Pa., for appellant.

J. C. Levi, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This appeal concerns the discharge of a bankrupt. The referee found against the discharge, and the District Court sustained his finding. 232 Fed. 378.

In March, 1912, the bankrupt gave R. G. Dun & Co. a statement purporting to show his true financial condition. He omitted $6,000 to $7,000 of bills payable, whereby his assets of something less than $10,000 were falsely swollen to $16,000. On April 1, 1912, Gross, Engel & Co. became subscribers to Dun & Co., and in September following, while still subscribers, made inquiry concerning the bankrupt's financial standing. They received from Dun & Co. the bankrupt's statement of the previous March, and relying upon it, sold the bankrupt goods and extended him credit. Involuntary proceedings in bankruptcy followed, and upon their termination the bankrupt petitioned for discharge. His petition was opposed upon the ground that he had forfeited his right to a discharge under section 14b of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, as amended by the Act of February 5, 1903, c. 487, § 4, 32 Stat. 797, and by the Act of June 25, 1910, c. 412, § 6, 36 Stat. 839), which provides that:

"The judge shall * * * discharge the applicant unless he has * * * (3) obtained money or property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person."

[1] Upon controverted questions of fact it was found, and we think properly so, that the bankrupt had *obtained property* from Gross, Engel & Co. *on credit* extended in reliance upon his statement to

Dun & Co.; that the statement was *materially false* in that it omitted the most of the bankrupt's indebtedness; that it was "knowingly" false, notwithstanding the bankrupt's explanation that he thought he was asked to give only his "*accounts* payable" and not his "*bills* payable"; and that the statement was *in writing* and made *for the purpose of obtaining credit.* This leaves for discussion the question: Whether in making the false statement to the mercantile agency for the purpose of obtaining credit, the bankrupt made the statement to the "representative" of the "person" from whom property on credit was afterward obtained, within the meaning of the act.

The applicable provision of the Bankruptcy Act (section 14b), as it stood before the amendment of June 25, 1910, provided that discharge shall be refused if the bankrupt has—

"obtained property on credit from any person upon a materially false statement in writing *made to such person* for the purpose of obtaining such property on credit." (32 Stat. 797.)

This provision was held to apply to cases where the bankrupt made a false statement directly to the person *from whom* he obtained property on credit, and as statements are not made to mercantile agencies for the purpose of obtaining property on credit *from them,* the provision was construed not to include the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers. In re Russell, 176 Fed. 253, 258, 100 C. C. A. 77. To this broad interpretation some courts made an exception to the effect that a false statement made to a mercantile agency when it was acting upon the specific request of a subscriber, was within the provision and barred a discharge. In re Pincus (D. C.) 147 Fed. 623; In re Carton & Co. (D. C.) 148 Fed. 63. The Circuit Court of Appeals for the Second Circuit withheld its approval of this ruling by declining to express an opinion as to its correctness. In re Russell, 176 Fed. 253, 259. In this state of the decisions, the amendment of June 25, 1910, was enacted, which, while altering somewhat the phraseology of the provision, changed its meaning only by enlarging it so as to include a false statement made to the "representative" of the person from whom credit was obtained.

The extent to which the amendatory words "or his representative" enlarge the provision has not been very generally considered by the courts. The Circuit Court of Appeals for the Second Circuit, in discussing the provision as last amended, in Re Zoffer, 211 Fed. 936, 128 C. C. A. 434, said:

"That clause certainly cannot be construed to cover 'general statements to mercantile agencies, not specifically asked for by prospective creditors.'"

thereby indicating (as insisted by the bankrupt) that the amendment was but a statutory declaration of the judicial view previously expressed in Re Pincus and in Re Carton & Co., supra.

In seeking the exact meaning of this expression we must consider the facts to which it had reference. These are so meagrely reported that we do not know whether the expression was intended to extend broadly to a case like the one under consideration or was narrowly

limited to the facts of the case in which the expression was used. It appears from the report that the bankrupt gave the mercantile agency a false statement upon a request made generally and not upon the request of a subscriber. After the statement was given, nothing happened so far as the report shows. It does not appear that the false statement was afterwards communicated to a subscriber or that any subscriber otherwise knew of it, or, relying upon it, extended credit to the bankrupt. If in fact the false statement was made generally to the mercantile agency and was not afterward communicated to a subscriber, and if, therefore, no credit was procured upon faith in it, then obviously the provision, which contemplates obtaining property on credit based upon a false statement, does not extend to a false statement alone.

But in the case under consideration, the bankrupt gave the mercantile agency a false statement for distribution among the trade for the purpose of obtaining credit, and though not given upon the specific request of a subscriber, it was subsequently communicated to a subscriber upon his request, with the result that it induced the extension of credit intended. The amendment of 1910, which bars a discharge when a false statement has been made to the "representative" of the person from whom property has been obtained on credit, does not prescribe that the statement to the representative must be made upon the specific request of the person extending the credit. It simply enlarges the number and character of persons to whom the making of a false statement operates as a bar to a discharge. The test, therefore, is whether the agency to which the false statement was made was in fact the representative of the person who receiving the statement extended credit. From the very nature of its occupation, a mercantile agency is the representative or agent of its subscribers in the business of obtaining for them credit ratings of persons with whom they propose to have dealings, and when a false statement is made to such representative and is communicated to the subscriber with the result that the subscriber, relying upon it, sells property and extends credit to one who becomes bankrupt, then the situation contemplated by the provision arises. If the amendment of 1910 did not thus enlarge the provision, then it did not change the law from what the courts had interpreted it to be before the addition of the word "representative."

Assuming that a mercantile agency may be the representative of its subscribers within the meaning of section 14b of the Bankruptcy Act as amended, the novel question in this case is whether the bankrupt made the false statement to the agency as the representative of the objecting creditors, in view of the fact that at the time the statement was handed the agency the objecting creditors were not subscribers. The determination of this question is controlled more by the character of the statement and the circumstances under which it was given than by the date of its delivery.

It may again be noted that the statement was flagrantly false; that the bankrupt admitted that he made it for the purpose of obtaining credit not from any particular person but from the trade generally,

which he addressed through the medium of the mercantile agency. This statement was not made in response to a particular trade inquiry but was made in anticipation of general trade inquiries to be made from time to time in the future. The statement given the agency was therefore in the nature of a general and continuing statement, addressed in effect to whom it may concern and running for an indefinite period.

[2] When the bankrupt addressed the statement to the trade generally through the agency, he gave it to the agency as the "representative" of any subscriber thereafter seeking information concerning his financial standing. The statement was therefore made to the agency in its capacity of agent or representative of those who were then subscribers and also of those who became its subscribers during the period through which the statement was intended to be used and was in fact used in obtaining credit. Such a period may be long or short according to varying circumstances and may conceivably be abbreviated and ended by intervening changes in the bankrupt's financial condition, but in the absence of such (and none appears in this case), the test of whether a false statement given upon one date and communicated and acted upon on a later date operates as a bar to a discharge, is two-fold: (1) Whether the agency was the representative of the prospective creditor at the time the statement was communicated to and acted upon by him; and (2) whether at that time the false statement was still in force and binding upon the bankrupt, to be determined according as it is found that the sale on credit was or was not the proximate result of the statement (In re Braverman [D. C.] 199 Fed. 863, 28 Am. Bankr. Rep. 513), and that its original falsity was or was not the thing that worked the mischief.

Applying this test, we are of opinion that the agency was the representative of the objecting creditors at the time the bankrupt's false statement was communicated to them, and that the objecting creditors were induced by the falsity of the statement to extend credit to the bankrupt at a time when the bankrupt intended the statement to serve that end.

The decree below is affirmed.

GOLDEN HILL DISTILLING CO. v. LOGUE.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2995.

1. BANKRUPTCY ⊜293(2)—VOIDABLE PREFERENCES—JURISDICTION OF COURT. Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552, as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798, and Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1916, § 9607), provides that suits by the trustee shall only be brought in the courts where the bankrupt might have brought them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under certain sections including section 60b (Comp. St. 1916, § 9644). Section 60b authorizes the trustee to avoid preferences and re-

cover the property or its value, and provides that for the purpose of such recovery any court of bankruptcy and any state court which would have had jurisdiction, if bankruptcy had not intervened, shall have concurrent jurisdiction. *Held* that, since the amendment of 1910, the bankruptcy court has jurisdiction of a suit to recover a preference, regardless of the amount involved or the citizenship of the parties.

2. BANKRUPTCY ⟸162—PREFERENCES—JUDGMENTS—"TRANSFER."

Under Bankr. Act July 1, 1898, c. 541, § 3, cl. 3, 30 Stat. 546 (Comp. St. 1916, § 9587), defining acts of bankruptcy, sections 60a, 60b, defining preferences and the right to recover them, sections 67c, 67f (Comp. St. 1916, § 9651), providing for the dissolution of liens obtained in legal proceedings, and section 1, cl. 25 (section 9585), defining a "transfer" as including the sale and every other and different mode of disposition of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift, or security, a creditor who recovers a judgment by consent or in invitum and by execution collects the judgment within four months preceding bankruptcy, and with reasonable cause to believe that a preference will result, receives a voidable preference, especially as, since the amendment of 1910, the debtor's intent is no longer relevant.

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

3. JUDGMENT ⟸707—CONCLUSIVENESS ON PERSONS NOT PARTIES.

The discharge of a receiver under a chattel mortgage on the property of a bankrupt, on a motion supported by affidavits tending to show that he was solvent, was not res judicata or binding on creditors or the trustee in a suit to recover a preference obtained a few days after such discharge.

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

Suit by James C. Logue, as trustee of Samuel Hornstein, bankrupt, against the Golden Hill Distilling Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shortly before judgment was taken and a levy made, as stated in the opinion, a receiver was appointed under the mortgage on the bankrupt's stock and fixtures, and a few days later the receiver was discharged on a motion in support of which affidavits were introduced tending to show that Hornstein was not insolvent, but that his assets were considerably in excess of his liabilities.

Hornstein conducted a saloon in Cleveland. The Distilling Company was his chief creditor, having control of a chattel mortgage which covered all his tangible assets, and having, also, an unsecured debt of about $1,200, represented by a cognovit note. Its manager, Bayer, was generally familiar with Hornstein's affairs. Hornstein's only asset, not covered by the chattel mortgage, was his license, which had a transfer value of $2,500. After certain proceedings, which need not be recounted, the Distilling Company took judgment on the cognovit note and caused the tangible property to be seized on the chattel mortgage and a levy to be made by the sheriff upon Hornstein's interest in the license. The sheriff thereupon advertised this interest for sale. After the notice had been running about two weeks, Hornstein's wife was appointed his guardian, upon the ground of his mental incompetency, and she thereupon filed, in the court where the judgment had been rendered, a motion to set it aside, and obtained a preliminary injunction against the sale. Her claim was that the debt had been paid. Upon this claim, there was a hearing upon the merits. The court decided that no part of the debt was successfully impeached, and denied the motion and dissolved the injunction. Thereupon, and on the same day, the sheriff sold the license to a third person, and paid over to the Distilling Company the $1,200. On the next day, a petition in bankruptcy was filed and the remainder of the license price was

eventually turned over by the sheriff to the trustee in bankruptcy. The trustee filed, in the bankruptcy court, a petition against the Disilling Company, asking the recovery of this $1,200 as a preference, and asking, also, a judgment for the value of goods returned by Hornstein to the Distilling Company shortly before the collapse, alleging that this return of goods was a preference. Upon the petition, summons was issued, the Distilling Company answered and the issue was tried before the District Judge (a jury having been duly waived), and he made findings of fact and law and entered judgment for the trustee for both amounts sued for. The Distilling Company brings error.

Frank C. Scott, of Cleveland, Ohio, for plaintiff in error.

C. F. Taplin, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The Distilling Company claims that the court below had no jurisdiction of the issue presented by the petition and answer, because there was neither the requisite amount in controversy nor the requisite diverse citizenship to give jurisdiction to a United States District Court. This claim depends, primarily, upon the construction to be given the language of section 60b of the Bankruptcy Act, as that act was amended in 1903 and in 1910. After defining a voidable preference and giving the trustee the right to recover, the section since 1903 has said:

"And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

The construction which the Distilling Company urges is not inconsistent with the precise language used. This construction is that the phrase "which would have had jurisdiction," etc., applies to and modifies both the preceding "any court of bankruptcy" and the preceding "any state court." Clause 8 of section 1 defines "courts of bankruptcy," and the construction urged would, therefore, be to the effect that any United States District Court or the Supreme Court of the District of Columbia or the United States courts of Alaska or any state court could entertain a suit to recover a preference, provided such court would have had jurisdiction of the same controversy before bankruptcy. Very early after the passage of the act, it was held (Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175) that by the effect of section 23b, jurisdiction of a suit under section 60b was restricted (unless it was enlarged by consent) to those courts where the suit might have been brought if proceedings in bankruptcy had not been instituted. It is common knowledge that the effect of this holding was distinctly to interfere with that uniformity of administration which was one of the objects of the Bankruptcy Act, and it has been thought that the amendment of 1903 to section 60b was for the purpose of giving that breadth of remedy which Bardes v. Bank had denied. When sections 23b and 60b are construed together as if they were one, the substantial effect of the amendment was to insert the words "in any court of bankruptcy or" before the words "in courts where the bankrupt * * * might have brought or prosecuted." There remained, however, an apparent inconsistency. Section 60b, as

amended in 1903 and as thus construed, says that such a suit might be brought in any court of bankruptcy, while section 23b, declaring generally the jurisdiction, continued to say that it was limited to the courts where the suits could have been brought if there had been no bankruptcy. In 1910, this inconsistency was removed by an amendment of section 23b which expressly excepts from the generally limiting language of the section the suits authorized by section 60b. The same inconsistency as to section 70e (Comp. St. 1916, § 9654) was removed in the same way, at the same time.

It is clear to us that, at least since the amendment of 1910, there is no room to doubt the jurisdiction of the United States District Court in a controversy such as this. We have repeatedly affirmed judgments of the same character. Both in Bank v. Chicago Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, and in Bush v. Elliott, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114, the court was considering cases which arose before the amendment of 1903.

[2] The Distilling Company next urges that the receipt by a plaintiff in execution of the amount of his judgment paid over to him by the sheriff from the proceeds of an execution sale, does not constitute a preference which is recoverable under section 60b. The argument is both that the judgment against Hornstein, after the exhaustion of the unsuccessful efforts made in his behalf, could no longer be said to have been "procured or suffered" by him, and that it is the intent of the section to legislate only against unsatisfied judgments without disturbing the status of the creditor who has, by execution sale, realized his judgment before bankruptcy petition filed. These two matters are sufficiently related to justify considering them together. We find no authoritative construction of the section in either particular, and we must determine its intent as best we may without such aid.

We find the subject of preference, resulting from legal proceedings, treated of by more or less similar language in at least three sections. Section 3, cl. (3), defining acts of bankruptcy, sections 60a and 60b, defining preferences and the right to recover them, and section 67c, providing for the dissolution of liens obtained in legal proceedings, all relate to the general purpose of securing equality among creditors and as against an effort of a creditor to collect by law on his own account. All three must be read together, and yet, it is quite impossible to bring them into detailed harmony. The preference, which is an act of bankruptcy, is only an execution levy or analogous lien which has been "suffered or permitted" to come into existence and which is allowed to continue until five days before the execution sale (Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352); the judgments regulated by section 60 are those which the bankrupt "procured or suffered" to be entered against him; and the liens reached by section 67c are invalid only if the lien was "sought and permitted" with the intent to work a forbidden preference. In Wilson v. City Bank, 84 U. S. (17 Wall.) 473, 21 L. Ed. 723, the court had to determine the validity, under the act of 1867 (14 Stat. 517, c. 176), of an execution lien existing in that form upon the property of the debtor at the time the petition in bankruptcy was filed, but it was necessary to consider both the provisions which defined an act of bankruptcy and

those which permitted the recovery of a preference. The conclusions of the court were:

"(1) That something more than passive nonresistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act.

"(2) That the fact that the debtor under such circumstances does not file a petition in bankruptcy is not sufficient evidence of such preference or of intent to defeat the operation of the act.

"(3) That, although the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

"(4) That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition."

In Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, the act of 1898 was involved. The sole question to decide was whether the judgment shown by that record had been "suffered or permitted" within the meaning of clause (3) of section 3. The judgment had been entered and the execution levy made without the consent or knowledge of the debtor, but by virtue of a cognovit note. The majority of the court held that such a judgment was to be deemed "suffered or permitted" within the meaning of this section; there were four dissenting judges adopting the contrary view. The opinion of the majority was based largely, if not essentially, upon the idea that by changing the language "procured or suffered," found in the act of 1867, and construed by Wilson v. City Bank, into "suffered or permitted," Congress had indicated its purpose that the active intent of the debtor to evade the equality of the Bankruptcy Act should no longer be the criterion, and that, therefore, the giving or allowing to continue the cognovit note which put it out of the debtor's power to resist the entry of a judgment when desired, was a sufficient suffering or permitting.[1] This decision is of no help in the present case, since section 60 retains the very language "procured or suffered" which was found in the act of 1867, and which, therefore, considered by itself, would ring the result of Wilson v. City Bank and not that of Wilson v. Nelson.

Turning, now, to the other branch of the contention, it must be conceded that there are, in sections 60a and 60b, no provisions which, in terms, reach the proceeds of a satisfied judgment, and that, since Wilson v. City Bank had ruled that under the act of 1867 the trustee could not recover such proceeds from the execution creditor, the clear expression of the contrary intent ought to be found in the act of 1898 before it should receive the contrary construction. It may also be said, according to the rule that things not specifically named in an enumeration are excluded, that the presence of provisions against the lien of a judgment and the omission of any mention of its proceeds raise a measure of presumption that the latter are not intended to be

[1] Wilson v. Nelson has been followed, if not extended, in Bradley Co. v. White (C. C. A. 5) 121 Fed. 779, 58 C. C. A. 55; Bogen v. Protter (C. C. A. 6) 129 Fed. 533, 64 C. C. A. 63; and Re Rung Co. (C. C. A. 2) 139 Fed. 526, 71 C. C. A. 342.

touched. The Supreme Court held, in Clarke v. Larremore, 188 U. S. 486, 490, 23 Sup. Ct. 363, 365 (47 L. Ed. 555), that where the proceeds of the execution sale were in the hands of the sheriff when the petition in bankruptcy was filed, the money should go to the trustee and not to the judgment creditor, but said:

"A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution and that which was done under them as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations."

Several District Court opinions have held that such an execution judgment lien is not invalidated by section 67f, but have declined to consider whether the proceeds of the sale could be recoverable under section 60b.[2]

Can the payment of the proceeds of execution sale be thought such a "transfer" as is contemplated by the section? The word "transfer" is given a broad meaning by the statutory definition. Section 1, cl. 25. A money payment is within this generality of definition. Pirie v. Chicago Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. There is surely a transfer by operation of law; the property goes to the purchaser and the proceeds to the creditor; yet, there has not been that voluntary action naturally implied from the use of the word "made" (by the bankrupt).[3]

It must be confessed that the application of section 60b to the situation which we have described as arising in this case is not clear and certain, and we suspect that there can be no construction of these and the other sections mentioned which will not develop some inconsistencies and conflicts; but we conclude that the key is furnished by the amendment of 1910. Prior to that time it had been essential, in order to recover a preference under this section, to show that the debtor had intended to accomplish a preference in violation of the act. It was consistent with this theory that collection against him by legal proceedings was not condemned, unless they were by his procurement, and that a transfer was not voidable unless it had been "made" by him. When the amendment of 1910 provided that the debtor's intent was no longer relevant, but that the transaction might be avoided if the creditor had reason to believe that he was thereby getting a larger percentage than other creditors would receive, it destroyed the reason for longer requiring this voluntary participation by the debtor. The principle of the decision found in the majority opinion in Wilson v. Nelson, applies here; and since the intent and purpose of the debtor are made no longer important, the language used and that allowed to remain must

[2] Re Bailey (D. C.) 144 Fed. 214, 216; Re Resnek (D. C.) 167 Fed. 574; Nelson v. Svea Co. (D. C.) 178 Fed. 136, 140; Re Weitzel (D. C.) 191 Fed. 463.

[3] Whether the receipt of money on execution is a transfer within this section has been considered in the District Court, but not decided, in a case where there was no collusion. Re Blair (D. C.) 102 Fed. 987; Re Knickerbocker (D. C.) 121 Fed. 1004; Re Bailey (D. C.) 144 Fed. 214, 216; Dreyer v. Kicklighter (D. C.) 228 Fed. 744, 752; Grant v. Bank (D. C.) 232 Fed. 201, 217.

be construed to effectuate this result, however far from apt the words may be.

When we consider the three sections first named, as well as section 67f, we conclude that the general purpose of the act, in its present form, can only be effectuated, and that inconsistencies and uncertainties are best reconciled and clarified, by holding that the creditor who recovers a judgment, by consent or in invitum, and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe, etc., receives a voidable preference, which he must repay to the trustee.

[3] The Distilling Company further contends that its agent, Bayer, had no sufficient reason to believe that the judgment or transfer would effect a preference, and this because he had no such reason to think Hornstein insolvent. The same reason is alone urged against the recovery for the goods returned on account. This presents only a question of fact. It is true that there had been a more or less formal judicial determination only a few days before that Hornstein was solvent; but this was, in no sense, res judicata, binding the creditors or the trustee, and the circumstances point strongly to the conclusion that Bayer must have reasonably anticipated that the assets were not enough to pay the debts. A review of the evidence pro and con would not be of value. It is enough to state our conclusion.

The judgment must be affirmed.

In re HONOLULU CONSOL. OIL CO.

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

No. 3003.

JUDGES ⇐43—DISQUALIFICATION—INTEREST AS STOCKHOLDER.

Where the United States government, as part of a unitary scheme or plan of litigation, has brought various suits against various oil companies to recover possession of oil lands and judgments for the value of oil or mineral extracted therefrom, in which the question of damages was identical, a judge owning stock in one of such oil companies is disqualified to sit on the trial of such a suit against another of such oil companies, under Judicial Code (Act March 3, 1911, c. 231) § 20, 36 Stat. 1090 (Comp. St. 1916, § 987), providing that, whenever it appears that the judge of any District Court is in any way concerned in interest in any suit pending therein, it shall be his duty to enter the fact on the records and certify an authenticated copy thereof to the senior judge for the circuit.

Petition for Order to the District Court of the United States for the Northern Division of the Southern District of California.

Original petition by the Honolulu Consolidated Oil Company for a writ of mandamus, directed to Hon. Benjamin F. Bledsoe, Judge of the United States District Court for the Southern District of California, Northern Division, commanding him to enter an order that an authenticated copy of certain suggested disqualifications be certified to the senior Circuit Judge of the circuit. Writ granted.

Morrison, Dunne & Brobeck, of San Francisco, Cal., George E. Whitaker, of Bakersfield, Cal., and W. N. Mills, of San Francisco, Cal., for petitioner.

E. J. Justice, Sp. Asst. Atty. Gen., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for respondent.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

PER CURIAM. It is alleged in the petition, among other things, that the Honolulu Consolidated Oil Company is the defendant in 17 certain suits brought by the United States in the Southern district of California, Northern division of said district; that in the complaints in said suits it is alleged in substance that the United States is the owner and entitled to the possession of the lands described in the said complaints; that such lands are oil lands and gas lands; that the same were included within the executive withdrawal order of September 27, 1909; that, notwithstanding the premises and in violation of the alleged proprietary rights of the United States, the petitioner herein entered upon and took possession of such premises, subsequent to the said date of such withdrawal, for the purpose of exploiting the same for petroleum, oil, and gas, and did so exploit the same, and appropriate to its own use the oil and gas therein explored for, drilled, discovered, and extracted; that this petitioner was not, nor was any other person at the time of such withdrawal, the bona fide occupant or claimant of such premises, or in the diligent prosecution of work leading to the discovery of oil or gas thereon; that it was further alleged that after such withdrawal the petitioner extracted, produced, and converted to its own use from the premises in question large quantities of petroleum, oil, and gas, and is continuing to do so, and will so continue, to the alleged irreparable damage of the plaintiff, if not restrained from so doing. By way of relief it was prayed, among other things, that an accounting be had by defendants, and that each of them make complete and itemized disclosures of the minerals, particularly gas and petroleum, removed, extracted, or received by them from such lands, and of any and all moneys or value received from the sale or disposition of minerals therefrom, and any rents or profits received under any sale, lease, transfer, conveyance, or agreement concerning such lands, or any part thereof, and that the United States recover from the defendants all damages sustained by the United States in the premises, and for the appointment of a receiver. An answer was interposed in each suit, substantially joining issue upon the ownership, and also upon the right of possession by the United States in and upon the lands in question, or any gas, petroleum, or other minerals therein contained.

It is further alleged in the petition that after issue joined, and on the 26th day of May, 1917, before Hon. Benjamin F. Bledsoe, an application was made by the United States for an inspection of certain books and documents of the petitioner; that this was the first adversary proceeding in the cause; that the petitioner resisted said application, upon what it believed to be sufficient and meritorious grounds, and, conceiving it to be its duty, seasonably and without delay suggested the disqualification of Hon. Benjamin F. Bledsoe under section 20 of the

Judicial Code; that petitioner formally made such suggestion in writing and supported the same by affidavit. This was done in each of the said suits. The suggested disqualification was that where the sitting judge has a lawsuit, or is a stockholder of a corporation having a lawsuit, pending or impending with another person, or with the same person or plaintiff, which rests upon a like statement of facts or upon the same point of law as that pending before him, it is a sufficient ground of disqualification. Accordingly it was moved on behalf of the petitioner that this disqualification be entered in the records of the court, and that an authenticated copy thereof be forthwith certified to the senior Circuit Judge of this circuit, to the end that such proceedings should be had thereon as provided in section 14 of the Judicial Code (Comp. St. 1916, § 981). Thereupon the said sitting judge denied the application for his disqualification, to which petitioner then and there duly excepted.

Attached to the petition is the affidavit of William P. Roth, the secretary of the Honolulu Company and one of the defendants in the suit, alleging that in these suits the United States seeks to recover possession of the lands described in the complaints, and judgments for the gross value of all oil or other mineral extracted therefrom during the use or occupancy thereof by the defendants; that in each of said cases there are one or more corporations defendant whose stockholders are subject to the stockholders' liability under the laws of California; that these oil suits are all a part of a unitary scheme or plan of litigation brought and maintained by the United States against the various oil companies in the state of California; that an important question to be determined in each of such suits would be the rule of damage to be applied; and that, in so far as the decision of such question is concerned, each of said cases is practically identical. These allegations were not denied in the answers filed herein, and it will be assumed that they are true.

Hon. Benjamin F. Bledsoe answered, stating in substance that some years ago, for a cash consideration, the exact amount of which he could not remember, but which to the best of his recollection amounted to some $300, he purchased from a stockholder of the Consolidated Midway Oil Company a small block of stock; that he did not remember whether it was fully paid up or not; that thereafter, and some time prior to February 1, 1912, he was apprised of some plan for a reorganization of this corporation, and that all the property of this corporation had been transferred to the National Pacific Oil Company, and that pursuant to such arrangement, and upon surrender of respondent's shares of stock of the Consolidated Midway Oil Company, there would be issued to him his proportionate part of the stock of the said National Pacific Oil Company; that thereupon respondent surrendered his stock in said Consolidated Midway Oil Company, and received in lieu thereof 1,125 shares of the stock of the National Pacific Oil Cmpany; that some time early in 1915 respondent had presented before him some phase of the oil litigation in which the United States was plaintiff and the said National Pacific Oil Company was a defendant; that thereupon respondent, realizing his ownership and possession of the 1,125 shares

of stock of that company, suggested his own disqualification in the case in which the said National Pacific Oil Company was a party, and which was then pending before him, but that the said suggested disqualification was waived by the parties to that controversy; that while respondent was still the owner and in possession of such stock, and while he was holding a session of his court at Fresno in October, 1915, counsel for the defendant in United States v. Devil's Den Consolidated Oil Co., being the same counsel representing the petitioner in this proceeding, suggested the disqualification of respondent to hear that case because of his ownership of the stock in the National Pacific Oil Company, and respondent thereupon declined to hear said case; that, desiring to relieve himself, so far as he might do so, from any legal disqualification, in order that the matters of business coming before his court might not suffer through delay, and because of the disqualification of the judges with respect to the great mass of oil litigation pending and impending therein, he indorsed said 1,125 shares of stock in blank and delivered the same to a broker in Los Angeles, with the request that they should be sold in the market at such price as was then ruling; that thereafter respondent was advised that such stock had been sold, and respondent on November 3, 1915, received a check for the purchase price thereof amounting to $16.90; that thereafter, in July, 1916, upon application for some form of provisional relief in the same case which had come before respondent in Fresno in October, 1915, the disqualification of respondent because of his ownership of the stock herein referred to was again urged; that thereupon respondent, conceiving that he had been disqualified in the case when the disqualification was first urged because of his then ownership of such stock, and that as to such case such such disqualification could not be removed by a subsequent sale of such stock, declined thereafter to hear said case, but as to any case which arose after respondent had entirely parted with his stock he conceived that no legal disqualification attached to him because of his previous ownership of said stock.

With the filing of this answer on the part of the respondent, the United States filed a demurrer to the petition, which after a hearing was overruled. The case coming on for a hearing upon the petition and answer, the petitioner offered the testimony of Mr. A. L. Weil and Mr. Oscar Sutro, in which they stated the circumstances under which the alleged disqualification of Judge Bledsoe was brought to his attention in the first instance by the defendants, and his action with respect thereto. In an additional answer filed by Judge Bledsoe, relating to the testimony of Mr. A. L. Weil and Mr. Oscar Sutro, Judge Bledsoe states that in his original answer he referred to a prior hearing in Los Angeles on "some phase of the oil litigation," wherein he suggested his own disqualification, and the disqualification was waived by the parties to the action, and not to the hearing at Fresno referred to by Mr. Weil and Mr. Sutro. We are of opinion that this particular controversy concerning the time and circumstances relating to the suggested disqualification of the respondent and the waiver of disqualification is immaterial to any issue now before this court.

The question to be determined is whether Judge Bledsoe is in any

way "concerned in interest" in the pending suit by reason of a stockholder's liability growing out of his ownership of 2,250 shares of stock of the Consolidated Midway Oil Company prior to February 1, 1912, and his ownership of 1,125 shares of stock of the National Pacific Oil Company, into which the former company was reorganized, and the ownership of the latter stock in lieu of the former from February 1, 1912, to November 3, 1915. Section 20 of the Judicial Code provides:

"Whenever it appears that the judge of any District Court is in any way *concerned in interest* in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior Circuit Judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen."

The case referred to by counsel on both sides as determining this question was mainly that of Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22. The rule stated in that case is that a judge is disqualified in any litigation where he has any certain, definable, pecuniary, or proprietary interest which will be directly affected by the judgment that may be rendered. The court, in support of this rule, referred to a number of cases, among others that of North Bloomfield G. M. Co. v. Keyser, 58 Cal. 315. In that case the respondent was the presiding judge in the superior court of Yuba county, Cal., and an owner of lots in Yuba City, in the county of Sutter, bordering upon the Feather river. The city of Marysville is situated on the north bank of the Yuba river, at its junction with the Feather river. In an action brought by the city of Marysville against the North Bloomfield Gravel Mining Company and others, it was alleged that the mining operations of the defendants on the headwaters of the Yuba river were filling up the Yuba river with mining sediment, slickens, and small stones, which, being carried down the channel, caused the waters of the river in the winter season to overflow its banks, and the sediment, slickens, sand, and small stones to be deposited on the lands of the city of Marysville bordering upon the Feather river. The defendants moved for a change of venue, upon the ground that the presiding judge was directly interested in the result of the action. The land owned by the judge was not in the city of Marysville, the complainant in the action, but in Yuba City, on the opposite side of the Feather river, and, while it was not involved in the action, it was equally affected by the mining operations complained of. The judge denied the motion for a change of venue, holding that, as he was not interested in the case, he was not disqualified from sitting in the cause, whereupon certain of the defendants applied to the Supreme Court for a writ of prohibition to prevent Judge Keyser from acting in the cause. The Supreme Court, speaking through Judge Ross, said:

"It is an ancient maxim, and one founded in the most obvious principles of natural right, that no man ought to be a judge in his own cause. That prin-

ciple finds expression in our statute in these words: 'No justice, judge, or justice of the peace shall sit or act in any action or proceeding: 1. To which he is a party, or in which he is interested.' * * * Section 170, Code Civ. Proc. This provision should not receive a technical or strict construction, but rather one that is broad and liberal. 'The court ought not to be astute to discover,' said the Supreme Court of Michigan, in Stockwell v. Township Board of White Lake, 22 Mich. 350, 'refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.' Undoubtedly the prohibition does not extend to cases where the interest is simply in some question or questions of law involved in the controversy, or when it is indirect and remote; and if the interest of Judge Keyser in the suit pending before him extends no further than that, it is clear that he is not disqualified to determine the cause. But we cannot so regard his interest upon the facts as presented."

It was accordingly held that the judge had an interest in the outcome of the litigation, and that it was a direct, measurable, pecuniary interest, and that he was disqualified to sit in the case.

We are of opinion that, under the rule stated in these two cases, and in the cases cited by the court supporting the doctrine there declared to be the law, Judge Bledsoe is concerned in interest in the result of this suit by reason of his stockholder's liability in the companies mentioned. We are of opinion, furthermore, that inasmuch as the matter is submitted with expressed disavowal of any purpose other than to obtain a ruling upon the naked, legal question involved, the court need not be astute in making nice distinctions as to the meaning of the words "concerned in interest," but can best do full justice in the premises by holding that, under the showing made, the judge is sufficiently related to the litigation to impel the conclusion that he is concerned in interest, and therefore should not sit.

A writ of mandamus will accordingly issue directed to Hon. Benjamin F. Bledsoe, Judge of the United States District Court for the Southern District of California, requiring him to enter an order in the records of the court in these cases in accordance with this opinion, and that an authenticated copy thereof be forthwith certified to Hon. William B. Gilbert, the senior Circuit Judge of this circuit.

FREEMAN v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2734.

1. POST OFFICE ⊂⊃35—FRAUDULENT USE OF MAILS—DEFENSES.

In a prosecution for using the mails in the execution of a scheme to defraud, it was not a defense that the letters charged to have been mailed were mailed in reply to decoy letters sent by post office inspectors, where the decoy letters were not sent for the purpose of suggesting the commission of a crime, but for the purpose of ascertaining whether defendant was engaged in using the mails in a scheme to defraud.

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

* Rehearing denied October 8, 1917.

2. CRIMINAL LAW ⊂⊃1043(3), 1056(1)—NECESSITY OF OBJECTIONS AND EXCEPTIONS.

The objection that the letters charged to have been mailed were mailed in answer to decoy letters was not available on appeal, where no objection was made in the court below to the introduction of the letters on that ground, and no exception was taken to an instruction that it was immaterial that the letters were addressed to fictitious persons and sent in response to decoy letters, and that it was the duty of the Post Office Department, upon learning or suspecting that any scheme to defraud was being operated through the mails, to see that the fraud was uncovered.

3. CRIMINAL LAW ⊂⊃371(1), 1169(1)—EVIDENCE OF OTHER OFFENSES—HARMLESS ERROR.

Defendant was charged with using the mails in the execution of a scheme to defraud, whereby persons, irrespective of their symptoms or whether they were in health or disease, would be informed by defendant that they were afflicted with diseases which he could or would cure upon payment of certain sums of money. A witness not named in the indictment as one of those to whom letters were mailed testified to correspondence with the concern operated by defendant and that he took treatment in person. *Held*, that if, as defendant claimed, the treatment was for an actual ailment and given in good faith, defendant was not injured thereby, while, if the evidence indicated that the treatment was not in good faith, and was for an alleged ailment from which the witness was not suffering, it was competent for the purpose of showing want of good faith, and as tending to show the intent with which the acts charged in the indictment were done.

4. CRIMINAL LAW ⊂⊃1129(4)—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where about 20 objections were taken to the testimony of a witness, an assignment of error that the court erred in admitting the testimony of such witness "as to what was done by the defendant prior to 1910," and in refusing to strike out "portions of such testimony," and "in overruling each of the objections of defendant to the testimony of the said witness," was insufficient, as it was not directed to any one of the objections to the testimony.

5. POST OFFICE ⊂⊃48(8)—CRIMINAL OFFENSES—ADMISSIBILITY OF EVIDENCE.

On a trial for using the mails in furtherance of a scheme to defraud, whereby persons would be treated for diseases, whether afflicted therewith or not, the indictment charged that the scheme was devised in May, 1912, and that letters were sent in execution thereof at different times from July to November of that year. *Held*, that testimony of a former employé of the concern with which defendant was connected, as to defendant's connection therewith and the course of business dealing when he was so employed in 1909 and 1910, was not so remote from the dates charged in the indictment as to be inadmissible.

6. CRIMINAL LAW ⊂⊃1147—REVIEW—DISCRETION—PUNISHMENT.

The nature of a sentence in a criminal case rests in the discretion of the trial court, and such discretion will not be reviewed by the Circuit Court of Appeals in any case where the punishment assessed is within the statutory limit.

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Gideon M. Freeman was convicted of an offense, and he brings error. Affirmed.

An indictment in five counts charged that the plaintiff in error, doing business under the name of Dr. Jordan, L. J. Jordan Company, and Jordan Museum of Anatomy, devised a scheme or artifice to defraud, or for obtaining

money or property by means of certain false pretenses, to be effected by means of the post-office establishment of the United States, the substance of which was that he should place or cause to be placed advertisements in newspapers of general circulation, or in letters, booklets, or other prints, setting forth in substance that Dr. Jordan was a physician practicing in San Francisco, and especially qualified to treat private diseases of men, and by means of said advertisements, letters, booklets, and other prints he then and there intended to cause or induce John Bammer, J. P. Millspaugh, George P. Alberts, Anson Ashford, and John Caroway, and divers other persons whose names are unknown, and the public generally, to open correspondence with Dr. Jordan by means of the post office, relative to their real or supposed ailments, which correspondence would be answered by the supposed Dr. Jordan by means of letters placed in the post office, stating that said persons, irrespective of their symptoms, or whether they were in health or disease, were afflicted with diseases which he could cure, and would cure upon payment to him of certain sums of money, and the indictment set forth other details to show that the scheme was fraudulent. It charged, further, that the plaintiff in error, on July 2, 1912, for the purpose of executing said scheme, placed or caused to be placed in the post office, to be delivered thereby, a certain letter, upon which postage had been prepaid, addressed to John Bammer, Colusa, Cal., a copy of which letter was set out in the indictment. The other four counts were identical with the first, except that the letters were alleged to have been mailed to the other persons named in the indictment. Upon the trial the plaintiff in error was found guilty as charged, and he was sentenced to pay a fine of $1,000 and to be imprisoned for one year in jail.

Knight & Heggerty and Charles J. Heggerty, all of San Francisco, Cal., for plaintiff in error.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

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

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] It is contended that the writing and mailing of the letters which are set out in the indictment were not criminal, and do not constitute crimes, for the reason that the letters were solicited by the United States post office inspectors in letters written by them and sent through the mails to Dr. Jordan as decoy letters, that the government officers initiated the crime, and that the case is thereby brought within the principle of the decisions of this court in Woo Wai v. United States, 223 Fed. 414, 137 C. C. A. 604, and Sam Yick v. United States, 240 Fed. 60, — C. C. A. —. The ruling in each of the cases so referred to was based upon the ground that the government officers had suggested the crime and induced its commission, and that the offense did not have its origin in the mind of the accused. The distinction between those cases and the case at bar is plain. Here the accused was suspected of being engaged in using the mails in a scheme to defraud. It was to ascertain whether such was the case, and not to suggest the commission of a crime which otherwise would not have been committed, that the decoy letters were written. The case comes clearly within the doctrine of Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, in which it was said:

"It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business."

See, also, Goldman v. United States, 220 Fed. 57, 135 C. C. A. 625, and cases there cited.

The contention of the plaintiff in error is further answered by the fact that in the court below no objection on the ground which is now urged was made to the introduction of the decoy letters, nor was any exception taken to the instruction to the jury in which it was said:

"It is not material that such letter or letters was addressed to fictitious persons and sent in response to test letters, to decoy letters sent them by the post office inspectors. It is the business of the executive officers of the government to see that this law is enforced, and when the Post Office Department, through its representatives, in the discharge of their duty, learn or suspect that any scheme to defraud is being operated through the United States mails, it is their duty to see that the fraud is uncovered."

[3] Error is assigned to the admission of the testimony of Walker, a witness for the prosecution, as to correspondence which he had with the Jordan Museum, and to the denial of the motion of plaintiff in error to strike out the testimony of the witness that he took treatment in person. Walker, who resided at San Jose, testified that he had correspondence with the Jordan Museum, and that he had received letters purporting to be from Dr. L. J. Jordan, which letters he identified, and that after the first correspondence he visited the Jordan Museum and received treatment there from a supposed Dr. Jordan, a man who looked very much like the plaintiff in error. It is unnecessary to consider at length the testimony given by the witness. If it is true, as the plaintiff in error asserts, that the evidence shows that the treatment he received was for an actual ailment, and was given in good faith, the evidence could not have injured the plaintiff in error; on the contrary, its effect would have been to his benefit. But if the evidence indicated that the treatment was not in good faith, and was for an alleged ailment from which the witness was not suffering, it was competent for the purpose of showing the want of good faith in the conduct of the business in which the plaintiff in error was engaged. The evidence of the correspondence and evidence of the treatment were also clearly admissible as tending to show the intent with which the acts charged in the indictment were done. Colt v. United States, 190 Fed. 307, 111 C. C. A. 205; Thomas v. United States, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505, and cases there cited.

[4, 5] The witness Boerner was called by the government to show the course of the business dealings of the Jordan Museum, for which he occupied the position of stenographer from May, 1909, to October, 1910. It is contended that the testimony was incompetent, for the reason that the indictment charged the scheme to have been devised in May, 1912, and the letters to have been sent at different dates from July to November of that year. It is to be observed, first, that the assignment of error is not sufficient to direct the attention of the court to any particular error in the admission of the testimony. It assigns as error the admission of testimony of the witness "as to what was done by the defendant prior to 1910," and the refusal of the court "to strike out portions of said testimony," and "in overruling each of the

objections of defendant to the testimony of the said witness." There were about 20 objections to the testimony, and the assignment is not directed to any one of them.

But, irrespective of the defective assignment, we think all the testimony was admissible. Boerner testified as to a course of dealing during the time while he was in the employment of the Jordan Museum, which was in harmony with that which the evidence disclosed as to the period covered by the indictment. He testified that the plaintiff in error was one of the directors of the company which carried on the business, that in his name was issued the license to do the business, for which $25 was paid quarterly, that the plaintiff in error had authority to sign checks, and that he received monthly his share of the profits of the business. The time referred to in the testimony of Boerner was not so remote from the dates charged in the indictment as to render the evidence inadmissible to show the course and methods of the business so conducted by the plaintiff in error and his associates, his relation to that business, the sending out of letters and circulars to correspondents in the forms that were used in the correspondence referred to in the indictment, and, in general, the commission of offenses of the same nature as those for which the plaintiff in error was indicted.

It is urged that the evidence is insufficient to prove the material allegations of the indictment, and that the court erred in denying the motion of the defendant, made at the conclusion of the government's case, to take the case from the jury. The presentation of that motion to the court below is ineffectual to bring the question of the sufficiency of the evidence before this court, for the reason that after the motion was denied, the plaintiff in error introduced evidence on his own behalf, and at the conclusion of the whole case, did not renew his motion.

[6] It is urged that, in consideration of the nature of the testimony, this court should modify the sentence and judgment, so as to omit the imprisonment of the plaintiff in error. To this it is to be said that the question of the nature of the sentence was one which rested in the discretion of the court below, a discretion which will not be reviewed in this court in any case where the punishment assessed is within the statutory limits. It is true that in United States v. Wynn (C. C.) 11 Fed. 57, and Bates v. United States (C. C.) 10 Fed. 92, it was held that a Circuit Court, on appeal from a District Court, was not bound to impose the same sentence as was imposed by the court below; but those rulings were made in view of the peculiar language of the third section of the act of March 3, 1879 (20 Stat. 354, c. 176), which provided that:

"In case of an affirmance of the judgment of the District Court, the Circuit Court shall proceed to pronounce final sentence and to award execution thereon."

There is no such provision in the act creating the Circuit Court of Appeals. Those courts are given only appellate jurisdiction to review, by appeal or by writ of error, final decision in the District Court.

We find no error. The judgment is affirmed.

CITY OF CHICAGO v. WHITE TRANSP. CO.

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

No. 2421.

1. MUNICIPAL CORPORATIONS ⟸723—LIABILITY FOR MARITIME TORT—EFFECT OF STATE LAW.
   A suit in admiralty may be maintained against a municipal corporation for a tort, if a cause of action is stated under the maritime law, although the same acts of its servants would not constitute a cause of action under the local state law.

2. MUNICIPAL CORPORATIONS ⟸853—LIABILITY IN ADMIRALTY—MARITIME TOOL.
   Libelant's steamer was tied up for the winter in the Chicago river, when on a very cold night a fireboat owned by the city, in fighting an elevator fire on the bank, located near the steamer, so handled its apparatus that her hold was filled with water and her deck and side coated with ice, causing her to sink. *Held*, that the injury was maritime, for which, if due to negligence, the city was liable in admiralty.

3. MUNICIPAL CORPORATIONS ⟸853—LIABILITY FOR TORTS—NEGLIGENCE OF SERVANTS.
   Evidence that the fireboat unnecessarily remained in its position, with knowledge by its captain that the steamer's hold was filling and she was listing more and more from the accumulating ice, and that it was moved only because of fear of injury from the sinking steamer, *held* to sustain a finding of negligence.

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

Suit in admiralty by the White Transportation Company, owner of steamer Arizona, against the City of Chicago. Decree for libelant, and respondent appeals. Affirmed.

Chester E. Cleveland, of Chicago, Ill., for appellant.

Charles E. Kremer, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge. [1] I. Appellee's steamer, the Arizona, was sunk in the Chicago river through the alleged negligence of the city's servants in the management of one of the city's fireboats. By the law of Illinois a municipal corporation is not liable to the owner of property for negligence of firemen in the performance of their duty. This, of course, applies to acts within the sovereign dominion of Illinois. In the case of Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, it was held that for every maritime tort there is redress if the admiralty court has jurisdiction of the offending person or thing; that, though a libel in personam is not maintainable against a sovereign, it is not for lack of a cause of action in admiralty, but on account of the sovereign's immunity from process; that a municipal corporation, like private corporations and persons within the reach of the court, is subject to process; and therefore that a municipal corporation must respond to a libel in personam if a cause of action is stated under the maritime law, although the same acts of its serv-

ants would not constitute a cause of action under the local law of the state. So the present libel in personam was a proper proceeding.

[2] II. At the close of navigation, the libel alleged, the Arizona was laid up for the winter at a dock on the east side of the Chicago river; that one night in midwinter a fire broke out in a grain elevator located on the west bank of the river, northwest of the Arizona; that a gale was blowing from the northwest, and the thermometer registered below zero; that the fireboat negligently took a position in the river near the Arizona, and negligently operated and continued to operate the fire apparatus in such a way that the water therefrom ran into the Arizona's hold, and also formed large masses of ice on her decks, cabins, rails, and port side, so that she began to list to port, and finally sank, all without fault of the libelant. The damages asked were the expenses of raising and repairing her.

Do these allegations exhibit a cause of action? In the Workman Case and in the other citations by appellee (Thompson Navigation Co. v. City of Chicago [D. C.] 79 Fed. 984; Philadelphia v. Gavagnin, 62 Fed. 617, 10 C. C. A. 552; The Major Reybold [D. C.] 111 Fed. 414; Port of Portland v. United States, 176 Fed. 866, 100 C. C. A. 336; Island Transportation Co. v. Seattle [D. C.] 205 Fed. 993), the injuries to the libelants' vessels occurred through collisions; that is, the negligence of the municipal corporations was in the operation of their vessels as vessels. Here, it is to be observed, the sole negligence charged consisted in bringing the fire apparatus so near the Arizona, and operating it in such a way, as to cause her to sink. No direct precedent has been cited by counsel or found by us; and so the question must be answered in the light of analogies. If the damage to the Arizona had resulted from the operation of fire apparatus located upon the banks of the river, a different question would be presented. Here, however, not only the Arizona, but also the instrumentality which injured her, was upon the navigable waters of the United States. In the federal license of the fireboat there were no provisions which would exempt the city of Chicago from any maritime liability which under the same circumstances would fall upon a private corporation or individual. It would therefore seem that, following in the line of the principles declared in the Workman Case, a municipal corporation is liable for any negligent act, committed on navigable waters, which would render any private corporation or any individual liable. And as to these latter, liability is created not merely by the negligent handling of their vessels, but as well by the negligent setting in motion of any force from their vessels which causes an injury to another vessel upon navigable waters. In The Chickasaw (C. C.) 41 Fed. 627, a steamer, moored to her wharf and with her furnaces fireless, cut loose a coal flat which was lashed to her side; the coal flat was carried down by the current of the river and drifted against and injured the libelant's vessel; and the decision turned on the question whether under the evidence the act of the Chickasaw's mate in setting the coal flat adrift was a negligent act. Very obviously the movements of the Chickasaw herself were not involved; but the injury to the libelant's vessel was caused by the impact of the coal flat. In The Clarita, 23 Wall. 1, 23 L. Ed. 146, a privately owned fireboat negligently permitted a burn-

ing vessel, which the fireboat had taken in tow, to get loose and to drift near and set fire to the libelant's bark. The negligence charged and proven consisted not at all in the lack of proper equipment or of proper management of the fireboat as a vessel; it consisted in the failure to provide fireproof hawsers which would have enabled the fireboat to prevent the burning vessel from escaping and communicating fire to other vessels. If any analogies may be drawn from these citations to the present case, they certainly are not as close as might be desired; but we believe that they justify, if not require, the application of the Workman decision to the present libel.

[3] III. The Arizona was tied with chains to a dock on the east side of the river about 200 feet east southeast of the burning elevator which was on the west side of the river. South of the burning elevator about 75 feet was the Minnesota elevator which the fire marshal had instructed the captain of the fireboat to save. Many other men and apparatus were engaged in other assigned tasks in the general effort to subdue and prevent the spread of the fire. A gale of 40 miles an hour was blowing from the northwest. The fireboat tied a forward line to a vessel lying south of the Arizona and an aft line to the Arizona, so that the fireboat lay on the port quarter of the Arizona. From this position the fireboat threw water on the south wall and the south portion of the east wall of the burning elevator. Spray from the nozzles was blown upon the aft part of the Arizona, water flowed through her hatches into her hold, and ice formed on the port side of her deck and cabins. She soon began to list, and finally, under the weight of ice 9 feet thick and of the water in her hold, she snapped her chains and sank.

The fireboat began her operations about 10 p. m. and continued fast to the Arizona until about 4 a. m. The Arizona sank about 7 a. m.

In the testimony of the captain of the fireboat and of one of his men, it was claimed that when they arrived the Arizona was already listing; that on examination her hold was found to contain a large quantity of water; and that, as she continued to list, water came into her through seams in her port side above the water line. But the testimony respecting the Arizona's condition before and after the sinking clearly establishes that the sole cause was the water from the nozzles of the fireboat, and the claim to the contrary is not now urged by appellant.

One contention of appellant is that the absorption of the men in fighting the fire, together with the darkness and smoke, prevented them from noticing and appreciating the increasing peril of the Arizona. Not long after the fireboat had been in operation the captain observed the listing and sent men on board the Arizona. These men, at the captain's direction, put in siphons to draw water from the hold. And the captain saw that water was being thrown in faster than it was being taken out; that she was sagging at the stern and listing to port more and more; and that "there was ice only at the aft part of her (right where the fireboat was), there was no ice forward at all, because there was no chance for ice there." And when he finally quit the Arizona it was because her condition was such that he thought she might break her chains at any moment and imperil his fireboat.

Appellant's principal argument on the evidence is that the position taken by the fireboat was "necessary and the only one suited for the purpose of effectually extinguishing the fire and protecting adjoining property." The captain and others, as experts, gave that as their opinion, and there was no expert testimony to the contrary. The reason given for the opinion was that thus the streams of water could be thrown directly against the wind and that this method was the most effective. If that be accepted as true, nevertheless the inquiry must be extended to the subsequent circumstances as the continually increasing peril to the Arizona became apparent. From the portion of the captain's testimony quoted in the preceding paragraph, it is evident that the range of spray from the fireboat's nozzles was comparatively limited. Would a reasonably prudent person have persisted or would he have changed his position? It would seem that a comparatively slight shifting of position would not have materially interfered with the execution of the fireboat's assignment to save the Minnesota elevator. Further, according to the undisputed testimony of a witness, about 1 a. m. "the wind changed around from the northwest into a west direction and it changed the course of the fire." So, according to the captain's theory of the greatest effectiveness, he continued in a relatively ineffective position for several hours before leaving the Arizona; and it was during those hours that the Arizona came to the point of imminent peril. It was only on account of the resulting peril to his fireboat that the captain left and went to the east side of the river to continue his operations. And at that time, according to the captain's own testimony, the fire "was darkened down, under control, well under control." If in the first hours the raging blaze prevented him from going to the east bank opposite the Minnesota elevator, it would seem reasonable to infer that during a material time preceding 4 a. m. he could at least have made the slight shift necessary to avoid the further loading of the Arizona with water and ice, because the condition of having the fire "darkened down and well under control" was not an instantaneous occurrence at 4 a. m.

The principle for guidance was:

"Where the danger is great, the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger." The Clarita, supra.

But the record impresses us that the captain believed that for any damage he did in operating the fire apparatus no action would lie, and that he acted accordingly.

There is no contention that appellee was in any way at fault.

Our conclusion is that the evidence sustains the charges of negligence laid in the libel.

The decree is affirmed.

E. G. STAUDE MFG. CO. et al. v. LABOMBARDE et al.

(Circuit Court of Appeals, First Circuit. June 7, 1917.)

No. 1276.

1. COURTS ⟸332—PRACTICE—RULES.
The Equity Rules, which went into effect in February, 1913, apply to proceedings in causes then pending, as well as those thereafter brought.

2. COURTS ⟸357—FEDERAL COURTS—EFFECT OF DISMISSAL—COSTS.
The time for taking of depositions under equity rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi) having expired, the cause was placed on the trial calendar pursuant to rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv). Thereafter, on stipulation of the parties that the case should be continued by being dropped from the trial calendar as provided in equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), the cause was ordered dropped; the order directing payment of all costs by the parties. Rule 57 declares that continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all parties and that all costs incurred theretofore be paid, whereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application by either party, but, if not so reinstated, the suit shall be dismissed without prejudice to a new one. Neither party applied for reinstatement within the year. *Held*, that both were equally in default, and in such case a subsequent order of dismissal could not assess defendant's costs against plaintiff.

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

Suit by the E. G. Staude Manufacturing Company and another against Elie W. Labombarde and others. From the decree dismissing bill without prejudice, but awarding costs to defendants (229 Fed. 1004), plaintiffs appeal. Reversed and remanded, with directions.

Nathan Heard, of Boston, Mass. (Maurice M. Moore, of Boston, Mass., and Amasa C. Paul, of Minneapolis, Minn., on the brief), for appellants.

George A. Rockwell of Boston, Mass., for appellees.

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

BINGHAM, Circuit Judge. This is a suit in equity, in which the E. G. Staude Manufacturing Company, a Minnesota corporation and the Potdevin Machine Company, a New York corporation, are plaintiffs, and Elie W. Labombarde, of Nashua, N. H., and the International Paper Box Machine Company, a Maine corporation, are defendants.

The suit was begun in the United States Court for the District of New Hampshire on August 14, 1911, charging infringement of letters patent and praying for an injunction and an accounting. September 22, 1911, the defendant filed an answer, and November 6, 1911, the plaintiffs filed their replication. The case being at issue the plaintiffs took depositions to make out a prima facie case and filed them in court February 14, 1913. During the period prior to and ending July

9, 1913, the defendants took the depositions of ten fact witnesses and one expert. These depositions have never been filed in court. September 13, 1913, the case being on the trial calendar, the parties agreed, as follows:

"It is hereby stipulated by and between the parties in the above-entitled case that the same shall be continued from the September, 1913, term of this court by being dropped from the trial calendar as provided in equity rule 57."

September 19, 1913, the court entered the following order:

"Upon reading and filing the foregoing stipulation, it is hereby ordered that the above-entitled case be dropped from the trial calendar in accordance with the provisions of equity rule 57, all costs to date to be forthwith paid by the parties."

December 13, 1915, the plaintiffs brought suit upon the same letters patent in the United States Court for the Northern District of Illinois, Eastern Division, against the Chicago Carton Company, a customer of the defendants, charging infringement. This "was done upon the supposition that rule 57 would operate to dismiss the [New Hampshire] case." December 20, 1915, the defendants filed a motion that the time for completing plaintiffs' evidence be limited to February 1, 1916. December 29, 1915, the plaintiffs filed a motion that the case, "not having been reinstated to the trial calendar within a year from the entry of the order dropping the case from the trial calendar on September 19, 1913, be now dismissed without prejudice." December 30, 1915, after hearing, the court granted the defendants' motion of December 20, 1915, and denied the plaintiffs' motion of December 29, 1915, and entered an order limiting the time for the taking of plaintiffs' evidence in rebuttal to March 1, 1916. January 10, 1916, the plaintiffs filed the following motion:

"And now come the plaintiffs and show the court that, having exhibited their bill in this court against the above-entitled defendants, who have appeared thereto, and the defendants having prayed for no affirmative relief, nor had accrued to them any substantial right since the suit was commenced, these plaintiffs are now advised to dismiss their said bill. The plaintiffs therefore move that the said bill may stand dismissed out of this court without prejudice, and with costs accruing subsequent to the order of September 13, 1913, to be taxed against the plaintiffs."

February 8, 1916, a hearing was had before the court on the plaintiffs' motion of January 10, 1916, and the decision was reserved. February 19, 1916, an opinion was filed, in which it was ruled that "the defendants should be indemnified not only for taxable costs, but for incidental expenses, including reasonable expense of counsel fees, which would be lost in subsequent litigation," and a commissioner was appointed to determine and report the taxable costs and incidental expenses. Later the commissioner reported the incidental expenses, "including reasonable expense of counsel fees," as $416.29, and the taxable costs to be a docket fee of $20, and travel and attendance at Littleton, Portsmouth, and Concord, three terms in 1913, four terms in 1914, four terms in 1915, and three terms in 1916, $94.50; and on January 30, 1917, a final decree was entered dismissing the bill without prejudice to the plaintiffs, and awarding that they pay the defend-

ants the items above stated, amounting to $530.79. From this decree the present appeal was taken.

[1] In their assignments of error the plaintiffs say that the court erred (1) in ordering them to pay to the defendants, as an indemnity, any sum on account of alleged incidental expenses; and (2) in including as taxable costs anything for travel and attendance of the defendants. The questions raised by these assignments have been argued by counsel as though the authority of the trial court in the premises was governed entirely by the general principles of equity practice regulating such matters, and not by the equity court rules which went into effect February 1, 1913, and which are applicable to all proceedings in causes then pending or thereafter brought, save in certain instances with which the proceedings in this case are not concerned.

[2] The real question, as it seems to us, is whether the court, in view of the facts appearing upon the record, had authority to order a dismissal of the suit other than as directed in the equity rules of 1913, and in particular rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv).

Under rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi), a plaintiff's depositions are to be taken and filed "within sixty days from the time the cause is at issue, those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions, and rebutting depositions by either party within twenty days after the time for taking original depositions expires," unless otherwise ordered by the court or judge for good cause shown. By rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv) it is provided that after the time has elapsed for taking and filing depositions the case shall be placed on the trial calendar, and that thereafter no further testimony by deposition shall be taken, "except for some strong reason shown by affidavit"; and by rule 57, after a cause is placed on the trial calendar, it is provided that:

"Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all parties, and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."

By the record in this case it appears that, after the time had elapsed for taking depositions, the case was placed upon the trial calendar, and that, on September 19, 1913, an order was entered dropping it from the calendar pursuant to the agreement of the parties above set forth, and that neither party applied to the court within the year after the order was entered to have the case reinstated.

On such a state of facts the rule is explicit that "the suit shall be dismissed without prejudice to a new one." No provision for costs, on dismissal under such circumstances, is made in the rule, and the reason for the omission is apparent when the facts upon which the rule authorizes dismissal are considered; for the entry of dismissal is to be made upon the failure of the parties to make application for reinstatement within the year, and neither having made the application, both are in default, so that neither is entitled to costs against the other.

Being of the opinion that the trial judge, in view of equity rule 57,

was without authority other than to dismiss the suit without prejudice to a new one, it is unnecessary to consider whether, in the absence of rule 57, under the general principles of equity practice, on the facts in this case, he would have had authority to make the order of dismissal conditional upon the payment of an indemnity and taxable costs.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion; the appellants recover their costs in this court.

THE CLARENCE L. BLAKESLEE.

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

No. 246.

1. TOWAGE ⟸11(1)—LIABILITY OF TUG FOR INJURY TO TOW—GENERAL RULES GOVERNING.

A towing tug is not an insurer, and negligence is not presumed because of an injury to her tow not otherwise accounted for, but must be affirmatively proved; nor is the tug liable for the master's error of judgment, unless he makes a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown.

2. TOWAGE ⟸15(2)—LIABILITY FOR INJURY TO TOW—PROOF OF NEGLIGENCE.

Allegations of negligence against a tug, causing one of the barges in her tow to fill and list, so that it became necessary to cast her adrift, *held* not sustained by the evidence, which rather tended to show that her leak was caused by collision with another barge, for which the tug was not in fault.

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

Suit in admiralty by the Conklin & Foss Company, as owner of the barge Ruth, against the steam tug Clarence L. Blakeslee; the New Haven Trap Rock Company, claimant. Decree for libelant, and claimant appeals. Reversed.

The libel alleged that the boat Ruth had received injuries (listing and losing her deck cargo) by going adrift while in tow of claimant's tug Blakeslee. The Blakeslee, with a tandem tow of four boats, was on the morning of November 15, 1915, in Bridgeport harbor bound for New York City. The Ruth was the hawser boat, and had under her stern the No. 38. The tow left Bridgeport about 7 a. m. of the day mentioned, and at about 8 p. m. the Ruth and No. 38 were in trouble; the tow being then off Shippan Point. Both boats took in water to such an extent that they listed sufficiently to dump their deck loads of crushed stone. They then righted, floated away, and were subsequently picked up, more or less injured; the tug in the meantime having proceeded with the remaining two scows, which were not injured.

Of the allegations of negligence but three require notice: (1) That the tug did not seek shelter at Norwalk, when off that harbor; or (2) did not turn back for shelter after having passed Norwalk; and (3) the tow was improperly made up.

Herbert Green, of New York City, for appellant.

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

Before COXE, ROGERS, and HOUGH, Circuit Judges.

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

HOUGH, Circuit Judge (after stating the facts as above). [1] The rules regarding litigation such as this have been plainly and repeatedly stated by this court. The mere fact that a tow receives injury does not render the tug liable; libelant must affirmatively prove negligence, which is not presumed merely because the injury is not otherwise accounted for. The Winnie, 149 Fed. 725, 79 C. C. A. 431. The tug is not an insurer, and is not responsible for a master's error of judgment. The W. E. Gladwish, 196 Fed. 490, 116 C. C. A. 185. Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown. The Nannie Lamberton, 85 Fed. 983, 29 C. C. A. 519. The line of demarcation between error of judgment and negligence is indicated in The E. B. Conine, 233 Fed. 987, 147 C. C. A. 661. The Frederick R. Ives (D. C.) 25 Fed. 447, shows facts quite like this case.

When the Blakeslee left Bridgeport, the wind was light and the Sound smooth. The weather conditions were such as to justify an experienced navigator, exercising ordinary prudence and familiar with ordinary conditions of proposed trip, to start out, having in view the character of his tow. Re McWilliams, 74 Fed. 648, 20 C. C. A. 580. The only harbor of refuge for vessels such as the Blakeslee and her tow between Bridgeport and Greenwich is Norwalk. Norwalk (Green's Ledge) Light was passed at 4:40 p. m. According to records of the nearest weather station (New Haven) the wind had risen to an average of 23 miles per hour between 3 and 4 o'clock. It then moderated, and from 4 to 6 o'clock averaged 20 miles. The Blakeslee had no barometer, but as matter of fact the glass was rising, and it is testified by the government observer that "with a rising barometer and a moderating wind" it would be a reasonable expectation that "the wind (would) die down with the sun, and decrease in its velocity; in fact that is always invariably the rule."

It is shown by uncontradicted evidence that the tow was in no trouble until after 6 p. m. The wind then increased, and at about 7:30 p. m. the master of the Ruth signaled the tug for help. The Blakeslee immediately cast off the towing hawser, and went back to the Ruth, to be told that the wife of the master was frightened and desired to be taken off. The tug captain inquired how much water there was in the Ruth, and was told four inches, a matter confessedly of no importance. The master of the Ruth did not testify, but the captain of No. 38 did, and his evidence is clear to the point that when the towing hawser was thrown off the Ruth "drifted underneath my bow; * * * she went up and down, and she knocked a hole in my bow." This collision with the Ruth was the sole cause of injury to No. 38. The tug, having picked up her hawser, resumed towing, but within half an hour was again signaled, this time by the No. 38. That boat and the Ruth were then filling fast, and listing so that further towage was impossible.

Contrary to expectation, the wind did not decrease after sundown, but rose to an average of 25 miles per hour from 6 to 7; 23 from 7 to 8; and 26 from 8 to 9. We incline to think that there were squalls of higher rate on the Sound, although the average velocity at water

level was probably less than that observed at New Haven, where the recording instruments are 150 feet above sea level. The Ruth and No. 38 were substantially similar vessels; the other two boats were a little larger. The wind during the whole of the afternoon and up to the time of injury was from west to southwest, and, having regard to the course of the tow, produced a sea on the beam, or a little forward thereof.

[2] Considering the allegations of negligence, it is said that putting the smaller boat ahead was a fault; the vessel with most freeboard should have been on the towing hawser. The evidence does not prove uniform practice in this regard; but, even if error was committed, the direction of wind and sea was such that the leading boats were not any more exposed to the waves than those further astern. There was nothing in the weather compelling or reasonably suggesting to the master the propriety of seeking refuge in Norwalk; it was not a fault to pass that harbor. After 6 p. m. it was no longer possible to turn back to Norwalk; and by 7:30 p. m. it was a shorter trip, and just as safe, to keep on and try for Greenwich.

The controlling fact in this case is that there is no affirmative proof that the injury to the Ruth was proximately caused by the weather. The anxiety of the wife of the Ruth's master caused the tug to lose control of the tow. It was not an error to come back when the Ruth gave signals of distress. Common humanity required as much, if it was reasonably possible; but under the evidence it was foolishness for the Ruth to give the signal. That the slackening of the hawser caused the Ruth to injure No. 38 is proven; it is likely that she injured herself at the same moment, for, if there were only four inches of water in her at 7:30 p. m., it seems impossible to account for her being in the same condition as the No. 38 at 8 p. m., unless the collision between the two boats injured both.

However this may be, libelant cannot recover without affirmatively showing some act of negligence on the part of the tug, proximately resulting in injury to his boat. This has not been done, and the decree below is reversed, with costs in both courts.

In re SUPERIOR JEWELRY CO.

In re LEWITT et al.

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

No. 245.

BANKRUPTCY ⊜59—ACTS OF BANKRUPTCY—FAILURE TO DISCHARGE LIEN—TIME OF ACCRUAL OF LIEN.

A judgment creditor of a corporation having an execution in the hands of the sheriff, which under the law of the state (Code Civ. Proc. N. Y. § 1405) bound the personal property of the judgment debtor, filed a petition in a bankruptcy proceeding against a partnership, alleging that certain personalty in the hands of the trustee was not the property of the bankrupts, but of the judgment debtor, and praying for its release, that it might be subjected to his execution. After a hearing such an order was made, but in the meantime the execution had been returned unsatisfied; an alias execution was issued and levied on the property, which was advertised for sale. Within five days prior to the date of sale, other creditors of the corporation filed a petition in bankruptcy against it, alleging its failure to discharge the lien of the levy as an act of bankruptcy. *Held*, that the petition filed by the judgment creditor was in the nature of a creditors' bill in aid of the execution, and that his lien dated at least from that time, and was not affected by the return of the execution and the issuance of an alias, nor by the filing of the petition in bankruptcy, which was more than four months afterward, and that therefore the failure to discharge the lien was not an act of bankruptcy available thereunder.

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

In the matter of the Superior Jewelry Company, alleged bankrupt. From an order dismissing the petition (239 Fed. 373), Louis Lewitt and others, petitioning creditors, appeal. Affirmed.

On March 6, 1916, the firm of Goldberg & Sagman was in bankruptcy. The trustee in charge had physical possession of certain jewelry, found by him (so far as this record shows) with the assets of said firm. On the same date Superior Jewelry Company was, and for nearly two years had been, a corporation, against which one Teitelbaum had duly recovered judgment in a court of the state of New York. Upon this judgment Teitelbaum had issued an execution on February 15, 1916, which execution was outstanding, and in the sheriff's hands, on said March 6th. On that date Teitelbaum filed a petition in the District Court, entitled in the Goldberg & Sagman bankruptcy, setting forth that the jewelry aforesaid belonged to Superior Jewelry Company, and not to the bankrupt estate, that the sheriff could not levy on or otherwise apply said jewelry to the satisfaction of his (Teitelbaum's) judgment owing to the bankruptcy court's possession of the same, and praying said court to relinquish such possession in favor of the judgment creditor.

The proceedings on this petition resulted in an order of relinquishment, made by the referee on August 25, 1916, and affirmed by the District Judge September 19th. In the meantime the sheriff had, on April 14th, returned Teitelbaum's execution as unsatisfied. This date was much earlier than hearing on petition for relinquishment. An alias execution was issued July 29th, and was outstanding when the District Court affirmed the referee's order. Thereupon, and on September 27th, the trustee of Goldberg & Sagman permitted the sheriff to levy on the jewelry, and the same was advertised for sale under the execution on October 4th. On that day other creditors of the Su-

perior Jewelry Company filed this involuntary petition against their debtor, alleging as the sole act of bankruptcy, the failure of Superior Jewelry Company to "vacate the judgment or lien" affecting said jewelry, within the statutory period after September 27th. Bankruptcy Act, § 3, subd. 3 (30 Stat. 546, c. 541 [Comp. St. 1916, § 9587]).

Teitelbaum as creditor answered the petition, and the District Court, holding that the alleged act of bankruptcy was not proven, entered the order appealed from.

S. H. Immergluck, of New York City, for appellants.

David Haar, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). If the judgment creditor's right or lien depends on or arose from the issuance of the alias execution, or the levy made thereunder, then, since both issuance and levy were within the four months period, it may be assumed (though not decided) that the petitioning creditors should prevail, because it was an act of bankruptcy not to discharge such lien within five days. If, however, Teitelbaum acquired a right to or lien upon the jewelry in question by the issuance of his original execution, or by filing his successful petition, or by the conjoint effect of both proceedings, and did not lose the same by the return of such execution, then his lien attached more than four months before the bankruptcy of the Superior Jewelry Company, and he is unaffected thereby.

Since the jewelry in question was personal property physically within the jurisdiction of the sheriff of New York county, Teitelbaum (under ordinary circumstances) had a lien thereupon or (in the language of the statute) the property was "bound by the execution" from the time he delivered the process to the sheriff, i. e., February 15, 1916. Code Civ. Proc. § 1405. The jewelry was in the custody of the District Court sitting in bankruptcy. Any exercise of dominion thereover by the sheriff of New York county would have been unlawful. Covell v. Heyman, 111 U. S. at 182, 4 Sup. Ct. 355, 28 L. Ed. 390; Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322. This required Teitelbaum to file his petition in and to the court whose possession of the chattels prevented a levy under his execution. The procedure was in accord with Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

That petition was of the nature of a creditors' bill, and specifically sought the aid of the court to remove the obstacle to the execution created by the possession of the trustee in bankruptcy. That the court had power to entertain and grant the petition is not denied, and it is certainly apparent. Whether Teitelbaum could have framed his petition in any other way, so as to appeal directly to the bankruptcy court as one conducting proceedings in equity (First National Bank v. Abbott, 165 Fed. 852, 91 C. C. A. 538, 21 Am. Bankr. Rep. 438), is not before us for decision. The petition as preferred was substantially a bill in aid of the execution, and speaks from the time it was filed (Freedman's, etc., Co. v. Earle, 110 U. S. 716, 4 Sup. Ct. 226, 28 L. Ed. 301).

No question could have arisen on this point, had not the proceedings under Teitelbaum's application been so delayed that the sheriff returned the execution which was outstanding at the date of petition filed. This was immaterial. The fact that the execution had been issued at the time of filing was necessary to jurisdiction. Jones v. Green, 1 Wall. 330, 17 L. Ed. 553; Dunham v. Coxe, 10 N. J. Eq. 437, 64 Am. Dec. 460. The fact of return pending proceeding did not nullify or abort the petition. Royer Wheel Co. v. Fielding, 31 Hun (N. Y.) 274; Home Bank v. Brewster, 15 App. Div. 338, 44 N. Y. Supp. 54. See, also, Beck v. Burdett, 1 Paige Ch. (N. Y.) 305, 19 Am. Dec. 436; McElwain v. Willis, 9 Wend. (N. Y.) 549; Crippen v. Hudson, 13 N. Y. 161. It follows that no preference or lien was created by the act of the sheriff in taking possession of the jewelry in question on September 27th. The lien which he enforced arose not later than March 6th.

Therefore the Superior Jewelry Company did not commit the act of bankruptcy alleged in this petition for adjudication, and the order appealed from was right, and is affirmed, with costs.

McKEY v. BRUNS.

In re GEORGE C. BRUNS CO.

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

No. 2456.

1. CORPORATIONS ⟸309(2)—ADVANCES BY OFFICERS—LIABILITY OF CORPORATION.
   Where the president and principal stockholder of a bankrupt corporation furnished the money with which to carry out a composition, and there was nothing to show that the advance was intended as a gift, he had a claim against the corporation for the money so advanced.

2. BANKRUPTCY ⟸312—RIGHT TO PROVE CLAIMS—ESTOPPEL.
   A bankrupt corporation effected a composition whereby $2,500 was to be paid to creditors in cash and the balance of the agreed payment was to be paid in installments. The president and principal stockholder, through a personal loan, provided the $2,500 for the cash payments, and in a letter proposing the composition he stated that this payment would be raised outside of the assets of the company. Notes were executed for the deferred payments, and, default having been made, another petition in bankruptcy was filed. *Held*, that the president's statement that the funds for making the cash payments would be raised outside the assets of the company did not estop him from proving his claim for the money advanced to the corporation; there being no representation that the advance would not be repaid by the corporation.

3. BANKRUPTCY ⟸314(1)—RIGHT TO PROVE CLAIM—EFFECT OF RIGHT OF PRIORITY.
   The fact, if true, that the claims based on the composition notes should be first paid, before payments of the president's claim, did not prevent the president from proving his claim and having it allowed.

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

Bankruptcy proceeding against the George C. Bruns Company.

From an order allowing the claim of George C. Bruns, Frank M. McKey, trustee, appeals. Affirmed.

In June, 1915, petition in bankruptcy was filed against George C. Bruns Company, a corporation. A composition was effected whereby the creditors received in settlement of their claims 50 per cent. thereof, as follows: Ten per cent. in cash; 10 per cent. December 15, 1915; 10 per cent. January 15, 1916; five per cent. on the 15th of each of the months of February, March, April, and May, 1916—notes being given for the deferred payments. It was agreed by the bankrupt, as a condition of the composition, that until the full payment of all the composition notes the business of the company should be supervised by a committee of the creditors, and that in case of default in payment of any of the notes, then after 15 days the committee be authorized to take possession of the company's assets, and, in the discretion of the committee, dispose of same, and pay, first, its expenses; second, all of the composition notes, including a note held by the committee for expenses theretofore incurred; and the balance, if any, to the attorneys for the company. When the composition became effective the bankruptcy proceedings were discontinued, and the property of the corporation was turned over to the company, which thereupon, under the general direction of the creditors' committee, continued to run the business, selling some of the goods on hand, buying some new goods, and incurring some further indebtedness. The 10 per cent. cash payment, amounting to $2,500, was provided by appellee George C. Bruns, president and principal stockholder of the company, through a loan to him personally, and in the letter which Bruns sent out to the creditors, proposing the composition, it was stated that the $2,500 to make the first payment would be raised outside of the assets of the company.

Default being made in the payment of the composition notes, which matured February 15th, and the committee being unable to reach an agreement for further continuance of the business, on March 31, 1916, the committee, on behalf of the creditors, filed another petition in bankruptcy against the company, under which it was declared a bankrupt, and the appellant herein duly chosen trustee. Under date of October 30, 1915, the company, by Bruns, its president, executed a note to Bruns for $2,500, representing the amount which Bruns had borrowed and turned over for the purpose of making the first payment, in case the composition was carried through. The board of directors of the bankrupt did not authorize such note to Bruns. In the present bankruptcy proceeding Bruns filed this note as a claim against the bankrupt estate. To the claim so filed the trustee made objection upon the following grounds: "First, said claim is colorable, fictitious, and invalid; second, said George C. Bruns is estopped from making said claim"—and asking that the claim be disallowed in its entirety. The referee in bankruptcy disallowed the claim, and on review the District Court ordered the claim allowed. By this proceeding it is sought to reverse the order of the District Court allowing this claim.

Henry J. Darby, of Chicago, Ill., for appellant.
James Rosenthal, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] There is nothing in the record from which it may be concluded that the $2,500, which Bruns advanced to make the first payment, was intended by him as a gift to the corporation; and, this being so, clearly Bruns had a claim against the corporation for the money he thus advanced for its benefit, and as the result of which the company was enabled to compromise the claims against it, and to resume its business freed from the bankruptcy proceedings.

It is urged that the note is invalid, because the board of directors did not authorize it to be given. But the note is of no necessary consequence, since it is the consideration, rather than the note itself, with which we are actually concerned. The claim is neither colorable, fictitious, nor invalid, and the trustee's first objection is not sustained.

[2] Respecting the second objection, that Bruns is estopped from making the claim, reliance is placed mainly upon his representation to the creditors that funds for making the first cash payment of $2,500 were no part of the assets of the corporation. This was not directly or indirectly any representation that the person advancing this money, primarily for the benefit of the corporation and to help settle its debts, would not have therefor a claim against the corporation. We find nothing in the record to warrant the contention that Bruns, or any one else who would thus advance the money, should not be repaid by the corporation, and nothing because of which Bruns is estopped from making claim for it.

[3] Much of appellant's brief is devoted to showing that, out of the assets of the bankrupt, the claims based on the composition notes should be first paid before appellee receives anything. However this may be, appellant's right to exhibit his demand, and to have it allowed as a claim against the bankrupt, is in no wise dependent upon the order of payment as between the various creditors of the bankrupt. His claim was provable, whether ultimately payable first or last. The objections of the trustee do not purport to raise any question of rank of the respective claims as to each other, nor does it appear that any of the other creditors who are directly interested in the question are asserting any right of priority over appellee; neither does the order of allowance of Bruns' claim assume to deal with any such question.

The District Court properly allowed the claim, and its order of allowance is affirmed.

TWENTIETH CENTURY MACHINERY CO. v. LOEW MFG. CO.

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

No. 2854.

1. PATENTS ⟸51(1)—ANTICIPATION—PRIOR KNOWLEDGE OR USE.
A patent is void for anticipation if the patented machine or its equivalent was known and used in this country by a single person prior to its invention or discovery by the patentee.

2. PATENTS ⟸62—ANTICIPATION—BURDEN AND MEASURE OF PROOF.
As respects an unpatented device, claimed to be a complete anticipation of a patent in suit and depending as to its existence and use upon oral testimony, the proof must be clear, satisfactory, and beyond reasonable doubt.

3. PATENTS ⟸62—ANTICIPATION—EVIDENCE TO CARRY BACK INVENTION.
Where the existence of an anticipating machine is shown with certainty in an infringement suit, it is necessary for complainant to carry the date of his invention back to a prior date by unequivocal and convincing proofs, and to show that he thereafter exercised reasonable diligence in reducing his conception to practice.

4. PATENTS ⟸90(5)—PRIORITY—DILIGENCE IN REDUCTION TO PRACTICE.
Diligence is of the essence of a proper relation between the conception and reduction to practice of an invention, and must consist of a degree of effort that can fairly be characterized as substantially one continuous act.

5. PATENTS ⟸59—ANTICIPATION—EVIDENCE TO SUPPORT DEFENSE.
A defendant has the same right to show the time of conception of an unpatented anticipating device, and diligence in reducing it to practice, as complainant has to do the same in respect to the patented device.

6. PATENTS ⟸328—VALIDITY—BOTTLE-SOAKING MACHINE.
The Volz patent, No. 736,037, for a bottle-soaking machine, *held* void for anticipation, in view of the prior art, and especially of an unpatented machine.

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

Suit in equity by the Twentieth Century Machinery Company against the Loew Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

S. E. Hibben, of Chicago, Ill., for appellant.

S. J. Cox, of New York City, for appellee.

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

WARRINGTON, Circuit Judge. This was a suit for infringement of a patent. The subject of the patent, No. 736,037, was devised by Simon Volz and, in virtue of direct and mesne assignments, the patent was granted to the appellant August 11, 1903. The device is entitled in the letters patent a "bottle-soaking machine." The pleadings in terms embrace the issues of validity and infringement as to all the claims; but the charge of infringement was limited at the trial to claims 2, 4, 7, 15, and 21. The decree adjudged these claims void "for

want of patentable novelty and invention," and dismissed the bill of complaint. The plaintiff below, the Twentieth Century Company, appeals.

At the date of the patent in suit patented bottle-soaking machines were in general use, chiefly in beer-bottling plants, though also in plants used for bottling other liquids, such as mineral waters, ginger ale, and the like. These machines, including the one in suit, were designed through mechanical means to cleanse both the inside and outside of previously used bottles by conveying them into and through tanks containing, for instance, a caustic soda solution, and thence to a rinsing-tank into which the bottles were in most cases automatically discharged, thus fitting them for reuse. The machines alluded to differ of course in mechanism, but they were all designed to accomplish the same result. References to some of these prior patents are given in the margin.[1] An obvious difference between the machine in suit and the machines thus far referred to consists in the manner in which the cleansing tanks are disposed; the tank of the former being placed and used in a vertical, while the tanks of the latter are maintained in a horizontal, position; and among the advantages claimed in respect of the device in suit over the old devices are (1) reduction in floor-space; (2) availability of the machine for elevator purposes, since the bottles may be placed in the machine at the botton floor and carried through the cleansing solution in the vertical tank to an upper floor and there automatically discharged into the rinsing-tank in a condition for reuse. The difference thus pointed out is regarded by plaintiff as one of the important features of the patent in suit; it is fully stated in the specification:

"Heretofore the tanks of bottle-soaking machines have been arranged in a horizontal position upon the floor, and the large size required for their purposes has consumed considerable floor-space, the head room or space above the tank not being of course utilized. Again, the bottles arrive in the works or establishment at the lower floor, and the same are required for bottling on an upper floor, more generally the next or second floor, the bottle-cleansing occurring on either the lower floor or the next floor. However, in either case several handlings of the bottles are required, entailing considerable labor and expense. My machine is designed to obviate the above-stated objections, and to this end the tank is arranged vertically and extends from floor to floor, thereby consuming a minimum amount of floor-space and utilizing the head room, and, further, the construction is such that the bottles may be fed at the lower floor, then carried through the tank and cleansed, and eventually discharged or delivered automatically at the upper floor where required for use. The arrangement is also such that the bottles may, if desired, be fed to the machine at the upper floor."

Other differences are pointed out and relied on by counsel to distinguish the Volz construction from the earlier machines referred to. These differences may be readily seen in Loew Supply & Mfg. Co. v.

[1] No. 647,082, Goetz, April 10, 1900—"bottle-washing machine"; No. 676,920, Schreiber, June 25, 1901—"bottle-cleaning machine"; No. 687,655, Scheid, November 26, 1901—"bottle washing and sterilizing apparatus"; No. 688,740, Kissel and Parsons, December 10, 1901—"bottle washing and sterilizing machine"; No. 690,563, Cobb, January 7, 1902—"bottle-washing machine"; No. 694,371, Goetz, March 4, 1902—"bottle-cleaning machine."

Fred Miller Brewing Co., 138 Fed. 886, 71 C. C. A. 266 (C. C. A. 7), where it was held that the Cobb patent, supra, No. 690,563, for a bottle-washing machine, was not infringed by the Volz machine; a drawing of each of the machines is there shown. Admittedly the validity of the letters patent covering the Volz machine was not in issue in that case. The question was simply whether the Volz machine infringed the Cobb patent; but the crowded condition of the bottle-soaking machine art, certainly as to machines like Cobb's comprising the horizontal cleansing tank, was thus pointed out by Judge Baker (138 Fed. 889, 71 C. C. A. 269):

"There is room for such an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same general field. * * * The claims in suit, if construed generically, would be void; limited to the specific form of adaptation, we do not find them infringed."

In the instant case advantages other than those already mentioned are claimed in respect of the Volz machine. For example, it is insisted as to his upright tank: The cleansing solution is kept clearer, more evenly heated, more active, and consequently more effective, in the vertical than in the horizontal tank; the chains carrying the bottle-racks are more easily balanced and less liable to drag, and hence more economically operated, in the vertical than in the horizontal type. As to Volz's bottle-racks: They are rectangular in form and composed of metal, two of their opposed sides comprising open frame-work, the other two sides being of sheet-metal containing circular openings which on one side are suitable in size to receive the bodies of the bottles and on the opposite side to receive the necks of the bottles; each rack is provided at its central transverse axis with fastening lugs for securing it in position between the two endless conveyer-chains, and is also disposed at an oblique angle to the plane of the chains; thus the racks are in succession presented in a downwardly inclined position to the operator at the feeding point; the bottles with the necks thrust through the racks are held by gravity in their upward movement on the outside of the tank until they pass sprocket-wheels *21*, when the oblique position of the bottles is reversed, and they are held in place in their downward passage into the tank by contact between their bottoms and a guard suitably disposed; this movement is continued thence until sprocket-wheels *23* are passed, when the bottles are carried upwardly again (in the same positon as in their first upward movement) to sprocket-wheels *16* and thence downwardly again with their bottoms in contact with a guard until they are automatically discharged into the rinsing-tank. See Fig. 1 of Volz patent drawings, 138 Fed. at 887, 71 C. C. A. 266. The relation of this general description of the Volz device to the claims of the patent is sufficiently illustrated by reference, for example, to claims 2 and 15, copied in the margin.[2] By extending the necks of the

[2] "2. A bottle-soaking machine comprising a vertical tank, rolling supports arranged above two opposite sides of the tank, a rolling support arranged within the tank, an endless bottle conveyer traveling over said supports and around two opposite sides and bottom of the tank, and a rinsing-tank located in close proximity to one of the rolling supports which are situated above the

bottles through the openings in the racks, as stated, it is contended that in the movement of the bottles through the cleansing operation abrasion of their crown-rims is substantially avoided and their condition for re-capping better preserved; also that this method of preserving the crown-rims and of exposing the inside and outside of the bottles to the cleansing solution is superior to that involved in the closed form of bottle pockets used in the horizontal tanks.

It is to be observed, however, that the idea of a vertical instead of a horizontal tank in which to cleanse bottles did not originate with Volz. The Dumke patent, No. 530,583, of December 11, 1894, was for a bottle-washing machine comprising a vertical tank; and, although the general appearance of the machine differs from that of the Volz machine, the essential operating features of the machines are very much alike. For instance, their sprocket-wheels and endless chains are similarly disposed; mechanical equivalency is found in the transversely adjusted bottle-boxes of the Dumke machine and the transversely secured bottle-racks of the Volz machine. True, the means of holding the bottles in place in the two devices differ, yet in both the bottles are held in a position oblique to the plane of the chains, and are conveyed similarly through the tank and thereafter automatically discharged. True, also, Dumke provided for feeding and discharging the bottles on the same floor, feeding on one side and discharging on the opposite side of the machine; but it is apparent from the drawings that the bottles might have been discharged as readily at an upper floor as upon the same floor; indeed, the specification distinctly contemplated by way of illustration a distance of 15 feet between the centers of the upper and lower sprocket-wheels; and any necessity for use of the cleansed bottles on an upper floor would seem to have been plainly suggestive of such a change in place of delivery. We observe, further, that the Dumke machine is called a "bottle-washer," and the use of water alone in the tank is mentioned in the specification, but the machine is to be so gauged in its operation as to submerge the bottles for a long period of time and so as to insure "a very thorough cleansing"; and, whatever may be said of any difference in cleansing qualities of the two machines, this can only be a matter of degree. The patent of Warning, No. 663,142, December 4, 1900, a "machine for cleaning lye from the exterior of lye-containing cans," shows a vertical tank having sprocket-wheels above its top and sprocket-wheels within and near the bottom of

sides of the tank, said conveyer being arranged to receive bottles along one of the side stretches of the conveyer outside the tank, and, after carrying them through the tank, to discharge them directly into the rinsing-tank whereby the bottles are not given an opportunity to dry."

"15. A bottle-soaking machine comprising a tank, an endless conveyer arranged to travel therein, a series of bottle-racks operatively connected with the conveyer and arranged transversely and obliquely to the plane or line of travel of the conveyer, a guide arranged within the tank adjacent the line of travel of the conveyer to prevent the bottle from falling out of their racks, each rack consisting of a frame having on its inner or rear side a series of openings larger than the necks of the bottles and through which such bottle-necks pass and project."

the tank, endless conveyer-chains passing around the wheels, openwork buckets connected to the chains for carrying the cans through hot water contained in the tank and finally discharging the cans automatically into a receiving trough. And the Volz plan of uniting the feature of an elevator with that of a bottle-soaking machine—that is, of associating a vertical or upright tank with conveyer-chains and bottle-racks both for cleansing bottles and elevating them from one floor to another—is not only ascribable to the teachings of the Dumke patent, but in practical effect was an adaption of Dodge's elevator, patented February 8, 1881, No. 237,501; and, further, as Judge Baker points out in the Loew Supply Co. Case, supra, 138 Fed. at 889, 71 C. C. A. 266, "Volz's rack is an adaptation of Dodge's integral centrally-secured buckets to bottle-holding purposes." Moreover, there is evidence tending strongly to show that in the summer of 1901 the defendant circulated among the brewers and brewmasters throughout this country, Mexico and Canada, printed publications and diagrams of a bottle-soaking machine which was designed, by means of an endless conveyer suitably disposed and operated over sprocket-wheels, to receive bottles at one floor, pass them through a horizontal tank, and thence to an upper floor, where they were to be automatically and directly discharged into a rinsing tank; and, in view of the number of witnesses produced and their apparent familiarity with circumstances calculated to enable them to fix time and place in connection with the production and circulation of the printed publications and diagrams themselves, it must, in relation with the other matters before pointed out, be concluded that Volz's idea of associating the feature of an elevator with a bottle-soaking machine was not new.

Now, when the state of the art thus far commented on is considered, it is clear that at the time Mr. Volz designed his machine there was but slight room for material advancement; certainly if his device was not in reality anticipated, the elements of his claims, as well as the result he achieved were old; and his combination was so nearly in identity with the prior art as to admit at most of only a restricted construction of the claims in issue. We say this in full recognition of the rule that invention may consist in combining old elements so as to produce either a new and beneficial result or an old result in a new and substantially better way. Proudfit Loose-Leaf Co. v. Kalamazoo Loose-Leaf B. Co., 230 Fed. 120, 127, 144 C. C. A. 418 (C. C. A. 6), and citations. Before passing upon the question of patentability, however, we shall have to consider an unpatented machine which is claimed to be a complete anticipation of the patent in suit. This machine comprises a tank divided into four compartments which are in part vertical and in part oblique, but all greater in height than width; a bottle conveyer composed of two parallel endless chains with bottle receptacles or racks disposed between and with their ends bolted to the chains, such receptacles having a series of openings on one side with a series of openings in registry therewith on the opposite side and so forming pockets into which the bottles are inserted with their necks protruding. The chains in their travel around the outer sides and bottom of the tank are suitably

guided and sustained, and in their travel downwardly and upwardly through each of the compartments they pass over sprocket-wheels properly disposed. The course of the chains along the outside of the front and rear elevations of the tank and within each of the compartments is oblique. The bottle-racks extend on both sides of the respective chains, and the bottles are held in place in portions of their course by gravity and in the other portions by guards appropriately placed. While at first the pockets were not oblique to the plane of the chains, substantially the same effect was secured through the oblique paths of the chains; and this feature was shortly afterward changed by arranging the bottle-pockets obliquely to the plane of the chains. Bottles are fed into the pockets at one end of the machine, and after passing through the compartments of the tank are automatically discharged directly into a rinsing-tank at the opposite end.[3] It is true that this is a single-floor machine, but the evidence shows that the feature of elevating the bottles to an upper floor before automatically discharging them involves only an extension of the conveyer and removal of the rinsing-tank; and since the idea itself was not new in the art at the date of the patent in suit, any need of such a plan was well within the scope of mechanical skill. Apart then from the question of priority, presently to be considered, it is safe to say that in practical effect, certainly in every patentable sense, the machine embodies the patent in suit; indeed, the controversy upon this part of the case is not so much as to patentable identity of the two machines as it is with respect to a question of priority in conception and reduction to practice of the machines. In saying this we have in mind a statement in the brief for appellant that even the existence of the anticipating structure has not been shown beyond a reasonable doubt; but we do not discover any testimony which tends to sustain the statement, and, on the contrary, we find testimony which clearly and convincingly establishes the fact that the structure was installed and successfully used in the Anheuser-Busch brewery in St. Louis, Mo., and that it was still there when the testimony herein was taken. We thus come to consider the time when the machine was constructed and reduced to practice.

[1, 2] It scarcely need be said that anticipation is a complete defense; for, in view of our patent laws and of the long-settled rule of decision, if the Volz machine or its equivalent was "known or used by others in this country" before his "invention or discovery thereof," the patent could not rightfully have been issued; such prior knowledge and use by a single person would have been sufficient to require denial

[3] This device may be better understood by reference to patent No. 736,209 to Busch, Gull, and Barry, August 11, 1903, the date of issue also of the patent in suit. It will be seen, however, that the patented device (No. 736,209) shows the sides of the compartments to be not simply in part vertical, but wholly so, and that the paths of the chains are likewise vertical. The application for this patent was made November 13, 1902, while that for the patent in suit bears date July 22, 1902; and since Volz's constructive reduction to practice thus preceded that of the Busch-Gull-Barry patented device, the latter cannot, in that sense of reduction to practice, be regarded as an anticipation of the former. Automatic Weighing Machine Co. v. Pneumatic Scale Corp., 166 Fed. 288, 293, 92 C. C. A. 206 (C. C. A. 1) and citations.

of the patent.[4] The defense of anticipation rests heavily upon the defendant. It is settled that as respects an unpatented device, claimed to be a complete anticipation of a patent in suit and depending as to its existence and use upon oral testimony, the proof must be clear, satisfactory, and beyond reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Deering v. Winona Harvester Works, 155 U. S. 286, 300, 15 Sup. Ct. 118, 39 L. Ed. 153; Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356; Columbus Chain Co. v. Standard Chain Co., 148 Fed. 622, 629, 78 C. C. A. 394 (C. C. A. 6); Peelle Co. v. Rashkin, 222 Fed. 293, 297, 138 C. C. A. 19 (C. C. A. 2); H. Mueller Mfg. Co. v. Glauber, 184 Fed. 609, 618, 106 C. C. A. 613 (C. C. A. 7); Drum v. Turner, 219 Fed. 188, 196, 135 C. C. A. 74 (C. C. A. 8); Diamond Patent Co. v. L. E. Carr Co., 217 Fed. 400, 402, 133 C. C. A. 310 (C. C. A. 9). It is to be observed that the learned trial judge, the present Mr. Justice Clarke, held that this unpatented machine was an anticipation of the Volz machine. Since it is not shown that any of the witnesses were examined in court, and since it expressly appears that one of the main witnesses as to anticipation testified by deposition, the appellant is entitled to the independent judgment of this court concerning the sufficiency of their testimony. Peelle Co. v. Rashkin, supra, 222 Fed. at 294, 138 C. C. A. 19.

Rudolph Gull, who had been a chemist of the Anheuser-Busch Brewing Association from 1893, testified in relation to the anticipating machine. He had much to do with its origin and installment. He said there were eight bottle-soaking or washing machines in use at the Anheuser-Busch brewery, and that the first one was "put in operation" in February or March, 1902. This is the machine that is claimed to anticipate the one in suit and has already been sufficiently described. The witness gave the name and address of the builder of the machine and, against objection, presented a blueprint bearing date February 24, 1902, and purporting to show in diagram the form and operating parts of a machine which is like the one before described as the claimed anticipating machine. He testified that he was present while the machine was in course of erection at the Anheuser-Busch brewery, that he had seen the machine in successful operation, and that the blueprint correctly described it. There are other features of his testimony which tend to show his familiarity with the conception of the machine; he took part in designing it, and during the progress of its construction he was often at the place of business of the company (Barry-Wehmiller Machinery Company) that built it; he was not contradicted

[4] Section 4886 (Rev. St.) as amended Act March 3, 1897, c. 391, § 1, 29 Stat. 692 (Comp. St. 1916, § 9430) and fourth paragraph of section 4920, Rev. St. (Comp. St. 1916, § 9466); Coffin v. Ogden, 85 U. S. (18 Wall.) 120, 124, 21 L. Ed. 821; Brush v. Condit, 132 U. S. 39, 48, 10 Sup. Ct. 1, 33 L. Ed. 251; Bedford v. Hunt, 1 Mason, 302, 303, Fed. Cas. No. 1,217; and Reed v. Cutter, 1 Story, 590, 597, 598, Fed. Cas. No. 11,645; both decisions by Mr. Justice Story on the circuit; Allen v. Steele (C. C.) 64 Fed. 793, 795, 796; Imperial Brass Mfg. Co. v. Nelson (C. C.) 194 Fed. 165, 167, affirmed 203 Fed. 484, 499, 121 C. C. A. 606 (C. C. A. 7); Wayman v. Louis Lipp Co. (D. C.) 222 Fed. 679, 694; Benthal Mach. Co. v. National Mach. Corporation (D. C.) 222 Fed. at page 930, 931–933.

and, on the contrary, was corroborated. It results that the blueprint was rightly received in evidence in connection with the testimony of the witness and as illustrative of it. Hall v. Conn. Mut. Life Ins. Co., 76 Minn. 401, 408, 79 N. W. 497; Johnston v. Jones, 66 U. S. 209, 222, 17 L. Ed. 117; 1 Wigmore on Ev., §§ 793, 794. Mr. Gull testified:

"The machine illustrated by the blueprint is in the bottle wash house of the Anheuser-Busch Brewing Association on 11th and Pestalozzi streets, where it has been ever since it was first erected. No material changes have been made in it since that time. The machine was almost erected at the time the blueprint is dated. I got the blueprint from the Barry-Wehmiller Machinery Company, and I know that drawings of the device shown in the blueprint were made prior to the drawings from which this blueprint is made. There had been some drawings made of the device shown in the blueprint, prior to the drawings from which this blueprint was made.

"I couldn't say positive at what time the idea of the machine on the blueprint was first conceived. It was a matter of working together of the patentees, some time in the year 1901. We came to the first idea about building a machine of this character and I recollect that we were working out the plans for the construction of a soaking tank of that kind, at the end of September or the beginning of October, 1901."

This witness further testified that the tank of the machine was delivered in the "second part of January, 1902," and that the machine was "put in operation the second part of February or the first of March, 1902." The witness produced the account of the builder of the machine for its cost, which is dated March 31, 1902, and bears the indorsement of an order dated May 29, 1902, signed by Mr. Busch, of the Anheuser-Busch Company, directing payment of part of the bill. The witness testified that the signature and date were in the handwriting of A. A. Busch, and also that the bill was rendered for the completed machine, and so enabled him to fix the time when the machine was put in operation as in February or March, 1902. Mr. Tolkacz, president of the Missouri Boiler & Sheet Iron Works, testified that his company constructed the tank of the machine for the Barry-Wehmiller Company in the months of December, 1901, and January, 1902, and delivered it to the Anheuser-Busch brewery prior to January 20, 1902. He fixed the time of delivery by reference to his company's daybook containing the charge for the tank, January 24, 1902. He identified the machine by stating that the blueprint before mentioned—

"is a duplicate of a blueprint or possibly the original, which we used in the construction of the first soaking tank built by us for the Barry-Wehmiller Machine Company and delivered to the Anheuser-Busch Brewing Association's old washhouse—I think it is No. 1."

Mr. Jenne, who had been the millwright for the Anheuser-Busch Company for 25 years, also fixed the time of installing the machine as in February and March, 1902, stating that the Barry-Wehmiller Company had the contract for "the whole thing," and that Tolkacz built the tank for that company; and, as respects the blueprint in question, he said: "This is the blueprint of the machine that I am testifying about." Mr. Baird, one of defendant's counsel, testified that he and Mr. Loew visited the Anheuser-Busch brewery in the early part

of May, 1902, and that he (Baird) visited the brewery again in December, 1912; that he saw a bottle-soaking machine in the brewery on both of these occasions, which he identified by reference to the blueprint already mentioned and by a statement that the blueprint shows in diagram the very machine he had seen; that these visits were made for professional objects, that on the first one he and Mr. Loew, whose testimony is to the same effect, made special examination of the machine, and Mr. Baird produced convincing data to show that the first visit occurred between the 3d and 10th of May, 1902. Counsel for appellant in several ways criticize the testimony of these witnesses, but we do not discover that they offered any evidence tending to refute the testimony. It is said, for instance, that Mr. Busch and the bookkeeper of the brewery might have been called, and this is true; but we are not satisfied that the witnesses who actually testified in connection with the unquestioned data they produced can be fairly discredited because of the failure to call the other persons alluded to. It is not pretended that plaintiff could not itself have called Mr. Busch and other persons, say from the companies that made the tank and constructed the operating parts of the machine (apart from Mr. Barry who died in 1904), if there was reason to believe that the showing so made ought not to be credited. It is hard to conceive that the evidence which tends to establish, for example, the existence and operation of this machine, as also the accepted account of the machine-builder against the Anheuser-Busch Company, and particularly the charge in the daybook of the tank-builder against the machine-builder, with their respective dates, could not have been met and overthrown if indeed the evidence is not true. Three of these witnesses are commended by their long connection with business concerns, and they are corroborated in a material respect by one of the counsel of record in this cause. There are other features of the record that lend support to the testimony of these men, but we do not think it necessary to dwell longer on the subject; in a word, the evidence is free from reasonable doubt and is persuasive of the fact that the anticipating machine was in course of construction as early at least as December, 1901, and was in successful operation early in March, 1902. Still other matters and their effect upon the foregoing evidence remain to be considered.

[3] Plaintiff claims that Volz conceived his invention in 1901 and disclosed it to others in the spring and again in the fall of that year, that he made an attested sketch of it February 1, 1902, and reduced the invention to practice by completing and filing an application for a patent, April 10, 1902. Defendant insists, however, that Volz abandoned that application, and filed the one of July 22, 1902, upon which alone the patent in suit was issued, August 11, 1903. The object of offering evidence to show an earlier conception than is indicated by the July application was, of course, to carry the date of his invention to a time prior to any of the anticipating features of the defendant's evidence. Evidence to this effect was admissible, but it was incumbent on plaintiff to establish such earlier date by unequivocal and convincing proofs. Defendant having shown with certainty anticipation of the patent in suit, as it appeared in the letters patent, it became necessary for plaintiff, as Mr. Justice Bradley said in Clark Thread

Co. v. Willimantic Linen Co., 140 U. S. 481, 489, 492, 11 Sup. Ct. 846, 851, 35 L. Ed. 521; "in rebuttal, to show, if not with equal certainty, yet to the satisfaction of the court," that Volz invented his machine prior to the date of such anticipation. Michigan Cent. R. Co. v. Consolidated Car Heating Co., 67 Fed. 121, 129, 14 C. C. A. 232 (C. C. A. 6); Columbus Chain Co. v. Standard Chain Co., supra, 148 Fed. 622, 629, 78 C. C. A. 394 (C. C. A. 6); New England Motor Co. v. B. F. Sturtevant Co., 150 Fed. 131, 137, 80 C. C. A. 85 (C. C. A. 2); Charles Hunnicutt v. A. B. Gaston Co., 218 Fed. 176, 177, 134 C. C. A. 56 (C. C. A. 3); Consolidated Ry., etc., Co. v. Adams & Westlake Co., 161 Fed. 343, 350, 88 C. C. A. 355 (C. C. A. 7). It is to be observed, moreover, that the evidence must satisfactorily show, both that Volz possessed the earlier conception claimed, and that he thereafter exercised reasonable diligence in reducing his conception to practice. Christie v. Seybold, 55 Fed. 69, 76, 5 C. C. A. 33 (C. C. A. 6); Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., 166 Fed. 288, 301, 92 C. C. A. 206 (C. C. A. 1).

In our consideration of the evidence offered in this behalf we meet with serious difficulty concerning both matters which the plaintiff was thus bound to make plain. In the first place, if the testimony be accepted as to Volz's disclosures in the spring and fall of 1901, his idea was to produce a two-story bottle-soaking machine which would receive the bottles at a lower floor and discharge them upon an upper one. He had since 1887 been engaged in a brewery at Milwaukee and in such capacities as to become familiar with its machinery and bottling department; and, notwithstanding his own experience and the existence of such patents as those of Dumke and Dodge and the circulation before considered of printed publications and diagrams in the summer of 1901 showing a bottle-soaking machine that was designed so to receive, elevate, and discharge bottles, Volz could only in a meager and tentative way describe the structure he claims to have conceived in the spring of 1901; and while there is testimony to the effect that in the fall of that year he showed to others several pencil sketches of parts of a two-story machine, yet it is not pretended that any of the sketches were in any sense complete; and none of them was regarded as of sufficient importance to preserve. Further, although Volz's sketch of February 1, 1902, shows, as plaintiff's counsel state, "a tank somewhat inclined, and having an endless carrier traversing the interior of the tank and running around the outside thereof with bottle-pockets of the type used in the old Loew machine," still when the main figure and certain smaller ones shown in the sketch are compared with the evidence as to Volz's ultimate conception, the sketch would seem to have been nothing more than a paper experiment; it was not adhered to; and it is noteworthy that while the sketch purports to bear the signatures of Volz and two witnesses, these witnesses were not called to testify, nor were their signatures proved except by Volz. The effect of this omission is not materially modified. True, Volz testified that when he explained his invention to the draftsman for the purpose of having drawings prepared to accompany his first application for a patent, he showed the sketch to the draftsman, who testified that it was "presented by the inventor to me; this sketch

or one similar to it," but the time of this interview is not shown; and so it results that the date of the sketch must depend solely on the testimony of one man, the patentee. Among the disclosures of this sketch are two rectangular figures which in his testimony Volz called plates on "bridge-work" and another figure which he said "apparently included a bottle with the head and butt sticking out"; but at most these could not have been more than tentative contrivances, for according to Volz's own testimony he regarded them as unfit for the "patent-stopper bottles" which he says were then in large measure used by the brewers. It is urged that these figures disclose an open-frame bottle-rack. This is not intelligibly disclosed by the sketch nor satisfactorily shown by the evidence; and the reason given for not adopting such a rack, and selecting the old Loew type instead, is inconsistent with the facts shown concerning the rack actually used in the Anheuser-Busch machine. We are confirmed in these views by the Volz application for a patent, April 10, 1902; for while the tank and conveyer there shown and the tank and conveyer shown in the sketch are similar both in form and position, still nothing like the open-frame bottle-rack claimed to be represented on the sketch is either mentioned in the specification or found in the drawings of the April application. The application, according to the record of Volz's solicitor, appears to have met with "objection on the part of the Patent Office," though it is not shown that anything was ever done to have the objection considered or the application allowed. As we have seen, a new application was filed July 22, 1902, and upon it alone the patent in suit was issued, August 11, 1903.

We thus come to the question whether these earlier disclosures are such as to indicate a conceptive relation between them and the patent in suit. If so, it cannot be said that there was an intent to abandon the April application. The reason stated for not prosecuting the application is that it was decided to change to a vertical tank. This would scarcely signify a purpose to abandon any features of the old application which, in point of equivalency, were traceable into the new one. The effect would be to show rather that both were designed, at least so far as they disclosed features in common, to constitute one continuous application within the true intent of the patent law. Godfrey v. Eames, 68 U. S. 317, 325, 326, 17 L. Ed. 684; Smith v. Goodycar Dental Vulcanite Co., 93 U. S. 486, 500, 23 L. Ed. 952; Corrington v. Westinghouse Air Brake Co., 178 Fed. 711, 713, 103 C. C. A. 479 (C. C. A. 2); Victor Talking Machine Co. v. Duplex Phonograph Co. (C. C.) 177 Fed. 248, 253, per Judge Knappen; this is not a case of rejection of application by the Patent Office and acquiescence therein within the meaning of section 4894, Rev. Stat., as amended by Act March 3, 1897, c. 391, § 4, 29 Stat. 693 (Comp. St. 1916, § 9438), and so the case is distinguishable from cases like Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 83, 70 C. C. A. 1 (C. C. A. 8); but so far as any material addition to or variance from the first application may be found in the second one, such addition or variance cannot be sustained on the first application. Railway Co. v. Sayles, 97 U. S. 554, 563, 24 L. Ed. 1053. In considering the question of identity between the two applications, we may for the moment lay to one

side the inquiry into Volz's diligence. We are concerned of course only with the five claims in issue of the patent in suit. These claims each comprise a tank, rolling supports, and an endless conveyer, claims 2, 4, and 21 calling for a vertical or upright tank, while claims 7 and 15 call for "a tank." In view of the prior art, all these elements in themselves and in combination are too old to indicate novelty in any of the claims. They appear, however, in the first application. The elements that may for the present be assumed to involve some degree of novelty are: (a) Proximity of the rinsing-tank of claim 2 to the upper rolling support so as to discharge the bottles into the rinser before they are given opportunity to dry; (b) track and guard of claim 4, the first to guide the conveyer along part of its course, and the second to keep the bottles in the racks through portions of their movement; (c) the open frame-work bottle-rack of claim 7 to hold a single row of bottles with the necks projecting through; (d) disposing the bottle-racks and the bottles according to claim 15 obliquely to the plane of the conveyer; (e) elevating the bottles as provided by claim 21 through a vertical tank extending from floor to floor. All these features appear more or less clearly, at least for purposes of identifying conception and completion, in either the specification or drawings of the April application, excepting certainly the open frame-work bottle-rack of claim 7 and possibly the oblique relation required by claim 15 of the bottle-racks and the bottles to the plane of the conveyer, though the equivalent of this oblique relation may have been in some degree achieved through the slight inclination from the vertical of the tank and conveyer.

We have further to consider the Volz sketch, bearing date February 1, 1902. The principal disclosure of the sketch shows sufficient correspondence with the first application to signify conceptive relation; but we cannot regard the evidence adduced to sustain the date appearing on the sketch as fairly sanctioned by the standard of proofs which the prevailing rule of judicial decision exacts. The effect of this is to leave in doubt the time, prior to the date of execution of his first application, when Volz can be safely said to have possessed a definite conception. True, an account is shown between Volz and his solicitor, which contains a charge and partial payments in cash beginning March 3, 1902, and ending April 2d following, for fees in respect of the first application. This account, however, does not solve the question of date, for the habit of the solicitor was to require of a new client, as Volz was, payment of fees in advance, and the draftsman before alluded to testified that there was "about eight hours' work on the drawings." In view of this uncertainty we do not feel justified in ascribing to Volz a definite conception as of a date prior to the execution of his first application, April 2, 1902.

[4] We must return briefly to Volz's claim that he conceived his invention and disclosed it to others in 1901. Apart from what we have said before on this subject, we think that prior to the execution of his first application for a patent Volz did not exercise reasonable diligence in adapting and perfecting the invention. Diligence is of the essence of a proper relation between the conception and the reduction to practice of an invention, and must consist of a degree of effort that can

fairly be characterized as "substantially one continuous act." Christie v. Seybold, supra, 55 Fed. at 76, 5 C. C. A. 33 (C. C. A. 6); and see Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra, 166 Fed. at 298, 301, 92 C. C. A. 206 (C. C. A. 1) and citations. Volz's delays and the vagueness of his pencil sketches prior to the sketch bearing date February 1, 1902, have already been commented on. We are not unmindful of the claim that Volz's financial condition brought about his delay; but this is not warranted by the evidence. True, Volz seems to have believed he should first secure financial assistance to obtain a patent and manufacture the patented device. He expended valuable time in endeavoring to associate himself with some person of means to accomplish both these objects; but we do not see, and the evidence does not explain, why he might not have separated the two objects and pursued the one that was vital to the other, i. e., to complete his conception by the preparation and filing of an allowable application for a patent. The truth is that after Mr. Scarborough had consented to join with him in the double enterprise, Volz himself paid the costs incident to his application of April 10, 1902; for, after making somewhat contradictory statements on the subject, he testified: "I paid, with my own money, for the preparation and filing of the application" of April 10, 1902. When this admission and the theory of a definite conception of the invention in the spring of 1901 are considered in connection with Volz's testimony that he alone prepared the sketch bearing date February 1, 1902, it is impossible to reconcile his course prior to April, 1902, with any claim of diligence. Christie v. Seybold, supra, 55 Fed. at page 77, 5 C. C. A. 33; United Tunnel Improvement Co. v. Interborough Rapid Transit Co., 207 Fed. 561, at 569, 125 C. C. A. 211, per Judge Hand, concurred in by Court of Appeals, 207 Fed. at 571, 125 C. C. A. 211 (C. C. A. 2).

It must follow, as before intimated, that the patent in suit should in respect of claims 2, 4, 15, and 21 be regarded as having been conceived and reduced at least to constructive practice as early as the date of execution of the first application, April 2, 1902; but that as to claim 7, the date of conception and constructive reduction to practice is to be treated as of the time of filing the second application, July 22, 1902. It need not be stated that the proximity in time between the putting into operation of the anticipating machine above considered and the Volz conception is calculated to give a court much concern touching the liability to error in either of the conclusions reached. There are other considerations here, however, which lead to a wider difference in point of priority. If it were assumed that the Volz sketch could safely be given an earlier date, even the date it bears, this would not aid the plaintiff; for the evidence concerning the origin of the anticipating machine seems to us indubitably to show that it was in course of construction as early as December, 1901. It hardly is conceivable that a definite conception and plan of the machine did not precede the commencement of its construction; in truth the evidence shows this, if evidence is necessary to establish such a fact. This must settle the question of priority, since it is not claimed, and it could not well be, that there was any lack of diligence in completing the machine after its construction was once begun.

[5] And as matter of law we see no difference between the right of a defendant to show the time of conception of an unpatented anticipating device, as also diligence in reducing it to practice, and the right of a plaintiff to do this in respect of a patented device. We conceive this to be the necessary effect of section 4886 and section 4920, paragraphs second and fourth, of the federal Revised Statutes; and these statutory provisions seem to have been substantially complied with in the second and third paragraphs of the answer when read in connection with the eighth paragraph. It cannot be that a patentee can escape the defenses either that he "unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same" (second par. § 4920), or that "he was not the original and first inventor or discoverer of any material and substantial part of the thing patented" (fourth par. Id.), whether the anticipating object is patented or unpatented. The statute makes no distinction in this regard; it is the fact of prior invention, not the nature of the right under which the invented device is held, that the statute treats as a defense. As Judge Colt said in Automatic Weighing Mach. Co. v. Pneumatic Scale Corp., supra, 166 Fed. at 301, 92 C. C. A. 219 (C. C. A. 1):

"No sound reason has been advanced why the doctrine of diligence should not apply to a patentee as well as to an inventor who has not secured a patent. On the other hand, any such distinction in favor of patentees is not in harmony with the patent laws."

Again, when speaking of Mr. Justice Story's opinion in Reed v. Cutter, Judge Colt said (166 Fed. 302, 92 C. C. A. 220):

"According to Reed v. Cutter [Fed. Cas. No. 11,645], * * * section 15 of the act of 1836 (containing in substance pars. 2 and 4, section 4920) secures to the first inventor the prior right, provided he uses reasonable diligence in adapting and perfecting his invention, and this rule applies to all inventors, whether patentees or otherwise."

[6] In view of the prior art, including the effect of the unpatented machine, as herein considered, the decree must be affirmed.

JACKSON CUSHION SPRING CO. v. ADLER et al.

(Circuit Court of Appeals, Sixth Circuit. May 18, 1917.)

No. 2782.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT.
The Adler and Sullivan patent, No. 991,187, for a spring cushion for the seats and backs of automobiles, conceding its validity, is of narrow scope, its range of equivalents small, and its practical utility doubtful, and, as so construed, *held* not infringed.

2. PATENTS ⟸61—SCOPE—PRIOR ART.
A patent the application for which was filed prior to that for the patent in suit is prima facie a part of the prior art, and may be considered in the limitations it imposes on the scope of the patent in suit.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by Theodore L. A. Adler and William G. Sullivan against the Jackson Cushion Spring Company. Decree for complainants, and defendant appeals. Reversed.

Edw. N. Pagelsen, of Detroit, Mich., for appellant.

Stuart C. Barnes, of Detroit, Mich., for appellees.

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

SATER, District Judge. [1] The controversy in this case relates to the portion of springs in automobile backs which supports the shoulder, neck, and head of automobile occupants. The lower court concluded that the defendant (appellant here) had infringed claims 1 and 6 of the plaintiffs' (appellees') patent No. 991,187, issued May 2, 1911, on their application filed November 24, 1909. The defendant appealed. The claims in question are shown in the margin.[1]

In upholstering the top portion of automobile seat backs, it had been usual to attach to the rigid trimming rail at the top of the back a rather expensive roll of hair in a duck or canvas casing. The leather back was then fitted over such roll. The roll, not having the same yielding quality as the back springs, frequently matted, sagged downward, and became unpleasant to the seat occupant. The patentees' purpose was to obviate these objectionable features by providing a spring edge at the top of the seat back which would yield uniformly with the adjacent portion of the back springs and maintain the contour of the upholstery and the comfort of the occupant. Incidentally it was claimed on the hearing that economy in the use of hair is effected. To accomplish their purpose they employed helical springs arranged in

[1] 1. In combination with a supporting frame, a helical spring rising therefrom and adapted to oscillate along its helical axis, an arched spring uniting the support and the free end of the helical spring, the arch extending beyond the edge of the supporting frame and forming a support for an upholstering cover extending from the plane of the top of the helical spring around the edge of the frame, and a pair of connecting and bracing members extending from the curved portion of said arch spring to corresponding portions of similar adjacent springs, one of said members being resilient and the other being relatively rigid, substantially as described.

6. A spring seat, having in combination with a supporting frame and a row of helical springs attached at one end of each to portions of said frame appreciably spaced from the edge thereof, a corresponding number of arched springs, one for each of the row of helical springs, and attached at their tops to the top portion thereof, said arched springs extending convolutely therefrom over and outside of the edge of the frame, with their base portions engaging there against, a relatively rigid connecting bar extending parallel to the edge of the frame and attached to the lower arched portion of each of said last-named springs, and a resilient connecting member extending parallel to said bar and to the edge of the frame, being attached to the upper arched portion of each of said last-named springs, whereby a strain imposed on any one of said arched springs is yieldingly communicated to the other springs and yieldingly opposed accordingly, substantially as described.

series, held together by tie wires, and fastened either directly to the seat back or to a supporting metal frame placed against such back. The row of helical springs near the top of the back projects horizontally and is necessarily placed some distance from the top edge of the seat. Extending upward and rearward from the top of each side of each helical spring is an arm, which, at the highest point of its arch and over the top of the seat back or trimming rail, is formed into a downwardly projecting convolute coil. The two arms are formed from a continuous wire which is so bent, where it reaches the top of the seat back, as to lie horizontally on it for the support of the spring thereon and its convenient attachment thereto. One arch arm may, if preferred, be used instead of two. To preserve the parallel relation between the arms, two classes of cross-stays are used. The stay of the first class, which is resilient and nearer the helical springs, is hooked around the arms, and, to permit it to yield under strain, may have eyelets or convolute curves between them. Springs of this class, instead of being of the character just mentioned, may assume the helical form of greater resiliency. The stay of the second class is affixed to the arched arms at or about their highest point, above the convolute coil, and some distance from their attachment to the frame, and is of sufficient rigidity to transmit from one spring to another any lengthwise strains imposed upon it. It is not contemplated that the stay shall remain stationary. The patentees assert that their arched springs with their connecting stay members constitute an edge cushioning structure, any of whose members will yield to a strain directly imposed on it, and that the extent of the yielding is reduced from what it would otherwise be by the pull of the two stays which transmit some of the strain to the immediately adjacent arched spring members and a lesser amount to those further from the point of greatest strain. The yielding character of the resilient stay, which is located where the greatest strain occurs, causes a less pull on the arched springs than does the relatively unyielding stay. The result is that with but little upholstery "the top edge, against which the user's body rests, is rendered most yielding and soft." They also claim that their mode of construction of edge springs allows them to retain their proper position, keeps the upper portion of the seat back cushion in proper shape, and greatly increases the action and efficiency of the adjacent cushion springs, to which they are united, by relieving them from the direct pressure and downward weight of the upholstery and that in consequence a lighter and softer wire may be used with an increased possibility of forming a very soft and elastic back.

[2] Young, to accomplish the same purpose as plaintiffs, filed an application on November 1, 1909, which is shown in the record, and obtained a patent, No. 1,155,391, on October 5, 1915, for upholstering a seat back. The patent issued subsequent to the date of the decree in the lower court. At the top of the seat back, where the frame is attached to it, is what he terms a border wire running lengthwise of the back. At the top of the outer edge of the topmost series of helical springs is another border wire. Extending convolutely from one of

these border wires to the other are spring arches. On each side of the coil flat metallic strips or stays arranged horizontally and parallel with the top of the seat back rest upon and are fastened to the arches or curved arms to tie them together and to support the hair stuffing. The top of his seat back spring differs from plaintiffs', in that his stays are not wire, but metal strips, are apparently of the same size, and are differently located on the arched springs, which do not, like plaintiffs', extend rearwardly beyond the trimming rail, and his convolute coil is in front of and above, but not over, such rail. It is obvious that if the seat back were turned about so that the top edge of the trimming rail would be in the same position as the front edge of the seat, the spring construction adopted by plaintiffs and by Young respectively would answer quite as well for the front of the seat as for the top of its back. The awkward phraseology in the descriptive portion of plaintiffs' patent is doubtless due to the effort to make it applicable to a seat cushion as well as to the top of a seat back. Claim 5 in the plaintiffs' patent, one of their broadest claims, and claim 8, of the Young patent, are both for an edge spring for a cushion seat, and are both couched in precisely the same language. An interference was declared November 12, 1912, and decided in Young's favor, which decision, no appeal from it having been taken, remains in full force. We are not unmindful that the claim of plaintiff's patent, put in interference, is not the same as either of the claims in suit, but it is clear that Young's device responds quite as well as plaintiff's to their claim 5, and that although Young's spring arrangement has not been adjudicated to anticipate that of plaintiffs as to the limited claims which alone are now in issue, the priority of the invention as to his entire device presumed from the earlier filing of his application (Electric Controller & S. Co. v. Westinghouse E. & Mfg. Co., 171 Fed. 83, 87, 96 C. C. A. 187 [C. C. A. 6] makes Young's patent a part of the prior art, and, as his invention was conceived and reduced to practice as an entirety, it may be thus considered in the limitations it imposes on the scope of the plaintiffs' invention. The prior art, as disclosed by the record, shows that spring edges for spring seats and kindred structures, convolute coils, arched springs, stays or connectors of various designs, resilient and nonresilient, or of varying degrees of resiliency, were old in the art before plaintiffs began their experimenting. Their patent is a narrow one, and its range of equivalents small. This further appears from a consideration of the Schultz & Sweeney patent, issued August 1, 1911, on their application of March 30th preceding, in accordance with which patent, except as to one added member hereafter to be mentioned, the defendant as a licensee operated. The normally flat ribbons of resilient wire bent into sinuous curves, employed by Schultz & Sweeney, are joined at their lower ends at the topmost row of helical springs, to downward connecting rods, from which connecting points they are bent or arched upward beyond the top of the seat back and then downward and forward that their ends may be fastened to the upper horizontal bar of the metal frame, which bar is attached to the top of the wooden seat back or to its top front portion. Their arched top

springs do not in cross section differ materially in appearance from plaintiffs', excepting that they have no convolute coils. Unlike plaintiffs', they are made of sinuous or wavy instead of round wires, and are connected not by two continuous resilient wire stays, one of which is more resilient than the other, but by two or more rows of resilient wire coiled springs, all of which are above and beyond the helical springs and are not a part of a continuous wire, but are separate and distinct, each extending from one sinuous or wavy arch to the next adjoining only. The added member in defendant's commercialized form of such device, to which member allusion above is made, was inserted at the suggestion of defendant's principal customer, and consists of a thin flat metal strip or bar about one and one-half inches wide, placed vertically and edgewise at or near the rear top edge of the wooden frame of the seat back. Its upper edge is bent over toward the front into an imperfect roll. The wavy arched spring wires are held to its rear side by clips, and pass downward and forward under such bar, their ends being fastened to the upper horizontal metal strip of the spring-supporting frame, although they might be fastened, it would seem, to the front edge of the top of the wooden frame, if the manufacturer should choose so to do.

The plaintiffs' patent must have issued on account of the restrictions placed on their combination of their connecting stays with the arched springs and the offices thereby performed. Plaintiffs' relatively rigid stay is susceptible of much motion, laterally, vertically, and rearwardly. This freedom of movement is attainable only by its location upon the arched springs at a distance from the rigid framework of the seat back. Were it located at or on such framework, it would not be free to move endwise to perform its function of transmitting from one spring to another any lengthwise strains imposed upon it, nor would it move readily forward or rearward, if at all. The portion of the arches extending between the framework and the stay yields with the residue of such arches when pressure is applied to such stay. The yielding and soft qualities of the plaintiffs' spring construction are so pronounced as to cause its rejection by manufacturers because it is not strong enough to maintain and hold in position the hair stuffing, and, if made strong enough to do that, is lacking in resiliency. The weight of the evidence would seem to indicate its impracticability as a working device, if constructed within the terms of the patent. Its construction, moreover, requires expensive machinery. The defendant's added strip or bar is not the equivalent of the relatively rigid connecting stay shown in the patent in suit. It is differently located and does not perform the same, or substantially the same, function or operate in a similar manner. It is so near the top of the seat back and the point at which the ends of the arches are attached, and is so rigid in itself and so firmly held by the numerous wires passing over and around it and attached to the metal frame as to render it incapable of any motion, even before the upholstering is done, which appreciably affects the arched springs, and, after the stuffing and leather cover are adjusted, the application of a considerable force fails per-

ceptibly to move the stay endwise, rearward, forward, or downward. The frictional contact of an occupant's back with the leather covering can produce no noticeable impression on such stay or bar, and such member consequently performs no function in transmitting from one spring to another any lengthwise strains. An essential feature of plaintiffs' spring construction—a feature on which they lay much stress—is therefore wanting in defendant's device. The defendant's arches are not convolutely extended, and in reality terminate at the top of the metal strip or stay which serves substantially the same purpose as an extension upward of the top of the seat back. If such metal strip may be likened to plaintiffs' relatively rigid stay, it must then be conceded that defendant's device is devoid of all arched spring construction between such stay and the trimming rail, and that the transmission of lengthwise strains resides in the resilient coiled spring stay alone. The defendant's structure is commercially operative and successful, and has gone into extensive use. It differs materially from the plaintiffs' in the result attained and the means of attaining it. Conceding the validity of the patent in suit, but considering its place in the art and its questionable utility, to give it a broad construction would operate to discourage rather than promote inventive talent. Infringement is not made out, and the judgment of the trial court is therefore reversed.

A discussion of the charge of piracy from the Young and the Schultz & Sweeney inventions so freely made against the plaintiffs is unnecessary. In view of the conclusions reached, defendant's motion to remand to take additional evidence is denied.

An order may be taken in accordance with the foregoing.

LEMLEY v. DOBSON-EVANS CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1917.)

No. 2936.

1. PATENTS ⟸32—SUIT FOR INFRINGEMENT—EVIDENCE.
   The printed date of the filing of the application as shown on the officially printed copy of the patent will be accepted as correct in the absence of objection.

2. PATENTS ⟸283(1)—SUIT FOR INFRINGEMENT—DEFENSES—ANTICIPATION.
   A patent the application for which antedates that for the patent in suit is a part of the prior art and if anticipatory may be shown in defense of a suit for infringement under subdivision 4, § 4920, Rev. St. (Comp. St. 1916, § 9466[4]), as evidence that the patentee "was not the original or first inventor or discoverer" of the thing patented, since the filing of the application was constructively a reduction to practice by the prior applicant and carries with it the presumption that he had at that time made the invention.

3. PATENTS ⟸328—INVENTION—LOOSE-LEAF BINDER.
   The Schade patent, No. 819,461, for a loose-leaf binder, in view of the prior art is void for lack of invention.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

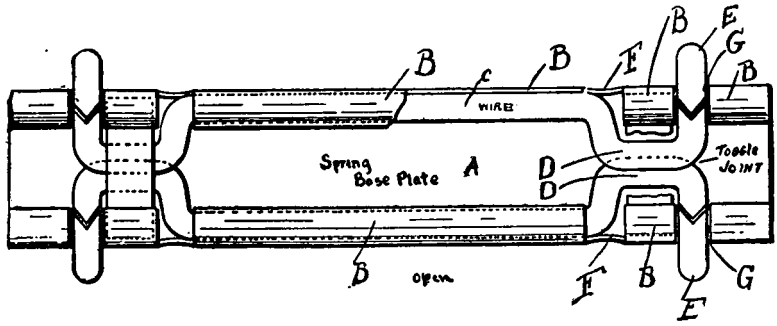
Suit in equity by the Dobson-Evans Company against S. T. Lemley. Decree for complainant, and defendant appeals. Reversed.

Stuart C. Barnes, of Detroit, Mich., for appellant.
Chester C. Shepherd, of Columbus, Ohio, for appellee.

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

DENISON, Circuit Judge. In a suit brought by the Dobson-Evans Company against Lemley, based upon the first four claims of patent to Schade, No. 819,461, May 1, 1906, for improvements in loose leaf binders, the District Court thought claims 1, 2, and 4 were valid and infringed, and the usual interlocutory decree was entered. Lemley, the defendant below, brings this appeal. There were several earlier binders of the Schade type. They comprised two or more leaf-holding rings or eyes centrally divided into half rings and with the halves hinged together so that they were adapted to be opened and receive loose sheets with prepared punched holes and then to be closed, whereby the sheets were strung upon the rings. They also embodied a holding cover or plate, whereby the rings and their hinges were retained in proper relative position. The closest resemblance to Schade, in both form and function, is found in Pitt, two years earlier. See Irving-Pitt Co. v. Twinlock Co. (D. C.) 220 Fed. 325; Id. (C. C. A. 2) 225 Fed. 1022, 140 C. C. A. 603; Irving-Pitt Co. v. Trussell (C. C. A. 2) 240 Fed. 730, — C. C. A. —; Irving-Pitt Co. v. Blackwell (C. C. A. 8) 238 Fed. 177, — C. C. A. —. See 240 Fed. 730, for drawing. Pitt provided a back plate of the desired length, and bent so as to form, in lateral cross-section, the arc of a circle with inturned lips. Within this back plate and under the retaining lips he put two rigid flat plates side by side, hinged together, so that the plates constituted hinge leaves, their combined width being slightly greater than the chord of the back plate arc. The back plate was made of resilient material, and the result was that the hinge between the two flat plates would form a toggle joint so that they would naturally fall into an obtuse angle, either above or below the line of the lips of the back plate, and be held there by the spring action of the back plate, and their motion in either direction would be limited by the back plate or its lips. To the two opposite hinged plates, Pitt fastened the lower ends of his half rings. When the upper meeting ends of the ring sections were forced apart, the toggle joint would spring into its upper position and the ring would be held open. When the ring sections were closed, the joint would spring into the lower position and hold them there. The resiliency of the back plate, yielding as the toggle-jointed back plates passed the horizontal plane, imparted to the ring sections this capacity to be held in either position in which they were placed. Schade adopted the Pitt structure, except that he substituted for each of Pitt's two flat toggle-jointed plates, to which ring sections were soldered or otherwise rigidly fastened, a continuous wire, the first part of which was held longitudinally and pivoted under one lip of the

back plate, the second part of which was bent out into a lateral plane so as to go slightly past the center of the back plate and then back again to the edge of it, forming a hinge leaf, and the remaining part of which was then developed into a half ring in a plane approximately at right angles to the planes both of the first and second parts. When two of these wire sections were opposed and in suitable engagement provided at the point where they met, they constituted a toggle-joint operating like Pitt. This construction is shown in the drawing herewith reproduced and is recited in claim 1 shown in the margin.[1]



It is not claimed that Schade is anticipated in the complete sense by the prior art, but the defense is that, in view of this art, the change made by him did not involve invention. Rightly to apprehend this art, further structures must be described. By an English patent, Lindner had shown a continuous wire half ring, leaf off-set and edge pivot of a form very close to Schade's corresponding parts; but the two leaf off-sets did not reach each other, and were held in one position by a sliding clamp instead of being held in alternative positions by a spring pressure. Blackmer and Robson also showed two wires, each developed into a half ring, and each containing an off-set portion like Schade. In this, as in Lindner, the two off-set portions did not touch each other, but, unlike Lindner and like Schade, the off-set portion served as a lever which, under spring pressure, held the ring open or closed. An encasing spring member formed an abutment against which this lever rested. Normally, it held the ring closed, and when the ring was forced open, the lever passed the point where the spring would throw it back and the spring held it open. McMillan, instead of using Pitt's flat plates, carried his ring sections themselves to the point of meeting where they were united with a hinge or pivot rod, and he so mounted them in the edges of the base plate that they constituted the spring pressed toggle-joint. The following selected figures from Lindner, Blackmer and Robson, and McMillan illustrate the description that has been given.

[1] 1. "In a temporary or loose-leaf binder, the combination with a base-plate made of spring sheet metal, of separable eyes mounted pivotally directly on the edges of said base-plate and having bent wire arms, the arms of the two opposite separable eyes being engaged to form toggle-levers between the sides of the spring base-plate substantially as set forth."

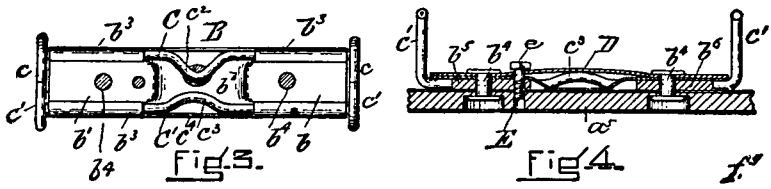
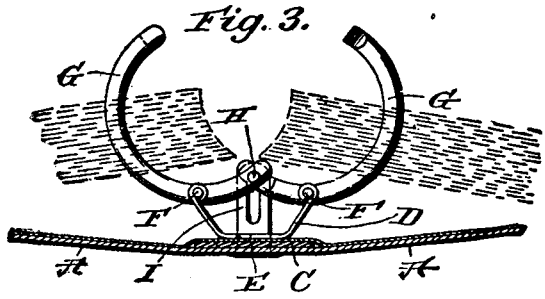
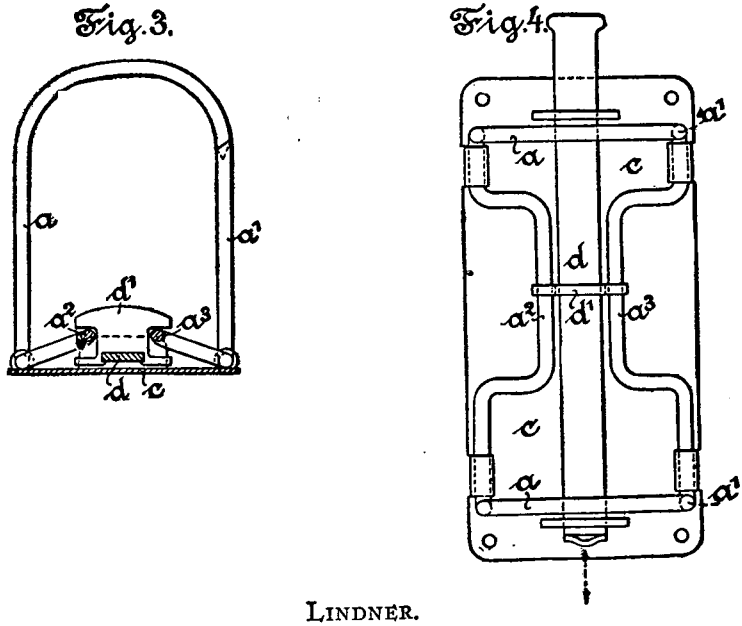


Fig. 3. Fig. 4.

BLACKMER AND ROBSON.



McMILLAN.



LINDNER.

[1] The patent of McMillan is No. 794,536, and was issued July 11, 1905, on application filed October 13, 1904. The Blackmer and Robson patent was applied for April 28, 1904, and issued August 29, 1905,

being No. 798,157. It is urged that these are not a part of the art prior to Schade whose application was filed January 17, 1905, after the filing of Blackmer and Robson and of McMillan, but before the issue of either. There is no evidence in the record as to the respective dates of invention, save that afforded by the usual printed copies of the three patents admitted by stipulation, and by the certified copy of the McMillan file wrapper and contents. While, in case of objection and insistence upon strict proof, it might be necessary to produce a copy of the Patent Office record in order to show the filing date, yet the practice of relying upon the date shown on the officially printed copy has now become so general that, in this circuit, the printed date is accepted as proof whenever objection is not made. Drewson v. Hartje Co., 131 Fed. 734, 738, 65 C. C. A. 548. We, therefore, assume that the filing dates of these patents are as above stated.

[2] This court held, in Drewson v. Hartje Co., supra, 131 Fed. at page 739, 65 C. C. A. 548, that a patent, the filing date of which antedated the filing date of the patent in suit, was, prima facie, anticipatory; and we have repeatedly accepted and applied that rule (e. g., Electric Co. v. Westinghouse Co., 171 Fed. 83, 87, 96 C. C. A. 187; Jackson Co. v. Adler, May 18, 1917, 243 Fed. 386, — C. C. A. —; Twentieth Century Co. v. Loew Co., 243 Fed. 373, — C. C. A. —, May 8, 1917). To rely upon these cases would be sufficient; but the contrary proposition is urged upon us so often and is observed to such an extent in current decisions that it seems to deserve re-examination. The cases, found cited to support the claim that such a patent is not part of the prior art, are collected in the margin.[2] We are satisfied that the confusion arises out of a question of pleading, and has no foundation in matter of substance.

The patent statute (R. S. § 4920 [Comp. St. 1916, § 9466]) catalogues five supposedly independent matters of defense, and requires the pleading of those which are to be relied upon. The separation is not analytically perfect; the last clause [b] of "third" seems to belong to "fifth," and since the patentee could not possibly be the first inventor of something that, before his invention, had been patented to or described by another, the entire first clause [a] of "third" seems quite unnecessary. However, we have to deal with the statute as it is. The two classes now material are:

"Third [a] that it [the invention] had been patented or described in some printed publication prior to his supposed invention or discovery thereof, or [b] more than two years prior to his application for a patent therefor. * * *

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[2] Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Diamond Co. v. Kelly (C. C.) 120 Fed. 282, 287; Anderson v. Collins (C. C. A. 8) 122 Fed. 451, 458, 58 C. C. A. 669; Thompson-Houston Co. v. Ohio Co. (C. C.) 130 Fed. 542, 546; Eck v. Kutz (C. C.) 132 Fed. 758, 764; Ajax Co. v. Brady Co. (C. C.) 155 Fed. 409, 415; Union Co. v. Smith (C. C.) 173 Fed. 288, 291; Gray Co. v. Baird Co. (C. C. A. 7) 174 Fed. 417, 421, 98 C. C. A. 353; Gen. Elec. Co. v. Allis Co. (C. C.) 190 Fed. 165, 170; Johns Pratt Co. v. Freeman (C. C. A. 3) 204 Fed. 288, 122 C. C. A. 512 (by affirmance of [D. C.] 201 Fed. 356, 360); Horton Co. v. White Lily Co. (C. C. A. 7) 213 Fed. 471, 476, 130 C. C. A. 117; Alvord v. Smith (D. C.) 216 Fed. 150, 154.

"Fourth. That he was not the original and first inventor or discoverer of any material and substantial part[3] of the thing patented."

Since an invention is not "patented" and the patent is not "published" until issued, it is apparent that when a patent is pleaded under this third defense and the fourth defense is not involved, its application date is of no importance whatever. It is equally sure that where the tendered issue is whether the patentee was the first inventor (fourth defense) and it appears that another had made the invention, the date of that other's patent, or whether he ever had a patent, or whether the prior description was by printing or without, is immaterial; the date of his invention is the vital thing.

Under the famliar Patent Office rule, the filing of an allowable application is a constructive reduction to practice,[4] and so there must be a presumption that the patentee had made his invention at the date of his filing. The cases where a substantial change in the invention is made pending the application are exceptional, and, of course, he who alleges an exception must prove it.[5] The existence of the presumption is worked out and declared, with perhaps unnecessary care, by the first Circuit Court of Appeals in Automatic Co. v. Pneumatic Co., 166 Fed. 288, 293, 92 C. C. A. 206. Hence, it assuredly follows that if a patent in suit was applied for January 15th, and there is nothing to carry the patentee's invention back of that date, and if a patent disclosing the same invention was issued to another in July upon an application filed January 1st, this tends to show that the patentee of the patent in suit was not the first inventor. This has been distinctly held not only in Drewson v. Hartje, supra, but by the Seventh Circuit Court of Appeals (Barnes Co. v. Walworth Co., 60 Fed. 605, 606, 9 C. C. A. 154); by Acheson, C. J. (Westinghouse v. Chartiers Co. (C. C.) 43 Fed. 582, and cases cited on page 588); and by the Second Circuit Court of Appeals (Sundh Co. v. Interborough Co., 198 Fed. 94, 97, 117 C. C. A. 280); and it has been expressly recognized and applied by the Supreme Court (Pope Co. v. Gormully Co., 144 U. S. 238, 244, 12 Sup. Ct. 637, 36 L. Ed. 420); by Mr. Justice Bradley (Kearney v. Lehigh Co. [D. C.] 32 Fed. 320, 322, 323); and by the Second Circuit Court of Appeals (Hillard v. Fisher Co., 159 Fed. 439, 441, 86 C. C. A. 469; Otis Co. v. Interborough Co., 222 Fed. 501, 502, 138 C. C. A. 97).

Turning to the cases cited contra: Bates v. Coe, in using the language so often quoted (98 U. S. on pages 33, 34, 25 L. Ed. 68) is speaking solely of "evidence to sustain the second [third] defense," and this restriction has not been observed when it has been quoted as if applicable to all defenses. In Horton Co. v. White Lily Co. (C. C. A. 7), the court

[3] Since the thing patented is a unit, to which "any material and substantial part of" is essential, and since no patent is found to be either anticipated or infringed except by comparison with devices containing every substantial and material part, the special force of the quoted words is not evident.

[4] Duryea v. Rice, 28 App. D. C. 423; Computing Co. v. Standard Co. (C. C. A. 6) 195 Fed. 508, 511, 115 C. C. A. 418; Sundh Co. v. Interborough Co. (C. C. A. 2) 198 Fed. 94, 97, 117 C. C. A 280.

[5] Webster Co. v. Higgins, 105 U. S. 580, 594, 26 L. Ed. 1177.

was considering two patents to the same inventor, a very different situation. In some, as in Anderson v. Collins (C. C. A. 8), it is carefully recognized that the ruling involves only the third defense. In others, the state of the pleadings does not appear. Some seem to depend upon a distinction between "anticipation" and "priority of invention," applying the former name to the third defense and the latter to the fourth, though we do not see why "anticipation" is not properly applicable to both. So far as any of the other cases may be distinctly inconsistent with the proposition of the preceding paragraph, we must think them erroneous.

It was the common, if not universal, practice under the old equity rules for an answer to recite under one paragraph all the older patents relied upon, and then, under another, to repeat all the names of the patentees with their places of residence. In deference to the simplifying spirit of the new rules, the defendant here pleaded that the patentee was not the first inventor, "but that said invention was first made by the applicants of the patents recited in paragraph 9." In such cases, there is no question of pleading, but the pertinence of the earlier filing date is clear. We should hesitate to reach the other result, even when the fourth defense was not pleaded in terms. Since patenting to another before the invention of the patent in suit necessarily implies denial that the patent in suit was issued to the first inventor, to plead the third defense is usually itself to plead the fourth, and it would be unfortunate that an invalid patent should be held valid only because a good defense had been pleaded by a wrong name. Any amendments that might seem necessary would doubtless be allowed on request, with due regard to the prejudice, if any, thereby caused.

[3] When we consider this prior art, including McMillan and Blackmer and Robson, we are forced to conclude that Schade took no inventive step. His continuous wire, developed into three parts, each part having a function, can be found merged in Pitt's hooks and flat plates, yet there would be ingenious, and, we assume patentable, novelty in observing this continuous wire and developing it out of its merged condition, if it had been a new thing after it was developed; and so Pitt alone will not serve to invalidate. McMillan makes his hooks or rings out of wire, and extends the hooks themselves to a meeting point, making a toggle lever hinge, and pivotally mounts the rings on the edges of the back plate. The language of Schade's claim 1, if given the broad meaning which could naturally be attributed to the selected words, plainly reads upon McMillan; and yet this is not conclusive of the question of invention, since the language of the claim, by reference to the specification, might fairly imply that the "bent wire arms" of the claim referred to arms bent up laterally and to hinge leaves of the general type shown rather than those which were mere continuations of the hook in the same plane, like McMillan. Even Lindner, considered by itself or in association with the others, would not necessarily negative invention, since the wire off-set of Lindner, shaped like Schade's wire off-set, had no function as a spring pressed lever, and to combine the thought of such a shaped and formed continuous wire with Pitt's thought of spring actuated toggle levers might well be

considered a patentable combination. We are convinced, however, that Blackmer and Robson furnish the final and unanswerable argument against invention. With a continuous wire member generally, undistinguishable from Schade and embodying the three functions of a separable retaining hook, an edge pivot and a doubly bent off-set portion operating as a spring pressed lever, we find that this off-set made contact with and passed by and was held in selected position by a resilient abutment located just above the off-set. Pitt had disclosed a ring section provided with an extension which made contact with a resilient abutment located at one side, viz. the opposite member of the same form. It follows that when Schade appeared, the toggle lever hinge form of Pitt and the spring pressed lever arm form of Blackmer and Robson were known equivalents, and what Schade did was to substitute one for the other as one of the members of his otherwise unchanged combination. He accomplished no "new result," in any sense of that ambiguous phrase, except that his substituted form was perhaps cheaper to make, stronger and more smoothly operating in this old combination than the equivalent element which it displaced. The mechanical modification required, considered either from the viewpoint of substituting the Blackmer and Robson continuous wire for the Pitt hook and plate, or substituting the Pitt toggle lever interlock for the Blackmer and Robson lever and casing interlock, was merely to extend the Blackmer and Robson off-sets until they were hinged together. In view of all that was before him in these several patents, we cannot think that this was more than the expected ability of the skilled artisan. Fare Register Co. v. Ohmer (C. C. A. 6) 238 Fed. 182 and cases cited at page 187, 151 C. C. A. 258; Budd Co. v. New England Co. (C. C. A. 6) 240 Fed. 415, and cases cited on page 417, — C. C. A. —.

The remaining claims involved in the appeal fall with claim 1. The decree is reversed, and the case remanded, with instructions to dismiss the bill.

BONNEY SUPPLY CO., Inc., v. HELTZEL et al.

(District Court, N. D. Ohio, E. D. June 4, 1917.)

No. 374.

PATENTS ⟸310(1)—SUIT FOR INFRINGEMENT—PLEADING.

In a suit for infringement, complainant cannot be required by a motion for further and better particulars, made under equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv), to make a comparison of the elements of the claims of his patent with the elements of defendants' structure, which would not be a statement of ultimate facts required by rule 25, but merely the opinion or conclusions of the pleader; but he may be required to specify the claims of the patent relied upon as having been infringed.

In Equity. Suit by the Bonney Supply Company Incorporated against John W. Heltzel and the Heltzel Steel Form & Iron Company. On motion by defendants for bill of particulars. Granted in part.

B. H. Davis, of Cleveland, Ohio, and Frank Keiper, of Rochester, N. Y., for plaintiff.

E. R. Alexander and George B. Pitts, both of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. Complainant's bill of complaint, after setting up its patent, alleges infringement thereof by the defendants in general language. In substance it says that the defendants have infringed letters patent No. 1,182,081 by making, using, and selling, or leasing, or causing to be made, used, and sold, or leased, rapid loaders for wagons, embodying the improvements set forth and claimed in complainant's patent. To this bill defendants file a motion for further and better particulars, as follows: (1) A statement specifying which claim or claims of the patent in suit is or are infringed by each of the constructions manufactured by the defendant the Heltzel Steel Form & Iron Company. (2) A statement or statements comparing the elements of each of the claims relied upon with the elements of each and all of defendants' constructions which plaintiff will allege infringe the patent in suit.

Whether the relief should be granted in either or both respects calls for an examination of new equity rules 20, 25, 30, 33, and 58 (198 Fed. xxiv, 115 C. C. A. xxiv). If complainant's bill does not contain a sufficient statement of ultimate facts in the respects complained of in the motion, then to that extent the motion should be sustained. If, on the other hand, it does contain a sufficient statement of ultimate facts, the motion should be overruled. In no event, however, should the motion be granted, so as to require further and better particulars by the pleading, or incorporation of evidential matter, or of conclusions of law and of fact. Inasmuch as the questions of practice raised by this motion are important, and cannot be said to be finally settled, an examination of the questions involved and a review of the pertinent authorities have been made by me, and the results thereof may properly be recorded in this memorandum for the information of counsel.

Equity rule 20 says:

"A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."

Equity rule 25, stating what a bill in equity shall contain, says:

"A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

Equity rule 33 abolishes exceptions to an answer for insufficiency and authorizes a motion to strike out in order to test the sufficiency thereof. Equity rule 58 provides for discovery, inspection and production of documents, admission of the execution or genuineness of documents, and for the submission of interrogatories in writing "for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause."

These new rules were intended to simplify equity pleading, and expedite the hearing and final decision of equity causes. They were intended in matters of pleading to assimilate bills in equity to the petition of the Code practice. While the language of the several Codes differs, they in general, require a statement of facts constituting a cause of action in ordinary and precise language. In some Codes the language is a statement of operative facts. In equity rule 25 the language is a short and simple statement of the ultimate facts. As a result of long years of practice, it is now settled that conclusions of law and of fact, matters of evidence, and all repetition should be avoided. The pleading is sufficient when the operative or ultimate facts are duly pleaded according to their legal tenor and effect. The Code practice provides for a motion to make definite and certain any pleading, the allegations of which are too indefinite and general to inform the opposite party of what it may be claimed will be the ultimate or operative facts. Indefiniteness and too great generality are not a ground for demurrer under the Code practice, and in this respect also the new equity rules have conformed to the same procedure. Equity rule 20, in like situations, permits an order to be made for a further and better statement of the nature of the claim or defense, or for further and better particulars of any matter stated in a pleading. It is manifest, therefore, that greater definiteness or certainty may be required under the new than was required under the old rules.

Rule 58, allowing the discovery by interrogatories of facts and documents, inspection, production, and admission of genuineness of documents, has also its counterpart in the Code practice. It will be noted the discovery is of facts and documents, and that interrogatories are available only for that limited purpose. Numerous cases may be found in which the kind of interrogatory that may be filed, and to which answer may be required, has been considered, and these cases are pertinent to the second ground of the motion now under consideration.

The general allegations of infringement in the bill in this case have been held sufficient on demurrer under equity practice prior to the new rules. In American Bell Telephone Co. v. Southern Telephone Co.

(C. C.) 34 Fed. 803, Judge Brewer (afterwards Mr. Justice Brewer) stated the established practice in this respect in these words:

"On authority, the other objection must also be overruled; that is, the objection that there is simply a general averment that the defendant infringes. It is not so easy to sustain that upon principle, because, as was well stated by counsel here, the exactness and certainty of equity pleadings would seem very properly to require that, instead of a simple averment that the defendant has infringed, particularly in a case where a patent covers many claims—in this case also covering both a process and an apparatus—it would narrow the inquiry if the averments were made specific that the infringement was in reference to one claim, and not in reference to the rest. Still, whatever might be the decision if the matter was open to question, the practice is very general in bills in patent cases to simply aver that the defendant has infringed. * * * So, while as a matter of principle it may not be so easy to sustain this practice, yet, in view of the great weight of authority as to the form of pleadings that are sufficient in patent cases, this objection must also be held not well taken, and the special demurrer will be overruled. Pitts v. Whitman, 2 Story, 609 [Fed. Cas. No. 11,196]; Turrell v. Cammerrer, 3 Fish. Pat. Cas. 462 [Fed. Cas. No. 14,266]; Haven v. Brown, 6 Fish. Pat. Cas. 413 [Fed. Cas. No. 6,228]; McMillan v. Transportation Co. [C. C.] 18 Fed. 260; McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000 [30 L. Ed. 1017]."

To the same effect is Luten v. Sharp (D. C.) 200 Fed. 151, a decision by Pollock, District Judge.

In Bayley v. Braunstein (D. C.) 237 Fed. 671, Hand, District Judge, holds that the ultimate facts are not sufficiently pleaded in a patent case by allegations that complainant is the owner of a patent, but that it must also be stated that he was the first original and sole inventor, and the negative requirements of the statute must also be complied with.

In Maxwell Steel Vault Co. v. National Casket Co. (D. C.) 205 Fed. 515, Ray, District Judge, has considered the same question at length, and has come to the same conclusion; whereas, in Zenith Carbureter Co. v. Stromberg Motor Devices Co. (D. C.) 205 Fed. 158, Tuttle, District Judge, has reached the opposite conclusion. The opinion of Judge Ray is particularly illuminating as to what is a short and simple statement of the ultimate facts in pleading a patent, and his reasoning commends itself to me. In alleging the ultimate facts of an infringement charge in a short and simple statement, it would seem that on demurrer, at least, the general averments of a bill good prior to the adoption of the new equity rules, should be good under the new rules. Upon a motion, however, to make definite and certain, a different question arises.

In Morton Trust Co. v. American Car & Foundry Co., 129 Fed. 916, 64 C. C. A. 367, the Circuit Court of Appeals, Third Circuit, Acheson, Circuit Judge, delivered the opinion, which was concurred in by Circuit Judges Dallas and Gray. The patent sued on contained 28 claims. The charge of infringement was in general language, no more detailed than is the bill in the instant case. The District Court had made an order requiring the complainant to amend its bill requiring a specification of the particular claim or claims of the patent, with respect to which the infringement by the defendant was charged, and that it specify also the particular parts of the defendant's car or car

construction that were relied upon as infringements of the patent in suit. This appears to be the exact relief sought by the present motion. Complainant having failed to comply with the order, its bill was dismissed. Upon appeal it was held that the averment of infringement was plainly sufficient, according to the approved practice in patent cases, and the judgment below was reversed. We quote from the opinion:

"In its scope the order goes beyond any precedent known to us. Compliance with the order would require definite knowledge of the defendant's car construction. It does not appear, and we think it ought not to be presumed, that the plaintiffs have had such an opportunity to inspect all the parts of the defendant's car as would enable them to specify the extent and character of the defendant's infringement with the particularity enjoined by the order. On the other hand, there is no hardship that we can see in calling upon the defendant to answer the charge of infringement contained in this bill. The defendant has before it, or is entitled to have before it, the patent sued on, and upon an inspection of the patent can see whether its construction is the same as or different from that of the patent. We are far from satisfied that the trial of patent causes would be expedited, or the records therein abbreviated, by the adoption of the new practice contemplated by the order in question."

In Foundation Co. v. O'Rourke Engineering Construction Co. (C. C.) 171 Fed. 425, Martin, District Judge, on demurrer, held that a general charge of infringement was sufficient to charge the defendant with having infringed all the inventions described in all of the specifications of seven different patents, containing 95 claims. Answering an argument that an examination of the letters patent makes it evident that there is conflict between the different patents and claims, and that a more definite and certain allegation should be made, he says:

"If this was an application for a bill of particulars, as to the claims of the various patents that the orators insist have been infringed, I should be inclined to hold, from an examination of the patents, that such an application should be granted; but, without the aid of evidence, the defendant's contention on this ground does not well enough appear."

In Marconi Wireless Telegraph Co. v. New England Navigation Co. (C. C.) 191 Fed. 194, Lacombe, Circuit Judge, held that a demurrer should not be sustained to a bill on the ground of indefiniteness and uncertainty because it failed to allege which of twenty claims were supposed to be infringed, but that this objection, if good at all, should be raised by motion, made at the proper time, to have complainant indicate on which claim it relies. In General Electric Co. v. American Brass & Copper Co. (C. C.) 209 Fed. 237, Lacombe, Circuit Judge, held on demurrer, that it is not necessary in a charge of infringement to state which of the claims of two patents sued on are alleged to be infringed. In P. M. Co. v. Ajax Rail Anchor Co. (D. C.) 216 Fed. 634, Sanborn, District Judge, considering interrogatories filed under equity rule 58, says:

"It is well settled by these decisions that the disclosure of evidence is not required. The nature of the case and the facts supporting it may be required to be stated. Mere evidence or facts tending to prove the nature of the case, or the facts upon which it is based, are quite generally held not proper to be inquired into."

He further states that certain interrogatories inquire as to the opinion of the complainant as to the construction of the patent, and this, he says, is a matter to be supplied by expert testimony in support of the contention of infringement, or the validity of the patent, or both; that these matters are purely evidentiary, and not facts such as may be inquired about under the rule.

In Luten v. Camp (D. C.) 221 Fed. 424, Thompson, District Judge, considering interrogatories under equity rule 58, holds that a party may be interrogated as to the facts upon which his cause of action is based, but not as to mere evidence or facts tending to prove the nature of the case, or facts tending to prove the main facts, and that, applying this holding, a party should not be required to make a comparison between the defendant's blue prints of construction and the plaintiff's patent plans, because this comparison is a matter for expert testimony, or to be determined by the court from an inspection of the documents at the trial, and is, in any event, merely evidentiary, and not a fact supporting plaintiff's case. In Blast Furnace Appliances Co. v. Worth Bros. Co. (D. C.) 221 Fed. 430, District Judge Thompson followed and applied these rules. In Window Glass Machine Co. v. Brookville Glass & Tile Co. (D. C.) 229 Fed. 833, Orr, District Judge, also followed and applied the rules announced by Judge Thompson.

In Gennert v. Burke & James (D. C.) 231 Fed. 998, District Judge Hand, considering interrogatories designed to compel complainant to point out, not only what parts of the defendant's machine infringed, but what part corresponds to each element of his claim, says:

"Strictly speaking, the motion is wrong in any event, for it does not ask the plaintiff to disclose any evidence in the case, but his own interpretation of the facts. It would more properly, therefore, arise on a motion for a bill of particulars, in which the party is asked to make more definite his position; but I do not wish to dispose of the motion upon so narrow a ground. The substantive question is whether the plaintiff should be compelled so narrowly to disclose what his position will be. Theoretically, perhaps, there is no good reason why a party should not be compelled to disclose the rationale of his position in the utmost detail, or at least of the alternative positions which he means to take before the court. Practically such a requirement would involve more friction and annoyance than it would be worth in the usual case. After a plaintiff has told what part of the machine he claims to be an infringement, there ought to be usually no difficulty in understanding what he means, without pointing out in what particular part each element is embodied. There may be cases in which the difficulties are so great of knowing the plaintiff's position that such relief would be proper, but that could only be in a case where the defendant showed satisfactorily that he was in honest doubt as to what the plaintiff could mean. No such showing is made in this case."

In Rodman Chemical Co. v. E. F. Houghton Co. (D. C.) 233 Fed. 470, Dickinson, District Judge, considering interrogatories filed under equity rule 58, holds (third syllabus):

"A defendant cannot through the guise of interrogatories be required to construe a patent claim or admit or deny infringement as a legal conclusion."

In A. B. Dick v. Underwood Typewriter Co. (D. C.) 235 Fed. 300, Mayer, District Judge, having under consideration interrogatories filed

under equity rule 58, holds that interrogatories should not be filed in the language of patent claims, which use terms the meaning of which may be open to dispute, and that a construction of patent claims cannot be called for by interrogatories.

The cases reviewed above are all the reported cases which have come to my notice bearing on this subject. Applying the principles to be deduced therefrom, I am of opinion that the second ground of the present motion should be denied, under all circumstances. It does not seek a discovery of facts, nor the pleading of ultimate facts. Everything asked for therein is evidential in character. The comparison demanded will not be required, even if sought by interrogatory, and for a stronger reason should not be required to be incorporated in a pleading. In addition, it may be said that the defendant, having access to complainant's patent claims, may make comparison, element by element, with its own construction as readily as the complainant or its experts can do it.

Touching the first ground of the present motion, somewhat different considerations apply. The authorities reviewed conclusively show that, if this question were raised by demurrer, the bill would be sufficient and the demurrer should be overruled; but under the new equity rule, as well as under the Code practice, a statement may be required of further and better particulars of any matter pleaded, or, in other words, to make definite and certain the statement of any pleading, and this cause is now before me for a consideration of a motion of that character.

In legal contemplation each separate claim is an independent patent, and the invention thereby covered patentable in and of itself. In other words, each claim is supposed to mean something different from the others. The patent in this case contains 10 claims. The defendant's construction may infringe some one or more of these claims, but it is not probable that it infringes all of them. The complainant knows, or should know, which of these separate claims are infringed; and it is therefore proper, in the interest of greater certainty and definiteness, that it be required to specify which of the ten claims it intends to rely on—in other words, give further and better particulars of the matter of infringement contained in its pleading.

This is as much as can be required of the complainant, as I understand the law. This may or may not inform the defendant exactly what is claimed; it may or may not limit the range of investigation necessary in preparing for trial, or the scope of the testimony at the trial. It is, of course, eminently desirable that counsel should, at all times, be candid with the court, and not bring forward unfounded claims, nor incumber the record with irrelevant and immaterial testimony. I am not unmindful, however, of the hazards and difficulties of forcing counsel in the advance stages of a lawsuit to determine with unerring certainty the items of evidence required to prove the ultimate facts. The relevancy of testimony is always a matter for the court, and counsel can scarcely be expected to rule too closely against their clients in advance of the court's ruling, or the full disclosure of their adversary's position. In Todd v. Whitaker (D. C.) 217 Fed.

320, Dickinson, District Judge, suggests a resort to the procedure provided by equity rule 48 (198 Fed. xxxi, 115 C. C. A. xxxi) as an appropriate means to obtain this full disclosure of each party's position and claims. A consideration of his suggestion is commended to counsel. But, aside from these considerations, I should not require a pleading conforming to the equity rules to be reformed in conformity to views personal only to myself.

An order may therefore be entered, requiring the complainant to specify within 10 days which claim or claims of the patent in suit it intends to rely upon, and overruling the motion in all other respects. An exception to this ruling may be noted in favor of both complainant and the defendants.

CLEVELAND ENGINEERING CO. v. GALION DYNAMIC MOTOR TRUCK CO.

(District Court, N. D. Ohio, E. D. June 11, 1917.)

No. 394.

1. PATENTS ⟸310(7)—SUIT FOR INFRINGEMENT—INCONSISTENT DEFENSES—ELECTION.
   Under equity rule 30 (201 Fed. v, 118 C. C. A. v), which permits the pleading in an answer of defenses in the alternative, regardless of consistency, a defendant in an infringement suit may deny complainant's title to the patent and allege ownership in himself, and also deny its validity, and cannot be required to elect between the two defenses.
2. COURTS ⟸264(2)—JURISDICTION OF FEDERAL COURTS—COUNTERCLAIM.
   The jurisdiction of a federal court, invoked by a complainant in his bill and shown by the allegations thereof, does not support or aid the jurisdiction of the court, when the defendant brings forward a counterclaim which may be the subject of an independent suit, and which does not merely concern matters already put in litigation by the original bill, and in such case, if there is not diversity of citizenship, or if the subject-matter of the counterclaim is not within the jurisdiction of a federal court, it should be stricken out for want of jurisdiction.
3. PATENTS ⟸310(7)—SUIT FOR INFRINGEMENT—COUNTERCLAIM.
   In an infringement suit, defendant may as matter of defense deny complainant's title to the patent, and by way of counterclaim allege the equitable ownership to be in itself, and pray for a decree quieting its title, as necessary in order that complete relief may be given concerning the subject-matter put in litigation by complainant's bill.

In Equity. Suit by the Cleveland Engineering Company against the Galion Dynamic Motor Truck Company. On motion by complainant to require defendant to elect between defenses, and also to strike out counterclaim. Denied.

Hull, Smith, Brock & West, of Cleveland, Ohio, for plaintiff.

W. J. Geer, of Galion, Ohio, and Harry Frease, of Canton, Ohio, for defendant.

WESTENHAVER, District Judge. Complainant's bill sets up two patents, one No. 894,752, and the other No. 1,155,315, which it is charged the defendant is infringing. The answer denies that complain-

ant has title to either of said patents, and as to the second patent asserts that it is the equitable owner thereof and entitled to a decree quieting its title, and requiring an assignment to it of the legal title. The answer also challenges the validity of both patents, because of anticipation and on other grounds.

This cause is now before me on complainant's motion to require defendant to specify, as to patent No. 1,155,315, which of two defenses, said to be incompatible or inconsistent, it will rely upon; also to require from defendant further and better particulars of certain matters in its answer, not now necessary to be stated; and also to strike from the answer defendant's counterclaim. The two defenses said to be incompatible or inconsistent, as to which an election is desired, are: First, complainant's want of title and defendant's ownership as to patent No. 1,155,315; and, second, invalidity of said patent.

[1] I am of opinion that this motion should be denied. Both defenses are and should be available to the defendant. Both of them may be true, or the defendant may own the patent, and the patent may be invalid. It cannot rely on either defense alone, without risking an entire loss of the other; or, if the defense of defendant's ownership is not lost, the result would be to require another action to settle finally the controversy now in court. Furthermore, even if these defenses are inconsistent, new equity rule 30 permits inconsistent defenses. It says: "The answer may state as many defenses, in the alternative, regardless of consistency, as the defendant deems essential to his defense."

Moreover, even without the aid of this rule, an election should not be required because of the supposed inconsistency. In Dick v. Hyer, 114 N. E. 251, a decision of the Supreme Court of Ohio (see Ohio Law Reporter, January 1, 1917, 94 Ohio St. 351), it is held error to require an election between two causes of action permitting of only one recovery, when the first cause of action is based on a promissory note to which the defense was that it had been altered, and the second cause of action was upon the original indebtedness for which the altered note had been given. In Railway Co. v. Hedges, 41 Ohio St. 233, an election was not required when plaintiff sued to recover damages for horses killed by defendant's train, based on two distinct wrongful acts: First, neglect to keep in repair a fence as required by contract; and, second, negligence in operating the train. On principle, these cases cover the situation here presented.

Complainant's remedy in this situation is to ask a separate trial of the issues relating to the title to this patent. This is within the power of a court of equity, and is specially authorized by new equity rules 26 (201 Fed. v, 118 C. C. A. v) and 29 (198 Fed. xxvi, 115 C. C. A. xxvi). Indeed, at the hearing, counsel for both parties joined in a request for a separate trial of such issues in the event the motion to elect and strike out defendant's counterclaim was overruled. In my opinion, the motion to strike out the counterclaim should be denied. A statement at length of the facts therein alleged is not necessary. It is sufficient to say that defendant asserts a good equitable title to patent No. 1,155,315, and prays that this title may be quieted against complainant's demands, and that a conveyance from complainant to de-

fendant of the legal title may be ordered. The origin of defendant's claim of title, it is alleged, is in part based on representations by persons for whose acts complainant was then and is now responsible, that the inventions covered by this patent were owned by a corporation and were being sold by it to another corporation, to whose right and title the defendant has since succeeded.

The motion to strike out is based on the supposed ground that this court has no jurisdiction of this counterclaim, because complainant and defendant are citizens of the same state, and the subject-matter thereof is not within any independent ground of federal jurisdiction. The cases cited and relied upon by complainant were examined and reviewed by me on motion to strike out a counterclaim in Ohio Brass Company v. Hartman Electrical Manufacturing Company, No. 373. In passing on that motion I filed an opinion, which is accessible to counsel, and I shall not, therefore, review those cases at length.

[2] It is true that a set-off or counterclaim which is the subject of an independent suit in equity cannot be sustained, unless some independent ground of federal jurisdiction is shown to support it. The jurisdiction of the court invoked by complainant in its bill, and shown by the allegations thereof, does not aid or support the jurisdiction of this court when the defendant brings forward a set-off or counterclaim which may be the subject of an independent suit, and which does not merely concern matters already put in litigation by the original bill. It follows, therefore, in that situation, if there is not diversity of citizenship, or if the subject-matter of a counterclaim is not within the jurisdiction of a federal court, the counterclaim should be stricken out for want of jurisdiction. Equity rule 30 (201 Fed. v, 118 C. C. A. v) could not, even if so intended, enlarge the jurisdiction of a court of equity, or of a federal court. On this proposition I agree with the conclusion reached in the cases cited by counsel: Marconi Wireless Tele. Co. v. National Elec. Signaling Co. (D. C.) 206 Fed. 295–300; Adamson v. Shaler (D. C.) 208 Fed. 566; Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377; United States Expansion Bolt Co. v. Kroncke Hardware Co. (D. C.) 216 Fed. 186; United States Expansion Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466; Geneva Furniture Co. v. S. Karpen, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. Ed. 1295.

[3] The question here, however, is entirely different. The defendant is not presenting a set-off or counterclaim which may be the subject of an independent suit in equity, in the sense in which that expression is used in equity rule 30, or in the cases above cited. The defendant's counterclaim is not really a counterclaim at all; it is a part of its defensive matter, and a determination thereof is necessary in order that complete relief may be given concerning the subject-matter put in litigation by complainant's bill. It is such matter as, according to familiar equity rules, might be made the subject of a cross-bill, and the necessity for pleading same as a counterclaim or cross-bill is in order that complainant may not only be defeated, but that complete relief may be given.

Manifestly, as a defense, the defendant may deny complainant's title to either or both of the patents sued on; it may, on the hearing, show title in some third party to either or both as a defense; it may also show title in itself to either or both as a defense. In any of these contingencies, complainant's bill should be dismissed. No new or additional evidence in the contingency last assigned would be required to warrant a decree in favor of defendant, pursuant to its cross-bill. It would seem little short of absurd if a court of equity had not power to give complete relief in that event by decreeing that defendant's equitable title should be quieted against complainant's false claim, and that the legal title should be conveyed to it.

The jurisdiction of this court to entertain the counterclaim depends on the case made by complainant's bill. The bill states a case within the jurisdiction of the federal court, arising under the patent laws. That jurisdiction is not ousted, or does not fail, because the defendant brings forward a matter of defense arising out of contract, and not within the original jurisdiction of this court. If jurisdiction has attached on the allegations of the bill, this court may proceed to try all questions between the parties, touching that subject-matter, and grant full relief to both parties, even though, on the hearing, the issues touching matters of proper federal jurisdiction are held in fact not to exist, or are decided adversely to complainant's contention.

In Pratt v. Paris Gaslight & Coke Co., 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458, the reverse of the situation here was presented for consideration. The vendor of a patent right sued for the purchase price in a state court, and the defendant, as one defense, pleaded entire invalidity of the patent sold by plaintiff. It was held that, inasmuch as the state court had jurisdiction of the cause of action stated in plaintiff's pleading, jurisdiction was not ousted by a defense cognizable exclusively in a federal court, but that the state court had power to hear and determine all questions, including those relating solely to the validity of the patent. That such is the law, and that in this case, jurisdiction having attached on the facts set forth in the bill of complaint, this court has full power to hear and determine all questions set up in defendant's counterclaim, is adequately established by the following cases: Louisville Trust Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299; Swindell v. Youngstown Sheet & Tube Co., 230 Fed. 438, 144 C. C. A. 580 (6 C. C. A.); Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; The Fair v. Kohler Die & Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716; Healy v. Sea Gull Specialty Co., 237 U. S. 479, 35 Sup. Ct. 658, 59 L. Ed. 1056.

That defendant's counterclaim is essentially a cross-bill, in the simple form permitted by equity rule 30, is made plain by an examination of the authorities. Story's Equity Pleading, § 389, says:

"A cross-bill, ex vi terminorum, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill."

In Daniell's Chancery Practice, pp. 1746, 1747, it is said:

"As a cross-bill is considered a mode of defense, or a proceeding to procure a complete determination of a matter already in litigation in the court, the plaintiff is not, at least, as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. It is treated in short, as a mere auxiliary suit, or as a dependency upon the original suit."

See, also, the following: Morgan's Co. v. Texas Central Ry., 137 U. S. 171 (opinion 200–203), 11 Sup. Ct. 61, 34 L. Ed. 625; North British & Mercantile Ins. Co. v. Lathrop, 70 Fed. 429, 17 C. C. A. 175.

The counterclaim touches only the matters in question in the original bill; the relief prayed for therein is necessary to a complete determination of the controversy between the parties relating to that subject-matter. The counterclaim does not, in any proper sense, introduce new and distinct matters into the litigation which were not embraced within the original bill. The subject-matter is the same, and the only necessity of a prayer for affirmative relief is to enable a decree to be entered in favor of defendant if the defense is made good.

Defendant further argues that the allegations of the counterclaim make a case concerning the title to a patent, and not merely a cause of action based on contract, and asserts that upon the authorities this court has jurisdiction as of a case arising under the patent laws. No opinion is expressed with reference to this contention.

Complainant also in its brief challenges the sufficiency of facts alleged in the counterclaim to constitute a cause of action in equity. The allegations of the counterclaim, if true, are, in my opinion, sufficient in law. Defendant's right would not be limited to a mere shop right or license, terminable when the licensee ceased to do business thereunder, but amounts to a claim of full and complete title in equity to the inventions embodied in the patent.

An order may be entered, overruling the motion to require an election, and also the motion to strike out the counterclaim. This order may also provide that a separate trial shall now be had of all issues relating to complainant's title to either or both patents sued on, and the defendant's claim of title to one of them. The remainder of the motion will not be disposed of at present, but may be called up for disposition after the trial now ordered is had. The parties should not be required to prepare for hearing upon issues affecting the validity of said patents or the infringement thereof by defendant until questions relating to title have been determined. An exception may be noted on behalf of complainant.

WOLF, SAYER & HELLER, Inc., v. U. S. SLICING MACH. CO.

U. S. SLICING MACH. CO. v. WOLF, SAYER & HELLER, Inc.

(District Court, N. D. Illinois, E. D. June 12, 1917.)

Nos. 430, 478.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—RIND-REMOVING KNIFE.
The Nayer & Perkins patent, No. 968,590, for a rind-removing knife for meat-slicing machines, *held* valid, but not infringed, by the device of the Stiles patent, No. 1,028,796.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—RIND-REMOVING KNIFE.
The Stiles patent, No. 1,028,796, for a rind-removing knife for meat-slicing machines, *held* valid and infringed.

In Equity. Suits by Wolf, Sayer & Heller, Incorporated, against the U. S. Slicing Machine Company and by the U. S. Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. Decree for defendant in first suit, and for complainant in second suit.

Max W. Zabel, of Chicago, Ill. (Sydney Stein, of Chicago, Ill., of counsel), for Wolf, Sayer & Heller.

Brown, Nissen & Sprinkle, of Chicago, Ill. (Frank T. Brown and A. J. Crane, both of Chicago, Ill., of counsel), for U. S. Slicing Machine Co.

SANBORN, District Judge. The patents in question in these two suits relate to rind-removing devices in meat-slicing machines. Each party has a patent. Plaintiff's patent was issued to Nayer & Perkins August 30, 1910, applied for December, 1909, No. 968,590. Defendant's patent is No. 1,028,796, applied for January 10, 1910, and issued June 4, 1912. While the two applications were copending in the Patent Office for seven months, they were not put into an interference. The machines of the two patents are similar to those often seen in meat markets, in which a revolving wheel knife or meat table is made to pass back and forth along the edge of a piece of bacon or dried beef and shave off thin slices. In the Nayer & Perkins machine the edge of the circular blade is so located that it does not go through the rind, while in the Stiles the blade cuts below the bed of the machine and through the rind. In the first, the rind is left intact, and the body of the meat is cut away from the rind by a second or rind-removing knife, placed near the front edge of the revolving blade and a little behind the advancing edge; while in the other the knife travels ahead of the revolving blade, and cuts off the rind before the latter cuts through the bottom part of the piece. In Nayer & Perkins the meat itself is cut, but not the rind, while in Stiles both are cut.

It is insisted by the U. S. Company that it does not infringe, because the claim in suit calls for a revolving circular blade reciprocating on the meat table of the machine, and not extending below the upper surface of such table, and that the words of the claim, "a rotary slicing blade mounted to reciprocate on said table," refer to a definite function of the machine, in connection with the rind-removing knife, so that

they cannot be construed to cover a rotary blade like that of the U. S. Company, which operates below the table. And to sustain this proposition the specification is quoted thus:

"By extending the cutting edge of the blade *12* slightly below that of knife *15*, the effect of blade *12* upon the bacon will be to hold the rind flat against the top of the table *1* without severing it, and thus facilitate the action of knife *15* in severing the slices from the bacon rind."

So the U. S. Company argues that plaintiff's circular knife is required to operate *on* the table, in order to hold down the rind, while the removing knife cuts away the flesh from it, and that this was the proper function and law of the machine. Further, the U. S. Company calls attention to the fact that its revolving blade is not mounted on the table, nor does it reciprocate. The place of mounting is immaterial, but the reciprocation of the table, instead of the knife, is important, because in Nayer & Perkins the revolving blade stops at each movement of the table, thus losing momentum and cutting less effectively. In the Stiles machine the revolving blade keeps up a steady movement so long as the crank is turned, and thus cuts better.

Both parties claim priority of invention, but I find this question immaterial. The inventions are distinct. One is a stationary table, with a reciprocating, revolving, circular blade, followed by a rind-removing knife, which cuts the flesh away from the rind, but leaves the latter uncut; the circular blade being located wholly above the surface of the meat table and not having any part below it. The other comprises a reciprocating table with a circular knife, located partly below the bed of the table, and with the rind-removing knife in front of the cutting edge, so that the flesh is first severed from the rind and then the slice is cut clear through. The two inventions were treated as distinct in the Patent Office by the failure to put them into interference, and a patent regularly granted on each application. If these inventions are valid, and they are presumed in law to be, neither party has the right to use that of the other.

As to infringement, the U. S. Company uses its own invention, and has never used that of Nayer & Perkins. It is entirely immaterial which of these was first conceived and reduced to practice, because they are entirely separate and distinct. There is no claim that either is invalid, and no testimony to support any such claim. The only questions, therefore, are those of infringement. The U. S. Company does not use the Nayer & Perkins invention, therefore does not infringe. Therefore it is only necessary to consider whether Wolf, Sayer & Heller are infringing the Stiles patent.

The first claim of the Stiles patent contains three elements: The relatively movable meat support, a slicing knife extended below the upper surface of said support, and means for removing the outer layer from each slice of the meat separately. All of these elements are found in the machine used by Wolf, Sayer & Heller, whose machine precisely corresponds to the Stiles conception. There is the moving table, the stationary revolving knife, the rinding knife, for separating the rind of only one slice at a time, the revolving blade below the table, and the rinding knife ahead of the blade, all as described and claimed in the Stiles patent.

The two cases seem to me to be entirely clear: First, that the U. S. Company, in using its own machine, covered by the Stiles patent, cannot possibly be held to infringe; and, second, that the adoption of the Stiles conception by Wolf, Sayer & Heller is a clear infringement.

There should be a decree sustaining both patents, holding the Nayer & Perkins patent not infringed, with costs against them, and also deciding that the following numbered claims of the Stiles patent are infringed: 3, 5, 9, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 32, 33, 34, 35, and 41—with costs.

U. S. SLICING MACH. CO. v. WOLF, SAYER & HELLER, Inc.

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

No. 507.

1. EVIDENCE ⟸334(1)—DOCUMENTARY EVIDENCE—PUBLIC RECORDS.
The certificate of an assistant registrar under the English Companies Act that a corporation had changed its name in due form by law is not legal evidence of such fact, which can only be shown by a duly authenticated copy of the record itself.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SHARPENER FOR MEAT-SLICING KNIVES.
The Stukart patent, No. 1,039,210, for a grinding apparatus for meat-slicing knives, *held* not infringed.

3. PATENTS ⟸235—INFRINGEMENT—DEVICE CAPABLE OF INFRINGING USE.
The rule that a device capable of infringement infringes, although designed to be used in such manner as not to infringe, does not apply, where there is no object in so using it as to infringe, but rather a disadvantage.

In Equity. Suit by the U. S. Slicing Machine Company against Wolf, Sayer & Heller, Incorporated. On final hearing. Decree for defendant.

Brown, Nissen & Sprinkle, of Chicago, Ill. (Frank T. Brown and A. J. Crane, both of Chicago, Ill., of counsel), for plaintiff.

Max W. Zabel, of Chicago, Ill. (Sydney Stein, of Chicago, Ill., of counsel), for defendant.

SANBORN, District Judge. This case is entirely separate from the ones just considered relating to the rind-remover, although pertaining to the same machine. Three patents are involved: Van Berkel, 806,603; Van Berkel, 895,213; and Stukart, 1,039,210.

[1] *Title to the Van Berkel Patents.* In respect to the two Van Berkel patents, a question of title is raised by defendant, and in view of its fundamental importance should be first considered. The chain of title is: (1) Van Berkel to an English corporation, called Van Berkel's Slicing Machine Manufacturing Company, Limited; and (2) Berkel & Parnall's Slicing Machine Manufacturing Company, Limited, to U. S. Slicing Machine Company, plaintiff here. The missing link between the two Van Berkel Companies is sought to be supplied by a

certificate under the English Companies Consolidation Act of 1908, reading as follows:

"Certificate of the Incorporation of a Company.

"Companies" Registration Office, 30 Mar., 1914.

"I hereby certify that Berkel & Parnall's Slicing Machine Manufacturing Company limited (originally called Van Berkel's Slicing Machine Manufacturing Company, Limited), and which name was changed by special resolution and with the authority of the Board of Trade on the twenty-ninth day of October, one thousand nine hundred and nine, was incorporated under the Companies Acts, 1862 to 1907, as a limited company, on the 9th day of September, one thousand nine hundred and eight.

"Given under my hand at London, this thirtieth day of March, one thousand nine hundred and fourteen. Geo. J. Sargent,

"Assistant Registrar of Joint Stock Companies."

The instrument is properly authenticated as to the official character of the assistant registrar who signs it. This paper is neither an assignment of any interest in a patent nor a copy of the incorporation certificate or of the resolution changing the corporate name. It is not, therefore, within section 4898 of the Revised Statutes (Comp. St. 1916, § 9444) relating to patent assignments. Nor is it within any common-law rule or equity rule of documentary evidence. The general governing rule is that the official certification of a fact drawn or gathered from a public record is a mere legal conclusion, or the opinion of the certifying officer, and so not admissible as evidence. He should copy the record verbatim, certifying that he has done so, and that the copy is an accurate transcript of the original. Wigmore, §§ 2162, 2165; Mandel v. Swan Land Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; People ex rel. v. Lee, 112 Ill. 113, 1 N. E. 471; Greer v. Ferguson, 104 Ga. 552, 30 S. E. 943; Hudkins v. Bush, 69 W. Va. 194, 71 S. E. 106, Ann. Cas. 1913A, 533.

While the question is largely technical, and I would much prefer to ignore the objection, I cannot see any way out of it but to decide that the suit must fail as to the two Van Berkel patents for want of proof of title in the plaintiff, without prejudice to another action, if plaintiff shall be so advised.

[2] *The Stukart Patent for the Sharpener.* This leaves for consideration only the sharpener patent; some 10,000 machines equipped with this device having been sold by plaintiff. The application was filed June 12, 1912, and the patent issued September 24, 1912. So no question of laches in bringing suit applies to this patent, though it was raised as to the two other suits.

The invention relates to a device consisting of two small circular whetstones arranged above the circular knife, and is thus described by counsel for plaintiff:

"This patent covers a special grinding apparatus particularly adapted to properly sharpen the concavo-convex revolving knife of a meat-slicing machine. In order to properly sharpen the concavo-convex knife, it should be so ground that there will be no flat surface on the concave side next the meat, and in shop practice, according to expert testimony, a concavo-convex knife is designated as a 'relieved cutter.' In the meat-slicing art, the flat side of the knife is 'relieved' by being cut in a concave form, so that with this relieved flat side of the knife, or concave side, there is no possibility of an ex-

tensive flat surface dragging against the meat, and causing great friction, and interfering with the accuracy of the slicing operation. When it comes to sharpening such a knife, it obviously would not do to sharpen it upon its relieved or concave face, because the tendency would in such case be to form a flat surface, or even perhaps an angular surface, and that would interfere with the complete relief of that side of the knife, and make it drag against the meat. The inventor contemplates sharpening this concavo-convex or relieved knife by grinding it on its convex surface to a considerable extent, and then simply taking off the burr and on the relieved or concave side, which latter requires, of course, much less time for grinding. This is effected in the Stukart patent in suit by bringing the grinders into action successively, as distinguished from simultaneously. That is to say, on the convex side the grinder is brought in immediately and operated for some time before the grinder on the concave or relieved side is applied, and finally the latter is applied just long enough to take off the burr."

Defendant relies mainly on the claim of noninfringement. It uses a device comprising the two grinders, both mounted on a rotating plate. The latter is swung by a lever which is designed to stop in two positions. In one position both sharpeners are away from the knife, and in the other stop position, which is provided, both sharpeners are in their proper position in engagement with the knife. On the grinder which operates on the convex side of the knife a strong spring is used, and on the other a weak spring, thus obtaining the same result by a simultaneous operation of the grinders as Stukart gets by his independent or successive movement.

[3] It is, however, apparent from actual inspection of defendant's machine in evidence, and also one of its machines which was viewed in a meat market in the city where the case was heard (nor is it disputed by the defendant), that the grinders can be operated successively. Although the construction is obviously intended to be used with both grinders at work, yet it is not at all difficult to operate them one after another; and plaintiff cites the well-known rule, so often applied by the courts, that a device capable of infringement makes the defendant liable, even though designed to be used in such a manner as not to infringe. Many dealers in automobile tire chains sought to get around the patent by providing snaps or chains to prevent the chain from traveling around the tire, and positive instructions were sent out with every set of chains that they were to be used only in this way. All such attempts to escape the patent were restrained. H. Channon & Co. v. Parsons Non-Skid Co., Ltd., 203 Fed. 862, 122 C. C. A. 173.

However, this is a different situation. Defendant has no object in so using its device as to make the grinders engage one after the other. It is more difficult to operate the machine in that way. Another way is obviously contemplated, and it is clear that no actual infringement occurs in the use of the machine, because it would be entirely useless. If the successive movement were an advantageous one, infringement would be clear; but, as there is nothing to be gained by so operating the machine, there is no substantial infringement. In the tire chain cases there was an enormous advantage in leaving off the binding snaps, because the tire is seriously injured if the chain is not allowed to travel around it. A similar situation appears in both the decisions cited by plaintiff. Marconi Wireless T. Co. v. De Forest, etc., Co.

(D. C.) 225 Fed. 65; Wright v. Herring-Curtiss Co., 211 Fed. 654, 128 C. C. A. 158.

The bill should be dismissed, with costs, but without prejudice as to the two Van Berkel patents.

THE ARLYN NELSON.

(District Court, W. D. Washington, N. D. April 24, 1917.)

No. 3430.

ADMIRALTY ⊂=62—JURISDICTION—CROSS-LIBEL.

A suit by the owner of a chartered vessel to recover its possession for alleged breach of the charter is within the admiralty jurisdiction, and may be joined with a cause of action in personam to recover charter hire, and in such the respondent may maintain a cross-libel in personam, based on claims arising out of the same maritime contract.

In Admiralty. Suit by Arthur W. Nelson against the gasoline tugboat Arlyn Nelson and the Sanitary Fish Company, with cross-libel by the respondent company. On exceptions to cross-libel. Denied.

Vince H. Faben, of Seattle, Wash., for libelant.

George H. Rummens and Edward Brady, both of Seattle, Wash., for claimant and cross-libelant.

NETERER, District Judge. The libel sets forth a charter party by which the gasboat Arlyn Nelson was leased to the Sanitary Fish Company for the fishing season of 1916, commencing on the 25th day of June, 1916, and ending on the 5th day of November of the same year, by which the owner agreed to keep the boat in good repair, and at his own cost and expense to supply a competent engineer to operate the boat, and keep the boat supplied with all towlines, bridles, and other appliances necessary to tow fish scows, and to operate the boat at such times and places as may be required, and was to receive $1,800 for the season, $900 to be paid on the 10th day of September, 1916, and the balance at the end of the season; and it alleges that the fish company failed and refused to pay the $900 at the time it became due, and also failed to pay certain bills and charges for the maintenance and operation of the vessel, to the amount of $500, that the fish company is irresponsible and unable to respond in damages, and that if the vessel should be retained by the claimant the ship will be seized by lien claimants and others having charges against the vessel, that possession has been demanded and it has been refused, that on the 19th of September, 1916, the master and the Sanitary Company surreptitiously and against the will and consent of the owner took possession of the vessel and removed her from her moorings and from the possession of the libelant, that the value of the vessel is $5,000, that it was registered in the district of Washington, and engaged in the business of a tugboat in connection with the fish business in the waters of Puget Sound and the tributaries thereof, and that there is due the sum

of $900 on the 10th of September, 1916, and the further sum of $499.86, fuel bills for fuel used and consumed by the Sanitary Fish Company upon the vessel; and it then prays that process issue in due form against the vessel, her tackle, apparel, and furniture, and that the Sanitary Fish Company may personally be cited to appear and answer all of the matters set forth, and that the Sanitary Fish Company be condemned to pay to the libelant his damages and costs, to be assessed and fixed by the court.

The Sanitary Fish Company has answered, and has filed a cross-libel, in which it pleads the contract, and alleges violation of the terms and conditions of the contract, in that the boat was out of repair, and that an incompetent engineer was placed in operation of the vessel, and that by reason of certain conduct on the part of the libelant the vessel failed to respond to the service which was contemplated by the lease, and by reason of certain conduct of the libelant the respondent was damaged in the sum of $3,992.03, and that by reason thereof the Arlyn Nelson in rem, and the libelant, Arthur W. Nelson, in personam, have become indebted to the cross-libelants, after making certain credits, in the sum of $2,192.03, and that by the maritime law of the United States, and by the statutes of Washington (section 1187, Rem. & Bal. Code), such sum is impressed as a lien upon the vessel, and prays that process and attachment against the vessel issue, and that the boat be sold in satisfaction of the claim.

The libelant has filed exceptions to the cross-libel, contending that the court has not jurisdiction in admiralty, and that damages accruing to the cross-libelant, if any, are matters of civil liability under the common law, and the remedy should be sought in the civil courts; while the cross-libelant contends that the contract is a maritime contract, and, the libelant having sought the admiralty court, that the entire matter arising out of the contract must be litigated in that court.

The charter is undoubtedly a maritime contract, as it was executed with relation to the vessel, and the vessel placed in the service pursuant to the terms of the contract, and the court is clothed with power to determine all rights of the parties arising out of the contract. The Nellie T., 235 Fed. 117, 148 C. C. A. 611. The libelant in this case, not only seeks the possessory right of the vessel, but likewise a claim in personam for damages accruing on account of unpaid consideration for lease in default, and for default in payment of certain claims for supplies for the vessel. A suit in rem and in personam, it has been held, may be united. The J. F. Warner (D. C.) 22 Fed. 342. The cross-libelant likewise unites an action in rem and a suit in personam, and where these may be united the libel may be prosecuted to final decision, even though one of the remedies may fail. I think, in view of the prayer of the libelant for a judgment in personam, that the cross-libelant has a right, in meeting this issue, to pursue the libelant in personam with relation to matters accruing out of the same maritime contract. I know of no provision under the general admiralty law which would give to the cross-libelant a lien upon the vessel for any of the damages which it alleges to have sustained. A right of lien, if

any exists, must be pursuant to the provisions of the laws of Washington, provided by section 1182, Rem. & Bal. Code:

"All steamers, vessels and boats, their tackle, apparel and furniture, are liable: * * * Fourth. For nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by the respective owners, masters, agents or consignees. Fifth. * * * Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle. * * *"

And section 1186:

"The liens hereby created may be enforced by a suit in rem, and the law regulating like proceedings shall govern in all such suits."

The allegations in the cross-libel do not make a case within the laws of the state for nonperformance or malperformance of contract for the transportation of property from a place within this state named by the owners of the vessel, as charged. The charge is malperformance of the general provisions of the terms of the lease, in depriving the charteree of the free use of the vessel in the pursuit of the objects of the business of the charteree as contemplated by the charter party. This I do not think comes within the provisions of the statute, but such fact does not prevent the cross-libelant from pursuing his remedy in personam, in view of the status of the record in this case.

The exceptions to the cross-libel, being general, must be denied.

In re RESNEK.

(District Court, S. D. New York. March, 1917.)

BANKRUPTCY ⟸114(1)—RECEIVERS—APPOINTMENT.

Prior to bankruptcy the bankrupt made a general assignment for the benefit of creditors, and after bankruptcy a receiver was appointed on application of an intervening creditor. On examination of the bankrupt, had under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. 1916, § 9605), it appeared that he had obtained credit on a financial statement and that such statement was probably false. *Held*, that the assignee appointed by the bankrupt was not entitled to a vacation of the order appointing a receiver, for, under the circumstances, the assignee was probably favorable to the bankrupt, and the bankrupt's property should be administered by an officer of the bankruptcy court.

In Bankruptcy. In the matter of the bankruptcy of Elias Resnek. On application to vacate and set aside an order appointing a receiver. Application denied.

Jellenik & Stern, of New York City, for assignee.

Saul S. Myers and Lawrence B. Cohen, both of New York City, for receiver.

MANTON, District Judge. This is an application to vacate and set aside an order appointing a receiver of the bankrupt's property. Prior to the filing of the petition in bankruptcy, on February 13, 1917, the

bankrupt made a general assignment for the benefit of his creditors to one Morris B. Arnold, of No. 320 Broadway, New York City. After the petition in bankruptcy was filed, and on February 16, 1917, upon application of an intervening creditor, a receiver was appointed. The assignee seems to have been selected by the bankrupt and his attorney. The assignee is engaged in the collection business at No. 320 Broadway, and evidently employs attorneys to make collections for commercial houses. Through his attorneys he now applies for this order vacating the appointment of a receiver and asks leave to file certain affidavits nunc pro tunc as of the time when the application for the appointment of a receiver was considered, to wit, February 16, 1917.

Prior to the time of the application for the appointment of the receiver the court received a letter from this assignee urging that he might be heard if an application were made for the appointment of a receiver. One or two similar letters from other attorneys were received. When the application was made, the court, out of due respect for these requests, sent for the assignee and the two attorneys who had made similar requests; oral statements were made for and against the appointment of a receiver, and the court then announced its intention of appointing a receiver. At that time no request was made for the filing of affidavits, but on the next day, after the appointment of the receiver, the attorney representing the assignee asked leave to file affidavits nunc pro tunc, which was denied. Thereafter this motion was made, and came on to be heard on February 26, 1917. The application for leave to file two affidavits submitted herein nunc pro tunc, and for the vacation of this order appointing the receiver, should be denied.

This District Court, in two well-considered opinions rendered heretofore, one by Hon. Julius M. Mayer (In the Matter of D. & E. Dress Co., Inc., 244 Fed. 885, alleged bankrupt, on June 26, 1916), and one by Hon. A. N. Hand (In the Matter of the Federal Mail & Express Co., 37 Am. Bankr. Rep. 240, 233 Fed. 691, rendered on June 26, 1916), laid down the rule that I followed in appointing this receiver, and in now refusing to vacate the order so appointing him.

The practice of permitting an assignee suggested by, or at least chosen by, the bankrupt, and then permitting such assignee to conduct an inquiry into the affairs of the bankrupt, should be discouraged. It is against the purposes and good intent of the Bankruptcy Law. In this particular case an examination has been had under section 21a, and the wisdom of the policy adopted by this court is vindicated. It appears that the bankrupt and his father-in-law issued a financial statement showing a surplus of upwards of $47,000, and on the strength of this statement they obtained credit by way of merchandise to the extent of approximately $200,000. There is justification for the belief that the statement was false; that the bankrupt had accounts receivable of about $6,000. Considerable merchandise was purchased—indeed, to the extent of about $50,000—and was sold to the customers below cost in this city and in Baltimore. Moneys have been paid to a bank, which has loaned money on the indorsement of the bankrupt's

wife and another, so as to free these indorsers of their obligation prior to the bankruptcy, and counsel have stated that they feel reasonably certain that further investigation will unearth other property which has been concealed or disposed of by the bankrupt. An investigation of this kind requires a strong, independent receiver, who has no alliance of a personal or business nature with the bankrupt. Surely all the creditors, for whom the assets of this bankrupt are sought to be obtained, must welcome some independent hand to undertake this work.

The circumstances of this case come fittingly within the reasons laid down in the two cases above referred to why an assignee should not continue. In the Matter of Louis Neuburger, Inc. (D. C.) 37 Am. Bankr. Rep. 248, 233 Fed. 701, in an opinion written by Judge A. N. Hand on June 12, 1916, and which was approved this week by affirmance in the Circuit Court of Appeals in an opinion written by Judge Rogers (240 Fed. 947, —— C. C. A. ——), a wholesome rule was laid down which should be a guidance to members of the bar practicing in this class of litigation, to wit, that receivers should have the possession and care of a bankrupt's property until such time as a trustee is appointed, and that this should be administered under the bankruptcy laws by the federal courts and not in the state courts.

The application will be denied. Settle order on notice.

UNITED STATES v. THIERICHENS (three cases).

(District Court, E. D. Pennsylvania. March Sessions, 1917.)

Nos. 66–68.

1. ALIENS ⟸17—CRIMINAL PROSECUTIONS—WAR VESSELS—JURISDICTION—COMITY.

While, under the comity existing between nations, a public armed ship of a friendly nation acting under the immediate and direct command of the sovereign power is not to be interfered with by the courts of a foreign state, because it would require the sovereign of the nation to which the vessel belongs to be impleaded in the court from which the process issued, and the courts will not assume jurisdiction over officers of such vessel while acting as such, but leave controversies arising out of the acts of the vessel and its officers for settlement through diplomatic channels, the commander of an interned German war vessel, who violated Mann Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1916, §§ 8812–8819), by aiding and assisting a woman to come from New York to Pennsylvania for immoral purposes, cannot defeat the prosecution by virtue of such comity; the acts occurring within the territory of the United States.

2. ALIENS ⟸17 — CRIMINAL PROSECUTIONS — WAR VESSELS — JURISDICTION — COMITY.

Where the commander of such interned German war vessel smuggled from the vessel property into the United States, he is subject to prosecution in the United States courts, regardless of the rules of comity.

Max V. Thierichens was indicted on charges of smuggling and on a charge of violating the Mann Act. Sur motions to quash bills of indictment. Motions overruled.

John R. K. Scott and William A. Gray, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. Under the indictments, as amplified by the bills of particulars, the defendant is charged, in Nos. 66 and 68, with smuggling certain chronometers from the interned German cruiser Prinz Eitel Friedrich into the port of Philadelphia, and, under indictment No. 67, with violation of the Mann Act in aiding and assisting and inducing a woman to come from Ithaca, N. Y., to the city of Philadelphia, over the lines of certain railroads, for immoral purposes.

The motions to quash the indictments raise the question of the right of the United States to prosecute the defendant, for the reason that at the time of the commission of the alleged offenses he was the commanding officer of the cruiser of the Imperial German Navy in a port of the United States; this nation at the time of the commission of the alleged offenses being at peace with Germany.

Counsel for the defendant base their claim for exemption from prosecution upon two propositions: (1) That the commander of the vessel under such circumstances is the representative of the sovereign of his country; and (2) that the privilege of extraterritoriality applies to offenses committed in connection with a public vessel of a friendly nation to those officially connected therewith, and therefore such officials committing such offenses may be tried and punished only by the sovereign power his ship represents, upon the theory that the ship is part of the territory of that sovereign.

[1] Argument has been presented in the form of briefs, in which the principles involved and the authorities have been carefully and fully presented. The well-settled rule that, under the comity existing between nations, the public armed ship of a friendly nation, acting under the immediate and direct command of the sovereign power, is not to be interfered with by the courts of a foreign state, is based upon the principle that, if the courts did attempt to assume jurisdiction over such vessel, it would require the sovereign of the nation to which the vessel belongs to be impleaded in the court from which the process issued, and, by common consent of nations, such situations could not arise without interference with the power and dignity of the foreign sovereign. Therefore the courts will not assume jurisdiction over such vessel or its officers, while acting as such, but leave controversies arising out of the acts of the vessel, and its officers, while acting in their official character, for settlement through diplomatic channels.

Assuming that the doctrine applies to the commanding officer of the ship, as representative of the foreign power, while acting in conformance with his employment upon national objects, it is apparent that there is nothing in the bills of indictment or the bills of particulars to carry the application of the doctrine to the cases before the court. Surely, as to the offense under indictment No. 67, even a discussion of the application of the rule would be lending dignity to an absurdity.

[2] As to the smuggling charges, under indictments Nos. 66 and 68, if the defendant is entitled to exemption from prosecution because the chronometers were carried ashore in furtherance of a national object

of his sovereign, nothing appears upon the record to justify that inference, and, if the fact is to be raised as a defense, its effect must be passed upon at the trial, if such fact then appears. So much for the question of immunity of the defendant as the representative of the German sovereign.

Passing to the question of extraterritoriality, indictment No. 67 sufficiently alleges the commission of the offense within the territory of the United States, and, as pointed out by the district attorney, the offense of smuggling is itself inconsistent with the theory of its commission upon the Prinz Eitel Friedrich, as that offense is not complete until the goods and merchandise charged to be smuggled are brought off the vessel into port. The record does not bring the defendant within any of the recognized exceptions to the general jurisdiction of the court over offenses within the district.

Without elaborating further, or citing the numerous authorities upon the questions involved, it is sufficient to say that there appears to be no ground for quashing the indictments, and the motions to quash will therefore be denied.

In re H. E. PLOOF MACHINERY CO.

(District Court, S. D. Florida. November, 1916.)

BANKRUPTCY ⊂=24—PROVING CLAIMS—REPRESENTATION BY ATTORNEY—"CREDITORS."

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 9, 30 Stat. 544 (Comp. St. 1916, § 9585), defining "creditor" as including the creditor's duly authorized agent, attorney, or proxy, unless the context is inconsistent with such construction, and General Order No. 4 (89 Fed. iv, 32 C. C. A. viii) providing that proceedings in bankruptcy may be conducted by the bankrupt, in person, in his own behalf, or by a petitioning or opposing creditor, and that a creditor will only be allowed to manage before the court his individual interest, and that every party may appear and conduct the proceedings by an attorney, who shall be an attorney or counselor authorized to practice in the Circuit or District Court, if an attorney in fact may prepare the proof of claim and present it to the referee for allowance, he may do so only for a particular creditor, and may not so represent more than one creditor.

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

In Bankruptcy. In the matter of the H. E. Ploof Machinery Company, bankrupt. On review of an order of the referee, refusing to allow a claim to be presented by an attorney in fact. Order affirmed.

McNeil & Strum, of Jacksonville, Fla., for appellants.

Haley & Heintz and Marks, Marks & Holt, all of Jacksonville, Fla., for appellees.

CALL, District Judge. The question raised by the petition to review in this case may be broadly stated to be: Can a person or a corporation represent a creditor in a bankruptcy proceeding, unless such person is an attorney of the court in which the proceeding is pending? A

person may, of course, represent himself in any of the courts of the United States. The bankruptcy court is not an exception to this general rule. Under Bankruptcy Act, § 1 (9), the word "creditor" is defined to include his duly authorized agent, attorney, or proxy, unless the context is inconsistent with such construction. As I understand the decisions, this provision has been construed to require a special authorization to represent the creditor as distinguished from the general representation of attorney at law, which arises from his employment.

It is well to bear in mind that all the proceedings in bankruptcy, with the possible exception of the meeting of creditors to select a trustee and fix the amount of his bond, are judicial in their character; the referee being a part of the bankruptcy court with judicial functions to be performed by him in the administration of the estate. An appearance before the referee for the purpose of protecting a creditor's rights is no other or different from an appearance before the judge in so far as the act of practicing law is concerned. Now General Order No. 4 (89 Fed. iv, 32 C. C. A. viii), with a view of carrying out the provisions of the Bankruptcy Act, and recognizing that a creditor may represent himself in all judicial proceedings, makes it plain that that representation is confined to his interest alone. When one prepares the proof of claim and presents it to the referee for the purpose of having it allowed, I apprehend no one would seriously contend he was not engaging in the practice of law. This is a proceeding then pending in the bankruptcy court, and the presenting and having filed the proof of claim is in the nature of an intervention inter esse suo, and clearly an act of practicing law. Now the creditor may do this for himself, but not in the interest of another; and if he may do this by giving a layman a power of attorney, it is only because the word "creditor" may without doing violence to the context be construed to mean duly authorized agent, attorney, or proxy. The language of General Order No. 4, which has all the force of law, it seems to me, makes this construction of the word creditor extremely doubtful. But granting that the word is susceptible of that construction, then certainly it must be confined to that particular creditor. If any other construction should be given the act and general orders then any one other than an attorney at law might by procuring powers of attorney from many creditors do a flourishing practice in the bankruptcy courts, and thus make meaningless General Order No. 4, and set at naught the laws governing the responsibilities and relations of attorney and client.

There is no merit in the contention that a court of bankruptcy is a business man's court, without rules of procedure, etc. Now, while counsel specifically urged at the hearing that he did not claim the attorney in fact for many creditors could appear and urge the claims of his principals before the judge of this court, yet if his contentions were carried to their legitimate conclusion such would be the effect and the proceedings, instead of being judicial, would partake more of the proceedings of a town meeting. The duties of an attorney at law to the court and to his client are well recognized by the law. He is an officer of the court, required to take an oath of office; has peculiar

privileges and great responsibility, and these it seems to me are recognized by the General Order No. 4, and the rules of practice of this court.

It would not be contended, I apprehend, that a corporation could engage in the practice of law, and everything I have said above applies with additional force to corporations. Nor would it be contended, I suppose, that a corporation could, through its manager or agent, engage in such practice.

The referee in the instant case allowed the attorney in fact to present, prove and have allowed one claim and refused to allow a second claim presented by the same attorney in fact. This last creditor petitions for this review. I have not decided the question whether an attorney in fact can represent the creditor in proceedings before the referee, if he is not an attorney at law, because I do not think that question is raised on the record. Whether such person can represent the creditor or not, I feel assured that he cannot represent more than one, unless he is an attorney admitted to practice in that court, and therefore there is no error against the petitioning creditor in this case.

UNITED STATES v. SUGAR et al.

(District Court, E. D. Michigan, S. D. July 10, 1917.)

No. 5875.

1. INDICTMENT AND INFORMATION ⟸125(5½)—OFFENSES—DUPLICITY.
An indictment charged that defendants did unlawfully, willfully, knowingly, corruptly, and feloniously conspire to commit an offense against the United States and to defraud the United States, in violation of Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1092 (Comp. St. 1916, § 10201), in that they conspired to induce other persons to refuse to register in accordance with Conscription Act May 18, 1917, c. 15, §§ 5, 6. The indictment clearly showed that defendants were charged with a conspiracy to commit an offense against the United States, and not to defraud it, although it followed the language of said section 37, which denounces, not only a conspiracy to commit an offense against the United States, but one to defraud. *Held*, that the allegations as to defrauding the United States should be rejected as surplusage, and hence the indictment was not bad as charging in a single count two distinct offenses, one a conspiracy to commit an offense against the Conscription Act and the other a conspiracy to defraud the United States.

2. ARMY AND NAVY ⟸40—CONSCRIPTION ACT—VIOLATIONS OF—INDICTMENT.
Under Criminal Code, § 332,[1] providing that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, commands, or procures its commission, is a principal, an indictment charging defendants with aiding, abetting, counseling, commanding, or procuring the violation of the Conscription Act must allege specifically that the act had been violated, in order to charge an offense.

3. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
Criminal Code, § 37, declares that if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each shall be punished. Section 332 declares that whoever directly commits any act constituting an offense defined in any law of the United States, or aids,

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

[1] Comp. St. 1916, § 10506.

abets, counsels, commands, induces, or procures its commission, is a principal. An indictment charged that defendants unlawfully conspired to commit an offense against the United States, in that they conspired to unlawfully, willfully aid, counsel, and procure persons to violate the provisions of the Conscription Act by failing and refusing to register, and to effect the object of the conspiracy circulated copies of a newspaper containing articles urging its readers to refuse to register. *Held*, that as the indictment charged a conspiracy to violate the Conscription Act, and did not aver that defendants were liable as principals, it was sufficient, having averred the distribution of the newspaper containing articles urging its readers to refuse to register as an act to effect the object of the conspiracy.

4. CONSTITUTIONAL LAW ⊜48—PRESUMPTION IN FAVOR OF CONSTITUTIONALITY.
In determining the constitutionality of a statute, as the Conscription Act, the act must be presumed constitutional.

5. CONSTITUTIONAL LAW ⊜83(2)—"INVOLUNTARY SERVITUDE"—WHAT CONSTITUTES.
Compulsory military service does not constitute involuntary servitude, prohibited by Const. Amend. 13; such amendment being directed against slavery, and not public duties, which may involve compulsory effort on the part of individuals.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Involuntary Servitude.]

6. CONSTITUTIONAL LAW ⊜208(3)—CLASS LEGISLATION—INHIBITION.
Const. Amend. 14, § 1, declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens, applies only to action by the state, and imposes no inhibition against the federal government; hence the Conscription Act, exempting from military service, though not from registration, certain classes of persons mentioned, is not invalid as class legislation, not being inhibited by any constitutional provision.

7. CONSTITUTIONAL LAW ⊜80(2)—DISTRIBUTION OF POWERS—JUDICIAL POWERS.
Const. art. 3, § 1, declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. Const. art. 1, § 8, authorizes Congress to make rules for the government and regulation of the land and naval forces. Const. Amend. 5, declares that no person shall be held to answer for an infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces. Conscription Act vests in boards to be appointed by the President the power to pass on exemptions contained within the act, but confers no such power on the federal courts. *Held*, that the act is not invalid, as depriving the courts of the United States of the power to pass on exemptions for the exemption boards, if they be regarded as courts, are military courts, which Congress might create under its power to make rules for the government of land and naval forces.

8. CONSTITUTIONAL LAW ⊜62, 80(1)—DISTRIBUTION OF POWERS—EXECUTIVE.
Congress cannot delegate either legislative or judicial powers to an executive officer or tribunal, although it may confer upon such officers or tribunals the power and duty to execute and enforce a statute and as an incident thereto, to determine the existence of facts upon which the application of the statute depends.

9. CONSTITUTIONAL LAW ⊜62, 80(1)—DISTRIBUTION OF POWERS—EXECUTIVE.
Conscription Act, which provides for exemptions, confers upon the President the power to establish boards of exemption, to review the decisions of such boards, and to make rules and regulations governing registration under the act, and all other rules and regulations necessary to carry

out the exemption provisions. There is no provision for review of exemption claims by the federal courts. *Held*, that the act is not invalid, as delegating to the President legislative or judicial powers; such power not being conferred on him or the exemption boards, the exemptions being defined by the act, and the power merely being to determine the facts which will render applicable exemption provisions of the statute.

10. ARMY AND NAVY ⟸20—CONSCRIPTION ACT—POWER OF CONGRESS.
Const. art. 1, § 8, subd. 18, authorizes Congress to make all laws which shall be necessary and proper for carrying into execution all powers vested in the government of the United States or any department thereof. Subdivision 12 confers on Congress power to raise and support armies, but declares that no appropriation of money for that use shall be for a longer term than two years. The Conscription Act provides for the registration of males between prescribed ages and for drafting them into the army. *Held* that, though Const. Amend. 10, declares that powers not delegated to the United States nor prohibited to the states are reserved to the states, Congress has the power to draft or conscript an army; such power being a necessary incident to the power to raise an army.

11. CONSTITUTIONAL LAW ⟸42—RIGHT TO RAISE CONSTITUTIONAL QUESTION.
Constitutionality of Conscription Act May 18, 1917, § 1, authorizing the drafting of the members of the National Guard, cannot be questioned by one unaffected thereby; it being separate and distinct, and separable from the other portions of the act.

12. ARMY AND NAVY ⟸20—CONSCRIPTION ACT—DRAFTING MEMBERS OF MILITIA.
Conscription Act May 18, 1917, § 1, authorizing the President to draft into the military service of the United States, organize, and officer, in accordance with National Defense Act June 3, 1916, c. 134, § 111, 39 Stat. 211 (Comp. St. 1916, § 3045), so far as applicable, any and all members of the National Guard, said members so drafted into such service to serve therein for the period of the present emergency, does not call forth the militia as such, which Const. art. 1, § 8, cl. 15, authorizes for certain purposes only; the section of the National Defense Act providing that the persons so drafted shall, from the date of their draft, stand discharged from the militia.

Maurice Sugar and others were indicted for conspiracy to unlawfully and willfully aid and abet and procure persons to violate the Conscription Act. On motion to quash indictment. Motion denied.

John F. Kinnane, U. S. Dist. Atty., and J. Edward Bland, Asst. U. S. Dist. Atty., both of Detroit, Mich.

Maurice Sugar, of Detroit, Mich., pro se.

Joseph B. Beckenstein, of Detroit, Mich., for defendants.

TUTTLE, District Judge. Defendants have moved to quash the indictment herein, alleging that it charges in a single count two distinct offenses, that the acts of the defendants recited do not constitute an offense against the United States, and that the Conscription Act, on which such indictment is based, is unconstitutional for various reasons stated.

The statute in question is the act of Congress known as the Conscription Act, which was approved on May 18, 1917. The purpose of the act is the raising of national armies for the prosecution of the war against Germany, declared by Congress a few weeks before the enactment of such act, and for that purpose it provides for the regis-

tration of all male persons between the ages of 21 and 30 years, inclusive, on a day and in the manner to be fixed by the President; for the exemption from its provisions of certain classes of persons named therein; for the establishment of exemption boards, to be appointed by the President and to have charge of the application of the exemptions referred to; for the mustering into the national forces of the persons conscripted by the act; and for the making of rules and regulations by the President governing the execution of the provisions relative to such registration and exemptions and the other provisions of the act. Section 5 of the act provides that:

"Any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction by a District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year."

Section 6 provides, among other things, that:

Any person who "evades or aids another to evade the requirements of this act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year."

This indictment charges the defendants with having unlawfully conspired to violate the provisions of the act just quoted, by conspiring to unlawfully aid and abet, counsel, command, induce, and procure other persons to violate said provisions, as hereinafter more fully set forth. The indictment will be found in full at the end of this opinion. See page 439.

[1] The claim that the indictment charges in a single count two distinct offenses, to wit, one a conspiracy to commit an offense against the United States, and the other a conspiracy to defraud the United States, cannot, in my opinion, be sustained. The indictment in charging the offense in general terms follows the language of the statute defining conspiracy (section 37 of the Criminal Code); but, in stating the acts alleged to constitute the crime charged, the indictment makes it quite clear that the defendants are charged with conspiracy to commit an offense against the United States, and not to defraud the United States. I am satisfied that the words in the indictment, "to defraud the United States," are mere surplusage and should be disregarded. Davey v. United States, 208 Fed. 237, 125 C. C. A. 437.

[2, 3] Defendants contend that the object of the conspiracy alleged in the indictment does not constitute any offense against the United States. The indictment charges in substance that the defendants named unlawfully conspired to commit an offense against the United States, in that they so conspired to "unlawfully and willfully aid and abet, counsel, command, induce, and procure" certain persons to violate the provisions of said Conscription Act by failing and refusing to register as required by said act and to evade the requirements of said act, and that in pursuance of such conspiracy and to effect the object thereof the defendants unlawfully and feloniously distributed and circulated copies of a certain newspaper containing articles and

editorials inciting and urging its readers to refuse to register as required by said act.

That the willful refusal or failure to register as required by the Conscription Act is an offense against the United States cannot, of course, be disputed. Section 332 of the Criminal Code provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

If, therefore, these defendants aided, abetted, counseled, commanded, induced, or procured the actual violation of said Conscription Act, they themselves thereby violated said act and committed an offense against the United States; and if they unlawfully conspired to aid, abet, counsel, command, induce, or procure the violation of said act, and one or more of them did any act to effect the object of such conspiracy, each of them would be guilty of an unlawful conspiracy to commit an offense against the United States, in violation of section 37 of the Criminal Code, which provides that:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

If this indictment charged the defendants with aiding, abetting, counseling, commanding, inducing, or procuring the violation of the Conscription Act, it would be necessary that it should allege specifically that said act had been actually violated. United States v. Mills, 7 Pet. 138, 8 L. Ed. 636.

The indictment, however, does not charge defendants either with having actually violated the Conscription Act or with having aided, abetted, counseled, commanded, induced, or procured such violation. It charges an entirely distinct offense, namely, an unlawful conspiracy to violate said act by the means and in the manner already pointed out. It will be noted that this conspiracy statute does not make the actual commission of the crime contemplated by the conspirators an essential element of the conspiracy. It is necessary only to prove that after such conspiracy any one of the conspirators did some act "to effect the object of the conspiracy" in order to render such conspiracy a violation of this statute. As was said in United States v. Rogers (D. C.) 226 Fed. 512:

"The commission of the crime of conspiracy is not complete until one or more of the conspirators does some act or acts in execution or furtherance of the conspiracy. These acts are called 'overt acts,' and may be innocent acts in and of themselves."

It is, I think, quite clear that the alleged acts of the defendants in circulating the literature referred to were acts in furtherance of, and done for the purpose of effecting, the object of their conspiracy. It therefore follows that the indictment properly charges a conspiracy to commit an offense against the United States, which, of course, is itself an offense against the United States.

Defendants attack the constitutionality of the Conscription Act on various grounds, which may be conveniently grouped as follows:

(1) That the act is contrary to the Thirteenth Amendment to the United States Constitution, which provides that:

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

(2) That the act constitutes class legislation.

(3) That the act deprives the courts of the United States of the power to pass upon the exemptions provided for in said act.

(4) That the act vests in the President legislative and judicial powers.

(5) That the act is not an exercise of any power conferred upon Congress by the Constitution, and is therefore void.

(6) That the act calls out the militia for a purpose not authorized by the Constitution.

[4] These contentions will be considered in the order named, and in approaching a consideration of the questions raised it is to be borne in mind that the act must be presumed to be constitutional unless it is clearly shown to be otherwise. Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. In the language of the Supreme Court in Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862:

"The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear."

[5] (1) The contention that compulsory military service constitutes involuntary servitude, within the meaning of the constitutional provision already quoted, cannot, in my opinion, be sustained. Considering the well-known historical circumstances surrounding the enactment of such provision, it seems to me quite clear that it has reference to slavery, or enforced labor, as between private individuals, and was not intended to prevent, or to apply to, the rendition by an individual of duties to the government properly imposed by law. As was said by the Supreme Court in the Slaughter-House Cases, 83 U. S. 36, 21 L. Ed. 394:

"The word 'servitude' is of larger meaning than 'slavery,' as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the British government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word 'slavery' had been used. * * * We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter."

It certainly cannot be said that military service under the properly constituted authorities constitutes any form of slavery. There are

many public duties which involve compulsory effort of various kinds. Familiar examples are found in the jury system, militia duty, enforced assistance in making arrests, and many other instances which will readily suggest themselves. Surely it cannot be seriously contended that the performance of such duties constitutes slavery or involuntary servitude within the meaning either of the spirit or of the letter of the Constitution. As was pointed out by the court in the case of In re Dassler, 35 Kan. 678, 12 Pac. 130, in overruling a contention that an ordinance requiring the performance of labor upon the public streets in lieu of taxes violated this amendment to the Constitution:

"The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in money in lieu of work, while in the nature of a tax, is not, in common speech or in customary revenue legislation, understood as embraced in the term 'tax.' The power to impose this labor is exercised for public purposes, and the general good and convenience of the community. Cooley, Tax'n (2d Ed.) supra; 1 Desty, Tax'n, 296; Starksborough v. Town of Hinesburgh, 13 Vt. 215; State v. Halifax, 4 Dev. (N. C.) 345; Day v. Green, 4 Cush. (Mass.) 433; 1 Dill. Mun. Corp. (3d Ed.) p. 394. Such labor has never been regarded or construed by any of the authorities as falling within the terms of the Constitution prohibiting slavery and involuntary servitude. Militia service is also compulsory, and, if the theory of the petitioner is correct, such service, when involuntary, is within the terms of section 6 of the Bill of Rights, and the Thirteenth Amendment to the Constitution of the United States. Such, however, is not the case, and we do not think that article 8 of the Constitution of the state conflicts in any way with section 6 of the Bill of Rights or with the Thirteenth Amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto. Among those services are labor on the streets or highways and training in the militia. As the performance of work, upon an assessment or levy, payable in labor, for the repair of roads or streets, is not the kind of involuntary servitude evidently intended to be embraced within the provisions of the Constitution of the state or of the United States, the power to impose such labor by the Legislature, or a city acting under its authority, cannot well be questioned."

It is entirely clear that this contention is without merit.

[6] (2) It is further contended that the act constitutes class legislation, in that it exempts from military service, although not from registration thereunder, certain classes of persons mentioned therein, and that, therefore, it violates the United States Constitution. No provision of such Constitution has been called to my attention, and I have found none, which would prohibit Congress from making the exemptions complained of. Section 1 of the Fourteenth Amendment to the Constitution provides, among other things, that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It will be noted that the language quoted applies only to action by the states, and imposes no inhibition against the action of the federal government. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; U. S. v. Adair (D. C.) 152 Fed. 737.

It is therefore unnecessary to consider the questions whether such exemptions are such arbitrary discriminations as to render such statute class legislation, or, if so, whether these defendants, charged as they are with a crime growing out of a refusal to register under the act, are entitled to invoke in their defense the unconstitutionality of an entirely separate and distinct portion of the act, having no relation to the provision requiring registration. This objection is clearly untenable and must be overruled.

[7] (3) It is further urged that the act is unconstitutional, in that it deprives the courts of the United States of the power to pass upon the exemptions provided for in said act; such power being, by the terms of the act, vested in certain boards to be appointed by the President.

Section 1 of article 3 of the United States Constitution provides that:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 8 of article 1 of the Constitution authorizes Congress—

"to make rules for the government and regulation of the land and naval forces."

The fifth amendment to the Constitution, in requiring that no person shall be held to answer for an infamous crime, unless on a presentment or indictment of a grand jury, expressly excepts "cases arising in the land or naval forces."

It is not entirely clear whether this argument is based upon the contention that these boards are not courts established by Congress, or upon the contention that such boards are not courts at all, but are merely subordinate executive tribunals exercising judicial powers. Whichever contention be the basis thereof, such argument is, in my opinion, without merit. It seems manifest that, if these exemption boards be regarded as courts, they are military courts, and therefore not created by virtue of the power granted to Congress by section 1 of article 3, already referred to, but under the power conferred by the fourteenth subdivision of section 8 of article 1 of the Constitution, authorizing Congress to make rules for the government and regulation of the land and naval forces, and that, therefore, their decisions are not required to be subject to review by the federal courts of civil jurisdiction.

"The decisions of the Supreme Court in reference to the power of military tribunals is founded upon the doctrine that the third article of the Constitution has conferred upon Congress the power to create certain federal courts; that another power is conferred upon Congress in the first article of the Constitution, namely, to make rules for the government and regulation of the land and naval forces. These powers are independent of each other. They are derived from different articles of the Constitution. When courts organized under these respective powers are proceeding within the limits of their jurisdiction, it is clear that they must be held free from any interference." Ex parte Dickey (D. C.) 204 Fed. 322.

The following language of the Supreme Court in Dynes v. Hoover, 61 U. S. 65, 15 L. Ed. 838, is, in my opinion, applicable here:

"Among the powers conferred upon Congress by the eighth section of the first article of the Constitution, are the following: 'To provide and maintain a navy;' 'to make rules for the government of the land and naval forces.' And the Fifth Amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation 'cases arising in the land or naval forces.' And by the second section of the second article of the Constitution it is declared that: 'The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.' These provisions show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations, and that the power to do so is given without any connection between it and the third article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."

The powers exercised by these exemption boards are certainly as military in character as those exercised by the provisional courts established by the President during the Civil War in the territory of the enemy occupied by the federal forces, and the duty of the government to establish such tribunals was, in the language of the Supreme Court in Grapeshot v. Wallerstein, 76 U. S. 129, 19 L. Ed. 651, "a military duty to be performed by the President as commander-in-chief." As was pointed out by the Supreme Court in the case of In re Vidal, 179 U. S. 126, 21 Sup. Ct. 48, 45 L. Ed. 118:

"This court is not * * * empowered to review the proceedings of military tribunals by certiorari. Nor are such tribunals courts with jurisdiction in law or equity, within the meaning of those terms as used in the third article of the Constitution, and the question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect of them."

In so far as this objection is based upon the claim that these exemption boards are executive tribunals exercising judicial powers, it will be disposed of in discussing the contention next considered.

[8, 9] (4) It is further contended that the act is unconstitutional because it vests in the President legislative and judicial powers. Defendants have not specified what powers conferred upon the President by the act are claimed by them to be legislative or judicial, but presumably they intend to refer to the power conferred upon him to establish the boards of exemption already mentioned, to review the decisions of such boards, and to make rules and regulations governing the registration under the act, the organization and procedure of exemption boards, and all other rules and regulations necessary to carry out the exemption provisions of the act.

It is, of course, well settled that Congress cannot delegate either legislative or judicial powers to an executive officer or tribunal. It is equally well settled that Congress may confer upon such officers or tribunals the power and duty to execute and enforce the provisions of a statute, and, as an incident thereto, to determine the existence of the facts upon which the application of the statute depends, and to establish and regulate, consistent with the terms of the statute, the manner and means whereby such statute shall be enforced and its purpose given effect. The principles applicable have been well expressed by Judge Knappen in United States v. Moody (D. C.) 164 Fed. 269, in the following language:

"It is elemental that Congress cannot delegate legislative authority to an executive officer or board, and that accordingly such executive officer cannot amend or extend a law of Congress, so as to make an act unlawful which, but for the action of the executive officer, would be lawful; in other words, that a sufficient statutory authority must exist for declaring an act or omission unlawful. Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; Field v. Clark, 143 U. S. 649, 691, 12 Sup. Ct. 295, 36 L. Ed. 294; United States v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764, 36 L. Ed. 591. It is however, equally elemental that Congress may constitutionally delegate to an officer or board the determination of a question of fact or state of things upon which the operation of the law is made to depend, or the regulating by administrative rules of the mode of procedure to carry into effect what Congress has otherwise enacted. Field v. Clark, supra; Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. In the cases cited by counsel, where the courts have refused to enforce administrative rules adopted by an executive officer or board, it has been found that the regulation in question practically added to or amended the statute (as in Morrill v. Jones, supra; United States v. Maid [D. C.] 116 Fed. 650; United States v. Hoover [D. C.] 133 Fed. 950; United States v. Matthews [D. C.] 146 Fed. 306), or (as in United States v. Eaton, supra) that the punishment for violation of the regulation in question was not provided for by the statute, or that there was no express or necessarily implied authority from Congress to make regulations. Here authority to make regulations has been given in explicit terms, and the statute has expressly declared the violation of such rules to be a criminal offense."

Here, as in Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525:

"We may say of the legislation in this case * * * that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

I do not think that it can be said that this act confers upon the President any legislative or judicial powers. The act itself completely expresses the purpose of Congress as stated in its title "to authorize the President to increase temporarily the military establishment of the United States." The act fully and clearly provides the general means adopted for carrying out this purpose, and the powers therein conferred upon the President are merely powers to regulate the details necessary to make practically effective the provisions of the act. In the language of the Supreme Court in Ex parte Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813:

"The regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offense. We think the act not open to the objection urged, and that it is disposed of by previous decisions. United States v. Bailey, 34 U. S. (9 Pet.) 238, 9 L. Ed. 113; United States v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415."

The same objection was made to the statute providing for the Civil War selective draft and authorizing the President to make rules and regulations governing the administration thereof, and in overruling such objection the court, in McCall's Case, Fed. Cas. No. 8,669, said:

"The proper inquiry, therefore, is whether they were such regulations as Congress could authorize the President to make. Regulations of some kind were necessary. The details of a compulsory draft could not be simple, and there was no practical experience of such a system. Of course, Congress cannot constitutionally delegate to the President legislative powers. But it may, in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration, or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority, inherent in the powers conferred, of making regulations necessarily incidental to their exercise, and of choosing between legitimate alternative modes of their exercise. Whether his authority extends farther, and enables him, without express authority from Congress, to make regulations which, though incidental, are not necessarily so, is a different question. When, however, Congress, in conferring a power, which it may constitutionally vest in him, not only omits to prescribe regulations of its exercise, but, as in the present case, expressly authorizes him to make them, he may, within the limits of, and consistently with, the legislative purpose declared, make any such regulations incidental, though not necessarily so, to the power conferred, as Congress might have specially prescribed."

The same principles apply to the delegation of judicial powers to the executive department. Congress cannot, of course, so delegate such powers. It may, however, confer upon executive officials the power of determining the existence of facts upon the existence of which the execution and application of a statute depends. This power is often essential to the proper enforcement of a statute, and as the exercise of such power is not an exercise of judicial powers, a determination of such facts is not necessarily reviewable by the courts. In the language of the Supreme Court in Zakonaite v. Wolf, 226 U. S. 272, 33 Sup. Ct. 31, 57 L. Ed. 218:

"It is entirely settled that * * * such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive."

As was pointed out by the same court in Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523:

"If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have from the foundation of the national government, exercised, and are now exercising, powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States."

For the reasons stated, it is clear that this objection is not well founded and cannot be sustained.

[10] (5) It is further urged that the act in question is unconstitutional, because it is an attempt by Congress to exercise a power not granted by the federal Constitution, and it is strenuously insisted that the Constitution does not empower Congress to provide for a compulsory military service.

It is a familiar rule that Congress cannot exercise any powers not expressly or by necessary implication conferred upon it by the United

States Constitution. Indeed, the Tenth Amendment to such Constitution expressly states that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

It is not, however, necessary that a power be expressly granted to Congress by the Constitution in order that the latter may exercise such power. The eighteenth subdivision of section 8 of article 1 of the Constitution authorizes Congress—

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The principle governing the construction and application of this language was well stated by the court in Fairbank v. United States, 181 U. S. 283, 21 Sup. Ct. 648, 45 L. Ed. 862, as follows:

"The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. Further, by the last clause of section 8, art. 1, Congress is authorized 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.' This, construed on the same principles, vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to this court, and it was affirmed that there could be no narrow and technical limitation or construction; that the instrument should be taken as a Constitution. In the course of the opinion the Chief Justice said: " 'The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the Legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation, to circumstances.' McCulloch v. Maryland, 4 Wheat. 316, 415, 4 L. Ed. 579, 603. And thereafter in language which has become axiomatic in constitutional construction (4 Wheat. 421, 4 L. Ed. 605): 'We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' "

The twelfth subdivision of section 8 of article 1 of the Constitution confers upon Congress the power—

"to raise and support armies, but no appropriation of money for that use shall be for a longer term than two years."

It seems to me too plain for argument that where, as here, the power "to raise armies" is conferred in broad terms and without the imposition of any limitations thereon, such power necessarily involves the power to determine the means whereby such armies shall be raised. If, in exercising this expressly conferred power "to raise armies," Congress is to be limited to certain specific means, how, and by whom, can it be determined what means Congress may adopt? Again, if it were possible to determine what means were theoretically proper for the purpose, and Congress were limited thereto, and it then developed that the use of such means was unsuccessful in raising the armies sought, of what force or value would this "power" thus granted to Congress be? Surely a power to raise armies which had not sufficient power to raise them would be a misnomer, a self-contradiction, a legal farce. In the language of In re Griner, 16 Wis. 423:

"The federal government is clothed with ample powers of self-preservation and self-defense, whether assailed by traitors at home or enemies abroad. Full authority in respect to the creation and direction of the national forces is conferred upon Congress."

In McCall's Case, Fed. Cas. No. 8,669, the constitutionality of the Civil War Selective Draft Act was attacked, and in upholding such act the court said, among other things:

"The Constitution of the United States authorizes Congress to raise armies, and also to call forth and organize the militia of the several states. Under this twofold power, both regular national armies and occasional militia forces from the several states may be raised, either by conscription or in other modes. Houston v. Moore, 5 Wheat. (18 U. S.) 17, 5 L. Ed. 19. The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security."

The constitutionality of the same act was also involved in Allen v. Colby, 47 N. H. 544, where, in reaching the same conclusion, the court used the following language:

"The Constitution of the United States (article 1, section 8) confers on Congress the power 'to raise and support armies, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.' Under this grant of power to raise and support armies and call out the militia, there can be no doubt that Congress has power to make and authorize such orders and regulations as may be necessary to prevent those who are liable by law to military service from evading that duty."

I am clearly of the opinion that there is nothing in the Constitution which prohibits the enactment of this Conscription Act. I think the conclusion is irresistible that it is a proper exercise of the power conferred upon Congress to raise armies, and that the means adopted therefor are appropriate and plainly adapted to that end, and therefore fall within the implied powers conferred by the Constitution. I do not deem it necessary to discuss the subject further. The language, however, of the court in the case of Kneedler v. Lane, 45 Pa. 238,

where in an exhaustive and able opinion the constitutionality of the Civil War Conscription Act was upheld, so fully and clearly expresses the principles applicable to this question that I quote therefrom somewhat at length as follows:

"Can the national armies be raised or recruited by draft? That the United States are a nation, and sovereign in the powers granted to them, is not denied. Their national characteristics are seen in the powers themselves, and their supremacy provided for in the instrument. They possess all the functions of a nation in the law-making, executing, and judging powers. We cannot conceive of a nation without the inherent power to carry on war. The defense of person and property is a right belonging by nature to the individual, and to every individual, and is not taken away by association. It therefore belongs to individuals in their collective capacity, whenever thus threatened or assailed. The Constitution, following the natural right, vests the power to declare war in Congress, the representatives of the people. It is noticeable that the Constitution recognizes this right as pre-existing, for it says, to declare war, which presupposes the right to make war. The power to declare war necessarily involves the power to carry it on, and this implies the means, saying nothing now of the express power 'to raise and support armies,' as the provided means. * * * The right to the means carries all the means in possession of the nation. Every able-bodied man is at the call of the government, for assuredly in making war, as there is no limit to the necessity, there can be no limit to the force to be used to meet it. Therefore, if the emergency require it, the entire military force of the nation may be called into service. But the power to carry on war, and to call the requisite force into service, inherently carries with it the power to coerce or draft. A nation without the power to draw forces into the field, in fact would not possess the power to carry on war. The power of war, without the essential means, is really no power; it is a solecism. Voluntary enlistment is founded in contract. A power to command differs essentially from a power to contract. The former flows from authority; the latter from assent. The power to command implies a duty to obey, but the essential element of contract is freedom to assent or dissent. It is clear, therefore, that the power to make war, without the power to command troops into the field, is impotent—in point of fact, is no governmental power, because it lacks the authority to execute itself.

"So much can be argued conclusively, from the fact that the Union is a government of national powers, and has the express authority to declare war and to provide for the common defense and general welfare. But, when we reach the express grant of the means of making war, we find it a general grant of the power 'to raise and support armies,' without any exception as to the extent, the mode, or the means—only that appropriations for the purpose shall not be made for more than two years, which strengthens the grant in every other aspect. Here there is a grant in the broadest language to raise armies, and the purposes (of which I shall say more presently) are vital and fundamental. What is the rule of interpretation to be applied as settled by the federal judiciary? In Gibbon v. Ogden, 9 Wheat. 188, 6 L. Ed. 23, Marshall, C. J., says: 'We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.' Then, speaking of the misapplication of the doctrine of strict construction, in language which seems as if written for this time and occasion, he says: 'If they contend for that narrow construction, which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant as usually understood import, and which are consistent with the general views and objects of the instrument—for that narrow construction which would cripple the government, and render it unequal for the objects for which it was declared to be instituted, and to which the powers given as fairly undefstood render it competent—then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.' In Martin v. Hunter, 1 Wheat. 304, 4 L. Ed. 97, Mr. Justice Story said: 'This instrument [the Constitution], like any other grant, is to have a reasonable construction, according to the

import of its terms; and when a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication.'

"It is conceded that, in construing the Constitution, we must take it as a whole, and not confine the question to a single isolated grant of power. But where a general power is vested in plain and absolute language, without exception or proviso, for high, vital, and imperative purposes, which will be crippled by interpolating a limitation, the advocate of the restriction must be able to point out somewhere in the Constitution a clause which declares the restriction, or a higher purpose which demands it. But by so much more that the life of a nation is greater than the life of an individual, which may be taken to preserve it, so much greater is the high purpose of raising an army to preserve the nation than the protection of the rights of the individual. The minor purpose, when urged as a reason for the limitation, cannot therefore be allowed to control the meaning of the plain language used for the major purpose. Then the inherent powers of a nation to make war for self-preservation, carrying with them all the means of making war effective, the express power to declare war and to raise and support armies, coupled with the express power to pass all laws necessary and proper to carry those powers into effect, all unite in sustaining the power to raise armies by coercion, and these are in turn sustained by the high, vital, and essential purposes of the grant. In addition, the considerations derived from the constitutional duties of the government, and the constitutional restrictions upon the states, enforce this conclusion. If, as inferred only, the Constitution denies coercion, what is its purpose in this? The power to raise armies by draft lies somewhere; if not in the Union, it belongs to the states. But if it abide in the latter only, how is it to be used at all? They cannot declare war, for this power clearly belongs to the nation alone. They cannot make treaties, contract alliances for mutual assistance, make peace, or do any act requiring forces to answer such stipulated duties, for these powers belong to the federal government, and are forbidden to the states. They cannot 'grant letters of marque or reprisal,' 'keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless when actually invaded, or in such imminent danger as will not admit of delay.' It does not belong to the states to provide for executing the laws of the Union, or for suppressing insurrections. Nor does it belong to one state to defend others against invasion. Of what use, then, is the compulsory power to raise armies, to the states, as such? But it does belong to the United States to provide for the common defense and general welfare, to declare war, to execute the laws of the Union, to suppress insurrections and repel invasions, to protect the states themselves against invasion and domestic violence, and to guarantee to them a republican form of government. If we deny to the Union the means of raising armies by draft, and leave coercion to the states, how are all these high federal duties to be performed?"

[11, 12] (6) Finally, it is insisted that the act is unconstitutional because it violates the fifteenth clause of section 8, article 1, of the federal Constitution, authorizing Congress "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions." And it is argued that, inasmuch as this provision of the Constitution authorizes Congress to call out the militia only for the purposes thus expressly designated, and as by the present act the militia is called for a purpose other than "to execute the laws of the union, suppress insurrections and repel invasions," therefore the act is an attempted exercise of power in excess of that granted to Congress, and is for that reason invalid.

Section 1 of the act authorizes the President, among other things:

"To draft into the military service of the United States, organize, and officer. in accordance with the provisions of section 111 of said National Defense Act, so far as the provisions of said section may be applicable and not inconsistent

with the terms of this act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: Provided that, when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the said designations of their respective organizations."

Section 111 of the National Defense Act, just referred to, provides that:

"When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct."

It does not appear that any of the defendants are members of the National Guard, or affected by this portion of the statute, and therefore, as this portion of the act is separate and distinct from the other portions thereof and separable therefrom, this objection might be overruled on that ground. Loeb v. Trustees of Columbia Township, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. Ed. 280; Gatewood v. North Carolina, 203 U. S. 531, 27 Sup. Ct. 167, 51 L. Ed. 305; Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Ann. Cas. 1034; New York Central & H. R. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613.

Here, as in the case last cited, it may be said that there is no defendant affected by this part of the act—

"complaining of the constitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions."

Aside, however, from these considerations, I am of the opinion that this objection is clearly without merit. It is by no means clear that, even if by this act Congress had provided for calling out the militia in pursuance of and to make effective its previous declaration of war, it would not have thereby provided for calling forth the militia "to execute the laws of the nation," and in so doing have been strictly within its constitutional powers. It is, however, in my opinion, unnecessary to determine or consider this question, for the reason that this act does not "provide for calling forth the militia."

It will be noted that the act does not purport to provide for calling forth the militia. The portion of the act here involved merely authorizes the President "to draft into the military service of the United States * * * any or all members of the National Guard," etc. It is then provided that "said members so drafted into the military service

of the United States shall serve," etc. The section of the National Defense Act referred to expressly provides that "all persons so drafted shall, from the date of their draft, stand discharged from the militia." It seems clear that Congress did not, by this language, intend to call out the militia, as such, but only to summon into the service of the United States those individuals who were, before being so summoned, "members" of the National Guard. This, in my opinion, does not violate the constitutional provision so invoked. If the federal government has, as there can be no doubt that it has, the power to draft into the military service of the United States any of its citizens, surely it has power to draft such citizens, notwithstanding the fact that they may previously have been members of the National Guard. Otherwise, it would be in the power of any state or of its citizens to easily evade or nullify any attempt of the federal government to exercise this power and such power might be made wholly nugatory. The constitutional provision authorizing Congress to provide for calling out the militia does not, in my opinion, limit or in any manner affect the broad power expressly conferred upon Congress by the other constitutional provision already considered "to raise" armies. This objection is therefore overruled.

For the reasons stated, the motion to quash the indictment must be, and it hereby is, denied.

THE INDICTMENT.

The grand jurors of the United States of America impaneled and sworn to inquire in and for the body of the Southern division of the Eastern district of Michigan, upon their oaths present: That heretofore, to wit, on the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and seventeen, and on divers and sundry days subsequent thereto up to and including, to wit, the thirty-first day of May, A. D. 1917, at the city of Detroit, in the Southern division of the Eastern district of Michigan and within the jurisdiction of this honorable court, one Nathan L. Welch, one Maurice Sugar, one Samuel N. Diamond, one Ludwig Bolz, one Robert Westfall, and one Daniel L. Powell, Jr., all late of the city of Detroit, and other persons to these grand jurors at this time unknown, did unlawfully, willfully, knowingly, corruptly and feloniously conspire, combine, confederate and agree together to commit an offense against the United States, and to defraud the United States, in violation of section 37 of the Penal Code of the United States, in this, to wit: That the said Nathan L. Welch, the said Maurice Sugar, the said Samuel N. Diamond, the said Ludwig Bolz, the said Robert Westfall, and the said Daniel L. Powell, Jr., and each of them, did then and there unlawfully, willfully, knowingly, corruptly and feloniously conspire, combine, confederate and agree together and among themselves and with certain other persons to these grand jurors unknown to unlawfully and willfully aid and abet, counsel, command, induce and procure certain male persons whose names are to these grand jurors unknown and being male persons between the ages of twenty-one years and thirty years, both inclusive, who are and shall be subject to registration under the terms and provisions of section 5 of an Act of Congress approved May 18, 1917, entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and in accordance with the regulations prescribed by the President under said act and at the time and place stated in the said proclamation and by public notice, made and issued and promulgated by the President under said act, to unlawfully and willfully fail and refuse to present themselves for registration and to unlawfully and willfully fail and refuse to submit themselves for registration at the time and place and in the manner provided in said act and by said regulations, proclamation and public notice,

and to unlawfully evade the requirements of said act and said regulations in not registering at the time and place and in the manner provided by the said act and regulations, proclamation and public notice. And the grand jurors do further present that in pursuance of said conspiracy, and to effect the object thereof, the said Nathan L. Welch, the said Maurice Sugar, the said Samuel N. Diamond, the said Ludwig Bolz, the said Robert Westfall, and the said Daniel L. Powell, Jr., and each of them, on, to wit, the twenty-seventh day of May, A. D. 1917, at the city of Detroit, in the Southern division of the Eastern district of Michigan, and within the jurisdiction of this honorable court, did unlawfully, willfully, feloniously and knowingly print, publish, issue and circulate and cause to be printed, published, issued and circulated certain literature in opposition to the operation and enforcement of the aforesaid act of Congress and proclamation and regulations promulgated for the enforcement of said law, said literature then and there consisting of a certain issue of a weekly newspaper printed and circulated in said city of Detroit, and being known as the Michigan Socialist, and said issue of said newspaper being the issue dated as follows, to wit: "Detroit, Mich., Sunday, May 27, 1917," and being known as the "Anti-Conscription Edition" thereof, the heading of said issue of said newspaper so printed and published and circulated in said city of Detroit being in the words and figures following, to wit, together with the resolution adopted by the Socialist Party of Detroit, appearing on the first page of said newspaper:

"Anti-Conscription Edition

"The Michigan Socialist

"Published by the Socialist Party of Detroit.

"Vol. 1. Detroit, Mich., Sunday, May 27, 1917. No. 46.

"What Socialists Will Do on Registration Day.

"Resolution Adopted by the Socialist Party of Detroit.

"The Government of the United States, in the interest of the capitalist class, has now plunged this country into the mad orgy of death and destruction which is convulsing the nations of the old world, and has forced conscription upon the people of this country.

"We, the Socialist party of Detroit, in joint meeting assembled, reaffirm our allegiance to the principle of international working class solidarity, reiterate our unalterable opposition to this war, and denounce the law just passed to conscript the workers into military service.

"This law forces into 'involuntary servitude' a portion of the population of the country, and we brand it as a violation of the spirit of the thirteenth amendment to the Constitution.

"In the name of the workers, who will bleed but not benefit, we pledge ourselves to oppose registration for conscription by refusing to enroll upon registration day, and we call upon all workers to refrain from signifying their willingness to kill the workers of any other nation.

"Better the freedom of a prison cell than slavery in the interest of commercialism."

And said issue of said newspaper, consisting of four pages of printed matter then and there containing certain articles, editorials and illustrations opposing the enforcement of the aforesaid act of Congress providing for the temporary increase of the military establishment of the United States and known as the Selective Service Act and inciting those subject to the operation of said act to willfully fail and refuse to present themselves for registration or to submit thereto as provided in said act and in the regulations and the President's proclamation pertaining thereto, and exhorting said young men subject to said registration and draft to oppose and refuse to register and particularly inciting and urging all such young men to violate said law and to oppose the enforcement of the same as shown in the leading article printed and published in the first column of the first page of said issue, said leading article being in the words and figures, following, to wit:

"Will You Cringe Like a Coward or Stand up Like a Man?

"Will you follow sheeplike the plutocratic interests sponsoring this war to the European slaughter house to be butchered and maimed so that plutocracy may coin profits out of the misery of the war stricken nations?

"Have you any backbone at all?

"Will you permit military authorities to draft you into involuntary servitude, in contempt of real American tradition?

"Will you stand by with your hands folded and permit the assassination of the constitutional rights of American citizens?

"The hour is at hand when you must either act like a man or forever relinquish your civil and moral right.

"War was declared by the President and Congress in the same arbitrary manner that the Kaiser declared it. You were not consulted about it.

"A draft law has been passed over the protests of American workers. Registration is but a few hours ahead.

"Will you register your willingness to rot in the trenches to accommodate our American plutocracy?

"What will you do?

"You must choose and decide quickly.

"Thousands of Detroiters have decided to refuse to register and refuse to permit the military authorities to conscript them to fight in a war about which they were not consulted. Will you stand with them and join their ranks? Will you stand up like a man for your rights NOW, or will you cringe like a coward when the supreme test of your manhood arrives?

"The question is simple.

"Will you go forth and murder your fellow men, against whom you have no grudge, or will you refuse to participate in the murder party?

"Are you ready to stand with men who will go down in history as the real men of the day, by fighting to maintain such democratic rights and privileges as have been gained through years of sacrifice, or will you sheepishly follow the American murder machine?

"Better a prison cell than the blood of innocent workers on your hands.

"BE A MAN!"

And the further contents of said issue of said newspaper so printed and circulated in the city of Detroit being too voluminous to be set forth at length in this indictment as will more fully appear by reference to the same—contrary to the form, force and effect of the act of Congress in such case made and provided and against the peace and dignity of the United States of America.

UNITED STATES v. CUDAHY PACKING CO. et al.

(District Court, D. Connecticut. June 5, 1917.)

Nos. 390–393.

1. FOOD ⟸20(1)—MEAT INSPECTION—INDICTMENT.

Where an indictment sufficiently set forth facts showing violations of the Meat Inspection Act, it is good against demurrers, though alleging that defendants failed to comply with a regulation of the Secretary of Agriculture determined to be unreasonable or void.

2. FOOD ⟸20(1)—MEAT INSPECTION—INDICTMENT.

An indictment charged that prior to the commission of the alleged offenses the Secretary of Agriculture had duly made and prescribed rules and regulations covering the inspection of meat and food packages to be shipped in interstate commerce in accordance with the Meat Inspection Act; that such rules were then in force, that regulation 18, § 3, par. 2, declares that, except persons having unrevoked certificates of exemption and farmers slaughtering animals on the farm, who comply with other

regulations, no person who slaughters cattle, sheep, swine, or goats in an establishment not having inspection in compliance with such regulations shall transport, offer for transportation, or permit to be transported any meat or product from such unofficial establishment in interstate or foreign commerce; that defendant did willfully and unlawfully offer to a common carrier for interstate shipment fresh meats which had not then and there been inspected and marked "Inspected and passed," within the intent of the Meat Inspection Act and in accordance with the rules and regulations of the Secretary of Agriculture; and that accused was not the holder of an unrevoked certificate of exemption and was not a farmer slaughtering cattle on the farm. Meat Inspection Act March 4, 1907, c. 2907, §§ 2, 3, 34 Stat. 1260 (Comp. St. 1916, § 8681), requires inspection of fresh meats intended for transportation or sale in interstate or foreign commerce, and declares that such as shall be found wholesome or fit for human food shall be marked "Inspected and passed," and that found otherwise shall be marked "Inspected and condemned." Other sections of the act allow the Secretary of Agriculture to prescribe regulations for inspection and for determining the sanitation of slaughterhouses; while section 18 declares that any person, firm, or corporation, who shall violate any of the provisions of the act, shall be deemed guilty of a misdemeanor. *Held* that, while the indictment emphasized the regulation of the Secretary of Agriculture, it charged a violation of the act, and hence was good against demurrer, though the regulation be invalid.

3. CONSTITUTIONAL LAW ⟸48—VALIDITY OF STATUTES.
The stated purpose of the Meat Inspection Act being to prevent the use in interstate and foreign commerce of meat and food products which are unsound, unhealthful, or otherwise unfit for human food, such act should be approved by the courts, unless in violation of unquestionable constitutional inhibition; the purpose being so beneficial.

4. CONSTITUTIONAL LAW ⟸62—FOOD ⟸1—MEAT INSPECTION—DELEGATION OF AUTHORITY—VALIDITY OF ACT.
While Congress cannot delegate its legislative powers, it can delegate authority, to proper administrative or executive officers to make administrative rules, violations of which may be punished as public offenses, where the act delegating the authority ordains that this be done; and hence the Meat Inspection Act, authorizing the Secretary of Agriculture to make rules for inspection, etc., is not invalid, on the ground that the Secretary of Agriculture was allowed to prescribe offenses—the act itself declaring that a violation of such rules should constitute an offense.

5. INDICTMENT AND INFORMATION ⟸150—DEMURRER—QUESTIONS PRESENTED.
Contention of counsel on demurrer to an indictment, unsupported by any facts in the record, need not be disposed of.

The Cudahy Packing Company and others, Sulzberger & Sons Company and others, Morris & Co. and others, and Herbert Barnes, Edward F. Mansfield, and George F. Burgess, copartners, were separately indicted for violation of the Meat Inspection Act, etc. On demurrer to the indictments. Demurrers overruled.

Thomas J. Spellacy, of Hartford, Conn., U. S. Dist. Atty., for the United States.

Samuel Campner, of New Haven, Conn., for defendants Cudahy Packing Co., Sulzberger & Sons Co., Morris & Co., and others.

Edward H. Rogers and Samuel C. Morehouse, both of New Haven, Conn., for defendants Herbert Barnes and others.

THOMAS, District Judge. The four concerns above named were separately indicted by the grand jury, and each one is charged in the

indictment with violations of the acts of Congress approved June 30, 1906 (34 Stat. 674–679, c. 3913), as amended on March 4, 1907 (34 Stat. 1260–1265, c. 2907), and familiarly known as the "Meat Inspection Act."

The Cudahy Packing Company is charged with 37 violations of the act, which are set forth in as many counts, and the violations are alleged to have begun on June 2, 1915, and to have continued until February 27, 1916.

Sulzberger & Sons Company is charged with 43 violations of the act, which are set forth in the same number of counts; each one setting forth a different shipment on a different day and extending from July 1, 1915, to the 21st of January, 1916.

Morris & Co. is charged with 44 violations of the act in as many different counts, covering a period of time from the 11th day of June, 1915, to the 3d day of February, 1916.

Herbert Barnes and others are charged with 59 violations of the act, beginning on the 1st day of June, 1915, and ending on the 28th day of February, 1916, as set forth in each one of the 59 counts.

The demurrers which were filed in behalf of each defendant raise the same questions of law and were argued at the same time, three of them by the same counsel; hence they will be disposed of in one memorandum, which will apply to each case with the same force and effect as though a separate memorandum was filed as to each demurrer.

In the several counts of each indictment it is set forth in substance: That before the commission of the alleged offenses the Secretary of Agriculture had duly made and prescribed certain rules and regulations covering the inspection of meat and meat food products to be shipped in interstate commerce in accordance with the act of Congress approved June 30, 1906 (34 Stat. 674 et seq.), and the amendment thereof, approved March 4, 1907 (34 Stat. 1260 et seq.). That said rules and regulations were then in full force and effect. That in paragraph 2 of section 3 of regulation 18 of said rules and regulations it is provided that:

"Except persons having unrevoked certificates of exemption and farmers slaughtering animals on the farm, who comply with the provisions of regulation 25 applicable to them, no person who slaughters cattle, sheep, swine, or goats, or processes any meat or product, in an establishment not having inspection in compliance with these regulations, shall transport or offer for transportation or cause or permit to be transported or offered for transportation any meat or product from such unofficial establishment in interstate or foreign commerce, or bring the same into an official establishment: Provided, however, that fresh meats and unmelted fresh fats which have been inspected and passed and which bear the inspection legend may be brought from any such unofficial establishment into official establishments in the same state, territory, or district when such meats or fats are found upon reinspection to be sound, healthful, wholesome, and fit for human food."

That notwithstanding these requirements, the accused, at the times stated in the various counts of the indictment, did, at the city of New Haven, willfully and unlawfully offer to a certain common carrier, then engaged in interstate commerce, certain fresh meats, "which had not then and there been inspected" and marked "Inspected and passed," within the requirements, meaning, and intent of the said act of Con-

gress and its amendment, and in accordance with the rules and regulations which the Secretary of Agriculture had prescribed in compliance with the provisions of said act, and more particularly those contained in paragraph 2, § 3, of regulation 18, for transportation to the city of New York, and did willfully cause and permit said meats and products to be thus transported and brought into an establishment owned by another person in said city of New York, although at the times stated the accused were not the holders of any unrevoked certificates of exemption, and were not farmers slaughtering cattle on the farm, but were engaged in slaughtering cattle, sheep, swine, and goats, and processing meat and meat products, in an establishment in said city of New Haven, which establishment did not have inspection in compliance with the regulations covering the inspection of meat by the United States Department of Agriculture—"against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided."

The essential parts of the Meat Inspection Act, so far as concerns the present cases are contained in the following synopsis of that law:

Sections 2 and 3 provide, in substance, that to prevent the use in interstate or foreign commerce of meats and meat food products that are unwholesome or otherwise unfit for human food, the Secretary of Agriculture shall cause a post mortem inspection to be made of all carcasses and parts thereof of cattle, sheep, swine, and goats intended to be prepared at any slaughtering, etc., establishment in any state or territory, or in the District of Columbia, for human consumption, and also intended for transportation or sale in interstate or foreign commerce, and that such as shall be found wholesome and fit for human food shall be marked "Inspected and passed," and that found otherwise shall be marked "Inspected and condemned," and then destroyed for food purposes; that after the inspectors have made a first inspection, and have marked "Inspected and passed" such meat products, carcasses, or parts thereof as are found to be wholesome and fit for human food, the inspectors may, whenever they deem it necessary, cause a re-examination of the same for the purpose of determining whether, subsequent to the first inspection, such carcasses, parts, or products had become unsound, unwholesome, or in any way unfit for human food; and that such as are then found to be unsound or otherwise unfit for human food, upon such re-examination, shall be destroyed for food purposes by that establishment where the inspection was made in the presence of an inspector, and that where such an establishment fails to destroy such unsound or otherwise unfit meat or product, the Secretary of Agriculture may remove the inspectors from that establishment; that these provisions shall also apply to carcasses, etc., brought into any slaughtering, etc., establishment, and that such examination and inspection shall be had before the said meats or products are allowed to enter any department to be treated and prepared for food purposes; and that these provisions shall likewise apply to all meat and products which, after issuing from any such establishment, shall be returned to the same or to any similar establishment maintaining federal inspection.

6. "The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering,

* * * establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled * * * as 'Inspected and passed.'"

8. "That on and after October 1, 1906, no person, firm or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one state or territory or the District of Columbia to any other state or territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as 'Inspected and passed,' in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture: Provided, that all meat and meat food products on hand on October 1, 1906, at establishments where inspection has not been maintained, or which have been inspected under existing law, shall be examined and labeled under such rules and regulations as the Secretary of Agriculture shall prescribe, and then shall be allowed to be sold in interstate or foreign commerce."

17. "That no person, firm, or corporation engaged in the interstate commerce of meat or meat food products shall transport or offer for transportation, sell or offer to sell any such meat or meat food products in any state or territory or in the District of Columbia or any place under the jurisdiction of the United States, *other than in the state or territory or in the District of Columbia or any place under the jurisdiction of the United States in which the slaughtering * * * establishment owned, leased, or operated by said firm, person, or corporation is located unless and until said person, firm, or corporation shall have complied with all of the provisions of this act.*"

18. "That any person, firm, or corporation, or any officer or agent of any such person, firm, or corporation, who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding ten thousand dollars or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court."

19. "That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be sound, healthful, wholesome, and fit for human food, and to contain no dyes, chemicals, preservatives, or ingredients which render such meat food product unsound, unhealthful, unwholesome, or unfit for human food; and to have been prepared under proper sanitary conditions, hereinbefore provided for; and shall perform such other duties as are provided by this act and by the rules and regulations to be prescribed by said Secretary of Agriculture; and said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

21. "That the provisions of this act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce,

nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: Provided, that if any person shall sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or by imprisonment for a period of not exceeding one year, or by both such fine and imprisonment: Provided also, that the Secretary of Agriculture is authorized to maintain the inspection in this act provided for at any slaughtering * * * establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of this act shall apply notwithstanding this exception."

Section 20 of the act also provides that any one bribing, by payment or gift, shall be deemed guilty of a felony and receive the punishment set forth in that section.

In the briefs which counsel for the accused have filed, the main argument seems to be based upon three propositions: (1) That the indictment only charges the violation of an unconstitutional and void regulation of the Department of Agriculture; (2) that there is nothing in the statute to indicate that the acts complained of are criminal offenses against the United States, and that the accused thereby have not made themselves liable to any penalty whatever; and (3) that the indictments seek to hold the accused for failure to have the meats reinspected after they had been previously marked "Inspected and passed," in accordance with the requirements of the act.

Counsel have also made the claim that the act itself is unconstitutional and void, on the ground that it permits the Secretary of Agriculture to prescribe certain rules which it is contended amounts in effect to additional legislation. This it is contended is an exclusive prerogative of the Congress, which has no constitutional power to delegate such authority to an administrative officer. No other question touching the constitutionality of the act has been raised.

[1, 2] If the constitutionality of the act and not the regulation be assumed, the real question here presented is whether the indictments charge violations of the act itself, even though they also charge, in conjunction therewith, violations of the regulation. If the indictments do sufficiently set forth facts showing violations of the act, then they must be held good, and the demurrers overruled, whether or not the accused, when violating the act, also neglected to comply with "an unreasonable or void regulation of the Secretary of Agriculture," as the eighteenth section of the act provides that any person, firm, or corporation, or the agent thereof, found guilty of violating any of the provisions of the act, shall be held guilty of a misdemeanor and liable to punishment.

It would also appear that Congress intended that certain acts, viz. those done in violation of the statutory provisions concerning inspection of cattle, meats, etc., and their shipment in interstate and foreign commerce, should be adjudged misdemeanors, no moral turpitude being involved, while those concerning bribery, which do involve moral turpitude, would, as they should, be punished as felonies.

The gist of the offenses charged is the offering for transportation in interstate commerce, and the transporting thereof into the establishment of a third person in another state than that where offered for shipment, certain fresh meats which had not been examined and inspected and marked or labeled "Inspected and passed," in conformity to the intent and provisions of the act requiring such examination, inspection, and marking, and in accordance with such appropriate rules and regulations as had been prescribed by the Secretary of Agriculture and authorized by the act.

At first glance one is quite apt to construe the indictments as only charging violations of the second paragraph of the third section of the eighteenth regulation prescribed by the Secretary of Agriculture, and it must be admitted that undue prominence has been given to the contents of that paragraph, especially in the first count of the indictment; but upon a closer study of the language used it becomes quite apparent that the indictments in fact allege violations of the act itself, viz. the attempt to and the actual shipping in interstate commerce of meats not marked "Inspected and passed" in conformity to the requirements of the statute, and that, in so far as regulation 18 is concerned, it was intended only to show that the Secretary of Agriculture had, as directed in the act, prescribed rules and regulations to govern the manner of inspection of meats and meat products, and that the same were in force at the time of the commission of the offenses charged. In other words, the allegations made in relation to the contents of the regulation can be treated as surplusage, without affecting the remainder of the allegations contained in the indictments as to the acts of the accused being violative of the intent and provisions of the Meat Inspection Act.

In view of the interpretation which I believe should be given the entire language of the indictments, it will be seen that much of the argument in behalf of the accused must prove of little effect in arriving at a solution of the questions raised by the demurrers, though it may not be out of place to say that the regulation very much resembles the style of language generally used in legislative measures, and, had the acts claimed to have been done by the accused not been within the prohibitions of the act itself, I should have deemed it proper to sustain the demurrers, on the ground that, in prescribing paragraph 2 of said regulation, the Secretary of Agriculture had in fact attempted to provide a rule of legislation, and had gone further than the provisions of the act seemed to warrant.

The allegations against the accused having been admitted by the demurrers, and in my view of the case being sufficient to show that they were guilty of a violation of the provisions of the eighth section of the act, whether because of failure to comply with the provisions of the sixth, seventeenth, or nineteenth sections thereof, or for some other cause, the demurrers on the point that the indictments show only a violation of an unconstitutional regulation of the Secretary of Agriculture must be overruled.

[3] The stated purpose of the Meat Inspection Act "is to prevent the use in interstate and foreign commerce of meat and meat food

products, which are unsound, unhealthful, unwholesome or otherwise unfit for human food," and it would seem that a purpose so obviously beneficial should receive the sanction and approval of the courts, unless in the face of an unquestionable constitutional prohibition against the right of the Congress to enact such legislation. Union Pacific R. R. Co. v. U. S., 99 U. S. 700, 25 L. Ed. 496.

[4] In view of this, and also of the fact that counsel do not appear to have seriously questioned the constitutionality of the act, other than in so far as it might be construed as permitting the Secretary of Agriculture to indulge in a matter of legislation, it would seem that no further consideration need be here given the question of the constitutionality of the act. U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, referred to and relied on by counsel for the accused, as supporting their contention, mainly concerned the construction to be accorded certain provisions of Oleomargarine Act Aug. 2, 1886, c. 840, 24 Stat. 209, section 5 of which (Comp. St. 1916, § 6217) required manufacturers of oleomargarine to keep such books, and render returns of materials and products in such a manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, "by regulation might require." This section, however, did not impose any penalty on such manufacturers as omitted or refused to keep such books or render such returns as were required by such regulations, nor did it or any part of it impose upon a dealer in oleomargarine the duty to keep like books, or render returns in the manner thus prescribed for manufacturers, unless such duty could be construed from the wording of another section (section 20 [Comp. St. 1916, § 6232]), which read "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act," and the wording of still another section (section 18 [Comp. St. 1916, § 6230]), providing "that if * * * any dealer * * * shall knowingly or willfully omit, neglect, or refuse to do * * * any of the things required by law for the carrying on or conducting of his business, * * * if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do * * * the thing required, * * * he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States."

It will therefore be seen that the question which the court in that case was called upon to decide was whether a wholesale dealer in oleomargarine, who had not kept such books or made the returns in the manner required by the regulations of the Commissioner of Internal Revenue, was necessarily guilty of a criminal offense because he had failed to do a thing "required by law in the carrying on or conducting of his business," within the intent and meaning of the above-quoted section, which imposed a penalty.

The Supreme Court held that, as the Secretary of the Treasury had no power to amend a revenue law by regulation, all he could lawfully

do was to regulate the mode of proceeding to carry into effect that which the Congress had enacted, and that this principle should be applied in a case where it was sought substantially to prescribe a criminal offense by the regulation of a department; that, as there are no common-law offenses against the United States, a principle of criminal law demanded that an offense which could be made the subject of criminal procedure was an act either committed or omitted in violation of a public law either forbidding or commanding it, and that it would be a very dangerous precedent to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation for carrying into effect an act of legislation might be considered as "a thing required by law" in such a manner as to become the subject of a criminal offense, where no penalty was imposed by the legislative act for failure to comply with such regulation, and that if the Congress had intended to make it a criminal offense for wholesale dealers in oleomargarine to omit or refuse to keep such books or render such returns as might be required by the regulations of the Commissioner of Internal Revenue it would have done so in distinct and positive language. The opinion contains the further statement that:

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress may be regulations prescribed by law. so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law."

It will be observed that in the Eaton Case the accused who were wholesale dealers in oleomargarine were charged with not having done certain things alleged to have been "required by law," while in the present cases the offenses charged are the offering for transportation to a common carrier, engaged in interstate commerce, for transportation from New Haven to New York City, and bringing into the establishment of a third person there, certain fresh meats, which, according to the wording of the indictments, "had not been examined and marked 'Inspected and passed,' contrary to the form of the statute in such case provided." On the other hand, in the statute applicable in the Eaton Case, there were no requirements that wholesale dealers in oleomargarine should keep a certain kind of book and make returns in accordance with rules or regulations to be prescribed by the Commissioner of Internal Revenue (although there was such a provision as to manufacturers), and the act failed to provide a penalty for such an omission even on the part of a manufacturer. The Meat Inspection Act contains provisions which prohibit the offering for transportation or for transporting in interstate commerce any meat or meat food products from certain kinds of animals, where such meat or meat products are intended for human consumption, unless the same shall have been examined and marked "Inspected and passed" by Inspectors appointed by the Secretary of Agriculture in accordance with rules and regulations which he was authorized by the act to prescribe, and that those who violated these provisions should be held subject to the penalty provided in the statute for such violations.

The circumstances of the Eaton Case and this one disclose such a difference as to the underlying facts and the law that it ought readily to be understood why the decision of the Supreme Court was favorable

to the accused while in this case it ought to be favorable to the government.

[5] There is nothing in the record here to sustain the contention made by counsel that the indictments were founded upon a failure to have the meats reinspected after they had been previously examined and marked "Inspected and passed," and it therefore becomes unnecessary to discuss what might have been the result in relation to such a situation as that suggested by counsel.

While it is true that Congress cannot delegate its legislative powers (Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294), it can, nevertheless, delegate authority to the proper administrative or executive officer to make administrative rules, violations of which may be punished as public offenses where the act of legislation which delegates the authority ordains that this be done (U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; In re Kollock, Petitioner, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; St. Louis & Iron Mountain Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061). There is nothing in the opinion of Mr. Justice Blatchford in the Eaton Case which is in any way contradictory of this view.

Notwithstanding that the regulation in question may have required acts to be done not strictly within the authority delegated by the acts of Congress to the Secretary of Agriculture, that fact can have no bearing upon the determination to be reached in this case, in view of the interpretation which I think ought to be placed upon the general language of the indictments.

The indictments in all cases are held sufficient and the demurrers are all overruled.

Ordered accordingly.

FIRST TRUST CO. v. CROOKED CREEK R. & COAL CO. et al.

(District Court, N. D. Iowa, C. D. June 12, 1917.)

1. RAILROADS ⟸171(3)—PRIORITIES—MERGER OF TITLE—"MORTGAGES"—"MERGER."

The stockholders of a railroad company entered into an agreement with L., the president of an electric line operating in adjacent territory, which contemplated the transfer of all of the capital stock of such railroad company to a new corporation, and for payment by the issuance of bonds secured by a mortgage on the property of the railroad company. The agreement further provided that the representatives of the stockholders might designate a majority of the directors of the railroad company, its successors or assigns, and two of the general officers. Pursuant to such arrangement the stock was assigned to L., but the arrangement was never consummated. Instead the railroad company, at the direction of L., issued bonds to the stockholders, who, in accord with the old agreement, designated a majority of directors. The company withheld from connecting carriers that portion of freight rates to which they were entitled as carriers of interline freight, although $4,000 additional bonds of the company were delivered to L., president of the electric line, who was to use them to raise funds to meet the expenses of the company. Shortly before suit by the mortgage trustee to foreclose the mortgage or deed of trust L. returned to the stockholders or their representatives the stock

assigned to him. *Held* that, as a mortgage is the conveyance of an interest or estate by way of pledge for the security of a debt to become void upon its payment, in which the legal title is vested in the creditor though in equity the mortgagor remains the actual owner, and merger of estates occurs when a greater estate and a lesser estate coincide in one and the same person without any intermediate estate existing in another, the stockholders could not, by virtue of their ownership of bonds secured by a mortgage or deed of trust, assert rights prior to those of carriers of interline freight, for the estate of stockholders by mortgage merged in their interest as stockholders. Citing Words and Phrases, First and Second Series, Merger; Mortgages.

2. RAILROADS ⟸171(10)—MORTGAGES—MORTGAGEES IN GOOD FAITH—WHO ARE —PRIORITIES.

In such case, as L., the president of the electric line, was a party to the whole arrangement, he cannot be deemed a holder in good faith of bonds to the amount of $4,000, and entitled to priority over the other carriers whose claims arose out of an interchange of traffic.

3. RAILROADS ⟸171(10)—MORTGAGES—PRIORITIES—CREDITORS' TRUST FUND THEORY.

In such case, as the assets of a corporation are a trust fund for the benefit of its creditors, the corporate stockholders are not entitled to the aid of a court of equity in foreclosing their mortgage and obtaining priority over the other carriers having claims arising out of interchange of traffic.

4. CORPORATIONS ⟸424—AUTHORITY OF DIRECTORS—RIGHT TO QUESTION.

In such case, as the stockholders of the railroad company retained the right to select a majority of the directorate, and did so, they cannot, on the theory that L., president of the electric line, actually controlled operations, question the acts of the directorate, a majority of which they named.

5. RAILROADS ⟸171(3)—MORTGAGES—PRIORITIES—CREDITORS—RIGHTS OF.

In such case, the claims of the interline carriers are entitled to priority, even though they accrued prior to six months immediately preceding the appointment of a receiver, the stockholders not being entitled to priority over corporate creditors.

In Equity. Bill by the First Trust Company, as trustee, against the Crooked Creek Railroad & Coal Company, in which the Chicago & Northwestern Railway Company, the Illinois Central Railroad Company, and the Northern Pacific Railway Company separately intervened. Decrees for interveners.

Submitted on separate petitions of intervention of the Chicago & Northwestern Railway Company, Illinois Central Railroad Company, and the Northern Pacific Railway Company, interveners.

The main suit is by the First Trust Company, a Wisconsin corporation, as trustee in an indenture of trust and first mortgage against the defendant Crooked Creek Railroad & Coal Company, an Iowa corporation, to foreclose said mortgage, which was made by the defendant to the plaintiff as trustee on January 3, 1911, upon all of its property then owned, or that it might thereafter acquire, to secure the payment of certain bonds of the railroad company made on that date; $116,500 of which bonds, it is alleged, were actually issued and outstanding at the time of filing the bill, which was on July 22, 1915. The appointment of a receiver was asked in the bill because of the failure of the railroad company to perform certain of its obligations assumed under the trust deed and because of its insolvency. An answer of the defendant was filed with the bill, in which the allegations of the bill are admitted, and consent given to the appointment of the receiver, who was thereupon appointed, and who took charge of the property of the defendant company, and continued its operation under the orders of the court.

In due time the Chicago & Northwestern Railway Company, an Illinois corporation, the Illinois Central Railroad Company, an Illinois corporation, and the Northern Pacific Railway Company, another railway corporation, separately intervened, each claiming that the defendant railroad company was owing certain amounts, which it was entitled in equity to priority of payment from the property covered by said mortgage over the claims of the bondholders.

In its intervening petition, as finally amended, the Chicago & Northwestern Railway Company alleges that the defendant railroad company is owing it $11,901.15, all of which was for the ordinary charges and earnings accruing to it from the defendant company as a connecting carrier of interline freight, car per diem, and other items arising out of such interchange of traffic, $4,003.94 of which amount accrued within the six months immediately preceding the appointment of the receiver, and $7,897.21 prior to such six months' period; an itemized statement of which claim is attached to its intervening petition, which is admitted by the plaintiff, the defendant, and the receiver to be correct.

The Illinois Central Railroad Company, in its intervening petition as finally amended May 12, 1916, makes a claim much like that of the Chicago & Northwestern Railway Company for $7,381.44, for which it asks that it be decreed a claim upon the property of the railroad company prior in equity to the claim of the bondholders under the mortgage to the plaintiff. It further alleges that of said amount it has judgment against the defendant in the district court of Hamilton county, Iowa, dated June 2, 1914, for $3,410.20, leaving a balance of $3,971.24, of which sum $166.05 accrued subsequent to the appointment of the receiver, and is a part of the operating expenses of the road by the receiver, and asks that said amount, and also its entire claim for $7,381.44, be allowed as a claim prior in equity to the claim of the bondholders under the indenture of trust and first mortgage in suit.

The Northern Pacific Railway Company in its intervening petition claims $593.11 from the defendant company accruing to it as interline freight for the exchange of traffic between it and said intervener as connecting carriers, all of which accrued more than six months prior to the appointment of the receiver.

Kenyon, Kelleher & Price, of Ft. Dodge, Iowa, for plaintiff First Trust Co.

James C. Davis, of Des Moines, Iowa, for interveners Chicago & N. W. Ry. Co. and Northern Pac. Ry. Co.

Helsell & Helsell, of Ft. Dodge, Iowa, for intervener Illinois Cent. R. Co.

REED, District Judge (after stating the facts as above). A large amount of testimony has been taken upon these respective claims, and it is stipulated by the parties that such testimony shall be used in the determination of each of said intervening claims. The controlling facts disclosed by the testimony are practically without dispute, some of them being matters of record.

The defendant Crooked Creek Railroad & Coal Company, which will be called the defendant, was incorporated under the law of Iowa, its first charter expiring November 8, 1895, when it was renewed for a period of 20 years, which expired November 8, 1915. The purpose of its incorporation, as stated in its charter, was the construction and operation of a short line of railroad, some 18 miles in length, from Webster City, in Hamilton county, Iowa, to Lehigh, in Webster county, the operation of certain coal mines, and the manufacture of brick and tile and other clay products from the lands owned by the company.

The operation of the coal mines seems to have been the principal reason for its original incorporation. It was not authorized by its charter to buy or sell its own corporate stock or the stock of other corporations. Prior to January 3, 1911, when the trust deed was made, the defendant had given no mortgage upon its property, and upon that date its entire outstanding stock of 2,250 shares, which had been reduced to the par value of $50 each, was practically all held by the original incorporators of the company or their heirs, to whom it descended. As early as 1904 the defendant's coal mines were becoming exhausted, the tonnage from that source diminished, and the stockholders were seeking to dispose of its property. Its stockholders were not practical railroad men. On March 24, 1909, the defendant company, by its board of directors as authorized by its stockholders, entered into an agreement with Homer Loring, of Boston, Mass., president of the Ft. Dodge, Des Moines & Southern Railroad Company (an electric line of railroad operating in the territory adjacent to the defendant's railroad), giving him an option for four months to buy its said railroad, which agreement is as follows:

"This agreement grants to Homer Loring an option and right to purchase, at any time within four months from the date of this agreement, all of the railroad property of said Crooked Creek Company, for the sum of $112,500, payable in first mortgage bonds of a new corporation to be organized by said Homer Loring, the payment of which bonds is to be secured by a first mortgage covering the railroad property, and an extension from said present line of railway to a junction with the Ft. Dodge, Des Moines & Southern Railroad Company, at or near Gypsum City, Iowa."

Attached to the option is a list of the railroad property owned by the defendant company covered by the option.

On September 1, 1909, said agreement was extended for a period of six months. On August 18, 1910, all of the stockholders of the defendant company and Homer Loring entered into another agreement, whereby the stockholders, as parties of the first part, set over and assigned to the party of the second part (Homer Loring) all of the shares of the capital stock of the Crooked Creek Railroad & Coal Company, after the assets of said company, other than its railroad properties, have been transferred to, and its liabilities, other than current items, assumed by, a new corporation as thereinafter set forth. The capital stock of the defendant company is to be paid for by the issuance of $112,500 of bonds, to be secured by a mortgage to be executed upon the property of the Crooked Creek Railroad & Coal Company, and such additions to such property as shall be made by the said Homer Loring.

On the same date, August 18, 1910, an agreement was entered into by and between George E. Burnham and Charles L. Burnham, president and secretary, respectively, of the Crooked Creek Railroad & Coal Company (and stockholders in said company), as representing all the then stockholders of said company, parties of the first part, and Homer Loring, party of the second part. This agreement refers to an agreement between the stockholders of the Crooked Creek Railroad & Coal Company and Homer Loring of the same date, and provides for certain things to be done by the said Homer Loring in the way of improv-

ing the Crooked Creek Railroad and Coal Company. In addition to this the agreement contains the following provision:

"The said parties of the first part herein (George E. Burnham and Charles L. Burnham), or their successors in office, may designate a majority of the directors of the Crooked Creek Railroad & Coal Company, its successors or assigns, and two of the general officers, to wit, president and secretary, and that he (Homer Loring), the said party of the second part, his heirs, executors, administrators or assigns, will elect or cause to be elected such majority of the directors and officers so nominated by said parties of the first part."

September 27, 1910, an agreement between all of the stockholders of the defendant railroad company, after referring to the agreement of August 18, 1910, recites the desire of the stockholders to provide for the payment of the liabilities of the defendant railroad company; and further provides that the first four directors to be selected under the arrangement are designated as F. Paul Stone, Minnie M. Wilson, George E. Burnham, and Charles L. Burnham; and George E. Burnham is to be elected as president and Charles L. Burnham as secretary of the company. It is further provided that F. Paul Stone, Minnie M. Wilson, George E. Burnham, and Charles L. Burnham are to represent their several interests under and pursuant to the terms of said two agreements dated August 18, 1910; and the stockholders agreed, upon the delivery to them of their proportion of the first mortgage bonds representing the sale of their stock, to pay the then liabilities of the Crooked Creek Railroad & Coal Company, other than current items, together with 3 per cent. of $112,500, to George E. Burnham, as commission for making the sale to Loring.

From these negotiations, and others shown by the testimony, it appears that a sale of the Crooked Creek Railroad property, or the stock of that company, to Homer Loring, of Boston, was agreed upon by the stockholders in 1909. Mr. Loring was then in control of the Ft. Dodge, Des Moines & Southern Railroad Company, and he was to make or cause to be made some improvements in the road, and extend it to a connection with the Ft. Dodge, Des Moines & Southern Railroad at or near the city of Ft. Dodge, in Webster county. He was also to form a new corporation, and the stockholders of the defendant company were to receive for their stock in that company bonds of the new corporation to an amount equal to their stock, to be secured by a first mortgage or trust deed upon the property of the new corporation. This arrangement progressed so far that the entire stock of the Crooked Creek Company was delivered to Loring, but was not transferred to him upon its books. For some reason not clearly appearing, but probably because of the financial condition of the Ft. Dodge, Des Moines & Southern Company, this deal with Mr. Loring was never finally consummated, and it seems to have been abandoned. In the latter part of December, 1910, another deal was consummated between said stockholders and Mr. Loring, whereby the defendant company was to issue its bonds up to $300,000 or more, to be secured by a first mortgage or trust deed upon the property of that company, the stockholders agreeing to pay its indebtedness to that date, and were to receive the bonds of the company so to be issued and secured in the amount of $112,500 in lieu of the stock of that company then owned or held by them. Pursuant to

this arrangement, $112,500 of the bonds of the defendant company so to be secured were issued and delivered to the stockholders, and the first mortgage or trust deed in suit made January 3, 1911, and duly recorded, to secure such bonds. In February, 1914, $4,000 additional bonds of the company were issued and delivered to Mr. Loring, who was to use the same to raise funds to meet the then present needs of the Crooked Creek Company. The defendant company was thereafter operated up to the time of the appointment of the receiver in July, 1915, by a board of directors and officers chosen as provided by the agreement of September 27, 1910, before referred to; George E. Burnham being president, and Charles L. Burnham, his brother, secretary, and they, with the two other directors named, who were associated in interest with them in the stock of the company, were a majority of the board of directors so chosen, and owners of practically all of the stock of the defendant company. It was while the road of the defendant company was being so operated under the management of said board of directors that the indebtedness due to the interveners, and perhaps others, was incurred; and some officer or officers of the Ft. Dodge, Des Moines & Southern Company during such time were chosen as auditor and treasurer of the defendant company, received its earnings, the greater part of which arose from the traffic furnished by the interveners as connecting carriers, and therefrom regularly paid the interest on such bonds at the rate of 5 per cent, semiannually, amounting to $5,625 a year, to the holders of such bonds through the Ft. Dodge, Des Moines & Southern Railroad Company, except the interest last maturing just prior to the appointment of the receiver; the interline traffic balances due to the interveners being used for that purpose, and for the purpose of paying the necessary current expenses of operating the road, instead of being paid to the interveners as they became due. Shortly before the appointment of the receiver the stock of the defendant company so transferred to Mr. Loring was returned by him to the stockholders, or to George E. Burnham, the persident of the defendant company and their attorney in fact for them.

It may be here said that the original stock of the defendant company actually issued and outstanding consisted of 2,250 shares, of the par value of $100 each, which represented the value of the road and certain coal and other lands owned or acquired by it; but later a corporation called the Lehigh Coal & Land Company was organized by the stockholders of the defendant company, or some of them at least, to which its assets other than its railroad property were transferred, thus leaving as the property of the defendant company its railroad properties alone; and through some arrangement between the stockholders the capital stock of the defendant company was reduced 50 per cent., or to $50 per share, thus making the 2,250 shares of the capital stock of the defendant company at the time of the issuance of the bonds in January, 1911, of the par value of $112,500, and by a vote or resolution of the stockholders the directors were authorized to issue $300,000 or more of bonds to be secured by the mortgage or trust deed in suit, as before stated.

Counsel for the respective parties have argued at much length, both orally and in elaborate briefs, contending:

First, for the complainant, that the bonds were authorized in good faith to pay for the stock of the Crooked Creek Company, and were and are valid obligations of the defendant company secured by the mortgage or trust deed in suit, which was duly recorded before any of the alleged indebtedness of the interveners was incurred, and therefore the prior lien upon its property.

Second, for the interveners it is urged (1) that the original agreement between the stockholders and Homer Loring, had it been fully consummated, would have been in effect a dissolution of the Crooked Creek Railroad Corporation, and a distribution of its assets among its stockholders, who were in fact the legal owners of such property, to the exclusion of its creditors, other than such stockholders (if they can be considered as creditors of the corporation), and void under the Iowa statute (sections 1620, 1621, Code of Iowa 1897); (2) that inasmuch as that agreement was never in fact consummated, but abandoned, the subsequent agreement between the stockholders and Mr. Loring, whereby the bonds of the defendant company actually issued to its stockholders and secured by the mortgage in suit, was in effect an attempt to substitute the bonds of the company for its capital stock, and make the stockholders to whom such bonds were delivered creditors of the company secured by a first mortgage upon all of its property, which would be in fraud of all creditors of the defendant company prior and subsequent to the issuance of such bonds.

[1] To follow counsel in their respective contentions would unduly prolong this opinion, and serve no useful purpose. Of course, if the bonds and mortgage in suit were made in good faith upon a then valid consideration, without notice to the holders thereof of any lack of consideration, or of some defect or invalidity therein, they would be a prior lien in favor of the holders upon the railroad property covered by the mortgage; but the undisputed facts are that the bonds, other than the $4,000 above mentioned, were issued and delivered to the stockholders of the defendant company in lieu of the stock of that company then held and still held by them, and are based upon no other consideration; the stock of the company delivered to Mr. Loring under their first agreement having been returned and redelivered by him to them after that agreement fell through and shortly before the commencement of this suit. The $4,000 of bonds issued to Mr. Loring in February, 1914, will be referred to later.

It further appears, without substantial dispute, that after the issuance of the bonds the owners of the stock of the defendant company to whom they were so issued, and for whose benefit the present foreclosure suit is prosecuted, were the same persons, except perhaps it be the holders of the $4,000 of bonds. A mortgage may be shortly defined as the conveyance of an interest or estate in property by way of pledge for the security of a debt, to become void upon its payment. The legal ownership is vested in the creditor; but, in equity, the mortgagor remains the actual owner until he is debarred by his own default or by a judicial decree. 4 Kent's Com. 136 (marg.); 2 Wash. Real Property,

475 (5th Ed.). The making of the mortgage or trust deed in suit, then, so far as it conveyed the property of the defendant company, was a conveyance of the legal title to secure the bonds so issued; but just how the stockholders of the company could acquire any greater or other interest under the mortgage than they, as the legal holders of the stock of the company, already possessed, is not readily conceivable. At most, the making of the mortgage by their own board of directors, if it had any effect as to the stockholders or creditors of the corporation at all, would only operate as a merger of the mortgage or lesser estate in the greater or legal estate already held by the stockholders. The merger of estates is said to occur when a greater estate and a lesser coincide and meet in one and the same person, without any intermediate estate existing in another. 2 Blackstone, Com. 177 (Cooley's Ed.); volume 5, Words and Phrases, First Series, and volume 3, Second Series; Bouvier's Law Dictionary (Rawle's 3d Ed.) title "Merger," and cases cited. There being no intermediate or other estate existing in any other person than the stockholders of the defendant company, the equitable estate or lien created by the mortgage, if it created any estate at all, merged or was absorbed by the greater or legal estate held by the stockholders.

[2] Of the $4,000 of bonds issued and delivered to Mr. Loring, as hereinbefore stated, the proceeds received from such bonds, except some expense in disposing of the same, were used to meet the present needs of the defendant company, and it may be urged that Mr. Loring is a good-faith holder of said $4,000 of the bonds. But Mr. Loring was a party to the arrangement for the issuing of all of the bonds, had full knowledge of the purpose for which they were issued, participated in the transaction whereby they were issued, and cannot rightly be regarded as a good-faith holder of them, as against these interveners.

[3] Further than this, the proofs also show that the owners of the stock were, when the bonds were issued and delivered to them, in possession of the railroad operating the same by a board of directors of their own selection, and thereafter remained in possession and operation of the road until the appointment of the receiver, receiving the income and earnings of the road, and paying to themselves therefrom the interest on such bonds as it matured, except perhaps the last installment maturing before the appointment of the receiver, and using for this purpose, and for the purpose of paying the necessary expenses of the operation of the road, the interveners' share, as connecting carriers, of such earnings, instead of paying such share to the respective interveners as they become due, and by this suit are now seeking to prevent the interveners and other creditors from recovering their rightful dues from the property of the defendant company. A court of equity will not lend its aid to the consummation of such a transaction as against creditors of the defendant corporation. Railroad Company v. Howard, 7 Wall. 392, 409, 410, 19 L. Ed. 117; Chicago, etc., Ry. Co. v. Chicago Bank, 134 U. S. 276, 287, 10 Sup. Ct. 550, 33 L. Ed. 900; Louisville Trust Company v. Louisville, etc., Ry. Co., 174 U. S. 674, 683, 684, 19 Sup. Ct. 827, 43 L. Ed. 1130; Kansas City Ry. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579;

Luedecke v. Des Moines Cabinet Co., 140 Iowa, 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616, and cases cited; Central Trust Company of Illinois v. Chicago, Anamosa & Northern Ry. Co. (Illinois Central Co., Intervener) (D. C.) 232 Fed. 936, 944, 945.

In Railroad Company v. Howard, above, it is said, beginning on page 409 of 7 Wall. (19 L. Ed. 117):

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid. Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company, and the division of the proceeds of the sale among the stockholders, will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute pro rata towards the payment of their debts out of the moneys so received and in their hands."

In Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. at page 683, 19 Sup. Ct. at page 830 [43 L. Ed. 1130], above, Mr. Justice Brewer, speaking of railroad mortgage foreclosures, said:

"We may not shut our eyes to any facts of common knowledge. We may not rightfully say that the contract of mortgage created certain rights, and that when those rights are established they must be sustained in the courts, and no inquiry can be had beyond those technical rights. We must, therefore, recognize the fact—for it is a fact of common knowledge—that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interests of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors, first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

[4] It is further urged that Mr. Loring, or the Ft. Dodge, Des Moines & Southern Company, was in the actual control and operation of the defendant's road after the agreement of August 18, 1910, and that it was Mr. Loring, or the Ft. Dodge, Des Moines & Southern Company, that used the earnings of the interveners, instead of the

stockholders or bondholders after the making of the mortgage. There is some evidence tending to support this contention; but it clearly appears that under the agreements of August 18 and September 27, 1910, the stockholders retained the right to and did in fact name a majority of the board of directors of the defendant company, who thereafter directed and controlled the operation of its road from that date to the appointment of the receiver. Neither as stockholders nor as bondholders, therefore, are they in position to question the action of the directors in the operation of the road up to the appointment of the receiver in July, 1915.

[5] Whether or not the claims of the respective interveners accrued within or prior to the six months immediately preceding the appointment of the receiver is quite immaterial, for the claims of the stockholders as such, or as bondholders under the mortgage, are inferior, in either event, to the equities of the interveners. Central Trust Co. v. Chicago, A. & N. Ry. Co. (Illinois Central R. R. Co., Intervener) (D. C.) 232 Fed., above, 941, 944, 945.

I am therefore of the opinion that the claims of the respective interveners, without priority as between themselves, are prior in equity to the claims of these bondholders, upon the property of the defendant company, who are also stockholders of such company, and decrees may be prepared accordingly.

It is so ordered.

In re SEGER BROS. CO.

(District Court, E. D. Michigan, S. D. June 13, 1917.)

No. 3558.

1. COURTS ⇐39—AUTHORITY—JURISDICTION.
A court has authority to determine whether it has jurisdiction to dispose of a particular case.

2. BANKRUPTCY ⇐302(4)—COURTS—JURISDICTION—PETITION.
In determining whether it has jurisdiction to entertain a petition by a trustee in bankruptcy to have decided conflicting claims to the ownership of a lease formerly held by the bankrupt as a tenant, the court of bankruptcy must accept the allegations of the petition as true in so far as not controverted by the other claimants, and may on controverted issues hear evidence.

3. BANKRUPTCY ⇐287(1)—COURTS—JURISDICTION—PROCEEDING IN BANKRUPTCY.
Bankr. Act July 1, 1898, c. 541, § 2, subds. 6 and 7, 30 Stat. 545 (Comp. St. 1916, § 9586), authorize the bankruptcy court to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy, and to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto. Section 23a (Comp. St. 1916, § 9607) declares that a Circuit Court shall have jurisdiction of all controversies, at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent as though the bankruptcy proceedings had not been instituted. A trustee, who asserted that a lease be-

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

longed to the bankrupt, obtained peaceful possession of the leasehold of which the bankrupt had had possession until the time of the filing of the petition. *Held*, that, in such case, the adverse claim of the lessor should be determined by a proceeding in bankruptcy instead of by a plenary suit.

In Bankruptcy. In the matter of the bankruptcy of the Seger Bros. Company, a corporation. Petition by the trustee for determination of conflicting claims to the ownership of a lease formerly held by the bankrupt as a tenant. Hearing directed.

Selling & Brand, of Detroit, Mich., for trustee.

Welsh, De Foe & Kahn, of Detroit, Mich., and Frank A. Stivers, of Ann Arbor, Mich., for respondent.

TUTTLE, District Judge. This is a petition by the trustee of said bankrupt seeking to have determined by this court certain conflicting claims to the ownership of a lease formerly held by said bankrupt as tenant. The sole question presented is whether this court has jurisdiction to determine herein the rights of the trustee and of the adverse claimant to such lease.

The petition of the trustee alleges that the bankrupt was, at the time of the filing of the petition in bankruptcy, the owner of the lease mentioned, covering a certain store occupied by the bankrupt in the city of Monroe, Mich.; that said bankrupt was in possession thereof until on or about February 23, 1917, when one of the creditors of the bankrupt caused an execution to be levied upon certain of its property located in said store, and the sheriff of the county, in making the levy, closed said store, whereupon the bankrupt surrendered to said sheriff the keys thereof, so that said property could remain in said store undisturbed until the execution sale; that, immediately upon the making of said levy, the involuntary petition was filed herein, and a receiver appointed, who forthwith took possession of said store, demanding and receiving from said sheriff the keys thereof, and thereafter remaining in open and sole possession thereof until the appointment of said trustee, to whom he then surrendered possession of such store; that neither the receiver, the trustee, nor any one else having authority so to do, has ever surrendered possession of said premises or canceled said lease, or surrendered the right of said bankrupt, receiver, or trustee therein, but that said bankrupt, receiver, and trustee have asserted ownership thereof as an asset belonging to the bankrupt estate; that, pursuant to the bankruptcy law, the sale of all the assets of said bankrupt, including said lease, was advertised to be held at said store on May 4, 1917; that on May 2, 1917, the Monroe Building Company, the lessor of said lease, delivered to said receiver a notice, copy of which was attached to the petition, whereby said lessor claimed to be in possession of said store, and claimed that all rights of said bankrupt and its estate therein had ceased under said lease; that at said sale one Harold Hutchins, agent of Hutchins & Co., a corporation, announced that he held a lease from the said lessor of said store, executed after the filing of the petition in bankruptcy, and objected to the sale of said lease, expressly stating that he would resist any attempt on the part of the purchaser of the rights under said lease to remain in possession of

said store, and that any person buying said lease was buying a lawsuit: that upon the election of said trustee, and prior to the sale of said property, certain witnesses were sworn by the referee in bankruptcy, and testified concerning the conflicting claims to said lease; that the secretary and treasurer of said Monroe Building Company testified that he claimed that all rights of the bankrupt and its estate under said lease had terminated by reason of a default in rent on February 20, 1917, at which time said store had been closed by a creditor of the bankrupt, and thereupon summary proceedings were commenced to recover possession thereof, which proceedings were afterwards abandoned; that said lessor attempted to charge said sheriff a larger rental than specified in said lease, which said sheriff refused to pay; that on March 1, 1917, after the filing of the petition in bankruptcy, the said lessor rendered said sheriff a bill for the amount of rental so demanded by it; that said lessor had not obtained the keys or possession of said premises; that no writing was executed by said bankrupt assigning, releasing, or canceling any rights in said lease; and that, as said lease contained a clause against assigning or subletting, said lessor claimed that all rights of said bankrupt in said lease had ceased, and that said lessor would commence ejectment proceedings against any purchaser thereof; that said sheriff, said receiver, and the president of the bankrupt testified that no surrender had been made by them, respectively, of possession of said premises to the lessor; that thereupon said lease was sold, together with the other assets of said bankrupt, on the condition that the trustee would at the expense of the estate defend the possession of the purchaser against the claims of said lessor and said Hutchins, and, if the trustee were unsuccessful therein, a refund would be made to the purchaser; that the trustee has been informed by said lessor and said Hutchins "that, as soon as the purchaser takes possession of said store, ejectment or other proceedings will be commenced to oust him, thereby interfering with the proper administration of said estate, and jeopardizing the interests of the persons interested therein and of your petitioner as trustee, and constituting a cloud upon the title of your petitioner under said lease, and of your petitioner's said purchaser at said sale, and constituting an interference with the duties of your petitioner to reduce the assets to money for the benefit of the persons interested in said estate."

The petition prayed that a hearing thereon be granted for the purpose of bringing in the persons claiming rights in said lease and determining in this cause their respective rights; that all claims that said lease had been canceled or surrendered be quieted by proper order of this court; and that the trustee and his purchaser be decreed to have a valid title thereto as against said lessor and those claiming under it; and that the latter be restrained from interfering with the possession of said premises to be given to said purchaser, and from taking any proceedings to regain possession thereof or to oust the trustee or his purchaser therefrom.

In the showing of respondents appearing specially in response to the order to show cause, respondents deny the jurisdiction of this court to determine in this cause and on this petition the conflicting rights to this lease, claiming that they are adverse claimants within the meaning of

the Bankruptcy Act, and that this court is without jurisdiction to determine the issues raised by such petition, except in a plenary action, and even in such action not without consent of respondents. Respondents allege that in a proper suit they will introduce testimony tending to prove the facts set forth in the notice delivered by the said lessor to the said receiver hereinbefore referred to. Said notice alleged that said lessor claimed the right to possession of the said premises; that said lessor, prior to the filing of said petition in bankruptcy, commenced legal proceedings to recover possession of said premises, which proceedings resulted in a voluntary surrender of said premises to the said lessor by the said bankrupt, and prior to the filing of the said petition in bankruptcy, in consequence of which surrender said proceedings were discontinued, and the lessor entered into actual possession of the property; that after obtaining actual possession of said premises the rights of said lessor therein were exercised by it through the aforesaid sheriff, to whom said lessor rented the same for the purpose of storing goods seized by him on a writ of execution; that the actual possession of the said premises by said sheriff as tenant of said lessor continued until after the adjudication in bankruptcy, whereupon the aforesaid trustee, without the knowledge or consent of said lessor, took possession of the said premises from the said sheriff, and has continued in the possession of the same by virtue of the permission of the said lessor, such lessor having all the time since the adjudication asserted rights of possession in said premises, and having permitted the use of the same only on the understanding that the said trustee should pay therefor a reasonable rental for the use thereof; that since the date of abandonment of the aforesaid legal proceedings the said lessor had been at all times in actual and legal possession of the said premises.

In their brief, respondents refer to a judgment recovered by the said Monroe Building Company as of March 12, 1917, in an action for possession instituted by it against said bankrupt before the circuit court commissioner for said Monroe county, based on the ground that said bankrupt had violated a covenant in said lease against assignment without the lessor's consent by making an assignment for the benefit of creditors.

The jurisdiction of this court to grant the relief prayed in this proceeding is disputed, and it therefore becomes necessary to determine this question of jurisdiction before proceeding to a consideration of the merits of the case.

[1] That the court may determine whether it possesses this jurisdiction is clear. Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; First National Bank of Chicago v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Rathman, 183 Fed. 913, 106 C. C. A. 253 (C. C. A. 8.).

[2] As was said in the case first cited:

"In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiries, although the result may be that it finds that it cannot go further."

In considering the question whether the court may entertain this petition, the allegations of such petition must be accepted as true for the

purpose of the present argument, although the correct determination of this preliminary inquiry may require that such of these allegations of fact as are disputed should be established by evidence.

[3] After giving the matter careful thought, I have no doubt that the court has jurisdiction to consider and dispose of this petition and to grant such relief thereon as the evidence may warrant. Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; In re Kleinhans (D. C.) 113 Fed. 107; In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, 2 L. R. A. (N. S.) 560; Gazley v. Williams, 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199; Mound Mines Co. v. Hawthorne, 173 Fed. 882, 97 C. C. A. 394.

Section 2, subds. 6 and 7 of the Bankruptcy Act, authorizes the bankruptcy court to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy," and to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Section 23a is as follows:

"The United States Circuit Court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

The question, therefore, involved here is whether this proceeding is a controversy in equity between the trustee and an adverse claimant or is a proceeding in bankruptcy within the meaning of the Bankruptcy Act.

The principles applicable have been so clearly stated in an opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of Re Rochford, 124 Fed. 182, 59 C. C. A. 388, that I quote at length from such opinion, as follows:

"Where, then, is the line of demarcation between 'controversies at law and in equity' and 'proceedings in bankruptcy,' within the meaning of section 23? It is perhaps impossible to correctly draw this line in the absence of further adjudications, and it may be the part of wisdom to leave it to be marked by the decisions in actual cases as they shall arise. Fortunately there are already two decisions of the Supreme Court which sufficiently illustrate the distinction between the two classes of cases to enable us to readily place the controversy before us in the class in which it belongs.

"In Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, that court held that a controversy between a trustee of a bankrupt estate and parties in possession of personal property under a conveyance by the bankrupt, which the trustee alleged to be fraudulent as to creditors, was a controversy in law or in equity, under section 23, and that the District Court had no jurisdiction to hear or determine it on the theory that it was a proceeding in bankruptcy.

"On the other hand, in Bryan v. Bernheimer, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814, the Supreme Court held that a controversy between an assignee under a state law of a party who was subsequently adjudged a bankrupt, a purchaser from such an assignee, and the United States marshal, who had taken possession of the property from the purchaser, pursuant to an order issued under clause 3 of section 2 of the Bankruptcy Act, was a pro-

ceeding in bankruptcy, and that the District Court had jurisdiction (1) to order the marshal to take the goods from the possession of the purchaser, and (2) to adjudge the latter's claim to them upon a summary order to him to propound it to that court within 10 days or to be decreed to have no right or interest in the goods. It is true that in that case the purchaser appeared in the District Court, and presented his claim to the property without protesting against its jurisdiction, but it is equally true and not less significant that the Supreme Court plainly declared that the District Court had the power under clause 6 of section 2 to bring in the assignee if necessary for the complete determination of the matter in controversy (page 198, 181 U. S., 21 Sup. Ct. 557, 45 L. Ed. 814), and that the District Court sitting in bankruptcy had plenary authority to summarily take property from the possession of adverse claimants by means of its receiver or the marshal, in case it found it absolutely necessary for the preservation of the estates under clause 3 of section 2. Pages 196, 197, 181 U. S., 21 Sup. Ct. 557, 45 L. Ed. 814. From these two decisions the following conclusions are fairly deducible:

"(1) The District Court sitting in bankruptcy has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant over the title or possession of property in the custody of the latter in the absence of his consent. But such an issue is a controversy at law or in equity, as distinguished from a proceeding in bankruptcy within the meaning of section 23 of the Bankrupt Act of 1898.

"(2) The District Court sitting in bankruptcy has jurisdiction of such a controversy in cases in which it finds it absolutely necessary for the preservation of the estate to take possession of the property from the adverse claimant by means of its receiver or the marshal under clause 3 of section 2, and such a seizure and the subsequent determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy as distinguished from a controversy at law or in equity, within the true construction of section 23.

"(3) The District Court sitting in bankruptcy has jurisdiction to determine, after reasonable notice to the claimants to present their claims to it, the claims of all parties to property and to the proceeds of property which its officers have lawfully reduced to their actual possession in the course of the administration of the estate of the bankrupt, and controversies between trustees in bankruptcy and adverse claimants to property which has in this way reached the custody of the District Court are not controversies at law or in equity, as distinguished from proceedings in bankruptcy, within the proper interpretation of section 23.

"The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. Bardes v. Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Swarts v. Siegel, 54 C. C. A. 399, 402, 117 Fed. 13, 16. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent in every court of equity, incidental, and indispensable to the authority to administer the property in its possession and to distribute the proceeds. Chauncey v. Dyke Brothers, 119 Fed. 1, 3, 55 C. C. A. 579."

It is now well established that when the trustee in bankruptcy has acquired peaceable possession of property claimed by him to belong to the bankrupt and to be a part of the assets of its estate, proceedings instituted by such trustee in a United States Court having custody, through such trustee, of such property, to determine the validity of adverse claims to such property, are "proceedings in bankruptcy," within the meaning of section 23a, already quoted, and that the proper bankruptcy court has jurisdiction, either by summary proceedings or

by a plenary suit, to bring in all persons claiming rights in such property and to determine the existence and extent of such rights.

"When the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it." Murphy v. John Hofman Co., supra.

"Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine, by plenary action or summary proceeding, as the nature of the case demands, all adverse or conflicting claims thereto, whether of title or of liens; and that court may, by the process of injunction, protect its jurisdiction against interferences. It may draw to itself the determination of all controversies over the property in its possession, and, when it once lawfully attaches, its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or through a seizure thereof by an adverse claimant. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Chauncey v. Dyke Bros., 55 C. C. A. 579, 119 Fed. 1; In re Corbett (D. C.) 104 Fed. 872. See, also, In re Rochford, 59 C. C. A. 388, 124 Fed. 182." In re Schermerhorn, 145 Fed. 341, 76 C. C. A. 215.

"If the District Court, having possession of the res, did not have jurisdiction to hear and determine claims to or against the res, unless the claimant should consent, what court did? Could the petitioner go into the state court, and there assert his lien, and then obtain a decree for its enforcement, and thus deprive the court of primary jurisdiction of the control and custody of the controverted property? The possession of the res draws to the court jurisdiction of all questions in respect to title or liens, irrespective of citizenship." In re McMahon, 147 Fed. 684, 77 C. C. A. 668 (C. C. A. 6).

"The question of jurisdiction is not free from doubt, but we are of opinion that the result of the cases is that a court of bankruptcy may by summary process require those who assert title to, or an interest in, property which has rightfully come into its possession and control as part of the bankrupt's estate, to present their claims to that court, and, the notice being reasonable, may proceed to adjudicate the merits of such claims. In re Kellogg, 121 Fed. 333, 57 C. C. A. 547; In re Rochford, 124 Fed. 182, 59 C. C. A. 388." In re Eppstein, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465.

"A proceeding in bankruptcy is a proceeding in equity, and, for the purposes of enforcing and protecting its jurisdiction, a court of bankruptcy has all the inherent powers of a court of equity. This being the case, it may be appealed to by supplemental and ancillary bill to enforce its orders, sustain its jurisdiction, and protect parties before it in the enjoyment of rights secured through and under it." In re Swofford Bros. Dry Goods Co. (D. C.) 180 Fed. 549.

If the allegations of this petition relating to the possession of the property here involved be established by competent evidence showing that, at the time of the filing of the petition in bankruptcy, the bankrupt had possession of such property, and that such possession was afterwards acquired, and is now held, by the trustee as alleged in its petition, it is clear from the authorities cited that this court will have jurisdiction to determine in this proceeding the rights of the conflicting claimants to this property and to bring in such claimants as parties for that purpose. In view, however, of the allegations of the showing in the nature of an answer by the respondents, it will be necessary to determine this question of jurisdiction before proceeding to a disposition

of the merits of the case. On the hearing, therefore, the court will first consider the evidence offered on the question of the jurisdiction, and if such evidence establishes such jurisdiction, the court will, at the same hearing, next consider the evidence offered on the question of title and determine the rights of the parties claiming such title. If, however, the evidence on the preliminary inquiry does not establish such jurisdiction, under the rule herein followed such petition will be dismissed.

BOURNE v. FEDERAL MINING & SMELTING CO.

(Circuit Court, D. Idaho, N. D. July 8, 1908.)

1. MINES AND MINERALS ⊜38(14)—EXTRALATERAL RIGHTS—PRESUMPTIONS AND BURDEN OF PROOF.
   Prima facie the owner of a mining claim is the owner, not only of the surface, but of all beneath the surface, of its claims, and an adjoining owner, claiming the right to follow a lode on its dip under the surface of such claim, has the burden of proof, and must show by a preponderance of the evidence such a location of his claim as entitles him to follow the lode to and into the adjoining claim.

2. MINES AND MINERALS ⊜31(2)—EXTRALATERAL RIGHTS—LOCATION OF CLAIM.
   Where a lode or vein apexing in plaintiff's claim crossed the southwesterly side line, plaintiff could not pursue the vein beyond the vertical plane of such side line, unless the apex intersected at least one of the end lines.

3. MINES AND MINERALS ⊜38(14)—EXTRALATERAL RIGHTS—PRESUMPTIONS AND BURDEN OF PROOF.
   Where the apex of a mining vein or lode has been in part disclosed, and so far as known its course is parallel to the side line of the claim, it may be inferred that the strike of the hidden portion is substantially the same as that which has been exposed, but this is an inference of fact, and not a presumption of law, and does not follow from the location of the claim or the direction of the boundary line, but from the actual course of the apex of the disclosed portion of the vein.

4. MINES AND MINERALS ⊜38(14)—EXTRALATERAL RIGHTS—PRESUMPTIONS AND BURDEN OF PROOF.
   Where a vein crossed the southwesterly side line of plaintiff's mining claim, and continued in an irregular and northerly course towards the corner at the intersection of the northwesterly end line and the northeasterly side line, being more nearly parallel with the end lines than with the side lines, no presumption could be indulged that it crossed the northwesterly end line, rather than the northeasterly side line.

5. MINES AND MINERALS ⊜38(18)—EXTRALATERAL RIGHTS—WEIGHT AND SUFFICIENCY OF EVIDENCE.
   In such case, evidence *held* sufficient to require a finding that the apex of the vein intersected both side lines, and that plaintiff was therefore not entitled to pursue it on its dip beyond the vertical plane of the southwesterly side line.

In Equity. Suit by Jonathan Bourne, Junior, against the Federal Mining & Smelting Company. Decree for defendant.

Myron A. Folsom, of San Francisco, Cal., for complainant.

F. T. Post, of Spokane, Wash., and John P. Gray, of Cœur d' Alene, Idaho, for respondent.

DIETRICH, District Judge. Complainant is the owner of the Ontario lode mining claim, situated in Shoshone county, and particularly described as follows: Beginning at corner No. 1 (which is the westerly corner); then north 50° 33′ east, 640 feet, to corner No. 2; thence south 67° 46½′ east, 773.3 feet, to corner No. 3; thence south 50° 33′ west, 647 feet, to corner No. 4; thence north 67° 19′ west, 770 feet, to the place of beginning. It will be noted that the boundary lines form acute angles at corners No. 1 and No. 3, and obtuse angles at corners No. 2 and No. 4; that the claim is nearly as wide as it is long; that corner No. 2 is the most northerly point of the claim; and that the northwesterly and southeasterly boundary lines are parallel. These, in the location of the claim, were deemed to be end lines.

It is alleged in the bill that the claim is located upon a lead and silver bearing lode or vein, the apex of which in its general course approximately parallels the side lines, and in passing out of the claim intersects the end lines, the dip being to the southwest. The defendant is the owner of claims in the vicinity of and lying in a southwesterly direction from the Ontario. The complainant asserts the right to follow his vein on its dip beyond the southwesterly side line of the Ontario, into and through the defendant's claims, at an indefinite distance beneath the surface thereof. Such a right the defendant denies, and hence the controversy.

Before the case was finally submitted, many of the issues of fact presented by the pleadings were practically eliminated, and at the argument it was assumed that plaintiff was the owner of the Ontario claim, and that it embraced a segment of the apex of a vein or lode. The vein is not highly or uniformly mineralized, and is of very irregular width or thickness. Its persistent feature is a well-defined footwall. Strictly speaking, it has no physical hanging wall, and for its upper boundary there is only the vague and irregular limit of mineralization. Nowhere upon the claim does the vein outcrop, and from underground explorations, made about the time and after the suit was commenced, it was found that the apex does not cross the southeasterly end line, but that, followed upon its northerly course, it enters the claim by intersecting the southerly side line, almost at right angles, about 210 feet northwesterly from corner No. 4, and that it continues in an irregular, but northerly, course toward corner No. 2.

The crucial question is whether or not it intersects the northwesterly end line; the contention of the plaintiff being that it crosses this line about 25 feet southwesterly from the corner, and of the defendant that it intersects the side line a few feet southeasterly from the corner. Much of the evidence was directed to this issue, and about it substantially all of the argument clustered; it being conceded that upon its determination the extralateral rights of the plaintiff depend. Excavations of various descriptions were made at and near corner No. 2, both by the plaintiff and by the defendants, and the physical features thereby disclosed were, in great detail, reproduced in court by means of maps and models and samples of material, illuminated by the testimony of witnesses of scientific learning and of practical experience in mining.

Avoiding details, it may be said that by a raise on the footwall along the vertical plane of the northwesterly end line, the vein is unquestionably followed to a point approximately 30 feet below the surface and about 25 feet from corner No. 2. It is the theory of witnesses for the plaintiff that a faulting has taken place at this point, the extent of which cannot be determined, and that here the apex must be deemed to be. Upon the other hand, defendant's witnesses deny the existence of a fault, and assert that in the excavations made, pending the hearing, the continuity of the vein to the northeasterly side line, upon a dip somewhat flattened, is unmistakably demonstrated. There is no material change, they say, in the essential features of the vein; it is inclosed by rock in place, and the footwall here, as in other places, is regular and clearly defined. What plaintiff calls a fault they characterize as a mere crack or fracture, caused by the folding of the vein. They point to the fact that corner No. 2 is upon the crest or backbone of a ridge, and assert that the flattening of the vein, here found, is, under such conditions, a common phenomenon. The base of the ridge has, by erosion, been carried away, and the crest, losing its support, has settled; the crack being the axis of the fold.

[1] The plaintiff asserts an extraordinary right, not incident to ownership under the common law, but conferred by statute. He seeks to go outside of the boundaries of his own claim and penetrate the possessions of another. Prima facie, the defendant is the owner, not only of the surface, but of all beneath the surface, of its claims. This presumption that its ownership is exclusive is effective to repel intrusion by any one who does not come clothed with a title acquired by virtue of a compliance with the provisions of the statute. By this suit the plaintiff seeks constructively to enter beneath the surface of the defendant's claims and to take therefrom valuable deposits. Necessarily he assumes the burden of proof, and it is incumbent upon him to show, by a preponderance of the evidence, such a location of the Ontario claim as, under the law, entitles him to follow the lode, apexing therein, to and into the defendant's claims. Lawson v. U. S. Min. Co., 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65; St. Louis M. Co. v. Montana M. Co., 194 U. S. 235, 24 Sup. Ct. 654, 48 L. Ed. 953; Leadville M. Co. v. Fitzgerald, Fed. Cas. No. 8,158; Consolidated M. Co. v. Champion M. Co. (C. C.) 63 Fed. 540; Cheesman v. Shreeve (C. C.) 37 Fed. 36; Doe v. Waterloo M. Co. (C. C.) 54 Fed. 935; Parrott Silver & Copper Co. v. Heinze, 25 Mont. 139, 64 Pac. 326, 53 L. R. A. 491, 87 Am. St. Rep. 386; Grand Central M. Co. v. Mammoth M. Co., 29 Utah, 490, 83 Pac. 648.

[2] Admittedly, he cannot pursue the lode beyond the vertical plane of the southwesterly side line, unless the apex thereof intersects at least one of the end lines. Mining Company v. Tarbet, 98 U. S. 463, 25 L. Ed. 253; Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 18 Sup. Ct. 895, 43 L. Ed. 72.

[3] At the argument it was suggested by counsel for the plaintiff that a presumption should be indulged that the apex of the vein in a patented mining claim runs parallel with the side lines. In cases where the apex has in part been disclosed, and, so far as known, its course

is parallel to the side lines, it may be inferred that the strike of the hidden portion is substantially the same as that which has been exposed. In Carson City M. Co. v. North Star M. Co. (C. C.) 73 Fed. 597, Id., 83 Fed. 658, 28 C. C. A. 333, and 171 U. S. 687, 18 Sup. Ct. 940, Judge Beatty uses this language:

"Generally, when a ledge has been traced for such a distance, in a claim of this size it would not be an unreasonable presumption that it would continue in the same direction far enough to cross the end lines of the claim."

In Montana M. Co. v. St. Louis M. & M. Co., 147 Fed. 897, 78 C. C. A. 33, Judge Hunt gave the following instruction:

"If you find that the course or strike of the discovery vein in the St. Louis mining claim, as [it is] disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location."

But this is an inference of fact, and not a presumption of law. It follows, not from the location of the claim, or the directions of the boundary lines thereof, but from the actual course of the apex of a portion of the vein. To that extent, and that only, do the decisions go, and reason goes no further. If in this respect there was originally any doubt as to the views of the Supreme Court of Colorado, as expressed in Armstrong v. Lower, 6 Colo. 393, it is dispelled by the opinion upon rehearing (6 Colo. 586), and by the decision in Wakeman v. Norton, 24 Colo. 192, 49 Pac. 283.

[4] The principle, therefore, is that where a vein is found to have a certain course, so far as it is disclosed, the inference may be drawn that it will continue in the same direction. Hence, if it crosses an end line and for some distance the strike is parallel to the side lines, it is not unreasonable to conclude that it continues in that direction. But, if such a rule be applied to the conceded facts in this case, of what avail is it to the plaintiff? We start with the admission that in its course the vein enters the plaintiff's claim by intersecting, not an end line, but a side line. So far as it is definitely and indisputably determined, its course is more nearly parallel with the end lines than it is with the side lines. Hence, if any inference is to be drawn, it must be to the effect that the apex intersects the northeasterly side line rather than the northwesterly end line. But, in view of the entire situation, I doubt whether any presumptions can legitimately be indulged. Excluding from consideration the disclosures made by the excavations in the immediate vicinity of corner No. 2, there is no more reason to infer that the apex would pass out of the plaintiff's claim upon one side of corner No. 2 than there is to infer that it would pass out upon the other. The general course of the vein from the point where it enters the claim is in the direction of corner No. 2, and there is no substantial basis upon which an intelligent estimate of the probabilities can be made.

[5] Does the evidence, by preponderance, support the plaintiff's theory that the apex of the vein intersects the northwesterly end line near corner No. 2? Ten witnesses testify that it does; 12 testify that it does not. Assuming the competency and fairness of the witnesses for both parties to be the same, the numerical disparity is not

thought to be controlling. Upon such an issue, calling for expert opinion, manifestly either side might have lengthened the list of its witnesses. The number was representative, and one or two more or less should not be held to determine the preponderance of the evidence. Upon the whole, the relations of the witnesses to the parties was such that presumptively it may be said that the witnesses for the defendant were more interested in the result than those of the plaintiff; but, in consideration of the nature of the issue and the absence of any evidence of a disposition on the part of the witnesses upon either side to be unfair, I am not inclined to attach great importance to this feature of the case. No question is made of the honesty or integrity or general character of any of the witnesses. They do not differ widely concerning the evidentiary facts, and it is not strange that they should take different views of the significance of these facts and the scientific conclusions to be drawn therefrom.

The testimony is voluminous, and a detailed analysis of it would require much space, and could subserve no good purpose. It must suffice for me to say that, with the maps, models, and samples before me, I have read, with painstaking care, the entire record, and the impression I received therefrom is favorable to the defendant's theory, and I must therefore find as a fact that in its course the apex of the vein intersects both of the side lines. It follows that the plaintiff is not entitled to pursue the vein beyond the vertical plane of the southwesterly side line.

It appears that a portion of the Silver Casket, one of the claims owned by the defendant, is within the vertical planes of the side lines of the Ontario extended westerly in their own direction; but I have not the benefit of the views of counsel upon the question as to whether or not the decree, under the pleadings and upon the evidence, may properly adjudicate the extralateral rights of the plaintiff in this direction. Counsel for the plaintiff may prepare a decree, not out of harmony with the conclusions I have reached as to the course of the vein, and submit it to counsel for the defendant for approval. If there is any disagreement as to the form and scope of the decree, I will consider the propriety of a further hearing upon that point.

Ex parte FOLEY.

(District Court, W. D. Kentucky. June 25, 1917.)

1. ARMY AND NAVY ⊜19—ENLISTMENTS—RIGHTS OF PARENTS.

Under National Defense Act June 3, 1916, c. 134, § 27, 39 Stat. 185, providing that no person under the age of 18 years shall be enlisted or mustered into the military service of the United States without the written consent of his parent or guardian, provided such minor has such parent or guardian entitled to his custody or control, the parent of a minor under 18 years of age, who enlisted without her consent, is, in the absence of other reason why he should be retained by the military authorities, entitled to a judgment releasing such minor from the control of the military authorities.

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

2. ARMY AND NAVY ⊂⊃44(3)—ENLISTMENTS—MINORS.
Where a minor under 18 years of age, who enlisted without the consent of his parents, was, before they obtained his release on habeas corpus, arrested for a military offense, the question whether he was arrested before or after the issue and service of the writ is immaterial, with respect to the right of the military authorities to punish the minor for such military offense.

3. ARMY AND NAVY ⊂⊃44(3)—MILITARY OFFENSES—JURISDICTION.
National Defense Act, § 27, declares that minors under 18 years of age shall not be enlisted or mustered into the service of the United States without the consent of either parents or guardians entitled to their control. Articles of War (Act Aug. 29, 1916, c. 418) arts. 8, 9, 10, 39 Stat. 650 (Comp. St. 1916, § 2308a), authorize the appointment of general and special courts-martials. Article 12 declares that general court-martials shall have power to try any person subject to military law for any crime or offense made punishable by such articles, and any person who by the law of war is subject to trial by military tribunals, while article 54 declares that any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct. A minor under 18 years of age enlisted without the consent of his parents, representing himself to be 20 years of age, and received allowances under such enlistment. *Held* that, while the parent of such minor was entitled to obtain his release from the custody of the military authorities by habeas corpus, yet such authorities had jurisdiction to try the minor by court-martial for the offense of fraudulent enlistment, and such jurisdiction could not be displaced by the act of the District Court in issuing a writ of habeas corpus.

4. ARMY AND NAVY ⊂⊃43—MILITARY TRIBUNALS—JURISDICTION—FEDERAL COURT.
Under Const. art. 1, § 8, cl. 9, giving Congress power to constitute tribunals inferior to the Supreme Court, clause 11, authorizing it to declare war, clause 12, giving it power to raise and support armies, and clause 14, giving it power to make rules for the government and regulation of the land and naval forces, Congress is authorized to create military tribunals and to confer upon them, as has been done by Articles of War, arts. 8, 9, 10, 12, jurisdiction to try military offenses, to the exclusion of the civil tribunals.

In the matter of Ivan Foley. Ex parte application by Mrs. Pearl Foley for a writ of habeas corpus against William A. Colston, Colonel of the First Kentucky Regiment of the National Guard. Writ denied.

Wm. L. Lucas, Jr., of Louisville, for petitioner.
Perry B. Miller, U. S. Atty., of Louisville, Ky., for respondent.

EVANS, District Judge. By the act of Congress entitled "An act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, it was provided (section 58 [Comp. St. 1916, § 3044]) that:

"The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years, organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one, and sixty-four years."

It was further provided (section 69 [Comp. St. 1916, § 3044h]) that:

"The period of enlistment in the National Guard shall be for six years," etc.

By section 27 of the act it was provided that:

"No person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, provided that such minor has such parents or guardians entitled to his custody and control."

On the 20th of the present month Mrs. Pearl Foley filed a petition in which she alleged in substance that Ivan Foley was her son; that he was born on October 25, 1900, and consequently was much under 18 years of age, that a short time previously her said son, under the name of Ivan D. Foley, had enlisted as a soldier in the First Kentucky Regiment, commanded by William A. Colston, who is its colonel; that this enlistment was had without the knowledge either of herself or of her husband, the father of her son; and that neither she nor her said husband had ever consented to his enlistment. She stated that he was unjustly and wrongfully detained from her and was deprived of his liberty by the colonel of said regiment.

[1] Claiming the right to the custody and control of her son, the mother prayed that a writ of habeas corpus might issue, and that he might be released from military control under his enlistment and be restored to her custody. The writ was served. Young Foley was brought into court, and Col. Colston filed his response and return to the writ. It was not denied that the minor was under 18 years of age, nor that he had enlisted without the consent in writing of his father and mother, or either of them. This, if alone, would entitle the mother to a judgment releasing her son from the control of the colonel or other officer of the First Kentucky Regiment. This general proposition is not disputed, but other facts have been made to appear by the return and by the evidence which are claimed to be of a character to overcome that general rule.

[2] Preliminary to a discussion of those matters, a question raised by the petitioner may be disposed of. It grows out of the fact that the arrest of this soldier, upon the charges against him, was made after the issue and service of the writ. It is insisted that this fact cannot have the effect of displacing our jurisdiction, which had been previously acquired. True, some courts have held that the enlistment of a minor without the written consent of his parents was wholly void, and it was upon that view that the courts acted in those cases; but the contrary was settled by the Supreme Court in the case of Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, where there was an application for a writ of habeas corpus by the soldier himself, and the court held that as between himself and the government he was competent to enter into the contract, whatever may have been the rights of the parents in the premises.

At the hearing in the instant case it was clearly shown that the arrest of Foley was made by the military authorities after the writ had been issued and served upon the colonel, and it is insisted that this fact is sufficient of itself to invalidate the return of the writ. But the weight of authority seems clearly to be that it is immaterial whether the arrest was made before or after the issue or the service of the writ. United States ex rel. Laikund v. Williford, 220 Fed. 291, 136

C. C. A. 273; In re Scott, 144 Fed. 79, 75 C. C. A. 237; United States v. Reaves, 126 Fed. 127, 60 C. C. A. 675; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127. These decisions by Circuit Courts of Appeal must be regarded as overruling decisions like those in In re Carver (C. C.) 103 Fed. 624, and Ex parte Houghton (C. C.) 129 Fed. 239, and other cases in the District courts.

[3, 4] Coming now to the return to the writ, we find that the material parts of it are as follows:

"The respondent, William A. Colston, upon whom has been served a writ of habeas corpus for the production of Ivan Foley, respectfully makes return to said writ and states that he is the colonel and commanding officer of the First Regiment of Infantry, Kentucky National Guard; and he and said regiment are now and have been continuously, since June 19, 1916, in the military service of the United States.

"Respondent further states that said Foley was duly enlisted, under the name of Ivan D. Foley, as a soldier of the Kentucky National Guard, in the service of the United States on June 1, 1917, at Louisville, Ky., for the term of six years; that on said June 1, 1917, the said Foley fraudulently and falsely represented to the recruiting officer, Capt. Ellerbe W. Carter, First Kentucky Infantry, that he was twenty years and seven months of age, and by means of said false and fraudulent misrepresentation procured his said enlistment, and since said date has received allowance thereunder.

"Respondent further says that on June 20, 1917, said Foley was placed in arrest, charged with the military offense of fraudulent enlistment, and that he, the said respondent, has since said time held said soldier by and under the authority of the United States, pending the time the case might be properly prepared and said soldier given a trial thereon before a military court.

"A copy of the charge against the said Ivan Foley, preferred on account of the military offense aforesaid, is filed as part hereof."

The charge made against young Foley and referred to in the return is as follows:

"Charge: Violation of the 54th Article of War.

"Specification: In that Private Ivan D. Foley, Company E, 1st Ky. Inf., N. G., did procure himself to be enlisted in the military service of the United States at Louisville, Ky., on June 1, 1917, by willfully concealing from Capt. Ellerbe W. Carter, First Kentucky Infantry, a recruiting officer, the fact that he was under the age of 18 years and representing to the said recruiting officer that he was above the age of 18 years on said last-mentioned date, and did thereafter, at Louisville, Ky., receive allowance under said enlistment.

"[Signed] Ellerbe W. Carter,
"Captain, 1st Ky. Inf., N. G., Officer Preferring Charges."

In support of the return, Col. Colston testified, and his statements were not contradicted, that Foley was now held in custody pending the early assembling and organization of a court-martial to try him on the charge above set forth, and the question is whether this return, taken in connection with the testimony, is sufficient to prevent, at least for the present, the release of Foley on the petition and clearly proved statements of the mother.

By an act entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, section 1342 of the Revised Statutes of the United States (Comp. St. 1916, § 2308a) was amended in many respects. Among the provisions thus enacted were the Articles of War now in force. Articles 8, 9, and 10 authorize the appoint-

ment of general and special courts-martial, and article 12, so far as now material, is in this language:

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any * * * person who by the law of war is subject to trial by military tribunals."

By Article 54 it was provided that:

"Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct."

It appears without contradiction that the general charge made against Foley is that he has been guilty of a violation of article 54, and the specifications in detail are set forth. It is entirely clear that his case comes literally within the provisions of the Articles of War which have been copied. Congress, having created the courts-martial unquestionably might define their jurisdiction, and not only did the statute define the jurisdiction of the courts-martial, but it defined certain military offenses, among them that which Foley is charged with having committed. It created the courts to try those offenses, and the jurisdiction of those courts over those offenses is exclusive of all other courts. This, we think, was clearly within the power of Congress under article 1, section 8, clause 9, of the Constitution, which gives Congress the power to constitute tribunals inferior to the Supreme Court, clause 11, which authorizes it to declare war, clause 12, which gives it power to raise and support armies, and clause 14, which gives it power to make rules for the government and regulation of the land and naval forces.

It needs no argument to show that while, in the absence of any charges against this soldier, his mother might claim him from the custody and control of the army, yet, now that a charge is made against him that he had committed a military offense, her rights must yield to the delay necessary for the trial of that charge, and for the enforcement of any sentence the court-martial may impose.

Some things which occurred at the hearing may make it well to say that the question before us is not whether Foley is innocent of the charge made against him, nor whether he, a boy less than 17 years old, should be punished for an offense possibly committed under impulses that were patriotic. All these matters, if proved, are for the exclusive consideration and action of the court-martial. The question for us to determine is whether the respondent has the lawful right to keep Foley in military custody until the charge against him has been fully disposed of. We think it entirely clear that Foley is in the lawful custody of the respondent, and that he must remain in that custody until discharged therefrom in due course of proceedings by the military tribunal.

It can hardly be supposed that prompt steps will not be taken to have a court-martial dispose of the case; but, should there be any unreasonable delay, the matter might be brought to the attention of the court. Inasmuch as the rights of the mother will be enforceable

after any sentence that the court-martial shall impose may have been carried into effect, we conceive it our duty to remand this soldier to the custody of the respondent, and to stay all proceedings under the writ and under the petition of the mother, until by her further pleading she has been able to show either that there has been unreasonable delay or that the obstacles now in her way have been entirely removed.

An order carrying these views into effect will be entered.

CARY v. INTERNATIONAL AGR. CORP.

In re HULL.

(District Court, N. D. Ohio. January, 1916.)

1. BANKRUPTCY ⟸342—RE-EXAMINATION OF CLAIMS—POWER OF REFEREE.

Bankr. Act July 1, 1898, c. 541, § 57d, 30 Stat. 560 (Comp. St. 1916, § 9641), provides that claims which have been duly proved shall be allowed upon presentation to the court, unless objection shall be made or their consideration continued for cause by the court upon its own motion. Section 57k provides that claims which have been allowed may be reconsidered for cause, and reallowed or rejected. Section 5g (Comp. St. 1916, § 9589) provides that the court may permit the proof of the claim of a partnership estate against the individual estates, and vice versa, and marshal the assets of the partnership estate and individual estates, so as to prevent preferences and secure the equitable distribution of the property. *Held*, that the referee had power on his own motion and on proper notice to all persons in interest to reconsider his action in allowing a claim against the individual estate of a partner and to reallow it against the partnership estate.

2. BANKRUPTCY ⟸342½—REVIEW OF DISALLOWANCE OF CLAIM—TIME FOR REVIEW.

Where a creditor waited more than two years before taking any action to review an order of the referee disallowing its claim as against the individual estate of one member of a partnership, instead of petitioning for review within 10 days as prescribed by rule of court, it voluntarily surrendered its right to review such order, and whatever rights it had against such individual estate.

In Bankruptcy. In the matter of Robert B. Hull, bankrupt. On petition of Charles Cary, trustee, for review of an order of the referee vacating a prior order respecting the claim of the International Agricultural Corporation. Petition granted, and order reversed and set aside.

See, also, 224 Fed. 796; 240 Fed. 101, —— C. C. A. ——.

Clarence A. Fisher and Celsus Pomerene, both of Canton, Ohio, and John Huston, of Millersburg, Ohio, for trustee.

James M. Butler, of Columbus, Ohio, and Robert L. Adair, of Wooster, Ohio, for creditor.

CLARKE, District Judge. This matter comes before the court upon a petition to review the finding and order of the referee entered on the 23d day of June, 1915, setting aside and vacating the entry of an order of a former referee dated the 29th day of April, 1913, on the ground

and for the reason that the earlier order was made without jurisdiction on the part of the referee to make the same. The facts essential to have in mind in deciding the question raised by this petition for review are as follows:

Robert B. Hull and H. F. Kyser formed a partnership early in the year of 1912 which was dissolved in the early fall of the same year when Kyser bought out Hull and assumed the liabilities of the firm. Among these liabilities were two claims, one of the Canton Buggy Company for about $900, and one of the International Agricultural Corporation for about $1,200. Upon learning of the dissolution of the partnership, these two last-named creditors were not satisfied to accept Kyser as their sole debtor, and demanded and received notes signed by both Kyser and Hull. The International Agricultural Corporation received two notes for its claim; both being signed by Kyser and Hull, and both dated the 31st day of December, 1912.

On the 11th day of January, 1913, Kyser filed a voluntary petition in bankruptcy, and on the 14th day of January, Hull likewise filed such a petition, and both were adjudicated bankrupts on the days the petitions were filed. On the 25th day of January, 1913, pursuant to proper notice, the creditors met with the referee in bankruptcy for the purpose of filing claims and electing a trustee, etc. The claim of the Agricultural Corporation was presented to the referee and he made the following entry upon proof of the claim, viz.:

"Amount due $1,106.73. Filed and allowed. 1/25/13. W. F. Kean, Referee in Bankruptcy."

And the referee at the same time made the following entry upon his record:

"In the Matter of Robert B. Hull, Bankrupt. In Bankruptcy. The following claims have been presented and allowed: No. 18. The International Agricultural Corporation. $1,106.73."

No entry seems to have been made upon the other, the smaller note of the Agricultural Corporation, and it is not necessary to consider it. Afterwards, on the 18th day of April, 1913, the referee in bankruptcy sent the following notice to all the creditors of R. B. Hull:

"In the District Court of the United States, for the Northern District of Ohio, Eastern Division.

"In the Matter of Robert B. Hull, Bankrupt.

"Notice is hereby given to the creditors of said bankrupt, that on the 29th day of April, A. D. 1913, at my office in Wooster, Ohio, a hearing will be had to determine individual and firm creditors, and especially to consider certain notes of the International Agricultural Corporation and the Canton Buggy Company, the same being firm debts of Kyser, Hull & Co., and for which notes were given in December, prior to the bankruptcy proceedings by both Kyser and Hull, as individual creditors, and to determine whether said claims are individual claims or not.

"Wooster, Ohio, April 18, 1913.

"W. F. Kean, Referee in Bankruptcy."

By this notice the Agricultural Corporation was advised that on the 28th day of April, 1913, at the office of the referee a hearing would be had—

"to determine individual and firm creditors, and especially to consider certain notes of the International Agricultural Corporation, and the Canton Buggy Company, the same being firm debts of Kyser, Hull & Co., for which notes were given in December prior to the bankruptcy proceedings by both Kyser and Hull, * * * and to determine whether said claims are individual claims or not."

This court concludes, from the summary of the evidence returned by the referee and from the additional evidence taken by him under direction of the court, coupled with the failure of the Agricultural Corporation to introduce any evidence to the point that it did not receive the notice of the referee dated April 18, 1913, that such notice was duly received by the corporation. It appears from the record that the corporation did not attend or was not represented at the hearing of the referee on April 29th, when the entry quoted was made.

Pursuant to the notice above quoted, dated April 18, 1913, a meeting of creditors was held on April 29th to consider the status which should be given to the Canton Buggy Company claim and the International Corporation claim, and the decision of the referee was as follows:

"On the 18th day of April, 1913, I gave notice to all the creditors that a meeting would be held in my office in Wooster, Ohio, on April 29, 1913, at 10 o'clock a. m., to determine whether certain notes signed by Robert B. Hull, within four months of the filing of petition in bankruptcy should be allowed to pro rate with the individual creditors. This includes the Canton Buggy Company and the International Agricultural Corporation. On this 29th day of April, came creditors and on argument of counsel I held that they should not so pro rate."

In this entry it is plainly decided that the two claims considered should not be allowed as individual claims against the estate of Hull, but they were permitted to stand as partnership claims against the estate.

The Canton Buggy Company, within the 10 days allowed by the rule of this court, filed its petition for review of the decision of April 29, 1913; but the Agricultural Corporation did nothing whatever until May 19, 1915, when it filed an "application," praying that the entry of April 29, 1913, might be corrected by omitting the words "and International Agricultural Corporation," thus making it not applicable to the claim of that company, and leaving that claim under the allowance of January 25th, an individual claim against the estate of Hull. The grounds of this application are two:

"(1) That the name, and so the claim, of the Agricultural Corporation was inserted in the entry by inadvertence and mistake. That no testimony was offered with respect thereto, and that the referee supposed at the time the corporation was represented by counsel, when in fact it was not, and did not know of the order until May 17, 1915, and

"(2) That the referee had no authority or jurisdiction to make the order, because there were no pleadings on file raising the question as to whether the corporation's claim was that of an individual or firm creditor, and no notice had been sent to the corporation advising it that such question would be for hearing."

There is no evidence whatever in the record that the entry making the claim of the corporation a firm debt was so entered by inadvertence or mistake. All that appears in the summary of evidence as returned by the referee is that the corporation was not represented by counsel on

April 29, 1913, when the entry was made. As we have said, however, it must be found upon the evidence returned that the Agricultural Corporation received the notice of April 18, 1913, and, with that notice before it, it was fully advised that the question of the status of its claim would be considered and decided at the meeting to be held on the 29th of April.

On June 23, 1915, the referee, acting on the application of the Agricultural Corporation filed on May 19, 1915, set aside the order of the referee of April 29, 1913, giving as his reason that that order was improperly entered, because the referee was without jurisdiction to make it, and the referee ordered that the Agricultural Corporation claim should stand as allowed in the entry of January 25, 1913, which would give it the status of an individual claim, and not a partnership debt.

The trustee files his petition to review this last entry by the referee, and it is this petition for review which we are now considering. Section 57d of the Bankruptcy Act provides:

"Claims which have been duly proved shall be allowed, upon receipt of or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

It must be assumed that it was pursuant to this authority that the allowance of the claim by the referee was made on January 25, 1913. Paragraph "k" of this same section provides that:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Section 5, paragraph "g," of the act, provides:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The decision of the referee setting aside the order of April 29, 1913, proceeds upon the theory that, because no petition or other pleading was filed by the referee or creditor, raising for decision the question of the status of the Agricultural Corporation claimed, therefore the action of the referee was without jurisdiction. It distinctly appears from the record that the action taken by the referee in giving notice of the hearing on April 18, 1913, and in rendering his decision on April 25, 1913, was of his own motion; but it appears from the record that all persons in interest, including the Agricultural Corporation, were duly notified of the meeting to be held, and no pleading could set out more clearly that the question of the status of the claim of the Agricultural Corporation as an individual or a partnership claim was to be considered, that it was set out in the notice of April 18, 1913, which we have found that the corporation received.

[1] We must assume that, in the interval between January 25th and the sending out of the notice on April 18th, it came to the knowledge of the referee that the claim of the Canton Buggy Company and that of the Agricultural Company grew out of the partnership which has subsisted between Hull and Kyser, and it seems clear enough that, under the provision of section 57, par. "k," it was competent for the

referee, proper notice being given to all persons in interest, to reconsider his action in allowing the corporation claim and to reallow it or deal with it according to the equities of the case. And paragraph "g" of section 5 gives to the referee authority to marshal the assets of the partnership estate and individual estates, so as to prevent preferences and make equitable distribution of the property of the several estates.

These sections of the Bankruptcy Act seem sufficient authority for the referee to reconsider his action in originally allowing the claim, and if convinced that justice and equity required it, it was competent for him to make the entry which he did on April 29, 1913. It would seem to be to subordinate substance to form to hold that the referee, due notice being given to all concerned, could not do of his own motion in such a case as this that which the referee impliedly at least, considers it would have been competent for him to have done if a petition or motion had been filed by the trustee or a creditor.

The decision of the referee would be subject to review in one case precisely as the other under General Order in Bankruptcy No. 27 (89 Fed. xi, 32 C. C. A. xxvii) and under Bankruptcy Rule No. 17 (89 Fed. viii, 32 C. C. A. xix) of this court, and it is quite impossible for this court to agree with the referee in holding that because the question was raised in the manner in which it was the referee was without jurisdiction when he would have had jurisdiction if it had been raised by petition or motion.

[2] The real reason the Agricultural Corporation sought a review of the decision of the referee of April 29, 1913, very certainly was the decision by Judge Killits, giving to the claim of the Buggy Company the status of an individual as distinguished from a partnership claim against the estate of Hull, but the Buggy Company filed its petition for review within the ten days prescribed by the rule of this court, while the Agricultural Company waited more than two years before taking any action to review the referee's order, and by this delay it voluntarily surrendered its right to review that order, and also whatever rights it may have had.

It results that the prayer of the petition for review will be granted, and the order of the referee of the 23d day of June, 1915, will be reversed and set aside.

In re SIMCOX, Inc.

Ex parte COMPTROLLER OF STATE OF NEW YORK.

(District Court, S. D. New York. July 13, 1917.)

1. BANKRUPTCY ⊂=346—PROCEEDINGS—CLAIM AGAINST BANKRUPT.
   Where the state asserted a claim for corporation taxes on the bankruptcy of a corporation, it is the duty of the bankruptcy court to reassess the tax, in case objection is made, regardless of its original assessment by the proper state authority.

2. TAXATION ⊂=238—CORPORATIONS—EXEMPTION OF CAPITAL USED FOR MANUFACTURING PURPOSES.
   Where more than one-half of the business of a New York corporation was the making of women's clothes, such corporation is to that extent

engaged in manufacturing, and hence, under Tax Law N. Y. (Consol. Laws, c. 60) § 182, imposing taxes on the capital stock of corporations, is liable to taxes on no more than one-half of its capital stock; section 183 exempting local corporations to the extent of the capital actually employed in manufacturing.

In Bankruptcy. In the matter of the bankruptcy of Simcox, Incorporated. On claim by the Comptroller of the State of New York for corporation taxes. On petition to review an order of the referee allowing the claim. Order reversed, and claim allowed for a lesser amount.

Petition to review an order of a referee in bankruptcy allowing the claim of the state of New York for taxes against the bankrupt estate under the following circumstances: The bankrupt was a corporation, and as such liable to taxation under section 182 of the Tax Law of the state of New York. For two years, ending respectively October 31, 1914, and October 31, 1915, the comptroller assessed the corporation $75 a year as a tax upon $100,000 of its corporate stock. This, together with $19.50 penalties, made a total sum due of $169.50, for which amount the state presented its claim to the referee. By section 182 of the Tax Law of New York it is provided that every corporation shall pay to the state treasurer an annual tax upon the basis of its capital stock employed during the preceding year within the state, and by section 183 it is provided that manufacturing corporations shall be exempt to the extent of the capital actually employed in this state in manufacturing or in the sale of the product of such manufacture. The trustee objected to the claim, and evidence was taken before the referee, on which it appears that the corporation was in fact no more than a form for a dressmaker's establishment, which was conducted in the city of New York. A part of the business consisted in making up raw material into women's clothes, and part consisted in importing from other countries made-up clothes and selling them. No evidence was introduced as to the proportion between the clothes manufactured by the bankrupt and those imported and sold, except in the following testimony: "Q. Can you tell me what percentage of your stock was manufactured by yourselves, and what percentage was obtained from manufacturers? A. I could not tell you exactly. Q. Approximately? A. It was more than half of it manufactured by us. Q. Much more than that? A. Yes." The referee found that the whole tax was properly levied, and allowed the claim in full.

Elkan Turk, of New York City, for trustee.
Robert S. Conklin, of New York City, for comptroller.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] There can be no doubt of the power and duty of this court to reassess the tax in case objection is made, regardless of its original assessment by the proper state authority. New Jersey v. Anderson, 203 U. S. 483, 493, 494, 27 Sup. Ct. 137, 51 L. Ed. 284. Such reconsideration must be upon evidence in this court going directly to the merits. It hardly needs argument to show that the process of making clothes out of cloth is manufacture in the most literal sense of the term, or that to the extent to which the stock was employed in that process the corporation should have been exempt. We have no evidence, however, of the proportion of the two, except that quoted, from which it appears without dispute that more than half had been employed in manufacturing. How much more than half it is impossible to say, but to the extent of one-half the estate is entitled to exemption. The tax will therefore be liquidated at the sum of $84.75, and the claim will be allowed at that amount.

Order reversed; claim allowed for $84.75.

MISSOURI DIST. TELEGRAPH CO. v. MORRIS & CO.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1917.)

No. 4771.

1. EVIDENCE ⟸419(11)—PAROL EVIDENCE TO VARY WRITING—NATURE OF CONSIDERATION.

Where defendant installed in plaintiff's plant a watchman telegraph signal, fire-alarm boxes, and fire-alarm register circuits, with necessary connections, and the contract under which they were installed disclosed the service to be performed by defendant in connection with the watchman's signals in detail, but was silent as to defendant's services with reference to the fire-alarm register, except that defendant agreed to install it, parol evidence was admissible that, as an additional consideration for the contract, defendant, upon receipt of the fire alarms at its central office, was to transmit them to gongs with which it was connected in plaintiff's engine room and the room occupied by its private fire department, as parol evidence may be introduced to show that the consideration stated in a written instrument was not all of the consideration.

2. CONTRACTS ⟸170(2)—CONSTRUCTION BY PARTIES.

Where defendant, in carrying out the contract, did transmit alarms to the engine room and fire hall, and without such service the fire-alarm register would have been worthless, this was a part of its duty under the contract, as contracts must be construed in accordance with the construction given them by the parties themselves in acting under them.

3. ESTOPPEL ⟸78(1)—OMISSIONS FROM CONTRACT—RETENTION OF CONTRACT.

Plaintiff, by accepting and retaining possession of a triplicate copy of the contract for over two years, without objecting that it did not contain all of the terms intended to be incorporated therein, was not estopped from claiming that it did not express the full agreement of the parties, where it received at all times from defendant the services for which it claimed it contracted.

4. ESTOPPEL ⟸78(1)—OMISSIONS FROM CONTRACT—PERFORMANCE.

Defendant was estopped from contending that it was not bound to transmit such fire alarms where, during all of the time it was operating the fire alarm system, it performed such services without objection, since it was its duty to make the objection immediately after the contract was executed.

5. DAMAGES ⟸23—BREACH OF CONTRACT—DAMAGES WITHIN CONTEMPLATION OF PARTIES.

Where defendant installed a fire-alarm system in plaintiff's plant, and contracted upon receipt of fire alarms at its central office to transmit them to plaintiff's engine room, the recovery of damages for its negligent failure to so transmit a fire alarm could not be defeated on the theory that it had no notice that plaintiff would not maintain at all times sufficient water pressure to fight fires, and that it was not within the contemplation of the parties that plaintiff would rely upon notice from defendant to increase water pressure in its fire lines, or would suffer damage by the engineer's failure to increase such water pressure.

6. EVIDENCE ⟸588—CONCLUSIVENESSS ON JURY.

Where, in support of its contention that such damages were not within the contemplation of the parties, defendant's witness, under whose supervision the gong was placed in the engine room, testified that he did not know what it was placed there for, or what the gong was placed in the fire hall for, the jury was not bound to accept such testimony, as the logical deduction therefrom was that defendant did not know why it transacted any business at all with plaintiff.

7. DAMAGES ⟸188(3)—EVIDENCE—CONSEQUENCES OF NEGLIGENCE.
In an action for a fire-alarm company's negligent failure to transmit a fire alarm received at its central office to plaintiff's engine room, resulting in the engineer failing to supply sufficient pressure to fight the fire, where there was abundant evidence to sustain a finding that, if the engineer had been promptly notified of the fire, he would have been able to furnish sufficient pressure to extinguish the fire while it was confined to the motor box in which it originated, and no damages were allowed for the destruction of the motor box, the damages were not so speculative and dependent upon changing, uncertain, and undeterminable contingencies as to defeat a recovery.

8. TRIAL ⟸192—INSTRUCTIONS—STATEMENT AS TO UNDISPUTED FACTS.
Where the contract between the parties was silent as to the services to be performed by defendant in connection with its fire-alarm system, and when the charge was given every one connected with the trial knew that the written instrument did not contain the complete contract between the parties, the court committed no error in so telling the jury.

9. APPEAL AND ERROR ⟸1062(4)—HARMLESS ERROR—SUBMISSION OF QUESTIONS OF LAW.
Though, as there was no dispute as to the real consideration moving from defendant to plaintiff for such contract, it might not have been error for the court to tell the jury that the transmission of such fire alarms should be considered a part of the consideration, the submission of this question to the jury was not error of which defendant could complain, where they found the contract to be just what the court would have been obliged to tell them it was, especially where the jury were required to determine the specific issue as to whether the want of water pressure was caused by the failure to receive the requisite notice from the defendant, and whether, if the pressure had been sufficient, the fire could have been confined to the motor box in which it originated.

10. NEGLIGENCE ⟸136(26)—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.
The question of contributory negligence is usually one of fact for the jury.

11. WITNESSES ⟸237(4)—EXAMINATION—QUESTIONS ASSUMING FACTS.
In an action against a fire-alarm company for failure to transmit a fire alarm to plaintiff's engine room, where a witness testified that when he first discovered the fire it was confined to a motor box, a question asked him as to how long it was after he got back up to the motor box before the fire spread to a leaf-lard cooler, was not objectionable as assuming without testimony, and in the face of the physical facts, that the fire originated in the motor box.

12. APPEAL AND ERROR ⟸501(4)—RECORD—PRESENTATION OF EXCEPTIONS.
A contention that the court in its charge assumed a fact cannot be reviewed where it does not appear from the record that any exception was taken to such statement.

13. EVIDENCE ⟸131—ADMISSIBILITY—CONDITIONS AFTER INJURY.
In an action against a fire-alarm company for negligent failure to transmit a fire alarm to plaintiff's engine room, resulting in the engineer failing to furnish sufficient water pressure, there was no error in admitting evidence of a test of the water pressure just prior to the trial, where the evidence tended to show that the conditions were the same and plaintiff had offered to let the defendant make the test itself at plaintiff's expense.

14. EVIDENCE ⟸183(2)—SECONDARY EVIDENCE—ADMISSIBILITY OF EVIDENCE OF DESTRUCTION OF PRIMARY EVIDENCE.
Where defendant's employé, in charge of its central office, testified as to what he read upon the tape on which the fire alarm was registered, it was not error to admit his testimony that he burned the tape, as the record

thereon was the original and best evidence of the fire alarm, and it was proper to show its destruction in order to make the testimony of the witness competent.

15. DAMAGES ⇐214—INSTRUCTIONS—REDUCTION OF DAMAGES.
In such action, the instruction given by the court on the question as to plaintiff's duty to notify the engine room by means of a push button and buzzer installed by itself *held* as favorable to defendant as it could ask.

16. CONTRACTS ⇐275—PERFORMANCE—DEGREE OF CARE REQUIRED.
Where defendant installed a fire-alarm system in plaintiff's plant, and agreed upon receipt of fire alarms to transmit them to defendant's engine room and fire hall, defendant was only required to exercise ordinary care, but the care to be exercised must be considered with reference to the surrounding circumstances, and, as any service but prompt service would be worthless, prompt service was required.

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

Action by Morris & Co. against the Missouri District Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Percy B. Eckhart, of Chicago, Ill., and P. E. Reeder, of Kansas City, Mo. (Albert T. Benedict, of New York City, and Edwin Camack, Maurice H. Winger, and New, Miller, Camack & Winger, all of Kansas City, Mo., on the brief), for plaintiff in error.

M. W. Borders, of Chicago, Ill., and Frank P. Sebree, of Kansas City, Mo. (Borders, Walter & Burchmore, of Chicago, Ill., and Sebree, Conrad & Wendorff, of Kansas City, Mo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. Defendant in error, hereafter called plaintiff, sued plaintiff in error, hereafter called defendant, to recover damages resulting from a fire in its packing house at Kansas City, Kan., which damages it is alleged were caused by the negligence of the defendant. The plaintiff recovered a verdict, and the defendant has brought the case here assigning error.

At the commencement of the trial in the court below counsel for defendant moved the court orally for judgment in its favor upon the pleadings. The grounds of the motion were (a) that the written contract set forth in the complaint did not impose upon the defendant any duty such as was alleged to have been violated by it; (b) that the damages claimed were not the proximate result of the alleged violation of duty; (c) that the damages sustained were so speculative and uncertain as to be impossible of ascertainment. These same questions were subsequently raised by objections to the introduction of evidence, requests to charge, and also by motion for a directed verdict. We prefer to consider the same generally, regardless of how the questions were raised. Looking at the evidence in its most favorable aspect with refer-

ence to the case of the plaintiff, as we are bound to do on a motion for a directed verdict, the following facts appear from the record:

Since 1905 the plaintiff has maintained and operated a packing plant at the city of Kansas City, Kan., and in connection therewith has conducted the business of buying and slaughtering cattle, hogs, and sheep, dressing, curing, and preparing the meat for food, and manufacturing the by-products thereof. The plant consisted of 20 buildings, varying in size from 20 feet by 40 feet to 150 feet by 175 feet. The buildings, with a few exceptions, were six stories high with basement separated by fire walls. Ever since the plant started, in 1905, the plaintiff has maintained a fire department of its own located on the third floor in building No. 12. From five to seven men are employed as firemen. The firemen have a room located as above called the fire hall, in which they sleep at night. The firemen were on duty on holidays and Sundays as well as week days. The department was equipped with a full fire hall equipment. A fire gong was placed therein by the defendant 14 inches in diameter. This gong connects with the central office of the defendant by an electric wire. It has no other connection. There were in the fire hall also a tape register and telephone placed therein by the defendant. The tape register is connected with the central office of the defendant and with no other place.

The plaintiff also maintains in its plant a room called the engine room, about 500 feet south of building No. 11, in which the fire in controversy occurred. The engine room is equipped with ice machines, pumps, and generators. In each corner of building No. 11 were risers or water pipes for fighting fire. Fire hose was attached to these pipes on each floor. These water pipes were connected directly with pumps in the engine room. There was a continuous water pressure of from 20 to 40 pounds maintained in these water pipes. The pumps are connected with the Kaw river and also with the city water system. The risers or pipes spoken of are six inches in diameter. There was no communication from the fire hall to the engine room by telephone. The defendant had installed in the engine room a fire gong and ticker service. The gong was 14 inches in diameter. The ticker service was the same as in the fire hall.

It was the invariable practice of the defendant at 6 o'clock in the morning and at 5:30 o'clock in the evening to test the fire-alarm service thus installed. The plaintiff itself placed in the fire hall and in the engine room a four-inch buzzer bell, so that the fact could be verified as to whether the engine room and the fire hall had received the same notice, when a test was being made. A wire ran from the fire hall into the engine room, which connected these bells or buzzers.

The defendant owns and operates Night Watchman's Telegraph Signal and Fire-Alarm Boxes, also Fire-Alarm Register Circuits. It installs these boxes and fire-alarm register circuits in large manufacturing and mercantile plants, and, for a rental agreed upon, performs a service in connection therewith which has for its only object fire protection. January 1, 1910, defendant entered into a written agreement with the plaintiff as follows:

"That for the consideration hereinafter named, the District Company agrees, at its own expense, to promptly place on the premises of the subscriber at—

	Boxes.	F. A. Registers.
Chicago, Ills.	172	2
St. Joseph, Mo.	52	1
East St. Louis, Ills.	53	1
Kansas City, Kan.	48	1

Night Watchman's Telegraph Signal and Fire-Alarm Boxes and Fire Alarm Register Circuits, with all necessary wire connections and other apparatus for the efficient working of the same.

"The District Company further agrees to install such boxes, gongs, and registers as may be ordered by the subscriber, on premises hereafter acquired by subscriber, at prices herein provided for.

"The watchman of the said subscriber shall communicate with the central office of the District Company by means of the said signal boxes, at such intervals during the night, commencing at 6 o'clock p. m., and ceasing at 7 o'clock a. m., Sundays and holidays included, as shall from time to time be determined upon by said subscriber, and by the same reported in writing to the office of the District Company.

"The District Company shall receive the signals of the watchman or other person for the time being in charge of said premises, and record the time when the same shall be so received; and in default of such watchman, or other person in charge as aforesaid, making such signals within ten minutes of the time after said signal is due according to the list then in force between the said parties, and said District Company shall and will forthwith send its roundsman to the premises and ascertain the cause of such failure or neglect of signaling.

"The District Company further agrees to furnish to the said subscriber a daily report in writing, showing the several times at which signals were received during the previous night, and also the excuse or explanation given by the watchman for any failure to signal as aforesaid.

"In case of accident or disability of the watchman of the said subscriber, the said District Company will furnish a temporary watchman, for which a reasonable charge shall be made.

"The said subscriber hereby agrees to pay for such service the sum of eighteen ($18.00) dollars per annum for each combination fire alarm and watch service box; one hundred ($100.00) dollars per annum for each gong and register circuit with one location; and fifty ($50.00) dollars per annum for each additional gong and register location on such circuit, for the period of five (5) years and thereafter until one year's notice has been given in writing by the subscriber of a desire to terminate this contract. Payments to be made monthly.

"Additional boxes will be installed as ordered by subscriber, who hereby agrees to pay for each such added box eighteen ($18.00) dollars per year.

"The said subscriber also agrees to reimburse said District Company for any change or alterations made after installation and approval of same, where such changes are made to accommodate alterations in subscriber's premises.

"This agreement shall be effective as of January 1, 1910, and cancels all agreements heretofore made between the subscriber and any associated District Company for fire-alarm and watch service in the plants herein named.

"It is further agreed that, in the event of the destruction by fire or other casualty of any portion of the aforesaid premises, the rental hereunder shall be reduced in the proportion that said boxes are thereby rendered out of service, at the rate per box provided for by this contract.

"It is further understood and agreed that the said instruments, and all wires and other apparatus hereto, shall be and remain the sole property of the District Company; and the said subscriber hereby authorizes and empowers the District Company, or its agents or assigns, to enter any building and remove the said instruments, provided that the said subscriber shall have failed to pay over to the District Company the stipulated rental monthly

aforesaid, or any other charge for service or expenditures that the said District Company may have been called upon to perform, either by signal or that have accrued under any of the provisions of this contract."

As the name of the boxes indicates, they performed two functions, viz. watchman's telegraph signal described in detail in the above contract and fire-alarm service. To give the fire alarm the watchman or other person, in accordance with permanent directions on the fire-alarm box, would break a glass thereon and turn a certain lever to the right. By so doing the number of the box would be recorded on the same tape that received the watchman's signals in the central office of defendant, but, in place of registering the number of the box once, it would register the number eight times. When a fire alarm was received at the central office from the plant of the plaintiff, it was the duty of the operator of defendant at the central office to throw a switch, requiring but a fraction of a second, and thereby turn the fire-alarm signal back to the plaintiff's fire hall and engine room, the whole operation requiring about thirty seconds. Over the objection of defendant's counsel, plaintiff was permitted to show that defendant had been for five years prior to January 1, 1910, for a rental agreed upon performing watchman's signal and fire-alarm service as above detailed. While this service was being performed as indicated the written contract above set out was executed, there being no change in the manner of service except that instead of the telephone the defendant installed, in connection with the fire-alarm service, a gong and register line in the plant of the plaintiff to connect with its central office.

Laying aside the manner in which the watchman's signals were made and recorded as not being involved in the present action, the manner of receiving and reporting fire alarms was as follows: The defendant's central office was located in a room also occupied by the Western Union Telegraph Company at the Livestock Exchange, Kansas City, Kan. There is a table in the central office on which are placed a series of registers. These registers are electrical instruments that record the number of the box pulled by the watchman in the plant of the plaintiff. There was one register for each plant for which a fire-alarm service was being rendered. At the time of the fire hereinafter mentioned there were about twelve registers.

The register in connection with the fire-alarm service rendered to the plaintiff was connected with the fire hall and engine room of the plaintiff by wire. There was a wire that connected with the watchmen's boxes which permitted the fire-alarm signal to come to the central office, and there was also another wire that connected the central office with the registers and gong in the fire hall and engine room. There was no connection between the plant of the plaintiff and the central office of the defendant for fire-alarm purposes except the wire which operated the gong and register. The gongs in the fire hall and engine room were for the purpose of notifying the fire hall and engine room that a fire-alarm signal was coming. The gongs could not be rung except by the operator in the office of the defendant. The defendant had installed in the plant of the plaintiff 48 of the watchman's telegraph signal and fire-alarm boxes. Under ordinary circum-

stances if a fire alarm would be signaled from one of the boxes in the plant of the plaintiff to the central office, the operator receiving the signal would communicate it to the fire hall and engine room within eight or ten seconds.

On July 7, 1912, one Sheldon, 19 years of age, was the manager and in charge of the central office of the defendant at the stockyards exchange, Kansas City, Kan. He had two employés assisting him in the work, M. Q. Williamson and M. W. Allie. They performed the services hereinbefore indicated for about 50 subscribers. The plaintiff was one of them. The ordinary duty of the employés was to place upon large sheets of paper, which had the numbers of the fire-alarm boxes in any particular plant thereon, the time that any particular watchman would pull a box in any particular plant. These reports would be coming in practically all day. On the day in question Sheldon's assistant Allie was absent for the day; Williamson was on duty that day, but at about 12:07 to12:10 o'clock went out for his luncheon. After Williamson left, Sheldon, the only remaining employé, took his lunch and went to a place in the central office 15 or 20 feet from the fire-alarm register. Sheldon did not hear any fire alarm from the time he commenced eating his luncheon.

While Sheldon was eating his lunch, and about 12:22, there came a call from plaintiff's plant over the telephone, which was received by an employé of the Western Union, who told Sheldon that the plaintiff was on the 'phone and wanted to talk about a fire. Sheldon went to the 'phone, and the plaintiff asked if he (Sheldon) got the fire alarm. Sheldon answered, "Yes." That is all there was said on the 'phone. In fact, Sheldon did not know that a fire alarm had been received. He then went to the register to see if a signal had been recorded, and found that while he was away eating his lunch three separate fire-alarm signals had been received from the plant of the plaintiff, and not one of them had been turned back to the fire hall or engine room of the plaintiff. Sheldon then notified the city fire department of Kansas City, Kan., and burned the tape upon which was recorded the fire alarms.

A few minutes after noon of July 7, 1912, Mr. Clark, the motor tender who was looking after the various motors in the plant of the plaintiff, while he was going around to see that they were oiled and in proper condition, went from building No. 10 into No. 11 on the fifth floor to examine a motor, when his attention was directed to smoke coming from a motor box in which was a motor that furnished the power to operate a system of fans in a lard cooler. The box was up against the ceiling and was four feet square. There was no flame discernible at that time. Clark immediately ran to the fire hall, which was on the third floor of building No. 12 adjoining building No. 11. In the fire hall were four or five firemen, and on his way to the hall he was "hollering" fire! The firemen immediately secured their spanners, and followed Clark to the fire. Clark estimated that it took one minute from the time he discovered the smoke until he and the firemen were back at the motor box. Robert Hooper, chief of plaintiff's police, who was coming up the stairway to the fire

hall to eat his lunch, heard Clark cry fire in coming to the fire hall, and he immediately ran to a window and called to his assistant, whom he had left on the loading deck, to pull one of these fire alarm boxes. When Hooper reached the window he saw Henry Haberle, a fireman, turning in a fire alarm through one of the combination boxes of the defendant. The time of giving the first alarm is definitely fixed at 12:00 o'clock and eight minutes by Hooper's watch, and 12:09 by the time of the defendant. Upon reaching the scene of the fire the firemen coupled up 50 feet of hose that reached within 25 to 30 feet of the motor box, but there was no fire pressure in the water pipes, and as a result the water merely ran over the end of the nozzle, not even reaching the motor box. The assistant fireman then immediately ran and turned in another fire alarm. In the meantime the firemen procured 50 feet of hose from another corner of the room, and put it on the first section, and again turned on the water, but there was no pressure. The assistant fireman turned in a third fire alarm. Then one of the firemen climbed up and opened the motor house door, and the smoke and flames shot out. The testimony showed the pumps in the engine room were able to furnish and throw 300 gallons of water per minute 120 feet.

After the second hose was obtained and attached, and there still being no pressure, the assistant fireman ran down five flights of stairs to the engine room, which was distant 650 feet, and notified the engineer of the fire, and, the pumps and apparatus being in good condition, a fire pressure was immediately given; but by this time the smoke drove the firemen out of the room where the fire occurred, some being compelled to go down the fire escape, and others being carried out to avoid suffocation.

There are many other facts in the record which sustain the verdict rendered, but the foregoing statement is deemed sufficient to present the important questions in the case. It is not disputed but that there was ample evidence to sustain the verdict of the jury as to the amount of damage which resulted from the fire if any damages were recoverable. There was also ample evidence to sustain the claim of the plaintiff that, had the fire-alarm signals which were transmitted to the defendant at its central office been immediately turned back to the engine room of the plaintiff, a sufficient water pressure would have at once been obtained to have extinguished the fire while it was confined to the motor box. No damage was allowed for the destruction of the motor box. The negligence of which complaint is made is, of course, the failure of the operator at the central office of defendant to give the engine room in the plant of the plaintiff immediate notice of the fire alarm, so that sufficient water pressure could be supplied to extinguish the fire.

Turning now to the written contract hereinbefore mentioned, it will be seen that it discloses the service to be performed by the defendant in connection with the watchman's signals in detail. When we come, however, to the service to be performed by the defendant with reference to the fire-alarm register, we find that the contract is silent except as to the fact that the defendant agrees to install a fire-

alarm register. This being the condition of the written contract, counsel for defendant raise the point that the written contract nowhere provides that the defendant should perform the duty which it is alleged the defendant failed to perform.

[1, 2] It is further contended in this connection that parol testimony is not admissible to vary, contradict, add to, or qualify the terms of the written instrument, and the learning upon the question of latent and patent ambiguity has been cited from 1630 (Lord Bacon's Rule 23) to the present time. There is no doubt about the rule, but, as is true of most rules, it has numerous qualifications as well established as the rule itself. Among these qualifications is the one that permits the introduction of parol testimony to show that a written contract was without consideration or that the consideration stated in the written instrument was not all of the consideration. In Richardson v. Traver, 112 U. S. 431, 5 Sup. Ct. 206, 28 L. Ed. 804, it was said: "It is elementary learning that evidence may be given of a consideration not mentioned in a deed, provided it be not inconsistent with the consideration expressed in it." 1 Greenleaf on Evidence, 286; 2 Phillips on Evidence, 353; Mills v. Dow, 133 U. S. 423, 10 Sup. Ct. 413, 33 L. Ed. 717; Fire Insurance Association, Ltd., v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860. The written contract provided that the defendant should install one fire-alarm register circuit in the plant at Kansas City. The inquiry naturally arises, what for? The contract does not specify the purpose of its installation, and mere installation would be worthless unless some service was to be performed in connection therewith. It then becomes material to inquire if there was any other consideration than the mere installation of the register circuit which the defendant was to perform for the annual rental of $18 for each watchman's signal and fire-alarm box, and $100 per annum for each fire-alarm register. It is proven that there was an additional consideration to be given by the defendant by the fact that the defendant performed a service in connection therewith, without which the fire-alarm register would have been worthless. It was competent to show this additional consideration by parol testimony, as it was not inconsistent with the written contract and defendant admits that the service was performed as proven. If the defendant had sued the plaintiff for the $100 rental and the plaintiff had sought to defend by showing that the written contract was void for want of consideration to be performed by the defendant, certainly in such a case the defendant would be allowed to show just what the consideration was as understood and acted upon by both parties to the contract. We have no doubt that parol testimony was competent to show the actual consideration for the contract on the part of the defendant, and that the contract must be construed in accordance with the construction given to the same by the parties themselves in acting under it.

[3, 4] It is next contended that plaintiff, by accepting and retaining possession of a triplicate copy of the original contract in question for a period of over two years, without making any objection that it did not contain all of the terms intended to be incorporated therein, there-

by ratified said contract, and accepted it according to its terms, and is now estopped from claiming that it does not express the agreement of the parties. There is not a single element of estoppel in the conduct of the plaintiff, for it received at all times from the defendant the service for which it claims it contracted. If either party should be estopped it should be the defendant, as during all the time mentioned it performed the service contended for by plaintiff without objection. If the defendant was ever going to say that the contract did not provide for the performance of the service for which the plaintiff was paying, it was its duty to make the objection immediately after the contract was executed or forever after remain silent.

[5, 6] It is next contended that the plaintiff should not be permitted to recover in this case for the reason that the evidence does not disclose that the defendant had any notice that the plaintiff would not maintain at all times sufficient water pressure to fight fire, and it was not within the contemplation of the parties when the contract was executed that the plaintiff would rely upon notice from the defendant to increase the water pressure in its fire lines, or that the plaintiff would suffer damage by reason of the failure of the engineer of the plaintiff to increase the water pressure in its own fire-fighting system. In considering this contention, it must be borne in mind that the whole service rendered by defendant to plaintiff and for which it was paid was to discover fire and prevent the spread thereof after discovery. It would be contrary to the common knowledge and experience of mankind to expect that the plaintiff would at all times keep up a sufficient water pressure to fight fire when there was no fire. It would be contrary to the general practice of fire departments generally. To say that it was not within the contemplation of the parties that the plaintiff would rely upon notice to the engine room so as to increase the water pressure would be to say that the officers and employés of defendant did not know why it placed a gong in the engine room. It is true that the witness Brownson, under whose supervision the gong was placed in the engine room, testified that he did not know or learn what the gong as placed in the engine room for, when it was so placed, and he also testified that he did not know what the gong was placed in the fire hall for. The logical deduction from this testimony is that the defendant did not know why it transacted any business at all with the plaintiff or for what purpose. The jury was not bound to follow such testimony when we consider that the only object for which plaintiff paid the defendant thousands of dollars per annum was fire protection. Conceding, for the sake of argument, that defendant did not know that the plaintiff at all times did not maintain a sufficient water pressure to fight fire, nevertheless it received thousands of dollars annually from the plaintiff for notifying it of the discovery of fire in its plant immediately, as the service was worth nothing unless performed with the utmost promptness. It is not competent, therefore, for the defendant, in the face of undisputed negligence, to say that it did not know for what purpose the plaintiff wanted the service performed. It was the defendant's duty to give the notice; the plaintiff's duty to make such use of it as the circumstances demanded.

[7] It is next contended that the evidence in the case, with respect to the particular point at which the fire might have been stopped in the event the water pressure had been adequate, is indefinite and uncertain, and the damages sought to be recovered are so speculative and dependent upon numerous, changing, uncertain, and undeterminable contingencies that the most the jury could do and did do was to guess at the amount of the damage which might have been occasioned by the failure of the engineer to increase the water pressure; consequently the court should have limited the amount of the recovery in any event to nominal damages. It is true that the defendant did not start the fire that destroyed plaintiff's property, but, contrary to the facts in the telephone cases cited (Volquardsen v. Iowa Tel. Co., 148 Iowa, 77, 126 N. W. 928, 28 L. R. A. [N. S.] 554; S. W. Telegraph Co. v. Thomas [Tex. Civ. App.] 185 S. W. 396; Providence Washington Ins. Co. v. Iowa Tel. Co., 172 Iowa, 597, 154 N. W. 874, and others), there is only one finding which must be made in order to establish the negligence of the defendant as the proximate cause of the destruction by fire of the property for which damages were recovered, and that is the finding that the engineer at the engine room, if he had been promptly notified of the fire, would have been able to furnish sufficient water pressure and extinguish the fire while it was yet confined to the motor box. There is abundant evidence to sustain the finding of the jury upon this question. In this connection it must be borne in mind that telephones are not rented for the special purpose of notifying the lessee of the discovery of fire.

In the Volquardsen Case, supra, the Supreme Court of Iowa said:

"Of course, if the failure to put out the fire was the direct and natural consequence of the unreasonable delay in making the connection (telephone), then there could be no doubt as to defendant's liability."

In the telephone cases it appeared that there were several links in the chain of sequences that were involved in doubt and speculation. In the present case the whole service for which defendant was paid was to notify the plaintiff of the discovery of fire, and the evidence does not leave the question as to whether the engineer of plaintiff, if he had received the notice of fire in time, could have furnished sufficient water pressure to extinguish the fire while confined to the motor, in doubt and speculation.

[8, 9] It is next contended that the trial court committed prejudicial error in submitting the construction of the contract sued upon to the jury, and in instructing the jury that the written instrument dated January 1, 1910, did not contain the complete contract of the parties. At the time the charge was given to the jury every one connected with the trial knew that the written instrument did not contain the complete contract between the parties, and the court committed no error in so saying. As there was no dispute as to what the real consideration moving from the defendant to the plaintiff was, it would not have been error perhaps if the court had stated to the jury that the service actually rendered by the defendant to the plaintiff under the contract should be considered a part thereof. It would have been obliged to say this if it construed the contract itself, but, even if it

be conceded that it was the duty of the court to so state to the jury, still the error, if any, in submitting the question to the jury was not error of which the defendant can complain, because the jury found the contract to be just what the court would have been obliged to tell them it was if he had not submitted the question to them. The jury, moreover, were not given a roving commission to create a contract upon guess or conjecture, for the reason that the court submitted the specific issue to the jury as to whether or not the want of water pressure was caused by the failure to receive the requisite notice from the defendant, and as to whether if water pressure had been sufficient the fire could have been confined to the motor box.

[10] It is next contended the court should have directed a verdict for the defendant because all the evidence offered by the plaintiff disclosed as matter of law that the damage claimed to have been sustained by it was caused and directly contributed to by its own negligence and that of its agents and servants. In regard to this contention it is clear that the facts in evidence were not such as would have allowed the court to decide as a matter of law that the plaintiff was guilty of contributory negligence. The question of contributory negligence is usually a question of fact for the jury, and it cannot be said that all reasonable men would have decided that the plaintiff was guilty of contributory negligence, when under a proper charge 12 men have already said that it was not. Upon this question it also may be remarked that plaintiff paid many thousands of dollars per annum under the written contract so as to be notified of the discovery of fire in its plant, which was the business the defendant was engaged in, and the contract between the parties. The plaintiff had a right to rely upon and receive such notice at the engine room and fire hall. Its fire department and its fire equipment was of no value or use unless this service was promptly performed by the defendant. When the service that was to be performed promptly by the defendant and upon which plaintiff relied failed, it is not strange that there was some delay or want of prompt action in turning to other means for putting out the fire. Defendant cannot be heard to criticize the acts of the plaintiff in putting out the fire too severely when these acts resulted from the failure of the defendant to perform its duty towards the plaintiff.

It is next contended that the burden of proof was on the plaintiff to show by a preponderance of the evidence that it was the negligence of the defendant, and not its own negligence, or that of its servants, inevitable accident, or some other cause, which was the proximate cause of the damage; and the court should have directed a verdict for the defendant because, under all of the evidence, the jury was compelled to and did render a verdict based solely upon guesswork, speculation, and conjecture as to the proximate cause of the damage. This contention needs but little consideration. It is, of course, true that the burden of proof to show negligence was upon the plaintiff and the jury were so told. The amount of the damages was not contested seriously. The evidence in regard to the negligence of the defendant was undisputed, and the real question for the jury was as to whether, if the engineer had received the fire notice as it was delivered to the de-

fendant, he could have furnished sufficient water pressure to extinguish the fire while confined to the motor box. The evidence upon this question was not a matter of guess or speculation, but there was direct testimony upon which the jury could find the fact.

It is next contended that the court erred in permitting witnesses to testify upon the assumption that the fire spread from the motor box to the lard cooler, and in assuming in his charge to the jury that the fire originated in the motor box and spread from the motor box to the lard cooler, without any testimony in support thereof, and in face of the physical facts disclosed by the evidence that the fire actually did originate in the walls of the lard cooler. When the question was put to the witness Hooper which assumed that the fire spread from the motor box to the leaf-lard cooler, an objection was made by defendant that it was assuming a fact not proven. This objection was sustained.

[11, 12] The witness Clark when upon the stand was asked the question: "Mr. Clark I wish you would give the jury your best recollection as to how long it was after you got back up to the motor box before the fire spread to the leaf-lard cooler." Answer: "Within eight or ten minutes." This question was objected to as leading, suggestive, calling for a conclusion, and assuming something not shown. The objection was overruled, and an exception taken. But Clark had already testified, without objection, that when he first discovered the fire it was confined to the motor box, so that it was not objectionable to ask Clark how long after he got back to the motor box was it before the fire spread to the leaf-lard cooler. There was no error in this ruling. In regard to the court assuming in its charge that the fire started in the motor box, it does not appear from the record that there was any exception taken to such statement.

[13] It is next contended that the court erred in admitting any evidence or proof of the test of the water pressure made just prior to the trial, which testimony was given by the witnesses Willard and Mercier. We see no objection to the admission of this testimony. American & English Enc. of Law, vol. 12, pp. 401, 402. The evidence tended to show that the conditions when the test was made were the same as when the fire occurred, and the plaintiff offered to let the defendant make the test at the expense of the plaintiff and report the same thereof to the court and jury, and the offer was refused.

[14] It is next contended that the court erred in admitting the testimony of the witness Sheldon to the effect that he burned the tape in the central office which registered the fire call sent in from the plant of the plaintiff at the time it is claimed the fire was discovered. It is urged that such testimony tended to inflame and arouse the passion and prejudice of the jury against the defendant. The record made on the tape by the register was the original and best evidence of what the fire alarm was, and it was proper to show the destruction of the original and best evidence in order to make the testimony of the witness competent as to what he read upon the tape when he went to the instrument after eating his luncheon.

[15] It is next contended that the court erred in refusing to give the following instruction to the jury:

"The court instructs the jury that if you find from the evidence that prior to July 7, 1912, the plaintiff installed an electrical gong or bell in the engine room of the plant connected with a push button in the fire hall, and promulgated a rule to the firemen and employés in the engine room that in case of a fire that the firemen should push the button in the fire hall and ring said bell in the engine room for the purpose of notifying the employés in the engine room to turn on fire pressure, and that upon the ringing of said bell it was the duty of the employés in the engine room to increase the water pressure on the fire line for the purpose of fighting fire, then your verdict must be for the defendant."

The court in its charge, in reference to the buzzer in the hall and engine room operated by a push button, charged the jury as follows:

"Now, then, in view of the law as thus stated let us consider the push button arrangement and small gong between the fire hall and engine room. You will recall that fire pressure was one hundred and twenty-five pounds. It is contended on behalf of the plaintiff that this gong was used only in testing the apparatus, and when pressure was to be put on for some comparatively unimportant purpose; such pressure as, according to the witness Norman, an engineer, would not exceed seventy pounds, and which would not require the engineer to stop the machinery and throw all pressure into the fire mains, as was the procedure in case of fire. Witnesses for the defendant claim that this push button and gong were used and to be used in case of actual fire and in blind tests. If you find the situation to be as contended for by the plaintiff in this regard, then this special line would cut no important figure in this controversy in any event. If you find it to be as the defendant claims, and as just stated, then you have still a further matter to consider. Concededly, whether for tests or more important purposes, this line between the fire hall and the engine room was installed by the plaintiff itself entirely apart from and disconnected with the fire-alarm system installed by the defendant company. You will determine to what extent plaintiff intended it to supplement and aid the latter system, if at all; but this fact appears practically without dispute as the court recalls it; when a box was pulled for fire, and an alarm sent into the central office of the Missouri District Telegraph Company, the practical operation of the system caused that alarm and notification to be sent back immediately, and within a few seconds, to the engine room of the plaintiff; the big gong was rung and the number of the box registered. Then, so engineer Norman says, and he is corroborated by other witnesses, under the rules the engineer blew the whistle three times, dipped the lights throughout the plant, shut down the machinery to the extent of throwing all pressure into the fire mains to bring that pressure and maintain it, so nearly as might be, at one hundred and twenty-five pounds, drain the ammonia pipes, and cut off electrical connections in the building involved. He needed no other sign or signal to impose upon him the duty to do all this; whatever other checks or balances there may have been in that plant, they could not make his duty more imperative, nor could they relieve the defendant from the duty of giving this notice to the engine room, if you find that was a part of the contract duty. In other words, the defendant had no right to exact from the plaintiff the duty to provide other means to supply the place of those provided by the defendant in case the latter failed. You are also to consider then whether, under the conditions there existing, in case of actual fire, it was deemed essential to get pressure to push the button in the fire hall, and whether, under the circumstances and conditions there existing, ordinarily careful men summoned to the fire in haste by messenger, with no alarm turned in from the defendant company, might not, in reason, have neglected to press the button to the engine room, if you find that such a proceeding under such circumstances was usual, but not absolutely essential."

We are of the opinion that the court in its charge stated the true rule to the jury for its guidance and in as favorable a manner as the defendant could ask.

[16] In conclusion, it may be said that the defendant contracted with the plaintiff for a certain service which had for its sole object the extinguishment of fire in its inception. The plaintiff paid for such service in all its plants $6,350 per annum. The very nature of the service demanded the utmost promptness in its discharge. While the care to be exercised by defendant would be called ordinary, still the care to be exercised must be considered with reference to the circumstances surrounding the performance of the duty imposed. What would be ordinary care under certain circumstances would not be ordinary care under different circumstances. Any service but prompt service would be worthless, so prompt service was required. The jury found that the negligence of the defendant was the proximate cause of the damage suffered by the plaintiff. The defendant must be held to have known the dangerous character of fire when uncontrolled, and must be held to have known that it would cause large damage in the plant of the plaintiff if allowed to spread. With all this knowledge it contracted with the plaintiff to notify it in the way indicated, if fire should be reported to its central station. We see no reason why the defendant should not be held liable for damages which were the proximate result of its negligence.

The judgment below is affirmed.

COLLINS v. MORGAN.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4680.

1. HABEAS CORPUS ⟸4—SCOPE OF INQUIRY.
   A writ of habeas corpus cannot be used as a writ of error, but only for the consideration of fundamental and jurisdictional questions.
2. HABEAS CORPUS ⟸105—NATURE OF WRIT—SCOPE.
   A writ of habeas corpus may be employed to correct an excessive punishment, after that which might have been lawfully imposed has been satisfied, upon the theory that a court is without power to impose a greater punishment than the law prescribes; but on habeas corpus a court has nothing to do with questions arising on the evidence presented to sustain the charge.
3. HABEAS CORPUS ⟸96—SCOPE OF WRIT.
   A writ of habeas corpus cannot be used to review a decision upon the legal sufficiency of a defense of former jeopardy.
4. HABEAS CORPUS ⟸30(1)—WRIT—NATURE OF.
   Mere error of law in the exercise of jurisdiction, though serious, is no ground for the writ of habeas corpus.
5. HABEAS CORPUS ⟸92(1)—SCOPE OF WRIT.
   Questions of jurisdiction even will not always be decided on writ of habeas corpus; the principle being that, if the court had jurisdiction of the case, the writ cannot be employed to retry the issues, whether of law, constitutional or otherwise, or of fact.
6. HABEAS CORPUS ⟸92(1)—TRIAL—JURISDICTION.
   Whether an act charged in an indictment is or is not a crime by the law which the court administers is a question within its jurisdiction.

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

7. INDIANS ⟸38(4)—INDIAN COUNTRY—CARRYING LIQUOR INTO—"WITHOUT."
The indictment under which petitioner was convicted and sentenced for the crime of introducing and carrying intoxicating liquor into Muskogee county, Okl., described the county as being a portion of the Indian country, and a part of what was formerly Indian Territory, and charged the introduction and carrying of liquor into said Indian country and into the county from without such Indian country. The act of 1895, prohibiting carrying of liquor into the Indian Territory, was, before the Oklahoma Enabling Act of 1906, in general terms, but after the Enabling Act its scope was restricted to the carrying of the liquor into what was formerly the Indian Territory from without the new state. *Held* that, as the word "without" means anywhere outside, the indictment was sufficient to charge an offense under the act of 1895, and to support a sentence under such act, and hence accused could not obtain release on habeas corpus, on the ground that the court was without jurisdiction to impose sentence in accordance with the act of 1895, but could proceed only under the act of 1897, which prohibits the introduction of liquor into the Indian country.

8. HABEAS CORPUS ⟸30(2)—SUFFICIENCY OF INDICTMENT—DISCHARGE.
It is no ground for discharge on habas corpus that the indictment is duplicitous, charging in one count offenses under two acts.

Sanborn, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by Jack Collins, on the petition of T. W. Bell, for a writ of habeas corpus against Thomas W. Morgan. From an order denying the writ, petitioner appeals. Affirmed.

R. E. Stewart, of Muskogee, Okl., and T. W. Bell, of Leavenworth, Kan. (G. W. P. Brown, of Muskogee, Okl., on the brief), for appellant.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for appellee.

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

HOOK, Circuit Judge. This is an appeal from an order denying Jack Collins a writ of habeas corpus. The petitioner had been convicted and sentenced for introducing and carrying intoxicating liquor into Muskogee county, Okl., and the Eastern judicial district of that state. The indictment described the county and district as being a "portion of the Indian country of the said United States," and charged the introduction and carrying of the liquor "into said Indian country and into the county aforesaid from without such Indian country; * * * the said county and district having been a portion of the territory of the said United States known as Indian Territory." The sentence was imprisonment for three years. On writ of error the sentence was affirmed by this court. Collins v. United States, 135 C. C. A. 342, 219 Fed. 670. A rehearing was denied (135 C. C. A. 344, 219 Fed. 672); and a writ of certiorari was denied by the Supreme Court (238 U. S. 625, 35 Sup. Ct. 663, 59 L. Ed. 1495). The sufficiency of the indictment and of the evidence to sustain the verdict was not properly challenged before us, and was therefore not considered.

It is now urged that the indictment was under the act of January 30, 1897 (29 Stat. 506, c. 109), and not under section 8 of the act of March 1, 1895 (28 Stat. 693, c. 145), as limited by the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and that the extent of imprisonment imposed upon the petitioner was not authorized by the act of 1897 and was beyond its power or jurisdiction. If the indictment is sustainable under the act of 1895, the term of imprisonment was fully authorized. A stipulation as to testimony at the trial is attached to the petition for the writ of habeas corpus; but, regarding it most favorably to petitioner as reciting all the testimony (which is doubtful), it is clear, as will presently appear, that we cannot consider it. We also pass by the contention of the government that petitioner had not served the lesser term of imprisonment that could have been assessed under the act of 1897.

[1–5] It is a familiar rule that a writ of habeas corpus cannot be used as a writ of error, but only for the consideration of fundamental and jurisdictional questions. Collins v. Johnston, 237 U. S. 502, 35 Sup. Ct. 649, 59 L. Ed. 1071. It may be employed to correct an excess of punishment, after that which might have been lawfully imposed has been satisfied. This is upon the theory that a court is without power to impose a greater punishment than the law prescribes. But in habeas corpus a court has "nothing to do with questions arising on the evidence presented to sustain the charge." Ex parte Carll, 106 U. S. 521, 523, 1 Sup. Ct. 535, 27 L. Ed. 288. It cannot review a decision upon the legal sufficiency of a defense of former jeopardy. Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, 28 L. Ed. 1005. Mere error of law in the exercise of jurisdiction, even though serious, is no ground for the writ. McMicking v. Schields, 238 U. S. 99, 35 Sup. Ct. 665, 59 L. Ed. 1220. Even questions of jurisdiction will not always be decided. Henry v. Henkel, 235 U. S. 219, 228, 35 Sup. Ct. 54, 59 L. Ed. 203. "The principle of the cases is the simple one that, if a court has jurisdiction of the case, the writ of habeas corpus cannot be employed to retry the issues, whether of law, constitutional or other, or of fact." Glasgow v. Moyer, 225 U. S. 420, 429, 32 Sup. Ct. 753, 756, 56 L. Ed. 1147. If the trial court had jurisdiction to try the issues and to render the judgment, the sufficiency of the information or of the acts set forth in an agreed statement to constitute a crime cannot be considered on habeas corpus. Matter of Gregory, 219 U. S. 210, 213, 31 Sup. Ct. 143, 55 L. Ed. 184.

[6] Whether an act charged in an indictment is or is not a crime by the law which the court administers is a question within its jurisdiction. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787. In Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248, the indictment charged an introduction of liquor into the Indian country and was clearly under the act of 1897. It contained no averment indicating a charge under the act of 1895. For the purposes of the applications to the Supreme Court for an original writ of habeas corpus and for certiorari to review a denial of such a writ by the District Court certain facts were admitted. They disclosed that the liquor had not been introduced into the Indian country, but had been shipped from Missouri into what was formerly Indian Territory. The Supreme Court sustained the juris-

diction of the trial court under the act of 1895 and denied the applications. It said:

"Whether the offense is sufficiently alleged in the indictment is another question, which, on familiar grounds, is not a proper subject-matter for inquiry on habeas corpus."

Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, is relied on. It arose on certiorari to review a judgment of conviction, not on habeas corpus, and is not in point.

[7] In the case at bar the District Court had jurisdiction of the subject-matter and of the person of the petitioner, and at the most the narrow contention is that he was charged only with violating the act of 1897 and was punished excessively under the act of 1895. That contention will not stand, if the indictment also charged a violation of the latter statute, even though informally and indefinitely. The prohibition of the act of 1895 against carrying liquor into the Indian Territory before the passage of the Oklahoma Enabling Act of 1906 was in general terms. In other words, it was without limitation as regards the exterior source of the liquor. A carrying into the Indian Territory from anywhere without, whether from some state then organized and existing or from the territory of Oklahoma, would have been an offense. But after the Enabling Act and the creation of the state of Oklahoma the scope of the act of 1895 was restricted, and it had to be shown that the carrying of the liquor into what was formerly Indian Territory was from without the new state; that is to say, was in interstate commerce.

Now, let us look at the indictment, bearing in mind the very narrow scope of our power in habeas corpus. The indictment of petitioner clearly conformed to the general terms of the original act of 1895. It charged an introduction and carrying of liquor into Muskogee county and the Eastern district of Oklahoma, which were averred to be Indian country and a part of what was formerly Indian Territory, "from without such Indian country." "Without" is anywhere outside. True, the term included the part of the state that was formerly Oklahoma territory; but it also embraced the states and countries beyond. It was broad enough to signify any state other than Oklahoma as the initial point of the carrying into what was once Indian Territory.

[8] There was enough in the indictment to call for the court's construction in relation to the act of 1895, and construction is in the ordinary exercise of jurisdiction. It is quite probable that the indictment was framed to charge a violation of both acts, 1895 and 1897. The terms "carry," "Indian Territory," "introduce," and "Indian country" were used. The first two are found in the act of 1895, and the last two are peculiar to the act of 1897. But, even so, a double charge in a single count of an indictment is no ground for discharge on habeas corpus. It is not amiss to say that the record before us on the writ of error indicates that the sentence of petitioner under the act of 1895 was not imposed inadvertently.

The order is affirmed.

SANBORN, Circuit Judge (dissenting). When the indictment in this case was drawn, and when Jack Collins was tried, the only offense

for which the trial court had jurisdiction to sentence him to imprisonment for three years was the introduction of intoxicating liquors from outside the state of Oklahoma into that part of the state which had been the Indian Territory. There was a large part of that state which had never been any part of the Indian Territory. The introduction of intoxicating liquors from that part of the state—that is to say, their introduction from within the state of Oklahoma into that part of that state which had been the Indian Territory, or into the Indian country—was an offense for the commission of which the court had no jurisdiction to impose a sentence of imprisonment for three years. Section 8, Act March 1, 1895, 28 Stat. 693; Joplin Mercantile Co. v. United States, 236 U. S. 531, 546, 547, 548, 35 Sup. Ct. 291, 59 L. Ed. 705. There was another act of Congress in force under which the trial court had jurisdiction to impose upon the petitioner, Collins, a sentence of imprisonment for two years, for the offense of introducing liquor into the "Indian country" from anywhere outside the Indian country, and the indictment against Collins charged him with the introduction of the liquors into the Indian country. Section 2139, Revised Stat. as amended by Act July 23, 1892, 27 Stat. 260, c. 234, as amended by Act Jan. 30, 1897, 29 Stat. 506, c. 109.

The term "Indian country" was not and is not synonymous with Indian territory, nor with that part of Oklahoma which was formerly in Indian Territory. Indian country is all the country declared to be such by Act June 30, 1834, c. 161, to which the Indians retained their original title, in the absence of some different provision by treaty or act of Congress, and it includes much country in many states outside the state of Oklahoma. Evans v. Victor, 204 Fed. 361, 365, 122 C. C. A. 531, 535, and the cases there cited.

The question in this case is not whether or not the trial court had jurisdiction to try Collins and to sentence him to imprisonment under this indictment. That the indictment was sufficient to give the court jursdiction to try him and to sentence him to imprisonment for two years under the act of 1892, as amended by the act of 1897, may be conceded. The only question in this case is: Did that court have jurisdiction under this indictment to sentence him to imprisonment for three years under the act of 1895, for it certainly had no such power under the act of 1892, or the act of 1897.

The excess of a sentence beyond the jurisdiction of the court which renders it, in a case in which it has ample jurisdiction of the case and of the parties, is as void as a judgment in a case in which the court has no jursdiction, and a prisoner held under such excess alone is entitled to his relief by writ of habeas corpus. Ex parte Lange, 18 Wall. 163, 176, 178, 21 L. Ed. 872; Munson v. McClaughry, 198 Fed. 72, 77, 117 C. C. A. 180, 185, 42 L. R. A. (N. S.) 302, and the cases there cited; O'Brien v. McClaughry, 209 Fed. 816, 820, 126 C. C. A. 540, 544. In Ex parte Parks, 93 U. S. 18, 23, 23 L. Ed. 787, the Supreme Court said:

"The writ ought not to be issued, or, if issued, the prisoner should at once be remanded, if the court below had jurisdiction of the offense, and did no act beyond the powers conferred upon it. The court will look into the proceedings so far as to determine this question. If it finds that the court

below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment."

And the court does transcend its powers when it sentences the accused to a longer term of imprisonment than the law prescribes for the offense with which he is charged in the indictment. In the case of Hans Nielsen, Petitioner, 131 U. S. 176, 183, 9 Sup. Ct. 672, 674, 33 L. Ed. 118, that court said:

"It is true that, in the Case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears in the indictment, or anywhere else in the record (of which judgment is only a part), it is sufficient."

A comparison of the two laws—(1) section 2139, as amended by the acts of 1892 and 1897, under which a sentence of imprisonment for not exceeding two years might be imposed, which will be termed the two-year law; and (2) the act of 1895, under which a sentence of imprisonment for not exceeding five years might be imposed—with the indictment has convinced me that this indictment did not charge the offense denounced by the five-year statute, therefore did not invoke the jurisdiction of the trial court to inflict an imprisonment of more than two years, and hence that the excess of its sentence beyond the two years' imprisonment permitted by the two-year statute was beyond its jurisdiction and void. The Supreme Court had occasion to compare these two laws with the indictment in the case of Joplin Mercantile Co. v. United States, 236 U. S. 536, 35 Sup. Ct. 291, 59 L. Ed. 705. The object of the prosecution in this case was, as it was in that case, to punish an offense which must have had reference to one or the other of the two distinct prohibitions contained in these two laws. "The one," said the Supreme Court, "is that arising from Act July 23, 1892, c. 234, 27 Stat. 260, amending section 2139, Rev. Stat., and amended in its turn by Act Jan. 30, 1897, c. 109, 29 Stat. 506. The other is section 8 of Act March 1, 1895, c. 145, 28 Stat. 693. These are set forth in chronological order in 225 U. S. 671 [32 Sup. Ct. 842, 56 L. Ed. 1261]. The distinction now pertinent is that, under the act of 1897: 'Any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor * * * or any ardent or intoxicating liquor of any kind whatsoever *into the Indian country, which term shall include any Indian allotment* while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished,' etc.; while the act of 1895 declares: 'That any person, * * * who shall, in said [Indian] Territory, manufacture * * * any vinous, malt, or fermented liquors, or any other intoxicating drinks * * * or who shall carry or in any manner have carried, *into said territory* any such liquors or drinks * * * shall, upon conviction thereof, be punished,' etc. The former has to do with the introduction of liquor into the 'Indian country'; the latter relates, not to the Indian country as such, but to the Indian Territory as a whole, irrespective of whether it, or any particular part of it, remained 'Indian country.'" The italics in the above quotation are those of the Supreme Court.

Turn now to the indictment in this case, bearing in mind (a) that the two laws forbid two distinct and separate offenses, the two-year law the introduction of liquors into the Indian country and the five-year law the introduction of liquors into the Indian Territory; (b) that the two-year law is a general law prohibiting the introduction of liquors into the Indian country anywhere in the United States; in Minnesota, Nebraska, Montana, and other states where there is Indian country, as much as in Oklahoma, while the five-year law is a local statute limited to the prohibition of the introduction of liquors into the Indian Territory; and (c) that the five-year statute was further limited by the enabling act of Oklahoma to the prohibition of the introduction of liquor *from without the state of Oklahoma* into that part of Oklahoma which was formerly the Indian Territory (236 U. S. 546, 547 [35 Sup. Ct. 291, 59 L. Ed. 705]), so that it was no violation of that law to introduce liquor from within the state of Oklahoma into that part of the state which was formerly the Indian Territory; and (d) that it was indispensable to the charge or statement of an offense under the five-year law that an averment be made that the liquors were introduced from without the state of Oklahoma. The entire charge in the indictment is in these words:

> That Jack Collins, in the county and district in which he was tried, "said county and district then and there being a portion of the Indian country of the said United States, did, at the time and place aforesaid, unlawfully, willfully, knowingly, and feloniously, introduce and carry into said Indian country and into the county aforesaid, from without such Indian country, one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, whisky and beer, the said county and district having been a portion of the territory of the said United States known as Indian Territory."

There can be no doubt that this indictment charges the introduction of liquors into the Indian country from without the Indian country, and therefore an offense under the two-year statute, which, says the Supreme Court, "has to do with introduction of liquor into the 'Indian country.'" And as the Supreme Court also says that the five-year statute "relates, not to the Indian country as such, but to the Indian Territory as a whole, irrespective of whether it or any particular part of it remained 'Indian country,'" the statement in the indictment that the liquor was introduced from without the Indian country was not a statement that it was introduced *from without the State of Oklahoma* into that part of Oklahoma that was formerly a part of the Indian Territory, and as there was no such averment or statement of its introduction from without that state in the indictment the conclusion is to my mind irresistible that the indictment utterly failed to charge an offense under the five-year statute, and left the court without jurisdiction to impose a sentence in excess of an imprisonment of two years for the simple introduction of liquors into the Indian country under the two-year statute.

Notwithstanding the view of the majority that the case of Joplin Mercantile Company v. United States, 236 U. S. 536, 537, 35 Sup. Ct. 291, 59 L. Ed. 705, is not in point in this case, it seems to me to be, and the conclusion I have reached appears to me to be abundantly sustained by the opinion in that case and to derive some support from

the fact that when the petitioner came here by writ of error for a review of his trial this court, doubtless without seriously considering the difference between an indictment for introducing liquors into the Indian country and for introducing them into the Indian Territory, yet doubtless not without perusing the indictment, said: "Collins was indicted for introducing liquor into the Indian country." Collins v. United States, 219 Fed. 670, 671, 135 C. C. A. 342. It is true that the opinion in Joplin Mercantile Company v. United States, was not rendered in a case involving relief from imprisonment by means of a writ of habeas corpus. Nevertheless the first crucial question of law decided in that case was the very question that conditions the decision of this case. It was: Does an indictment which charges the introduction of intoxicating liquors into the Indian country in that part of Oklahoma which was formerly the Indian Territory state an offense under the five-year law, in the absence of an averment therein that the defendant introduced the liquors from without the state of Oklahoma? In that case the indictment charged a conspiracy to commit the offense of—

"introducing intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the state of Oklahoma, and into the city of Tulsa, Tulsa county, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into other parts and portions of that part of Oklahoma which was within the Indian country."

On this indictment the defendants were tried, convicted, and sentenced. Subsequently a motion in arrest of judgment was denied, and a writ of error was sued out of this court, "where," says the Supreme Court, "the only question raised was whether the indictment charged an offense against the laws of the United States; neither the evidence nor the charge of the trial court being brought up." 236 U. S. 535, 35 Sup. Ct. 291, 59 L. Ed. 705. This court affirmed the judgment below, and the Supreme Court took the case by writ of certiorari and considered nothing but the sufficiency of the indictment. It held that the indictment failed to charge any offense under the five-year statute, because it contained no averment that the liquors were introduced from without the state of Oklahoma, but that it charged the offense of introducing liquors into Indian country in violation of the two-year statute. On the question which, in the case at bar, determines the jurisdiction of the court below to impose the excess of the sentence challenged beyond the two years permissible under the two-year statute, that court said:

"That clause of the indictment which sets forth the conspiracy does not in terms allege, as a part of it, that the liquor was to be brought from without the state of Oklahoma; nor does this clause refer, for light upon its meaning, to the clauses that set forth the overt acts. Hence we do not think the latter clauses can be resorted to in aid of the averments of the former."

After stating in a few words the reason why the latter clauses regarding the overt acts were immaterial to the decision of the question, the court continued:

"We therefore think the Court of Appeals properly treated this indictment as not charging that the liquors were to be introduced from another state,

and correctly assumed, in favor of the accused (supposing the law makes a distinction), that the design attributed to them looked only to intrastate commerce in intoxicants. The suggestion of the government that the omission of a distinct averment that the conspiracy was to introduce liquors from without the state did not prejudice petitioners, and should be regarded after verdict as a defect in form, to be ignored under section 1025, Revised Statutes, cannot be accepted, since we have before us only the strict record, and therefore cannot say that the trial proceeded upon a different theory from that indicated by the indictment, or that its averments were supplemented by the proofs."

For the same reasons stated here by the Supreme Court, I cannot fail to think that the indictment under consideration in this case ought to be treated as not charging that the liquors there mentioned were introduced from without the state of Oklahoma, and that the suggestion that the omission of the averment, indispensable to the charge of the offense at all, that Collins introduced the liquors from without the state, was a mere immaterial negligible defect, ought not to be indulged to create a charge which I am unable to find in the indictment, and to prolong the punishment of the petitioner, when the general rules are that the accused, until proved guilty, is presumed to be innocent of offenses not charged as well as those charged against him, and that he ought not to be punished, even when a reasonable doubt of his guilt exists.

For these reasons it seems to me that the trial court was without jurisdiction to impose the three years of imprisonment, and, as the petitioner has already served his two years, I am in favor of reversing the order and decree below, and of discharging him from the custody of the warden of the penitentiary.

BROUGHAM et al. v. BLANTON MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. May 14, 1917.)

No. 4584.

1. COURTS ⇐273—FEDERAL COURTS—JURISDICTION—INJUNCTION.
An injunction may be granted against subordinates of the Secretary of Agriculture for attempting to enforce his unlawful orders, though the Secretary of Agriculture, not being within the district and not appearing, could not have been enjoined.

2. FOOD ⇐1—CONGRESS—POWERS OF—REGULATION.
The enactment of the Oleomargarine Acts (Act Aug. 2, 1886, c. 840, 24 Stat. 209; Act May 9, 1902, c. 784, 32 Stat. 193), under Const. art. 1, § 8, par. 1, declaring that Congress shall have the power to lay and collect taxes, duties, imposts, and excises, does not restrict the power of Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, conferred by paragraph 3 of the same section; and hence the Meat Inspection Act June 30, 1906, c. 3913, 34 Stat. 669, and Pure Food Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [Comp. St. 1916, §§ 8717–8728]), apply to oleomargarine dealers, notwithstanding the prior law.

3. EVIDENCE ⇐7—JUDICIAL NOTICE—OLEOMARGARINE.
It is a matter of common knowledge that oleomargarine is a meat food product, and hence Meat Inspection Act June 30, 1906, applies to manufacturers of oleomargarine.

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4. FOOD ⟸8—OLEOMARGARINE—MEAT INSPECTION LAW—TRADE-NAME.

Meat Inspection Act June 30, 1906, declares that 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. Prior to the enactment of the Meat Inspection Act plaintiff, a manufacturer of oleomargarine, adopted the trade-name "Creamo Oleomargarine," registration of which as a trade-mark was allowed subsequent to the enactment of the law. Thereafter the Agricultural Department officially approved the trade-name, and complainant expended large sums in advertising its product as "Creamo Oleomargarine." Cream was not always used in the manufacture of complainant's oleomargarine. *Held*, that the trade-name was not deceptive, and the Agricultural Department having approved it, it could not thereafter retract its approval and compel complainant to abandon the trade-name.

Amidon, District Judge, dissenting.

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

Suit by the Blanton Manufacturing Company against James J. Brougham and another. From a decree for complainant, defendants appeal. Affirmed.

Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., for appellants.

Shepard Barclay, of St. Louis, Mo. (S. Mayner Wallace, of St. Louis, Mo., on the brief), for appellee.

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

SMITH, Circuit Judge. The Meinecike-Blanton Manufacturing Company commenced the manufacture of oleomargarine about 1902. It adopted the trade-mark "Creamo Oleomargarine" for its goods about 1904. It was succeeded by the appellee the Blanton Manufacturing Company. August 2, 1886 (24 Stats. 209, c. 840), Congress passed a law imposing a tax of $600 a year upon all manufacturers of oleomargarine. On May 9, 1902, Congress greatly elaborated this law. 32 Stat. 193, c. 784, U. S. Compiled Stats. 1916, § 5977. Section 6 of the act (24 Stats. 209, 210) contained the following:

"Sec. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages."

The plaintiff's brand was approved by the Commissioner of Internal Revenue January 19, 1904, and prior to the enactment of the meat inspection law or the pure food law. The label in question has always remained thus approved. On June 30, 1906, Congress passed both the meat inspection law (Act June 30, 1906, c. 3913, 34 Stats. 669, 674) and the pure food law (Act June 30, 1906, c. 3915, 34 Stats. 768 [Comp.

St. 1916, §§ 8717–8728]). On April 4, 1907, the Department of Agriculture having taken charge of the inspection of the oleomargarine factory of the Blanton Manufacturing Company under the claim that its oleomargarine was a meat food product, the Secretary of Agriculture approved the labels on the packages then in use under the trade-name "Creamo Oleomargarine." On January 6, 1908, the complainant made application to register the trade-mark "Creamo Oleomargarine" in the United States Patent Office. This registration was allowed on January 9, 1908. The Blanton Manufacturing Company continued for years to sell its goods under this label with the express approval or acquiescence of the Treasury and Agricultural Departments. On July 8, 1912, the defendant was expressly officially notified of the approval of the trade label "Creamo Oleomargarine" by the Agricultural Department. For many years the company has spent an average of $7,500 a year in advertising the commodity under this name and in the past 10 years has spent $75,000 in that way, but the Department commenced to complain in about 1912 of the use of the word "Creamo." Up to that time the Blanton Manufacturing Company had spent between $35,000 and $40,000 in such advertising. On October 2, 1912, the Chief of the Bureau of Animal Industry wrote the Blanton Manufacturing Company that the use of "Creamo" was considered deceptive and misleading, and the Bureau must therefore decline to continue permitting the use of this name in connection with oleomargarine. The letter recited that the Bureau's approval of the use of this name was formerly given. On February 10, 1914, the inspector in charge at St. Louis notified the Blanton Manufacturing Company that on and after March 1, 1914, "the use of that label will not be allowed."

Thereupon the Blanton Manufacturing Company brought suit in the court below against Dr. James J. Brougham, chief inspector in the city of St. Louis of the Bureau of Animal Industry of the Department of Agriculture, Arthur N. Stankey, local inspector of said Bureau in charge of the inspection at the manufacturing plant of the Blanton Manufacturing Company, Dr. Alonzo D. Melvin, Chief of said Bureau, and Hon. David F. Houston, Secretary of Agriculture of the United States, praying that this "court may grant to plaintiff a writ of injunction * * * perpetually enjoining and restraining said defendants from interfering with the use and enjoyment by plaintiff (in interstate commerce or otherwise) of its said trade-mark 'Creamo' Oleomargarine upon its labels now in use in its said business as above described, and from attempting to deprive plaintiff of the use thereof," and for general equitable relief. Dr. Brougham and Arthur N. Stankey were served with process and filed answer, but the Secretary of Agriculture and the Chief of the Bureau of Animal Industry were not found in the district and did not appear. The case was tried upon the issues joined as between the complainant and Messrs. Brougham and Stankey, and the court found the issues in favor of the plaintiff and enjoined Dr. James J. Brougham and Arthur N. Stankey, their agents, successors, and employés, from interfering with the use and enjoyment by the plaintiff, its successors, and assigns, in interstate commerce and otherwise of the said trade-mark "Creamo" upon stencils and la-

bels as theretofore approved and used on packages of various sizes for the sale of oleomargarine, and Messrs. Brougham and Stankey appeal.

[1] It is first contended by the appellant that no injunction could rightly have been granted against the appellants, because such an injunction could not have been properly granted against the Secretary of Agriculture. In St. Louis Independent Packing Co. v. Hon. David F. Houston, —— C. C. A. ——, 242 Fed. 337, we recently had occasion to fully examine this question, and following that case we hold that this injunction could properly have issued against the Secretary of Agriculture, had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them.

[2] The plaintiff first insists that its business is governed wholly by the Oleomargarine Law (24 Stat. 209; 32 Stat. 193) and that neither the Secretary of Agriculture nor the Bureau of Animal Industry has under the Meat Inspection Law any power or control over the complainant's business. The Oleomargarine Law was enacted under the power of Congress (Constitution, art. 1, § 8, par. 1):

"The Congress shall have power to lay and collect taxes, duties, imposts and excises."

While the Meat Inspection Law and the Pure Food Law were enacted under the power conferred by Const. art. 1, § 8, par. 3:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Whatever may have been the ulterior purpose in the passage of the Oleomargarine Law, it cannot be held that anything in it tended to substract any power subsequently conferred on the Secretary of Agriculture under the Meat Inspection Law, or upon the Secretary of the Treasury, the Secretary of Agriculture, or the Secretary of Commerce and Labor under the Pure Food Law. The first, the Oleomargarine Law, was enacted in the exercise of the taxing power, and this could not prevent Congress, under the power to regulate commerce, enacting the Pure Food Law and the Meat Inspection Law in the interest of the public health or welfare.

[3, 4] The Meat Inspection Law, in what may be called the preamble (34 Stat. 669, 674), declares that it is enacted for the purpose of preventing the use in interstate or foreign commerce as hereinafter provided of meat and meat food products which are unsound, unhealthful, unwholesome or otherwise unfit for human food, and further provides (page 675):

"That for the purposes hereinbefore set forth the Secretary of Agriculture shall cause to be made by inspectors appointed for that purpose an examination and inspection of all meat food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment."

And it provides for marking the same "Inspected and Passed," or "Inspected and Condemned," and the consequences. Meat food products were not more definitely defined and the Secretary of Agriculture

in July, 1910, secured the opinion of the Attorney General as to the true definition. 28 Op. Atty. Gen. 369. It is provided in the Meat Inspection Law (34 Stat. 678):

"Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

The Attorney General, first having held that the term "similar establishments" as used in the law was intended to include all establishments that were not specially mentioned in which the animal is slaughtered or the carcasses or meat are prepared or in which the meat food product is manufactured, then held that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal and that the determination of the meaning of the term "meat food product" is essential to the proper enforcement of the Meat Inspection Law, and as Congress has not defined the term, and it has no well-defined meaning, but is one of common use, and Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the act, the power to determine what manufactures are meat food products rests in the Secretary of Agriculture, subject to the restriction that the definition of the term adopted be not clearly or unquestionably outside the intent of the act. It may not be without importance to state that the opinion was delivered in a case of a compound which consisted of 80 per cent. cotton seed oil, clearly not a meat food product, and 20 per cent. of oleo stearin, a meat food product. There is no evidence that oleomargarine is not a meat food product, and we regard it as a matter of common knowledge that it is such a product, and clearly, therefore, its manufacture comes within the language of the Meat Inspection Law.

The Meat Inspection Law (34 Stat. 676) provides:

"No such 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 and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

We are not desirous of deciding more than is before us, and must pass upon the question whether the Department of Agriculture could pass upon and approve a trade-name under this last statute, which we find "Creamo Oleomargarine" was and is, and approve it in 1907 and again in 1912, and later, after an established business had been built up under that name, and a vast sum of money expended in the business, with or without evidence, change its ruling, and refuse to allow the use of the trade-name.

It is not claimed, as we understand it, that the public was deceived by the use of the name "Creamo Oleomargarine." The use of it is objected to upon its similarity to the word "cream," and upon the assumption that some of the public may be deceived into believing that

cream is contained in the oleomargarine. The word is not "cream," but "Creamo." It is a rule that words merely descriptive cannot constitute a trade-mark, because descriptive words cannot be expressly appropriated, and that it is essential to a valid technical trade-mark that the words or phrases be used in a purely arbitrary or fanciful way as applied to the goods in question. "Creamo" is not a word in common use among English-speaking people, but is such a fanciful word used by the complainant. But, even if the term had been "Cream Of," it would not be objectionable as a brand upon manufactured goods. There is a well-known brand of cigars known as "Cremo Cigars." "Cream of Wheat" is a brand used for breakfast food, and "Cream Baking Powder" is a well-known brand of that article. No one has ever assumed there is any cream in the cigar, in the Cream of Wheat, or in the Cream Baking Powder.

Could the Department of Agriculture approve the use of the label "Creamo Oleomargarine," as provided in the Meat Inspection Law, and then, after a trade had been built up and extended under that name, and vast sums of money expended in advertising it, change its ruling and forbid its use unless 10 per cent., for instance, of cream was used in the manufacture? We are constrained to say that we do not think any such power was vested in the Secretary of Agriculture.

The decree of the District Court was right, and it is affirmed.

AMIDON, District Judge (dissenting). I take the facts from the testimony of Mr. Blanton, president of the plaintiff company, below. They are uncontroverted. When the name "Creamo" was selected, plaintiff was using 30 per cent. of cream in its product. The name was chosen to indicate to the consumer and to the trade that cream was used in producing plaintiff's oleomargarine. The fact is that plaintiff sometimes uses cream, sometimes it uses no cream, and sometimes it uses skim milk. Whatever the practice, the product is all sold under the name "Creamo Oleomargarine." At the same time that the name here involved was chosen, plaintiff had another brand of oleomargarine, which it marked "Fulcreme," and another one "Extracreme." These were used continuously until they were withdrawn in 1912, by order of the Department. Plaintiff's letter head, used generally in its business, states with a conspicuousness which cannot easily be reproduced that the Blanton Company are "churners of Creamo, the only full cream Butterine." These are a few of the conspicuous features of the evidence, showing that plaintiff has habitually represented that cream is used in its product. It is also plain that to induce that belief is a decided trade advantage. It is conceded by plaintiff that the representation is false. The name "Creamo" was chosen as a part of this deception. Mr. Blanton himself testifies with emphasis that the name was chosen to convince the consumer and the trade that cream was an important element in the production of his company's product. As that product is conceded sometimes to contain no cream, and sometimes to be made by the use of skim milk, the name is false and deceptive. The proof is further emphasized by the fact that plaintiff, in its negotiations with the Department, refused

to add to its label the statement, "contains no cream," or a statement of the percentage of cream used. It is stated that the word "Creamo" is a fancy word, and will be so understood. That, it seems to me, is to indulge in one of the simplest of logical fallacies. Like most words in the language, cream has a figurative and a literal meaning. It may signify excellence of quality, or it may mean the part of milk that comes to the surface. When the term is applied to a cigar or a breakfast food, it is plain enough that it is used in its figurative sense. It will not cause anybody to believe that cream is used in making the cigar or the cereal. How stands the matter in the case of oleomargarine? It has been one of the trade frauds, from the time that article was invented, to palm it off as a dairy product. The states and the national government have been engaged for more than a generation in trying to defeat that trade deception. To create the belief that cream is used in the production of oleomargarine has been a part of the fraud. Mr. Blanton is a "practical" man. He probably knew what he was doing when he selected the word "Creamo." He says he chose it to make the consumer and the trade believe that cream was used in the production of his article. To say that the term "cream" will not deceive when it is applied to oleomargarine, because it does not deceive when applied to a cigar, seems too manifest a fallacy to require answer. As a matter of fact, therefore, I do not see how a plainer demonstration could be made that a trade-name is false and deceptive than has been made in this case.

I hesitate, however, to go into this subject, for in my judgment it is committed exclusively to the Secretary of Agriculture by the statute which is quoted in the majority opinion. I am at a loss to harmonize the opinion in this case and that rendered in the recent case of St. Louis Independent Packing Co. v. Houston, with the uniform practice of this court and of the Supreme Court, in holding that decisions of the Postmaster General and the Secretary of the Interior on questions of fact are conclusive. Acting upon that principle, the decisions of the Land Department, and of the Post Office, determining questions of fact in the disposition of the public lands, and in passing upon what forms of business are fraudulent so as to subject them to a fraud order, we have uniformly held that the decisions of those departments are binding upon the courts, and have refused to enter upon any review of their decisions, although the gravest interests were involved, and the most serious charges of mistake and sometimes of fraud were made. The general rule was stated by the Supreme Court, upon a full review of the authorities, in Bates & Guild Co. v. Payne, 194 U. S. 106, 109, 24 Sup. Ct. 595, 597 (48 L. Ed. 894) as follows:

"The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive, and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

The doctrine of this court and the Supreme Court on this subject is so axiomatic as to make the citation of authorities unnecessary. Why should not the same rule be applied to the Secretary of Agricul-

ture while enforcing the Meat Products Act? The jurisdiction is the same. The law in plain terms commits to that officer to determine when a trade-name is false and deceptive; and yet in this case, and in the other case to which I have referred, this court exercises a power to review his decision which would hardly be exercised in reviewing the findings of a master in chancery. I myself am unable to assign any reason for this variety of practice as between the Postmaster General and the Secretary of the Interior on the one hand, and the Secretary of Agriculture on the other, and can find none in the opinion in this case or in the other case.

The opinion in the present case seems to be based mainly upon the ground that the name, "Creamo Oleomargarine" had been approved by the Department in 1908 and in 1912, and plaintiff has expended money in advertising the name, and it is indicated that these facts deprive the Department of the power to forbid the use of the name although satisfied that it is false and deceptive. That, it seems to me, is a doctrine fraught with the gravest danger. It has been uniformly held that even the most solemn acts of legislation, pursuant to which parties have invested large sums of money, can in no way impair the authority of the state to exercise its police power. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Texas & N. O. Railroad Co. v. Miller, 221 U. S. 408, 414, 31 Sup. Ct. 534, 55 L. Ed. 789, are cases in which this familiar rule is cited and applied. Can it be possible, then, that a mere executive officer by his mistake, honest or corrupt, can destroy within the field of his jurisdiction, a police statute of the nation? It has been the uniform holding of the courts that the conduct of such officers cannot impair the rights of the government even in civil matters. United States v. Pine River Logging & Improvement Co., 89 Fed. 907, 917, 32 C. C. A. 406; United States v. Lee Wilson Co. (D. C.) 214 Fed. 630, 651. It seems to me too plain for debate that an executive officer appointed to enforce a statute cannot by any act or omission of his impair the power of the government through a subsequent officer, to enforce a police statute. To hold otherwise is to give such officers the power to annul the law. It might well happen that the use of a name at the time of its selection, and even for years thereafter, would appear to be innocent, and would be approved in the routine course of administrative business; then upon a careful investigation it would be found that the name was chosen and was actually used in the channels of trade for false and deceptive purposes. That seems to be what has occurred in the present case. It seems to me an alarming doctrine that the approval of a name which was in effect selected for purposes of deception can destroy the power of the government to stop the fraud. Some point is made in the brief that the plaintiff has a registered trade-mark for the term "Creamo Oleomargarine." This seems to have troubled the Department in dealing with the name. It is, however, settled law that a trade-mark that is chosen for fraudulent purposes will not be protected even in civil litigation; much less can such a trade-mark be used to impair the power of the government to enforce a police statute.

In my judgment both on the law and the facts, the decree made by the trial court was conspicuously improper, and should be reversed.

STOCKYARDS LOAN CO. v. NICHOLS et al.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1917.)

No. 4716.

1. CHATTEL MORTGAGES ⊂=124—AFTER-ACQUIRED PROPERTY—"INCREASE"—"ACCRETIONS."

A mortgage on 500 head of cattle, with all increase thereof and accretions thereto, covered, not only the offspring of the mortgaged cattle, but also cattle added to the herd by acquisition; since, while "increase" as used in mortgages ordinarily means that which is added to the original stock by augmentation or growth, produce, profit, interest, progeny, issue, or offspring, the word "accretions" has a broader meaning and is not confined to the results of natural growth, but includes the additions of parts from without, and this was especially true where the mortgagee knew that the mortgagor only had 170 head of cattle, and the loan secured by the mortgage was made to enable him to buy cattle until he should have 500 head as mentioned in the mortgage (citing Words and Phrases, Increase; see, also, Words and Phrases, First and Second Series, Accretion).

2. CHATTEL MORTGAGES ⊂=18—VALIDITY—AFTER-ACQUIRED PROPERTY.

A chattel mortgage on cattle, including all cattle added to the mortgagor's herd by purchase, was valid under the express provisions of Rev. Laws Okl. 1910, § 3829.

3. CHATTEL MORTGAGES ⊂=157(3)—RIGHTS OF PURCHASERS—NOTICE—QUESTIONS FOR JURY.

In replevin by a chattel mortgagee of cattle against a purchaser from the mortgagor, evidence *held* to make questions for the jury as to whether the purchasers, who were informed that the mortgage covered cattle subsequently purchased by the mortgagor, were not put upon inquiry, and would not have learned of the mortgagee's lien by investigation.

4. TRIAL ⊂=45(1)—OFFER OF PROOF—EFFECT OF ADVERSE RULING.

In replevin by mortgagees of cattle, described as branded with a crossbar against purchasers from the mortgagor, where the court ruled that the mortgage did not cover cattle purchased after its date, it was not incumbent on the mortgagee to present proof of the branding of the cattle after they were purchased and before they were sold to defendants.

5. CHATTEL MORTGAGES ⊂=148—PURCHASERS FROM MORTGAGORS—NOTICE.

Where such purchasers were charged with knowledge of the mortgage, and that it covered after-acquired cattle, they were bound also to know that brands need not be affixed to the cattle immediately after purchase.

6. CHATTEL MORTGAGES ⊂=155—BONA FIDE PURCHASERS—NOTICE.

Comp. Laws Okl. 1909, § 4422, provided that a mortgage of personal property was void as against creditors and subsequent purchasers, and incumbrancers in good faith for value, unless the original or an authenticated copy was filed as therein required. Rev. Laws Okl. 1910, § 4031, contains a similar provision, except that the words "in good faith" are omitted; but a further provision of such section, relating to mortgages on property in an unorganized county makes such mortgages void against subsequent purchasers or incumbrancers in good faith for value, unless filed. Section 4035 provides that a chattel mortgage shall cease to be valid as against subsequent purchasers or incumbrancers in good faith after the expiration of three years, unless a renewal certificate is filed. *Held*, that the Legislature did not intend to make an unfiled mortgage invalid as against a purchaser for value; but having notice of the mortgage used the words "purchasers and incumbrancers for value" in the first part of the section in the same sense as the words "purchasers or incumbrancers in good faith for value" in the last part of the section.

7. STATUTES ⟸181(2), 184, 205, 225—RULES OF CONSTRUCTION.
To ascertain the intention of the Legislature in the enactment of the statute, the court may look to each part of the statute, to other statutes upon the same or relative subjects, to the old law upon the subjects, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation.

8. CHATTEL MORTGAGES ⟸173(4)—RIGHTS OF PURCHASERS—NOTICE—EVIDENCE.
In replevin by a chattel mortgagee of cattle against a purchaser from the mortgagor, a certified copy of the mortgage and of the record of its filing should have been admitted on the theory that the jury might find that the purchasers, knowing that a mortgage had been given, should have made inquiry at the county clerk's office, and would have learned that the mortgage covered after-acquired property.

9. CHATTEL MORTGAGES ⟸172(2)—REPLEVIN AGAINST MORTGAGOR—DEFENSES.
In replevin by a chattel mortgagee against the mortgagor and purchasers from him, the demurrer to the evidence of the mortgagor was properly sustained, where the property was in possession of the purchasers, as the action of replevin is a possessory one.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Action by the Stockyards Loan Company against James Nichols and others. Judgment for defendants, and plaintiff brings error. Affirmed in part and reversed in part, and new trial ordered.

Robert F. Blair, of Wagoner, Okl., and B. F. Deatherage, of Kansas City, Mo., for plaintiff in error.

William B. Moore, of Muskogee, Okl. (W. W. Noffsinger and Y. P. Broome, both of Muskogee, Okl., on the brief), for defendants in error.

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

MUNGER, District Judge. The plaintiff in error brought an action in replevin against defendants in error, Nichols, Miller, and Briscoe, to recover possession of some cattle. At the close of plaintiff's evidence the court directed a verdict in favor of the defendants. The plaintiff claimed the right of possession because of a lien arising from a chattel mortgage given to it by defendant Nichols. The defendants Miller and Briscoe, as partners, from whose possession the property was taken under the writ, claimed the right of possession because they had purchased the cattle of Nichols, without notice of plaintiff's claim. Nichols had borrowed about $10,000 from plaintiff on January 2, 1915, and to evidence and secure the debt he, at the same time, executed a promissory note and chattel mortgage. A copy of the mortgage was filed on January 12, 1915, with the county clerk of Cherokee county, Okl., where the property was situated. By evidence and admissions on the trial, it was established that Miller and Briscoe purchased the replevined cattle from Nichols, in Cherokee county, in the early part of February, 1915. The court directed the jury to return a verdict in favor of defendants because the mortgage did not include cattle purchased by Nichols after its date.

Portions of the mortgage relating to the description of the property incumbered read as follows, except that the word "crossbar" is substituted for the character used in the mortgage:

"One hundred fifty cows, ages from three to seven years old, all branded crossbar on left side or shoulder.

"Ninety head of three year old steers, branded crossbar on left side or shoulder.

"Two hundred head of two year old steers branded crossbar on left side or shoulder.

"Sixty head of yearling steers and heifers, branded crossbar on left side or shoulder.

"Located in E. Crawford's pasture 4 miles northwest of Hulbert, Cherokee County, Okl.

"In the event said first party owns a larger number of cattle, of like kind and description as those herein described, then said second party, or its assigns, shall have the right at any time to elect and select, from such entire number, cattle of like kinds, equal to the number, as stated in this mortgage.

"Together with all increase thereof, and accretions thereto, being all the cattle of the above description owned by said first party on his own premises leased, loaned or hired to him in said county of Cherokee, state of Oklahoma, it being hereby expressly stipulated and agreed, that said cattle above described, shall be kept on feed, on said premises, separate and apart from all other cattle during the existence of this mortgage.

"The marks and brands used above to describe said cattle are the holding marks and brands and carry the title, although said cattle may have other marks and brands. This mortgage shall also cover and include all the right, title, and interest of said party in and to the feed, pasture, feed pens, feed troughs, and water privileges used in feeding said cattle until the indebtedness herein secured is paid in full. * * *

"The first party shall not sell or attempt to sell, except in conformity herewith, or remove or attempt to remove, from its present location in the county aforesaid, any part of said property. * * *

"For the purpose of obtaining the money at this time loaned by the second party, and for the benefit of possible future transactions, the first party states that the said first party is the absolute and lawful owner of all of the above-described property; that the same is free from any and all incumbrances; that he has full power to sell or mortgage the same and give clear title thereto and that all of the same is now in the possession of first party at the location above mentioned in said county and state."

[1] It appears that in seeking this loan the mortgagor had given a financial statement to the mortgagee showing that he owned 170 head of cattle that were incumbered by a chattel mortgage for $2,200, and he listed his total net worth as $5,425. The loan was made by plaintiff through the agency of Mr. Waller who was cashier of a bank at a town near to Nichols' residence. Mr. Waller testified, and from his testimony it appears that it was contemplated that Nichols should use the money borrowed from plaintiff to buy cattle additional to the 170 head he possessed, until he should have 500 head, the number mentioned in the mortgage. In the conversation with Mr. Waller, the mortgagor outlined his plans for the purchase of more cattle, giving the names and locations of persons from whom he expected to make purchases. The word "increase," as used in mortgages of this kind, ordinarily means that which is added to the original stock by augmentation or growth; produce; profit; interest; progeny; issue; offspring. Alferitz v. Ingalls (C. C.) 83 Fed. 964; Jones on Ch. Mtges. (5th Ed.) § 149; 4 Words and Phrases, 3515.

The word "accretion," as defined by Webster's Dictionary, means:

"Growth; organic growth; also, increase by external addition, or by accession of parts externally; and extraneous addition, as an accretion of earth."

The Century Dictionary defines it as:

"The act of accreting or accrescing; a growing to; an increase by natural growth; an addition; specifically an increase by an accession of parts externally."

The Standard Dictionary gives the definitions:

"(1)Growth or formation by external additions; increase by adhesion or inclusion. (2) That which is so formed or added, an accumulation or external addition; matter added."

It will be seen that the use of the word "accretions" expresses a broader idea than is expressed by the word "increase"; it is not confined to the results of natural growth, but includes the additions of parts from without. In the mortgage in question the use of this phrase clearly expressed the idea that the mortgage should extend, not only to the offspring of the mortgaged cattle, but also to the cattle added to the herd by acquisition.

Looking to the situation of the parties in applying the meaning of these words to their subject-matter, no construction of the mortgage other than that the word "accretions" was intended to apply to after-purchased cattle seems reasonable, when it is considered that the mortgagee knew that the borrower had only 170 head of cattle, that they were incumbered for $2,200, and that the borrower's credit rating was quite inadequate as security for the amount loaned. The purpose of the mortgage was to give security to the plaintiff, and the only way by which it could be accomplished was to have its lien extended to cattle to be purchased thereafter, with the funds advanced, until the total number mentioned in the mortgage had been acquired.

[2] The validity of the lien thus given does not seem open to question, as section 3829, of the Revised Laws of Oklahoma of 1910, provides:

"An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case, the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest."

As construed by the Supreme Court of Oklahoma, this statute gives to the mortgagee a legal lien upon the after-acquired property upon its acquisition by the mortgagor. Payne v. McCormick Harvesting Mach. Co., 11 Okl. 318, 66 Pac. 287; Garrison v. Street & Harper Furniture & Carpet Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. Ed. 1014; Title Guaranty & Surety Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43.

[3] After the original note and mortgage had been admitted in evidence, the plaintiff sought to prove that Miller and Briscoe had notice of its lien. Mr. Waller testified to a conversation that he had with Miller at the bank about the middle of January, 1915, and before Mil-

ler and Briscoe made their purchase from Nichols, in which Miller inquired where Nichols was "getting this money to buy cattle with." Waller informed him that he had secured a loan of $10,000 for Nichols from a Kansas City Loan company. "I said I got Mr. Nichols a $10,000 loan on the cattle he is now buying. * * * Well, I said I got this mortgage on cattle he is now buying." Section 2926 of the Revised Laws of Oklahoma of 1910 is as follows:

"Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself."

[4, 5] Mr. Miller undertook an inquiry of Mr. Waller as to the source of the money which Mr. Nichols was using, evidently deeming that fact one that was important, and was informed of the loan and of the mortgage security therefor, and that the mortgage was not limited to cattle owned by Mr. Nichols at the date of its execution but was upon cattle Mr. Nichols was then buying. In view of this evidence, there were questions to be submitted to the jury, whether Mr. Miller, thus put on guard, should not have made further inquiry before he purchased these cattle for his firm, so soon after the conversation, and whether he would not have learned of plaintiff's lien by such investigation. There was evidence to show that the cattle replevined bore the crossbar brand, when they were seized in August, 1915, and that some also bore newer and later brands. The defendants question the sufficiency of the proof of identity of the cattle with those mentioned in the mortgage. They assert that there is no evidence the crossbar was Nichols' brand or that it was placed upon these cattle by Nichols. The court had already ruled that the mortgage did not cover cattle purchased after its date, and that meant plaintiff's defeat. Hence it was not incumbent on plaintiff to press the proof of the branding of these cattle after they were purchased and before they were sold to Miller and Briscoe. As the mortgage covered cattle increase and cattle to be bought, although it described them as branded, it must have been in contemplation of the parties that the brand would be affixed by Mr. Nichols after he had acquired them, and, as Miller and Briscoe may be held to knowledge of the mortgage and that it covered after-acquired cattle, they would be bound also to know that brands need not be affixed to the cattle immediately after purchase.

[6] The claim is made on behalf of Miller and Briscoe that the statutes of Oklahoma invalidate plaintiff's mortgage as to them, because neither the original mortgage nor a copy thereof authenticated by the register of deeds was filed for record. For many years the statute of Oklahoma relating to this subject read as follows:

"A mortgage of personal property is void as against creditors of the mortgagor, subsequent purchasers, and incumbrancers of the property in good faith, for value, unless the original, or an authenticated copy thereof, be filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated." Section 4422, Snyder's Comp. Laws of Okl. 1909.

See Strahorn-Hutton-Evans Commission Co. v. Florer, 7 Okl. 499, 54 Pac. 710.

In 1911 the Legislature of Oklahoma adopted the revision of the state statutes made by Code Commissioners known as the Revised Laws of Oklahoma; and the corresponding provision is found as a part of section 4031, but the words "in good faith" are omitted. It is contended that this change of the statute renders void the plaintiff's mortgage, because Miller and Briscoe were purchasers from Nichols for value. The statute in question is a portion of a chapter relating to the execution, recording and effect of mortgages upon both real and personal property. Other sections of the chapter retain the exception of actual notice as equivalent to a sufficient notice by record. Sections 4021, 4035, Rev. Laws of Okl. 1910.

[7] In order to ascertain the intention of the Legislature in the enactment of section 4031, the court may look to each part of the statute, to other statutes upon the same or relative subjects, to the old law upon the subject, to the evils and mischiefs to be remedied, and to the natural or absurd consequences of any particular interpretation. Lewis, Suth. Stat. Const. §§ 378, 382, 471; Endlich on Interp. of Stats. §§ 39, 295, 298; Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; United States v. Hogg, 112 Fed. 909, 50 C. C. A. 608; Interstate Drainage & Invest. Co. v. Board of Com'rs, 158 Fed. 270, 85 C. C. A. 532; Hemmer v. United States, 204 Fed. 898, 123 C. C. A. 194; Harper v. Victor, 212 Fed. 903, 129 C. C. A. 423.

The remaining portion of section 4031 is as follows:

"And a mortgage of personal property situated in portions of this state attached to an organized county thereof for judicial purposes, shall be void against creditors of the mortgagor, subsequent purchasers, or incumbrancers of the property in good faith for value, unless the original or an authenticated copy thereof, be deposited and filed in the office of the register of deeds of the county to which the territory in which such property is situated is attached for judicial purposes."

If a literal interpretation is placed upon this section, an unrecorded mortgage upon personal property situated in unorganized counties is void as to purchasers in good faith, but a mortgage upon property situated in organized counties is void as to purchasers in bad faith. Section 4035 provides that a chattel mortgage shall cease to be valid as against subsequent purchasers or incumbrancers in good faith after the expiration of three years from filing for record, unless a renewal certificate is filed. We cannot believe that the Legislature of Oklahoma intended to inaugurate a new policy or to declare that one who knew of an existing incumbrance might ignore it and acquire property free from any lien, if he but paid some consideration to the seller. Nor was it intended that one rule should apply in organized counties and the opposite rule in unorganized counties, nor one rule as to real estate mortgages and its opposite as to chattel mortgages. The purpose of the statute was to give constructive notice to those whose dealings were in good faith, and who had no actual knowledge of the facts. The words "purchasers and incumbrancers for value," in the first portion of section 4031, are used in the same sense as the words "purchasers or incumbrancers of the property in good faith for value" in

the remainder of the section. Van Rensselaer v. Clark, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280; Gibson v. Linthieum (Okl.) 150 Pac. 908; Merchants' Nat. Bank v. Frazier (Okl.) 159 Pac. 647.

[8, 9] The plaintiff offered in evidence a certified copy of the mortgage and of the record of its filing, on the theory that the jury might find as one reasonable act of diligence, that inquiry should have been made at the county clerk's office by the purchasers of these cattle after they knew that Nichols had given a mortgage upon these cattle, and had that inquiry been made they would have learned of the terms of this mortgage. The court excluded this evidence, consistently with its ruling that notice of the mortgage was of no avail, as it did not cover after-acquired property. We think this evidence was admissible, and that the demurrer of Miller and Briscoe to the evidence should have been overruled. As the action of replevin is a possessory one, and the cattle were in the possession of Miller and Briscoe, the demurrer of Nichols was properly sustained. Robb v. Dobrinski, 14 Okl. 563, 78 Pac. 101, 1 Ann. Cas. 981.

For these reasons, the judgment will be affirmed as to the defendant Nichols, but as to the other defendants it will be reversed and a new trial ordered.

LOHMAN v. STOCKYARDS LOAN CO.*

(Circuit Court of Appeals, Eighth Circuit. April 9, 1917.)

No. 4779.

1. APPEAL AND ERROR ⊜75S(1)—AFFIRMANCE FOR DEFECTS IN BRIEF.
   Disregard of rule 24 of the Eighth Circuit (188 Fed. xvi, 109 C. C. A. xvi), requiring the brief of plaintiff in error to set out the specifications of error relied upon separately, warrants an affirmance of the judgment.
2. APPEAL AND ERROR ⊜204(3, 4), 205, 217, 259, 260(1, 2)—REVIEW—NECESSITY OF OBJECTIONS AND EXCEPTIONS.
   The sustaining of an objection to a question, the admission in evidence of a mortgage and a certified copy thereof, and permitting the jury to take depositions with them in the jury room, cannot be reviewed, where no objections were made or else no exceptions were taken.
3. APPEAL AND ERROR ⊜977(5)—MATTERS REVIEWABLE—DENIAL OF NEW TRIAL.
   A complaint that the court overruled the motion for a new trial presents no proper question for review.
4. TRIAL ⊜418—DEMURRER TO EVIDENCE—WAIVER.
   A complaint, that the court overruled defendant's demurrer to plaintiff's evidence, presents no proper question for review, where defendant then introduced his evidence, and did not renew the motion in any form, nor request a verdict to be directed in his favor.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Replevin by the Stockyards Loan Company against A. W. Lohman. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles M. Cope, of Pawhuska, Okl., for plaintiff in error.

R. F. Blair, of Wagoner, Okl. (B. F. Deatherage, of Kansas City, Mo., on the brief), for defendant in error.

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* Rehearing denied August 9, 1917.

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

MUNGER, District Judge. In its facts this case is in many ways similar to the case of Stockyards Loan Co. v. Nichols, 243 Fed. 511, — C. C. A. —, and the cases were argued and submitted at the same time. The loan company began an action of replevin against Nichols and Lohman, to recover possession of some cattle. The case was subsequently dismissed as to Nichols, as the cattle were not in his possession when replevined. The plaintiff asserted a lien by reason of the same mortgage that it relied upon in the other case. The cattle in controversy here were purchased by Nichols a few weeks after the execution of the mortgage. He and Mr. Charboneau made a purchase of 108 head of cattle and each took half of them. Each then branded his cattle, Nichols placing the crossbar brand upon the left shoulder of those he selected. They kept them together in Charboneau's pasture in Cherokee county, Okl. A week or two afterwards, the defendant Lohman, accompanied by Mr. Miller, a friendly adviser, made an examination of the herd with a view of purchasing them. There was evidence tending to show that Miller, in the presence and hearing of Lohman, asked Charboneau why the cattle bore two different brands, and Charboneau answered that half of the cattle belonged to him and half to Nichols, and that Nichols had his half mortgaged to one firm and he had his half mortgaged to another, and therefore they had separate brands to distinguish them. The next day Lohman purchased the cattle and thereafter shipped them to his ranch in Osage county.

They were seized in this action in August, 1915. The court submitted the case to the jury, and the jury found for plaintiff under instructions of the court that, unless Lohman had notice of plaintiff's mortgage before he purchased the cattle, the verdict must be for the defendant.

[1] The brief of plaintiff in error disregards the provisions of rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi), which requires the brief to set out the specifications of errors relied upon separately, and this would warrant an affirmance of the judgment. Moline Trust & Savings Bank v. Wylie, 149 Fed. 734, 79 C. C. A. 440.

[2-4] In the specification of errors as filed in the lower court, objections are made, because an objection was sustained to a question asked of witness Charboneau, because the jury were permitted to take some depositions with them to the jury room and because of the admission in evidence of the original mortgage, and of a certified copy of that mortgage; but the record shows that no objections were made, or else that no exceptions were taken to the rulings made on these matters. No proper questions for review are presented by complaints that the court overruled defendant's motion for a new trial, and his demurrer to plaintiff's evidence, because the defendant then produced his evidence and did not renew the motion in any form nor request a verdict to be directed in his favor. Holder v. United States, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; Allen v. Knott, 171 Fed. 76, 96 C. C. A. 180; Collins v. United States, 219 Fed. 670, 135 C. C. A. 342.

Other assignments of error raise the question whether the mortgage imposed a lien on the cattle acquired by Nichols after the date of its execution. The question has been determined in the case of Stockyards Loan Company v. Nichols, supra, and what is said there need not be repeated here.

This disposes of all material questions presented and the judgment of the court below will be affirmed.

YUMET & CO. v. DELGADO et al.

In re E. DEL PILAR HERMANO & CO.

(Circuit Court of Appeals, First Circuit. May 26, 1917.)

No. 1272.

1. BANKRUPTCY ⟸200(3)—LIENS—RIGHT TO.

Under Bankr. Act (July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1916, § 9651), declaring that all levies, judgment, attachments, or other liens, obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy, shall be deemed null and void in case he is adjudicated a bankrupt, a lien obtained by attachment served more than four months before the filing of a petition in bankruptcy is not nullified, where it is valid at the time of the attachment, though the judgment was not rendered until within the four months, and until that time the lien was inchoate.

2. BANKRUPTCY ⟸200(3)—LIENS—VALIDITY.

Code Civ. Proc. Porto Rico, § 5233, declares that every person who shall bring an action for the fulfillment of any obligation may obtain an order from the court having cognizance of the suit, providing that the proper measures be taken to secure the effectiveness of the judgment. Section 5234b declares that the provisional remedy shall consist of the attachment of sufficient property of the debtor to cover the amount claimed, while section 5242 provides that an attachment on personal property shall be effected by depositing the personal property in question with the court or the person designated by it, under the responsibility of the plaintiff. Section 5258 declares that all property and right of property seized and held under attachment are liable to execution, but, until a levy, property is not affected by execution. Under the Porto Rico practice an attaching creditor takes priority over another creditor recovering judgment without attachment. *Held*, that the lien of an attaching creditor is created by the Porto Rican law on the levy of the attachment, and hence, where attachment was levied more than four months before the filing of the petition in bankruptcy, the lien of the attaching creditor was not vacated by Bankr. Act, § 67f, though the judgment perfecting it was rendered within the four-months period.

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

In the matter of the bankruptcy of E. Del Pilar Hermano & Co. Petition by Yumet & Co., opposed by Isidoro D. Delgado, trustee, and others. From an order reversing an order of the referee, petitioner appeals. Order reversed, and cause remanded.

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

Joseph B. Jacobs, of Boston, Mass. (Henry G. Molina, of San Juan, Porto Rico, and Jacobs & Jacobs, of Boston, Mass., on the brief), for appellant.

Harry F. Besosa, of San Juan, Porto Rico, for appellees.

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

DODGE, Circuit Judge. The appellants sued the bankrupt firm in a Porto Rican court, attaching personal property belonging to the firm in accordance with the local procedure. This was done more than four months before the involuntary petition was filed, under which said firm was adjudged bankrupt by the federal District Court.

The suit thus begun was to recover the price of goods sold. It resulted in a judgment in the appellants' favor, and a subsequent order of execution issued by the local court; both within the four months preceding the filing of said bankruptcy petition.

After the bankruptcy petition had been filed, the marshal of the local court proceeded, under the execution in his hands, to advertise the attached property for sale, in order to satisfy the judgment. It had remained in his custody since it was attached as above. The bankruptcy court enjoined the proposed sale, holding that the appellants acquired no lien by their original attachment, and that any lien acquired by virtue of the judgment or the steps taken subsequent thereto had been avoided or nullified according to section 67f of the Bankruptcy Act. It reversed an order by the referee declaring the appellants "in possession of a valid lien," from which order of reversal they appeal.

[1] If the appellants got no valid lien upon the attached property until the judgment in their favor was entered, there is no error in the order appealed from. But, if they obtained a valid lien when they attached the property, section 67f has no application, this order should be vacated, the sale allowed to proceed, and the referee's order sustaining the lien affirmed.

In view of Peck v. Jenness, 7 How. 612, 12 L. Ed. 841, decided under a former bankruptcy law, and of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, decided under the present Bankruptcy Act, attachment on mesne process, such as the laws of the states within this circuit permit, is to be regarded as creating a lien in the plaintiff's favor, valid from the time the attachment is made, and not nullified or avoided by subsequent bankruptcy proceedings under the present act, unless the same are begun within the four months following such attachment; and this notwithstanding the fact that the lien so obtained is inchoate only, and subject to be lost if the suit wherein it has been made does not result in a judgment in the plaintiff's favor. The lien is considered as obtained when the attachment is made, and a subsequent judgment for the plaintiff as doing no more than establish the fact that it was rightly obtained. Such a judgment, followed by execution and levy, only enforces the lien created by the attachment. In re Blair (D. C.) 108 Fed. 529, cited with approval in Metcalf v. Barker, 187 U. S. 165, 174, 23 Sup. Ct. 67, 47 L. Ed. 122; Collier, Bankruptcy (10th Ed.) 969; Remington, Bankruptcy (2d Ed.) §§ 1455, 1588.

[2] Whether or not such attachments create a lien upon the attached property, valid from the time they are made as above, depends wholly upon the local law. The laws of some, but not of all, the states without this circuit permit attachments on mesne process similar in character and effect. The laws of Porto Rico permit attachments on mesne process according to provisions hereinafter considered. Whether or not attachments such as are thereby permitted are also to be regarded as affecting the attached property with a lien valid from the time of the attachment is the question presented by this appeal.

The statutory provisions authorizing attachments on mesne process in Porto Rico are found in sections 5233–5250 of the Code of Civil Procedure. They were originally enacted March 1, 1902, as "An act to secure the effectiveness of judgments." Section 5233 is as follows:

"Every person who shall bring an action for the fulfillment of any obligation may obtain an order from the court having cognizance of the suit providing that the proper measures be taken to secure the effectiveness of the judgment as the case may require it, should it be rendered in his favor."

The "proper measures" are prescribed by the next section, 5234, and differ somewhat according to the nature of the obligation sued on. When, as in this case, the obligation is the payment of any sum of money, section 5234 (b) provides that:

"The provisional remedy shall consist of the attachment of sufficient property of the debtor to cover the amount claimed."

Section 5242 provides that an attachment on personal property—

"shall be effected by depositing the personal property in question with the court, or the person designated by it, under the responsibility of the plaintiff."

The same section provides further for deposit with the defendant, upon sufficient bond given by him, in the discretion of the court; for its sale at public auction, on demand by the owner, upon condition that the proceeds be deposited with the court, and for its sale, if perishable, on petition of either party, at public auction, the proceeds to be deposited as directed by the court. With these provisions, however, this case is not concerned. The property attached was deposited with the marshal of the court and kept in his custody. Had it been sold under any of the provisions permitting its sale, the proceeds would, of course, have taken its place for the purposes of the present case.

Except that a special order of court authorizing each attachment is required, this procedure does not appear to differ in any essential respect from that which may be availed of, under the laws of the states within this circuit, at his option, by any plaintiff desiring security upon the defendant's personal property, at the outset, for such judgment as he may obtain. Designated personal property of the defendant is taken into an officer's custody, who holds it until the attachment is dissolved, or it is applied to satisfy a judgment for the plaintiff. Meanwhile the defendant may dissolve it by giving bond; discontinuance of the suit or judgment for the defendant will dissolve it; or the court may, pending the suit, for cause shown, order it sold, and the proceeds held under attachment in its place. Judgment having been entered, execution issued in the suit accomplishes application of the attached property or

its proceeds in satisfaction of such judgment. Until then the defendant's property right therein continues, notwithstanding the plaintiff's inchoate or contingent lien. Actual transfer is prevented by the officer's custody; the defendant can transfer only his right thereto, subject to such custody and the plaintiff's lien.

The provisions of the Porto Rican Code regarding the disposition of attached property on execution are found in the next succeeding title of said Code, "Of the Execution of the Judgment in Civil Actions," and are as follows:

Section 5258: "All property and right of property, seized and held under attachment in the action, are liable to execution. * * * Until a levy, property is not affected by the execution."

It is also true, in Porto Rico as with us, that an attaching creditor has priority as to the property attached over a creditor recovering judgment against the same defendant without any attachment, and that, as between creditors attaching the same property, the earlier attachment has priority. See Oronoz & Co. v. Alvarez, 23 P. R. 497.

That what is in substance a lien upon the property attached is created when an attachment is made under the above provisions of the Porto Rican Code cannot in our opinion be denied. The right or interest then acquired by the plaintiff in property so attached is referred to as a "lien" in the decisions of the Supreme Court of Porto Rico. See Auffant v. Succession Ramos, 23 P. R. 410 (relating to attachments of real estate); Oronoz & Co. v. Alvarez, 23 P. R. 497, already cited. We find nothing to indicate that the attaching creditor's right or interest, arising at the time of the attachment, under the Porto Rican procedure, is intended to be any less effective for the purpose of securing his judgment, than an attachment on mesne process under the laws of the states above referred to. In Porto Rico, as under those laws, and as was done in this case, the property attached is segregated from the defendant's other property by the custody of a public official acting under the authority of the court, for the publicly declared purpose of keeping it so segregated until applied to satisfy the plaintiff's claim. Until so applied the defendant's property in it remains subject to the plaintiff's right to such application in priority to the rights of other creditors. After custody under such an attachment has continued for more than four months, we see no more reason for holding the plaintiff's prior right subject to be defeated by bankruptcy proceedings than would exist in the case of an attachment such as was made in Re Blair (D. C.) 108 Fed. 529, cited above.

We find nothing in Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, referred to in the opinion of the learned District Judge, inconsistent with the foregoing conclusion. The plaintiff in that case had made no attachment before obtaining judgment and got no right of any kind in the defendant's property until he levied execution. Judgment, execution, and levy had been vacated, so far as they affected the defendant's property or its proceeds at the execution sale, by bankruptcy within four months thereafter.

The conclusion we adopt is in accordance with that reached in this case by the District Court, in an opinion of earlier date than that be-

fore us in this record, which was the result of a reconsideration. See 8 P. R. Fed. 605.

The order of the District Court of December 29, 1916, reversing the referee's order of September 27, 1916, is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion, and the appellants recover their costs of appeal.

THE SKIPTON CASTLE.

(Circuit Court of Appeals, Ninth Circuit. May 7, 1917.)

No. 2774.

1. SHIPPING ⟸141(1)—LIABILITY FOR DAMAGE TO CARGO—HARTER ACT—CONSTRUCTION.

The "negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of cargo, from liability for which, under Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 (Comp. St. 1916, § 8029), a vessel cannot exempt herself by any clause or agreement in the bills of lading, applies to the care necessary to protect the cargo from injury during the voyage, where it does not primarily have to do with the navigation or management of the vessel.

2. SHIPPING ⟸141(1)—LIABILITY FOR DAMAGE TO CARGO—HARTER ACT.

On a voyage from Antwerp to California ports, requiring some two months, a portion of the cargo stowed in between-decks compartment, consisting of bottled mineral water and willow baskets, was badly damaged by the heating of a shipment of bone meal stowed in the hold directly below; the hatchway between the two holds having been left partly uncovered to permit the circulation of air. The excessive temperature of the lower hold, showing that the bone meal was heating, became evident on the fourth day out, and greatly increased afterward; but nothing was done to protect the cargo above, although it could readily have been removed sufficiently to permit the closing of the hatchway, and the holds had separate ventilators. *Held* that, under section 1 of the Harter Act, the ship was liable for the damages, notwithstanding a provision of the bills of lading exempting it from liability for loss or damage caused by sweating, leakage, breakage, or decay.

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

Suit in admiralty by the American Import Company, a corporation, Tillman & Bendel, a corporation, James L. De Fremery and Henri M. Suermondt, partners as Jas. De Fremery & Co., and the Appolinaris Company, Limited, against the British steamer Skipton Castle; the Lancashire Shipping Company, Limited, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 223 Fed. 839.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

William Denman and Denman & Arnold, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Action for damages to cargo. The British steamer Skipton Castle, bound to San Pedro and San Francisco, loaded at Antwerp in December, 1910, with a quantity of bottled mineral water, willow baskets, and general cargo. When the ship arrived at the ports of discharge in February, 1911, a great many of the bottles were found in broken condition and the baskets had rotted. Shipment was under bills of lading stipulating that the ship should not be liable for loss or damage occasioned, among other things, by "sweating, leakage, breakage, wastage, decay, or the indirect causes thereof, * * * the negligence, default, or error in judgment of the master, mariners, * * * or other persons employed on or about the ship." The libel charged that the damages were inflicted while the cargo was in the possession of the ship, by water and breakage and leakage of the bottles because of bad stowage and unseaworthiness. The answer admitted that there had been some damage, but alleged that whatever damage was done was within the exceptions of the before-mentioned bills of lading, exempting a ship from liability for loss or damage by breakage, wastage, decay, sweating, and other like causes. The District Court held the claimant liable, because of the failure of those in charge of the ship to remove the cargo stowed on the 'tween-decks hatches, close the hatches, and care for any merchandise then found to be suffering injury because of heat or moisture, by drying and airing it. Claimant appeals.

A quantity of bone meal stored in compartment No. 1, lower hold, was loaded in the winter, December 8th, at Antwerp, when the temperature was about 40 degrees Fahrenheit. As far as external examination showed, the bone meal was in good condition when it was taken aboard the ship. The mineral water was stored in the forward part of the 'tween-decks No. 1 hold, and the willow ware and the general cargo in the hatchway and wings of the same compartment. The weight of testimony is to the effect that compartment No. 1 between-decks was believed to be the coolest, and therefore the best in which to store the mineral water. Compartment No. 1 between-decks and the lower hold were equipped with standard ventilators. The ventilator pipes from the No. 1 hold passed through from the forward " 'tween-decks compartment" and out upon the open deck, where they terminated in the four ventilator hoods. The ventilator pipe out of the top of the between-decks fitted around the outside of the pipes from the hold, and through it a separate current of air passed in and out. One of the witnesses described the ventilating system as "telescoped," with the object of having ventilation go up, instead of mixing through the between-decks space.

Four days after the ship sailed, on December 12th, the temperature of the No. 1 hold was 18 degrees warmer than the next compartment, and 49 degrees warmer than the outside air. No. 2 hold showed 83 degrees. Conditions of high temperature in the hold below continued, due undoubtedly to heating of the bone meal. Again on December 22d the temperature in the forward hold at the foot of the ventilator showed 101 degrees, and on December 30th, when the ship was at Las Palmas, the temperature showed 110 degrees, while the hold No. 2 showed 85 degrees. The evidence is that a temperature of 90

degrees would be cause for worry, while 110 degrees would cause great anxiety. When these conditions of temperature were indicated, some hatch boards were taken off the forward end of the deck hatch above and two of the boards aft. This, however, was not effective, for after the removal of the two planks the temperature in the lower hold was 100 degrees, and remained at 100 or above for the ensuing 10 days. No attempt was made to shift the cargo, so as to let air down into the hold. The ventilators and hatches were kept as they usually had been. The weather was good on December 22d and for the four days thereafter. No sufficient reason is given for failure during that time to take the upper hatch off and to take the cargo on the lower hatch up to the deck, in order that the lower hatch flooring could be laid in its place, or canvas laid over the opening, in order that the heat in the lower hold could be forced out through the ventilators which ran from that hold. The hot air could have been let out by opening the entire face of the upper hatch when the heating was first discovered, or by taking out the cargo and letting it pass out through the ventilators, making tight the lower hatch floor. It is possible that some damage was caused by heating prior to the time when it was plain that the fertilizer was heated; but, if proper attention had been given when the heat indicated rotting, it is fair to believe the damage would have been of no consequence. It is clear, therefore, that testimony concerning the condition of the hatches became most material, and after careful reading of the whole evidence the most reasonable conclusion is that the proximate cause of the damage was the failure to let out all the hot air possible from the lower hold.

[1] We need not consider the question whether the vessel was sent to sea in a seaworthy condition, for we can assume that she was. But upon that assumption there remains the question whether there was negligence on the part of the ship in the care of the cargo during the voyage. In Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90, the Supreme Court ruled that it was not a sufficient compliance with the provisions of section 1 of the Harter Act merely to give proper care, custody, and caution to the loading and stowage of cargo before sailing, but that duty continues throughout the voyage. This rule was laid down in a case where wool was properly stowed in a seaworthy compartment when the vessel started on her voyage, but the wool was damaged on the voyage because of drainage from wet sugar stowed near the wool. The drainage was caused by alteration of the trim of the ship. The court held that the violation of one of the obligations toward the cargo enumerated in section 1 of the Act of Congress (27 Stat. 445), namely, that there must be good stowage of cargo subsequently located, although occurring after the voyage of the injured cargo had started, made the ship liable. The court said:

"Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading falls within the first section. The ship and [her] owner must therefore answer for this damage, and the third section is inapplicable."

In the later case of The Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, the court approved of the rule of Knott v. Botany

Worsted Mills, supra, and held that, where the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but, where the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the ship does not make it the less a fault of the class which the first section of the Harter Act removes from the operation of the third section of the act. The court recognized that a case might occur, which in its different aspects would fall within both sections, and said that the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss. Both of these decisions of the Supreme Court were cited by this court in Corsar v. Spreckles Bros. & Co., 141 Fed. 260, 72 C. C. A. 378, where the court considered the question involved under the facts as primarily and essentially one of navigation, and therefore the determination of the master would not make the ship or her owner liable for any incidental damage sustained by the cargo, because of the third section of the Harter Act. In Nam v. The Appalachee, 202 Fed. 826, 121 C. C. A. 130, this court regarded the question there involved as whether the damage done to the merchandise was properly referable to a lack of care on the part of the officers of the ship, or to fault or error on the part of the officers in the management of the ship, and quoted from the Germanic Case, supra. The distinction in the rule applicable was observed by the Court of Appeals of the Second Circuit in The Persiana, 185 Fed. 396, 107 C. C. A. 416, where oil was allowed to accumulate in the bilges, not for the ship's purposes, but because the master intentionally allowed it to accumulate to save it for profit. United States v. New York & O. S. S. Co., Ltd., 216 Fed. 61, 132 C. C. A. 305, also decided by the Court of Appeals of the Second Circuit, seems to have turned upon the particular facts, although some of the comments of the court seem at variance with the rule of the earlier decision in the Persiana Case, supra, not referred to by the court.

[2] In the case at bar the navigation of the ship was not affected by the failure to raise the cargo stowed on the hatch, and to put it on the deck and dry it there, closing the hatch and then replacing the cargo; and while doubtless the removal of the upper hatch boards to get the cargo out, and the putting of canvas or additional hatch boards under the cargo in the lower hatch pertained to the management of the ship in an incidental sense, yet the primary purpose would be care of cargo threatened with injury from heat below.

We are of opinion, therefore, that the appellees proved their case by the greater weight of evidence, and that the decree should be affirmed. So ordered.

JOHN A. ROEBLING'S SONS CO. OF CALIFORNIA et al. v. IDAHO RY., LIGHT & POWER CO. et al. *

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2813.

1. APPEAL AND ERROR ⟸907(1)—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.
On appeal from a decree denying claims for material sold a railway, light, and power company, shortly before the appointment of a receiver, priority over mortgage bondholders, where a part of one of the claims was for materials furnished for "service extensions," and there is no record evidence making it clear what the precise items were for, the District Court's finding that the materials were not an operating expense will be adopted.

2. RECEIVERS ⟸158(2)—PRIORITY OF CLAIMS—CLAIMS FOR MATERIALS.
That parties selling materials to a railway, light, and power company, shortly before the appointment of a receiver, expected payment of their bills out of the company's current income, did not entitle them to preference over mortgage creditors, unless all parties agreed that their claims should be first paid out of current earnings.

3. STIPULATIONS ⟸14(10)—CONSTRUCTION AND OPERATION—AGREED STATEMENT OF FACTS.
Where the enlargement and improvements of a power plant of a railway, light, and power company was to put the company in a condition to better serve its customers, and to supply the increasing demand for electric current, and machinery was furnished the company by a claimant for the purpose of generating increased power to be transmitted over new transmission lines, a stipulation, in an agreed statement of facts, that the machinery was necessary to the continued operation of the company's system, and that without it it could not perform its duties to the public, was not an agreement that the machinery, prior to its installation, was necessary to the continued operation of the system, or that the company could not, prior to such installation, perform its duties to the public.

4. RECEIVERS ⟸158(3)—PRIORITIES—UNSECURED CLAIMS FOR MATERIALS.
Such machinery being for work of new construction, it was furnished in the enlargement, and not for the repair or maintenance, of the company's plant, as respected the claimant's right of priority over mortgage creditors.

5. RECEIVERS ⟸158(2)—PRIORITY OF CLAIMS—CLAIMS FOR MATERIALS.
The diversion of a railway, light, and power company's income to the payment of interest on bonds of a subsidiary company did not entitle parties furnishing material to the principal company, shortly before its receivership, to priority over its mortgage bondholders, where the mortgage securing their bonds did not cover the property of the subsidiary company, and the payment of such interest did not inure to their benefit.

6. RECEIVERS ⟸158(2)—PRIORITY OF CLAIMS—CLAIMS FOR MATERIALS.
The payment of interest by a corporation on its bonds, at a time when nothing was due on a claim for materials furnished it shortly before its receivership, was not a diversion of its earnings entitling such claim to priority over the mortgage bondholders.

7. RECEIVERS ⟸158(3)—PRIORITY OF CLAIMS—CLAIMS FOR MATERIALS.
Materials furnished a corporation within six months before its receivership, for new construction and extraordinary improvements in its plant, were not payable as current operating expenses in preference to the claims of mortgage bondholders.

Gilbert, Circuit Judge, dissenting.

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

* Rehearing denied October 8, 1917.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Westinghouse Electric & Manufacturing Company against the Idaho Railway, Light & Power Company and others, in which John A. Roebling's Sons Company of California and another intervened. From a decree denying their claims for preference, the interveners appeal. Affirmed. See, also, 228 Fed. 972.

Appeal from a decree of the District Court of Idaho denying certain claims for preference asserted by appellants, Roebling's Sons Company and I. P. Morris Company, for materials and supplies furnished to the appellee, Idaho Railway, Light & Power Company, before the appointment of a receiver for the corporation. The Westinghouse Electric Manufacturing Company, a general creditor of the Idaho Railway, Light & Power Company, to be called the Railway Company, brought suit on December 23, 1913, against the Railway Company, alleging that it owed large sums which it was unable to pay, and praying for the appointment of a receiver.

The Railway Company was in the general business of generating and distributing electricity and operating electric railway lines in many places in Idaho, the power and the traction properties operated by the Railway Company being under one control and management. After the Railway Company admitted the indebtedness sued upon and that a receiver was necessary, the court appointed as receiver O. G. F. Markhus, who had been general manager of the Railway Company. After the receiver was appointed, the Guarantee Trust Company of New York, as trustee, sued the Railway Company to foreclose a trust deed given by the Railway Company to secure payment of a bond issue of $30,000,000 of which approximately $9,000,000 were outstanding. The mortgage covered all the property of the Railway Company, including property that might thereafter be acquired by it, and all income and profits of all properties which were subject to the mortgage. In March, 1914, Roebling's Sons Company and I. P. Morris Company, respectively, intervened, and by cross-bill asserted priority of claims over the mortgage creditors. In due time foreclosure was decreed, and the property was sold under foreclosure to the Electric Investment Company for a sum sufficient to pay only $534.15 on each $1,000 bond outstanding under the mortgage. Thereafter the District Court denied the claims of preference of Roebling's Sons Company and Morris Company, and they have appealed.

From an agreed statement of facts it appears that between the 18th of March and the 30th of May, 1913, Roebling's Sons Company sold and delivered to the Railway Company, then a going concern, certain supplies and material for which the Railway Company agreed to pay; that it was to be a cash transaction, payment to be made by the Railway Company on bills as rendered within 30 days from the delivery of the various items; that before the receiver was appointed there was a payment of $17,519.80 on account, and that the balance due was $21,057.37 with interest; that the material and supplies were sold on open account under a belief on the part of the seller that the moneys to be due therefor should be paid out of current operating income; that, during the time when the supplies were furnished, the Railway Company was setting up reserves from its earnings and from the proceeds of sale of its bonds to pay bond interest; that the interest accruing on the bonds of the Railway Company on June 1, 1913, was $165,750; that the bond interest reserves in the six months preceding June 1, 1913, amounted to $135,750; that the Railway Company borrowed on the note of the company the balance required to meet the interest; that, in addition to the foregoing interest reserves, the Railway Company on April 1, 1913, paid from its earnings the interest on its underlying bonds of the Boise & Interurban Railway Company, amounting to $26,825, and on June 1st the interest on the bonds of the Boise Railroad Company, amounting to $9,725; that of the foregoing interest reserves about $79,000 was obtained from the earnings of the company during the period mentioned, and $56,750 from the proceeds of the sale of bonds; that when the supplies and material were furnished the Railway Company was constructing a transmission line about 30 miles long, from its central station in Swan Falls, Idaho, to a pumping plant of the Gem Irrigation District, with a four-mile branch

extension from a point on its line to the Guffey pumping station; that, before constructing this line, the Railway Company had generated power at its Swan Falls plant and had a transmission line running to certain mining districts in Owyhee county, Idaho, and another transmission line to places in Ada county, Idaho; that during the fall of 1912 and the winter of 1913 the Railway Company was enlarging the capacity of its Swan Falls plant by replacing generating units, and that one of its lines then under construction was to several irrigation districts with which contracts had been made; that when the Gem line was under construction the Railway Company owned a controlling interest in the stock and bonds of the Idaho-Oregon Light & Power Company, which stock and bonds were included in the trust security to the Guarantee Trust Company; that the Oregon Light & Power Company defaulted in paying interest on its bonds, April 1, 1913, and that the Railway Company had offered to the bondholders of the Idaho-Oregon Company a plan of reorganization under which the Idaho-Oregon Company should be maintained as a going concern; that the Idaho-Oregon Company had made various contracts for irrigation, involving the construction of extensions; that the material for such extensions was bought by the Railway Company and furnished to the Idaho-Oregon Company under an equipment trust agreement by which the Railway Company retained title to the supplies and material until the same should be paid for; that the material and supplies furnished by the Roebling's Sons Company was principally copper wire for extensions for the installation of new or replacement units, and that the wire and material delivered had been put to use by the Railway Company in its system, and contributed to the earnings and value of the properties and the security of the bonds, and that the material is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied and in which it is used.

The claim of the I. P. Morris Company was for furnishing and installing certain power machinery for the electric plants of the company; the supplies having been received by the Railway Company prior to the first of June, 1913, but the installation was not completed or the work accepted until December, 1913, within six months of the appointment of the receiver. The Railway Company paid to the Morris Company $21,200.66, and gave two promissory notes for the balance due, one due in three months, the other in six months, from date. It appears from a stipulation of facts that between November 1, 1912, and December 23, 1913, the Railway Company paid from its earnings in interest on the bonds of the Boise & Interurban Railway Company, one of its constituent traction companies, on April 1, 1913, $26,825, and on October 1, 1913, $26,825; that it paid interest on the bonds of the Boise Railroad Company, Limited, another of its constituent companies, on December 1, 1912, $9,725, on June 1, 1913, $9,725, and on December 1, 1913, $9,725; that for the benefit of the sinking fund of the bonds issued by the Boise Railroad Company it paid on December 1, 1912, $5,000, and on December 1, 1913, $5,000; that on December 1, 1912, it paid, as interest on the bonds of the railway company, $146,075, and on June 1, 1913, $165,750, and in addition thereto has paid out large sums for permanent improvements and equipment, adding to the value of the property securing the bonds of the Railway Company issued under the trust deed to the Guarantee Trust Company; that the material and machinery furnished were necessary to the continued operation of the Railway Company's system, and that, without it, it could not perform its duties to the public, and that the Morris Company sold the material to the Railway Company in the belief and intention that, unless otherwise provided for, payment would be out of the operating or current income of the Railway Company.

Beverly L. Hodghead, of San Francisco, Cal., for appellants.

John F. MacLane, of Salt Lake City, Utah (Henry Root Stern, of New York City, of counsel), for appellees, Idaho Ry., Light & Power Co., O. G. F. Markhus, receiver, etc., Guarantee Trust Co., and Electric Inv. Co.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1, 2] The appellant's principal contention is that there was a wrongful diversion of income, and that, in view of the extensive system of properties owned and operated by the Railway Company, the work done constituted merely ordinary service extensions and improvement and repairs, and was properly chargeable to maintenance and operation. As set forth in the statement of the case, the Roebling's Sons Company claim is in much the larger part for new wire for the transmission of electric power over newly constructed transmission lines, running from a central station to an irrigation transmission line and to a certain pumping station. When completed, these lines constituted substantial additions to the lines owned and operated by the Railway Company, or owned by the Idaho-Oregon Company, a separate corporation, the stock and bonds of which were principally owned by the Railway Company. The minor part of the claim, an item of $1,121.15, was for materials used "in connection with general service extensions of the Railway Company and its distributing systems" about and in the village of Eagle, Idaho. We are not advised just what "service extensions" included, and, in the absence of record evidence to make clear what the precise items were for, we will adopt the finding of the District Court, that under the facts shown it cannot be held to have been an operating expense. The stipulation of fact that the material furnished by the Roebling's Sons Company "is and was necessary to the continued maintenance and operation of the respective parts of said property for which the same was supplied and in which it is used" is to be construed with other portions of the stipulation, which show that the material went to making additions or enlargements of the system which had existed and for the maintenance and operation of such newly constructed lines adding to the system. This, however, takes us no further than to the point that, inasmuch as the supply was for new construction and use in connection therewith, it is not to be regarded as necessary for such repair or replacement as was required to keep the power plant and system a going concern as it had theretofore been conducted and kept up. The case is not altered by the stipulation that the Roebling's Sons Company sold the materials in the belief and intention on its part that the bills therefor should be paid out of current operating income. It is probably true in many instances that merchants who sell their products to public service corporations expect payment of their bills out of current income; but if there is an outstanding mortgage contract between the corporation and a mortgage creditor, such as there was here, preference will not be awarded over the mortgage creditors, unless it is proven that all parties agreed that the claim of the merchant shall be first paid out of current earnings of the buying company.

[3, 4] The claim of the Morris Company is for material furnished under a contract dated October 31, 1912, wherein the Morris Company was to design, construct, deliver, and install certain machinery necessary to enlarge and reconstruct what is called the Swan Falls plant of the Railway Company. The power part of the machinery was to be delivered in installments prior to April 1, 1913, and certain other materials were to be delivered within a year from the date of

the contract. The enlargement and improvement made at the Swan Falls plant was to put the Railway Company "in a condition to better serve its customers and to supply the increasing demand for electric current." The machinery to be furnished was for the purpose of generating the increased power to be transmitted over the new transmission lines heretofore referred to in connection with the claim of the Roebling Company. It also appears that the machinery included in the claim of the Morris Company would generate approximately 60 per cent. of the entire power of the Swan Falls plant, which is the only power plant owned and operated directly by the Railway Company. The stipulation of facts that the machinery is necessary to the continued operation of the Railway Company's system, and that, without it, it could not perform its duties to the public, is not an agreement that the machinery prior to its installation was necessary to the continued operation of the system, or that the Railway Company could not, prior to such installation, perform its duties to the public. The machinery being for work of new construction, we think that the conclusion of the District Court that the machinery furnished was for the enlargement, and not for the repair or the maintenance, of the Railway Company's plant, is the only correct one that could be reached with respect to this claim. It is to be specially noted, too, that the contract pertaining to this machinery was made 14 months before the appointment of the receiver; that the work was not finally completed until September, 1913, and was not finally accepted until December 9, 1913, upon which latter date $21,200.66 was paid, and two promissory notes, each for the sum of $13,246.58, were given. The comment of the District Court upon this phase of the claim was that it was "quite incredible" that the Morris Company, having knowledge of the plans of the Railway Company, could have expected that the entire expenses to arise under the contract would be taken care of from current receipts.

[5] In arguing for the claims above mentioned, appellants say that there was diversion of income by reason of the fact that the railway company paid on June 1, 1913, interest on the bonds held by the Guarantee Trust Company amounting to $165,750, interest on the bonds of the Boise & Interurban Railway Company amounting to $26,825, and interest on the bonds of the Boise Railroad Company amounting to $9,725, or a total of interest paid, $202,300. But of this amount, $56,750 came from the proceeds of the sale of the bonds of the Railway Company, and $30,000 was borrowed on the note of the company. If we deduct the amount of these two items from the total sum of $202,300 paid out, we have a balance of $115,550. In this amount was $9,725 interest on the bonds of the Boise Railroad Company, but this amount did not inure to the benefit of the bondholders of the railway company, and in the decree made by the District Court it was specially provided that the Guarantee Trust Company, or bondholders represented by it, should not be held on account of the construction payments made on account of the Boise Railroad Company, as the properties of that company had been decreed not subject to the mortgage of the Guarantee Trust Company, and were ordered segregated from the receivership estate.

[6] With respect to the Morris claim, it is to be noted that the alleged diversion of June 1, 1913, was nearly seven months before the receiver was appointed. Or if, as counsel for Morris Company have urged in their brief, the material and labor involved in the claim were furnished within six months before the appointment of the receiver (December 23, 1913), then the claim did not accrue until after June 1, 1913, when the interest on the bonds was paid, and preference cannot be claimed, for clearly it is not a diversion of earnings for a corporation to pay interest due on its bonds when nothing is due at the time of the payment.

The legal principles and the more important authorities which bear upon the several views of the questions presented having recently been carefully considered and announced in Crane Co. v. Fidelity Trust Co. et al., 238 Fed. 693, — C. C. A. —, any extended discussion of the law would be but a repetition of what was there said.

[7] In accordance, therefore, with the rule of that case, we conclude that Roebling's Sons Company furnished material which went for new construction and extraordinary improvements in the plant of the Railway Company or the plant of the Idaho-Oregon Company, and the claim is not properly payable as a current operating expense in ordinary course of business, and that there was no diversion of any income earned after the accrual of the Roebling's Sons Company claim; that the Morris Company claim, being for generating machinery by way of new construction and extraordinary improvement to the mortgaged property, is not to be recognized as a current operating expense incurred in the ordinary business of the railway company, and that, the claim having accrued within six months prior to the appointment of the receiver, there was no diversion of income by payment of interest on June 1, 1913. It may be added, however, that, if we should assume that the materials involved in the Morris claim were furnished more than six months before the receiver was named, no special circumstances appear for departing from that period as the usual and reasonable limit.

The decree is affirmed.

GILBERT, Circuit Judge (dissenting). I dissent from the opinion of the majority of the court in this case, on the grounds stated in the dissenting opinion in Crane Co. v. Fidelity Trust Co., 238 Fed. 693, — C. C. A. —.

PATAGONIA S. S. CO., Ltd., v. GANS S. S. LINE.

(Circuit Court of Appeals, Second Circuit. June 6, 1917.)

No. 240.

1. SHIPPING ⊂=49(2)—CHARTER—RIGHT OF CHARTERER TO USE DECK SPACE.
A vessel was chartered to carry a full cargo of heavy grain at a stated rate of freight per quarter. The charterer was given the use of all holds and covered deck space where cargo is ordinarily carried, but no provision was made for a deck load. The charterer was also given the right to load

a full cargo of other merchandise by paying a total freight equal to what it would amount to on a full cargo of heavy grain. The charterer loaded a cargo of general merchandise for other shippers and paid the agreed rate of freight on the dead weight capacity of the ship, but it also loaded an open deck cargo of lumber. *Held*, that the owner was entitled to recover the reasonable value of the use of the deck space, which had not been contracted for, in addition to the charter hire, not measured however by the bill of lading freight received by the charterer, which was not a trustee for the owner in respect to such freight nor a wrongdoer, the lumber having been taken by the master without objection, nor by the market rate of freight, since the owner was without right to use such space or hire it to others than the charterer.

2. SHIPPING ⇐58(2)—CHARTER—OMISSION OF PROVISIONS THROUGH MISTAKE.
A court of admiralty may permit a charterer to show, in defense to a suit by the owner for extra freight on deck cargo, that by the agreement it was to have the use of such space, but that the provision was inadvertently omitted from the charter party.

3. SHIPPING ⇐39—CHARTER—CONCLUSIVENESS OF CHARTER PARTY.
A charter party as executed, in the absence of fraud or mutual mistake, determines the rights of the parties, and neither the master nor other agent of the owner has authority to alter or waive its provisions.

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

Suit in admiralty by the Patagonia Steamship Company, Limited, against the Gans Steamship Line. Decree for libelant, and respondent appeals. Modified and affirmed.

Haight, Sandford & Smith, of New York City (John W. Griffin, of New York City, of counsel), for appellant.

Convers & Kirlin and Kirlin, Woolsey & Hickox, all of New York City (Charles R. Hickox and Cletus Keating, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1] March 6, 1912, the libelant, the Patagonia Steamship Company, Limited, chartered its steamer Patagonia to the Gans Line to carry a full cargo of heavy grain from New Orleans to Rotterdam at 3s. 3d. a quarter. The charter contained a clause familiarly known as the dreading clause, the material part of which was as follows:

"4. The charterers have the further privilege of shipping, full cargo of other lawful merchandise, in lieu of a like quantity of grain, in which case the charterers are to appoint the stevedores to load and to discharge the cargo, under master's supervision, paying all loading and discharging expenses, but charterers to be in no way liable for improper stowage, the owners paying them the expenses, including bag hire, figured at current rate of the port, which the vessel would have incurred loading and discharging a full cargo of heavy grain, and total freight to be equal to what it would amount to on a full cargo of heavy grain."

The charterer availed itself of this privilege, and, instead of a cargo of heavy grain, shipped a cargo of general merchandise belonging to various shippers. The space appropriated to cargo was defined in article 11:

"11. The charterers to have full reach of the holds, including peaks, and all covered deck spaces where cargo is ordinarily carried, the same as if vessel loaded for owners' account."

The charterer, however, loaded 836 tons of lumber on the open deck, for which the consignees paid bill of lading freight in the sum of £695. 12s. 9d.

The freight on the dead weight capacity of the vessel was £5,915, and this sum the charterer paid to the owner, but refused to pay any additional freight on the deck load, and the owner filed this libel to recover a reasonable freight therefor, plus the reasonable cost of lashing the lumber.

Nothing whatever having been said in the prior negotiations between the agents of the parties about a deck load, the owner's agents prepared and submitted to the charterer's agent a charter party which contained a clause permitting a deck load:

"20. If safe and legal deck load may be given, at merchant's risk."

[2] The agents of the charterer not being satisfied with one of the clauses, according to them the consignment clause, and according to the owner's agents, the dreading clause, submitted a different form of charter party containing no privilege to load on deck, which was duly executed. About a week later the charterer's agents observed that there was no such clause and pointed this out to the owner's agents, who, they say, replied that there would be no trouble because it was understood and agreed that the steamer should carry deck cargo. If this were the agreement, a court of admiralty, even if it could not reform the charter in a direct proceeding on the ground of mutual mistake (Williams v. Insurance Co. [D. C.] 56 Fed. 159), would doubtless admit such an equitable defense (The Hero [D. C.] 6 Fed. 526; U. S. v. Cornell Steamboat Co., 202 U. S. 184, 194, 26 Sup. Ct. 648, 50 L. Ed. 987). But Judge Learned Hand has found that there was no such understanding, in which we concur with him, and therefore the owner's agents could not alter the charter in this respect after it was executed.

[3] The charterer further contends that the owners are estopped from making this claim because the master, before the steamer sailed from New Orleans, indorsed on the charter party, "All conditions of the within charter have been complied with at New Orleans," and drew a draft in favor of the charterers for the difference between the bill of lading freight and the freight payable on the dead weight capacity of the steamer. As in the case of the agents, the master had no authority to alter the contract made by the charter party. The charter party as executed, in the absence of fraud, which is not suggested, or of mutual mistake, which has been found not to exist, determines the rights of the parties.

The charter party contained a cesser clause as follows:

"Charterers' liability to cease on cargo being shipped and difference of freight and for demurrage, if any, paid, vessel having a lien on the cargo for freight."

The owner was obliged to collect all the bill of lading freight in order to cover the charter money due it and pay the master's draft drawn at New Orleans in favor of the charterer. Freight on the deck load as between it and the charterer was neither ascertained nor provided for in the charter party, and the owner was not given a lien upon it to secure whatever claim it might have. Therefore the cesser clause does not apply.

Finally, the charterer says that the court should not permit the owner's claim because it is inequitable. It contends that the owner has received full freight for the dead weight capacity of the vessel and the deck load imposed no additional burden upon it. But a charterer has no right to load on deck unless the charter gives him the privilege (Carver on Carriage by Sea, § 262), and no such privilege was given in this case. It could not acquire the right to load on deck because it had paid freight for the full dead weight capacity of the vessel, all of which it did not use, even with the deck load included. No court can alter anything in or add anything to a contract because it thinks to do so would be reasonable. The assumption of such an authority would dangerously invade the rights of contracting parties.

The charterer, having used a part of the vessel to which it had no right, must pay the owner for it. This leads us to inquire how the compensation is to be measured. The charterer in this case cannot be regarded as a wrongdoer because the master did not refuse to receive the lumber on deck; he taking the position that, while the charter did not allow a deck load, the owner could sue the charterer for compensation. For the same reason the charterer cannot be regarded as a trustee for the owner in respect to the freight collected from the consignees. The libel recognized these propositions by asking to recover a reasonable freight, and by so doing waived any objections it might have had to the loading of cargo on deck.

We do not think The Port Adelaide (D. C.) 59 Fed. 172, in point. There the charterer was entitled to the whole vessel. Nevertheless the owner without the knowledge or consent of himself or his agents took on cargo in an adventure on his own account and deviated from the voyage. This plainly made him accountable as trustee, at the option of the charterer, for all the freight earned.

In the present case, the charterer contends that it should pay only the reasonable value of the use of the deck. That value cannot be the market rate of freight which the owner could recover by putting the space in the market, because it was not entitled either to use the space itself or hire it to others. The charterer was the only person in the world the owner could deal with. It had already paid for the voyage in the lump freight on the vessel's dead weight capacity. What the owner should receive for this deck space which could have been used by no one else is certainly not the market rate of freight, nor what this favored person could collect from others. The evidence is not specific upon this point, but the highest estimate in the record is £200, and this with interest plus $70, the expense of lashing the lumber, is what the charterer should pay. So modified, the decree is affirmed, with interest and costs of this court to the appellant.

CHELENTIS v. LUCKENBACH S. S. CO., Inc.

(Circuit Court of Appeals, Second Circuit. May 25, 1917.)

No. 223.

SEAMEN ⊂=11—INJURY IN SERVICE—MEASURE OF RECOVERY.

The rights of a seaman, injured in the service of the ship, are the same, by virtue of the inherent nature of his contract, whether he sues in a court of admiralty or of common law, and his recovery is limited to his wages to the end of the voyage and the expense of his maintenance and cure, regardless of the question of negligence or contributory negligence; and this rule is not changed by Seamen's Act March 4, 1915, c. 153, § 20, 38 Stat. 1185 (Comp. St. 1916, § 8337a), providing that "in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

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

Action at law by Peter Chelentis against the Luckenbach Steamship Company, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

Silas B. Axtell, of New York City (F. R. Graves, of New York City, of counsel), for plaintiff in error.

Carter & Carter, of New York City (Peter Carter, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This was an action at common law by a seaman employed on the steamer J. L. Luckenbach against her owners to recover damages for personal injuries sustained by him on his second voyage. The only charge of negligence in the complaint as to which there was any proof was as follows:

"* * * Because said defendants and said persons in their service having command negligently and unlawfully compelled plaintiff to carry an ash bag across an open and exposed deck on board said vessel during a severe storm and while the waves were calculated to and did break over the same, plaintiff, although himself in the exercise of due care, was suddenly and without warning struck by a wave with great violence and precipitated from his feet, thereby sustaining severe, painful, and permanent personal injuries, as hereinafter more particularly set forth."

The plaintiff sued for full indemnity, and on the trial declined to make claim for wages to the end of the voyage and expenses of cure and maintenance for a reasonable time thereafter, insisting that by virtue of section 20 of the Seamen's Act of March 4, 1915, he was entitled to full indemnity and to go to the jury on the question of the defendant's negligence and of his own contributory negligence. This section reads:

"Sec. 20. That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

Judge Manton directed a verdict for the defendant, relying on the decision of the Supreme Court in The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

December 26, 1915, the plaintiff, Chelentis, a fireman, was in the watch of Snell, the second engineer, 12 to 4 a. m. At 4 a. m. he came on deck, in accordance with the regular practice, to rest for half an hour and then with his mate to take the ashes raked from the fires by the 4 to 8 watch and put into bags lifted by machinery from the stokehole to the grating in the fireroom level with the deck. One man would take a bag off the hoist and deliver it to his mate, to be carried by him through the port door of the fireroom out on deck and dumped over the port side.

The only ash hoist was on the port side and there was a coal bunker running across the grating in the fireroom from side to side. The cross bunker did not prevent any one from going through the port door of the fireroom to the port side, but if the bags were to be dumped on the starboard side a third man would be needed, viz., one to take the bag from the hoist and deliver it to another, to carry it to and pass it over the cross bunker to a third, to carry it from there to the door on the starboard side and dump it over.

At 4:30 a. m. the plaintiff and his mate went to the engineroom and asked Keyser, the first assistant engineer in charge of the watch, to give them a third man, so that they could dump the ashes over the starboard side, the sea being so high on the port side as to make it dangerous to dump them there. This they testified he refused, with oaths, and drove them out of the engineroom, ordering them to do the work as usual. As the plaintiff was returning to the ash hoist after emptying his first bag over the port side, a wave struck him and carried him over to the starboard side, causing him very severe injuries.

The defendant contended that Snell should have been on deck supervising this operation of dumping the ashes by the men in his own watch, and that the plaintiff was not in Keyser's watch or subject to his orders. But the evidence is that Keyser was giving him orders, and we are clear that Snell's watch were bound to obey him. After the accident three men were employed and the ashes were dumped over the starboard side.

December 27th the steamer arrived in port and the plaintiff was taken to the Marine Hospital, where he remained three months and four days; it being found necessary to amputate his right leg six inches above his knee.

The contract of a seaman is maritime, and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola, supra; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common-law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman, who had been locked up or put in irons for disobedience of orders, were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur,

who had received the same treatment. So a seaman, bringing suit in a common-law court for personal injuries, could recover, even if guilty of contributory negligence, although a shore servant, suing in the same court, could not; and a seaman, suing in a common-law court for personal injuries, could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.

Has Congress changed the situation by section 20, of the Seamen's Act, supra, as the plaintiff contends? He argues that the act makes the master a fellow servant of the seaman, and therefore that Congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the Supreme Court, in the case of The Osceola, supra, while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master which resulted in personal injuries to the seaman. This was the precise question decided. The facts were that the master ordered a gangway to be hoisted by a derrick and swung outboard when the steamer was proceeding in a strong head wind, so that she might be ready for an immediate discharge of the cargo on arrival. The gangway, as soon as it swung clear of the side, was turned broadside by the wind and threw down the derrick, which struck and injured the libelant. The first and third questions certified to the Supreme Court were answered, "No":

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel."

"Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

It follows that whether the master and seaman are follow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this reason the court was right in directing a verdict for the defendant, and the judgment is affirmed.

HUTTIG v. JOHN PAUL LUMBER CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917. Rehearing Denied May 16, 1917.)

No. 2403.

1. TRIAL ⟸178—MOTION FOR DIRECTED VERDICT—EFFECT.
On defendant's motion for a directed verdict, the trial judge was bound to accept the testimony favorable to plaintiff.

2. BROKERS ⟸88(3)—QUESTIONS FOR JURY—PROCURING CAUSE OF SALE.
In a broker's action for commissions on a sale of land to a corporation, evidence *held* insufficient to warrant an inference that plaintiff, through any acts of his own or of others on his behalf, was the procuring cause of the sale, though he had negotiated for a sale with M. and R., a stockholder in such corporation, and hence the court properly directed a verdict for defendant.

3. BROKERS ⟸86(1)—SUFFICIENCY OF EVIDENCE—CONJECTURE.
In a broker's action for commissions, plaintiff, upon whom the burden of proof rested, was not entitled to a verdict on conjecture.

Alschuler, Circuit Judge, dissenting.

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

Action by Harry W. Huttig against the John Paul Lumber Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Huttig's declaration was based on the following contract:

"Chicago, August 8, 1912.

"H. W. Huttig, Muscatine, Iowa.

"Dear Sir: Referring to all of the holdings of the John Paul Lumber Co. in the La Fayette, Taylor, Madison, Jefferson, Wakulla counties in the state of Florida, with the exceptions of the ninety thousand acre tract contained in townships 6 south, R. 12 east; 7 south, 12 east; 8 south, 12 east; 9 south, 12 E.; 6 south, 13 E.; 7 south, 13 E.; 8 south, 13 E.; 9 south, 13 E.—all in La Fayette county, Florida, comprising with the above exception about (234,000 acres) two hundred and thirty-four thousand acres, we hereby authorize you to sell all of the above named 234,000 acres for $2,560,000, for which in case of sale we agree to pay you a commission of 5 per cent.; and we further agree to pay you a commission of 5 per cent. on the consummation of a sale of any part thereof; and we further agree to pay you a commission of 5 per cent. on any sale you may make thereof that is consummated, whatever the purchase price may be. We will allow you sixty days from date to get parties interested and to examine property and a reasonable time thereafter to examine timber and abstracts.

"Yours truly, John Paul Lumber Company.
"By R. W. Paul, V. Pt."

At the conclusion of all the evidence the court directed a verdict for defendant. This is assigned as error.

Wm. S. Oppenheim, of Chicago, Ill., for plaintiff in error.
Andrew Lees, of La Crosse, Wis., for defendant in error.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1, 2] McMillan, a real estate broker in Chicago, in late July, 1912, met Musser, of Muscatine, Iowa, in Chicago and told him that the Florida

lands of defendant were for sale and asked him if he would be interested. Musser said that he would, and that one Roach and he were interested in lands in the same locality, and he thereupon called Roach on the phone. McMillan then wired defendant in Florida, and in response thereto R. H. and J. J. Paul, of defendant company, arranged to come to Chicago on August 8th. That day McMillan met them, and took them to plaintiff's room in a Chicago hotel. Plaintiff was a relative of Musser, lived at Muscatine, was engaged in the sash and door business, and occasionally sold property on commission. At plaintiff's room the contract in question was executed, and plaintiff employed McMillan to work thereunder. Musser was said to be the man with money, able to buy, and already interested in Florida lands. Roach was not financially able to make the proposed purchase. The Pauls had known Roach for several years, during which there had been negotiations between them concerning the sale of these lands. In our judgment, the evidence establishes beyond any reasonable inference to the contrary that the parties went to Muscatine the next day for the purpose of initiating a deal in which Musser was the new and dominating element, that at Muscatine such a deal became pending, and that neither plaintiff nor his agent McMillan was "the procuring cause" of any other deal. There is a dispute in the evidence whether, at the Muscatine meeting, Roach mentioned "associates." He testified that he named O'Brien, Howe, and Stephenson (who were fellow stockholders in Gulf Land Company, a Florida corporation) as associates who might become interested in the deal. Pauls testified that no one was mentioned but Musser and Roach. On the motion for a directed verdict the trial judge was bound to accept Roach's version, and he did so, but held that under the evidence it was immaterial whether the proffered deal was one with Musser and Roach, or with Musser, Roach and others, because neither plaintiff nor defendant contemplated a deal except with Musser in. We think he was right. McMillan originated the negotiation by presenting the question of purchase to Musser. McMillan went to Muscatine repeatedly to try to induce Musser to buy. Plaintiff also worked upon Musser. So far as this case is concerned, that was the extent and the end of their efforts. Officers of defendant also tried to forward the Roach and Musser deal. The pending deal was always referred to in conversations and in correspondence between the parties as the Roach and Musser deal. Musser's interest apparently continued until the last of September, when Roach told the Pauls (and McMillan did likewise in November) that Musser would not go on. And Musser in fact had no part or interest in the sale that was subsequently made.

In March, 1913, defendant sold a half interest to the Gulf Land Company, a Florida corporation, for $800,000, being $100,000 less than the lowest and last price made or authorized by defendant during the pendency of the Roach and Musser deal, or during the 60 days plaintiff had "to get parties interested." Gulf Land Company was organized in the spring of 1912. It was not mentioned by any one in connection with the Roach and Musser deal, and Roach was not authorized to act for it. Defendant had no knowledge of its existence till after Musser withdrew. Its president, O'Brien, testified without

dispute that he had long known about the Paul lands being for sale; that he knew the price the Pauls were asking prior to August 8, 1912; that neither plaintiff nor McMillan (whom he met a number of times after August 8th) ever said anything to him about the Paul lands; that the rules of the company required the approval of all stockholders for purchases of land; and that a purchase of the Paul lands by the company never interested him at all until he learned in the spring of 1913 that a half interest could be had for $800,000.

[3] We believe the trial judge was correct in telling the jury, in substance, that there was no basis in the evidence for a reasonable inference that plaintiff, through any acts of his own or of others on his behalf within the 60 days from August 8, 1912, was the procuring cause of the sale to the Gulf Land Company in March, 1913, and that a party upon whom lies the burden of proof is not entitled to a verdict on conjecture.

The judgment is affirmed.

ALSCHULER, Circuit Judge (dissenting). Without pointing out those parts of the evidence which induce my nonconcurrence, I will say that to my mind the record fairly presents controverted questions of material and controlling facts which should have been submitted to the jury: Whether at the Muscatine meeting it was in effect stated, and was understood by all concerned, that the persons then and thenceforth contemplated by the parties as the broker's prospective buyer were Roach and his associates in the ownership of large tracts of timber land lying adjacent to and about the Paul lands in question, regardless of whether or not Musser was interested in the purchase; whether, from the time of the Muscatine meeting, the negotiations, as there under consideration, were carried on by the Pauls with substantial continuity and without abandonment until the sale in question was effected; whether the Gulf Land Company was not as to this business a mere convenience to take title for its stockholders, directors, and officers, Roach and his associates, as the beneficiaries in the transaction; and whether or not plaintiff in error was the procuring cause of the making of the sale, through interesting in the property within the 60 days of the contract, persons willing and able to purchase it, and who as the result of being so interested, within reasonable time after the 60 day period did in fact consummate the purchase.

I believe the judgment should be reversed, and the cause remanded for new trial.

WOO HOO v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2871.

1. ALIENS ⇐22—CHINESE PERSONS.

Under treaty of November 17, 1880 (22 Stat. 826) between the United States and China, article 2 of which provides that Chinese merchants shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions

accorded to citizens and subjects of the most favored nation, a Chinese merchant domiciled in the United States has the right to bring his wife and minor children into the country, and this right may be exercised, though the minor son of such merchant was 20 years old and had contracted a marriage in China before admission was sought.

2. HABEAS CORPUS ⟸S5(1)—DEPORTATION—CHINESE PERSONS.

On habeas corpus by a Chinese person, who applied for admission to the United States as the minor son of a regularly domiciled merchant in the United States, evidence *held* to show that the immigration commissioner wrongfully denied admission on the ground that the applicant was over 21 years of age, and that the hearing was unfair, and hence the writ should be granted.

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

Petition by Woo Hoo, on behalf of Woo Dan, for a writ of habeas corpus against Edward White, as Commissioner of Immigration at the Port of San Francisco. From a judgment sustaining a demurrer to the petition, petitioner appeals. Reversed and remanded, with instructions to overrule demurrer and issue writ.

Albert C. Aiken, 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 and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The court below sustained a demurrer to the appellant's petition for a writ of habeas corpus, and the appellant takes this appeal. The petition alleged that Woo Dan applied for admission to land as the minor son of Woo Hoo, a regularly domiciled merchant in the United States; that the immigration commissioner denied admission on the ground that the applicant failed to show that he was a minor son of Woo Hoo, which decision was affirmed, on appeal to the Secretary of Labor. The record of the proceedings before the immigration commissioner was made part of the petition for the writ. The petition further alleged that the local inspectors in conducting the examinations, displayed such animus toward the applicant that he was deprived of the benefit of a fair and unprejudiced consideration of his application; that one inspector sought to falsify and distort the record, to the prejudice of the applicant; and that another inspector incorrectly reported certain facts in a way which tended to discredit one of the identifying witnesses. The Secretary of the Department of Labor, in affirming the decision of exclusion, had before him the memorandum of the Commissioner General of Immigration, which stated the grounds for excluding the applicant, as follows:

"There is considerable doubt that he is a minor; he is more likely 22 to 24 years of age, than 20, as claimed. At any rate, he is in no substantial sense the minor son of a merchant, even if it should be conceded (as it is not) that the evidence is sufficient to show affirmatively that his claim of relationship to the alleged father is true. It is not claimed with respect to him that he is

less than 20, and he is married and the responsible head of a family; so that his landing could be justified, even if the evidence of relationship were clear and satisfactory, only by observing form and ignoring substance upon this proposition of minor children joining their parents here, and by arbitrarily fixing upon the American age of majority as the age which is to be the dividing line in such a Chinese case."

[1] We think it is clear that the grounds so advanced for the exclusion of the applicant cannot be sustained in law. The fact that the applicant was 20 years of age when he claimed the right to land in no way affects his father's right to his presence in the United States as a minor son. Nor is the question affected by the fact that before coming to join his father in the United States the son married and left his wife in China. Notwithstanding these facts, he remained a minor, and his father was entitled to all the privileges accorded by the treaty of 1880 between the United States and China (22 Stat. 826), article 2 of which provides that Chinese merchants shall be allowed "to go and come of their own free will and accord, and * * * accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." It is well settled that the terms of that treaty confer upon a Chinese merchant domiciled in this country the right to bring his wife and minor children into the United States. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.

[2] The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that "his age is within one year either way of 23 years." It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a question, the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years. There are circumstances connected with the examination of the applicant which, unexplained, tend to indicate an unfair attitude on the part of the immigration officials. For instance, the baggage of the applicant was searched, and the inspector reported that he found in it a letter addressed to "Woo Dock Wo, my brother," and he concluded that, as the applicant had stated that he had no brother, the letter was evidence against the truth of his testimony. But it was shown, and it was later conceded, that the letter was not found in the applicant's trunk, but was discovered on the outside of the trunk, beneath a burlap covering, where it might have been placed by any one who might have picked it up, and, discovering the name Woo Dan on the trunk, might have thought that Woo Dock Wo was another name of the owner of the trunk. The inspector made no mention, however, of the fact that in the trunk he found books and papers of Woo Dan, and chops or wooden stamps of the name of Woo Dan which bore signs of use.

Another fact relied upon by the appellant is that the inspector discredited the testimony of Woo Mun, who had lately arrived from China, and who had visited, as he testified, the home of the applicant

in China. His testimony fully corroborated the testimony of Woo Dan, but it was rejected for the reason, as alleged by the inspector in his report, that Woo Mun had been confined in the detention sheds along with Woo Dan for a period of 22 days, whereby opportunity had been afforded to manufacture testimony. It was subsequently shown that it was not true that Woo Mun had been confined in the detention sheds with Woo Dan; that, while Woo Dan had arrived on December 6, 1915, Woo Mun had not arrived until December 27th. The error in the report was subsequently corrected; but, notwithstanding the correction, the testimony of Woo Mun was disregarded by the inspector as adding nothing to the case.

Again, the opinion of the commissioner seems to have been influenced by the fact that the examining inspector believed the applicant to be Woo Sick Ngon, one of two boys who had applied for and were denied admission in 1910, as the sons of Woo Wai Gim. That belief was based upon the resemblance which the inspector found between the applicant and the photograph of Woo Sick Ngon, taken in April, 1909, when he was 16 years of age, and the general resemblance between the applicant and Woo Wai Gim. The photographs of all of these persons are in the record before us. We are unable to discover the resemblance which the inspector found. If there is indeed a resemblance, it is extremely remote, and is not sufficient, in our opinion, to constitute evidence. We think that, upon the case made upon the petition, considered in connection with the record of the proceedings before the immigration officials, a writ of habeas corpus should issue.

The judgment is reversed, and the cause is remanded, with instructions to overrule the demurrer and issue the writ.

UNITED STATES & MEXICAN TRUST CO. et al. v. BEATY et al.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1917.)

No. 4550.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

On petition for rehearing. Rehearing denied, and former opinion (240 Fed. 592) sustained.

REED, District Judge. The appellants in No. 4550 have filed a petition for rehearing in the above cause, upon the ground alone as alleged:

"That the opinion of this court is in direct conflict with the majority opinion of the Supreme Court in the Gregg Case" (Gregg v. Metropolitan Trust Company, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717).

That the majority opinion in that case has limited in some particulars the prior opinion of that court in Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, and some other

cases, which has resulted in a diversity of opinions in the lower federal courts, may be admitted, but that it does not overrule the Miltenberger, and other similar cases, is not doubted. The facts and grounds upon which the receivers were appointed in this case are stated at some length in the opinion heretofore filed and need not be restated. In the Gregg Case a receiver was appointed June 1, 1897, in a proceeding to foreclose two mortgages upon a railroad property; the grounds upon which he was appointed are not stated. After his appointment there was found on hand a quantity of railroad ties of the value of some $3,200 which were used in the maintenance of the road as a going concern. The petitioner Gregg made a claim on the funds in the hands of the receiver for the value of these ties, because he had not been paid for them, and they had not been returned to him by the receiver. The Circuit Court of Appeals affirmed an order of the Circuit Court which established the claim as a six months claim, but denied priority of payment therefor from the body of the fund, and the case went to the Supreme Court upon certiorari. The Supreme Court said of the case:

"The case stands as one in which there has been no diversion of income by which the mortgagees have profited, or otherwise, and the main question is the general one, whether in such a case a claim for necessary supplies furnished within six months before the receiver was appointed should be charged on the corpus of the fund. There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 58 [21 C. C. A. 219], and perhaps in other cases. But we are of opinion, for reasons that need no further statement (Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97 [10 Sup. Ct. 950, 34 L. Ed. 379]), that the general rule is the other way, and has been recognized as being the other way by this court."

The Miltenberger Case is then referred to and the opinion continues:

"But while the payment of some pre-existing claims was sanctioned in that case, it was expressly stated that 'the payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership.' The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition. In the later cases the wholly exceptional character of the allowance is observed and marked [citing the cases]. In Union Trust Co. v. Illinois Midland Ry., 117 U. S. 434, 465 [6 Sup. Ct. 809, 29 L. Ed. 963], labor claims accruing within six months before the appointment of the receiver were allowed without special discussion, but the principles laid down in the Miltenberger Case had been repeated in the judgment of the court, and the allowance was said to be in accordance with them. * * * But the payment of the employés of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts." (But for what reason is not stated.)

In Kneeland v. American Loan Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, cited with apparent approval in the majority opinion in the Gregg Case, we call attention to the particular facts, without reciting them, upon which the court denied the priority of the claim

for rental of certain rolling stock prior to December 1, 1883, but allowed such rental for the rolling stock after that date, because the mortgagee upon that date applied for and obtained the appointment of the receiver. Mr. Justice Brewer, speaking for the court, said (136 U. S. at page 98, 10 Sup. Ct. at page 953, 34 L. Ed. 379):

"But it is urged, * * * that the court did not allow contract price, but only rental (for the rolling stock), and the question is asked: May a court, through its receiver, take possession of property and pay no rental for it? If it may legitimately compel the operation of the railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries, we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this, irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself."

See, also, Union Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295, 27 L. Ed. 488, cited in the majority opinion in the Gregg Case with apparent approval, but distinguishes it upon certain grounds from the Gregg Case, where supplies furnished within the six months period for the operation of the road were allowed priority in payment from the proceeds of the sale of the property by the receivers, because the trustee of the bondholders who had procured the appointment of the receivers and consented to the use of the earnings of the receivership for the improvement and preservation of the road, instead of paying such claims as the receivers were authorized to pay by the order of court appointing them. Mr. Chief Justice Waite said of this transaction (107 U. S. at page 595, 2 Sup. Ct. at page 298, 27 L. Ed. 488):

"Clearly, therefore, on the face of the transaction, the fund in court represents in equity the income which belongs to the labor and supply creditors as well as the mortgage security, and there was no impropriety in appropriating it as far as necessary to pay the creditors especially provided for when the receiver was appointed."

This is sufficient to show that the majority opinion in the Gregg Case recognizes that there may be cases wherein the payment for labor rendered and supplies furnished necessary to keep the road in operation and preserve its property and business from sacrifice, deterioration, or waste during the six months period preceding the appointment of the receivers, or thereafter, may be allowed from the corpus of the property in the hands of the receiver.

In the Souther and Kneeland Cases the supplies furnished and the rentals allowed for the rolling stock were not to pay expenses of the receivership, but for supplies and rentals furnished during the six

months period preceding the appointment of the receiver, while in the present case the complainant trust company, representing the bondholders, joined in the application for the appointment of the receivers and requested that they be authorized to take possession of the railroad property and continue its operation under the order of the court until such time as the bondholders might effect a reorganization of the road, arrange for the payment of its obligations, including supply demands, and preserve the property until that could be accomplished. The receivers were accordingly appointed, and almost simultaneously with their appointment the 92 cars of coal in question came into their custody, or it may be the possession of the road; but this coal was received by the receivers and used by them in the operation of the road thereafter, and they were authorized under the order of the court appointing them to pay therefor. Even under the majority opinion in the Gregg Case and the cases cited therein with approval, we are of opinion that the trial court was clearly justified in directing its receivers, under the special circumstances shown, to pay for such coal from income in their hands, and, if none, then from the proceeds of the property arising from the sale thereof, as a proper and necessary expense of the receivership, inasmuch as they used the coal in lieu of purchasing other coal to take its place in keeping the road in operation.

The petition for rehearing is denied.

WHITE, Immigration Com'r, v. WONG QUEN LUCK.

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2810.

1. ALIENS ⟸32(13)—DEPORTATION—CHINESE PERSONS—HEARING.
Where a Chinese person, applying for admission to the United States as the son of a native of the United States, was after hearing ordered deported on account of errors in the interpretation of his answers to the questions propounded, a writ of habeas corpus may be granted on the ground that he was not accorded a fair hearing by the immigration officials, such applicant and his counsel having no opportunity to read the record, although ordinarily such person should not be allowed to raise the question of errors in the interpretation of his answers, where given a hearing by the immigration officials, unless that question was raised at the hearing.

2. HABEAS CORPUS ⟸111(1)—ALIENS—FAIR HEARING—DISCHARGE.
Where a Chinese person, applying for entrance into the United States, was ordered deported without a fair hearing, he should not, on writ of habeas corpus, be unconditionally discharged from custody; but such discharge should be conditional, to be effective only in case the immigration authorities should fail to give the applicant a fair hearing within a reasonable period, as a month.

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

Application by Wong Quen Luck for a writ of habeas corpus against Edward White, Commissioner of Immigration at the Port of San Francisco. From an order issuing the writ, and discharging the petitioner, respondent appeals. Order modified and affirmed.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

Joseph P. Fallon, of San Francisco, Cal., for appellee.

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

HUNT, Circuit Judge. Wong Quen Luck was discharged from custody after hearing in habeas corpus proceedings before the District Court, and the commissioner of immigration at San Francisco has appealed from the order of discharge.

Wong Quen Luck, about 16 years old, was born in China, and claimed to be the son of Wong Shoon Jung, a native of the United States. Luck applied to be admitted in June, 1915; his application was heard, and finally denied, by the Secretary of Labor, upon the ground that the relationship claimed was not established, in that discrepancies developed in the testimony of some of certain witnesses, particularly with respect to the applicant's paternal grandfather, and to the time when the alleged father was in China, and to the number and sexes of the children of a neighbor of the applicant in China. In the record it is set forth that the court, having determined that the hearing before the immigration officers upon the application of Luck to enter the United States was unfair, proceeded to determine and hear the application. Thereupon it was stipulated between counsel for the government and Luck that upon the hearing Luck contended that the discrepancies which appeared in his testimony and the testimony of his father at the hearing had before the immigration officers were due to the fact that the official interpreter, who acted for the immigration officials at the time that the testimony of the applicant was taken, spoke a different dialect from that spoken by Luck, and that because of the fact that the official interpreter spoke a dialect which was not understood by the detained, the hearing granted him upon the application to enter the United States was unfair. It also appears by the stipulation that, upon the statement as above, the judge of the District Court permitted Luck to testify, "and the answers of the said detained to the various questions propounded to him by his counsel and the United States attorney's office through the official Chinese court interpreter, namely, D. D. Jones, explained the discrepancies satisfactorily to the court, and the said detained was ordered released."

[1] It is contended by counsel for the government that no objection to the interpreter was ever made on the part of Luck during the hearing before the immigration officials, and that the court erred in allowing appellee to attack the proceedings had before the immigration officials. In a general sense this position is well assumed, because an applicant for admission, who is given opportunity to be heard by the immigration officials, should present objections of such a character to those authorities. The Japanese Immigrant Case, 189 U. S. 86–101, 23 Sup. Ct. 611, 47 L. Ed. 721. But, on the other hand, if

as a matter of fact there has been serious error made in the interpretation and recording of the answers given by an applicant to the questions propounded to him before the immigration authorities, and if the applicant or his counsel has not had opportunity of reading the record, and if it is made clear that such error in interpretation and recording is in direct respect to the matters upon which the immigration authorities have finally based their order of deportation, he may in petition for habeas corpus set up that he has been denied a fair hearing.

Under such circumstances the primary question would be, not whether there was an abuse of discretion on the part of the immigration authorities, nor whether the weight of the testimony purporting to have been given is for or against admission, nor whether he understood the import of the questions propounded to him, but is whether the applicant has been examined fairly at all as to his right to admission in the United States. This must be so, for it is self-evident that an essential requisite of a fair hearing is that the interpreter employed must know two languages, English and Chinese, sufficiently well to translate the questions and answers with substantial accuracy. Guided evidently by the justice of such a view, the judge of the District Court permitted the petitioner, Luck, to testify that the interpretation of the dialect which he spoke had been inaccurately made and recorded before the immigration officials, in that, if the answers to the questions which were propounded had been correctly interpreted and recorded, they would have shown that he was the son of Wong Shoon Jung, and therefore entitled to admission.

We are of the opinion that the District Court committed no error in taking jurisdiction and hearing the testimony of the petitioner, and in the absence of the testimony from the record we find no reason for concluding that the court erred in holding that the applicant did not have a fair hearing.

[2] But we think that, in ordering the unconditional release of the applicant, the court went further than it should have, in that the order of discharge should not have been final, but conditional, to be effective only in case the Immigration authorities should fail to give the applicant the fair hearing required by law within a reasonable period, say 30 days hereafter. United States v. Petkos, 214 Fed. 978, 131 C. C. A. 274. The order of the lower court is therefore modified as indicated, and the matter is remanded to that court for further proceedings in conformity herewith. As modified, the order will be affirmed.

ROPNER et al. v. INTER-AMERICAN S. S. CO.

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

No. 174.

SHIPPING ⊂=49(2)—TIME CHARTER—CONSTRUCTION—RATE OF HIRE FOR OVERTIME.

Where a time charter of a steamer required payment of the hire semimonthly in advance, and provided that, should she be on her voyage to-

ward port of delivery when a payment became due, it should be paid for the length of time estimated by the parties to complete the voyage, the difference, if any, either way, to be settled on her redelivery, the owner was entitled to payment for overtime in such case at the charter rate only, and not at a higher market rate.

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

Suit in admiralty by Robert Ropner, John Henry Ropner, and William Ropner against the Inter-American Steamship Company. Decree for respondent, and libelants appeal. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham and Benjamin W. Wells, both of New York City, of counsel), for appellants.

Haight, Sandford & Smith, of New York City (Clarence Bishop Smith, of New York City, of counsel), for appellee.

Before WARD, ROGERS and HOUGH, Circuit Judges.

WARD, Circuit Judge. The libelants, owners of the steamer Teesdale, filed this libel against the charterer, respondent, to recover hire for an overlap of 4 days 20¼ hours. For this period they contend that they are entitled to the market rate of freight, which was higher than the charter rate; whereas, the charterer says that it is only obliged to pay the charter rate. Judge H. A. M. Smith sustained the contention of the charterer.

The steamer was chartered for a period of 18 calendar months minimum and 21 calendar months maximum at the charterer's option. The charterer exercised its option by taking the steamer for 21 months, so that we start with the fact that the charter was for a flat period of 21 months. The material provisions of the charter party are:

"4. That the charterers shall pay for the use and hire of the said vessel (5/–) five shillings no pence British sterling per ton on total deadweight capacity of ship including bunkers on Lloyds' summer freeboard per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the owners (unless lost) at a port in the U. S. north of Cape Hatteras at charterers' option.

"5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners, or their agents, and charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owners' agents any difference shall be refunded by steamer or paid by charterers, as the case may require.

"6. Payment of the said hire to be made in cash in New York at the current short sight rate of exchange semimonthly, in advance, and in default of such payment the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they (the owners) may otherwise have on the charterers, in pursuance of this charter."

Under article 4, separately considered, the owners would have been entitled to the steamer on May 2, 1915, and, if not then redelivered, they could have held the charterer either for the charter rate or the market rate, at their option, during the period of overlap. But article

5 prescribes what shall be done, in case it appear on the date the last semimonthly hire in advance is due that there will be an overlap, viz., the parties are to agree on an estimated time necessary to complete the voyage, and the charterer shall pay additional hire for that period, any deficiency to be paid by it when the steamer is redelivered, or any excess to be returned by the owners.

It is quite obvious that the contracting parties were contemplating the charter rate of hire. If the owners had intended to reserve the option of collecting the market rate, they should have said so, and we think would have said so. This is the natural construction of the language used, and there is another consideration sustaining it. The last semimonthly installment of hire fell due April 17, 1915. It was payable in advance up to May 2d. The steamer was then on a voyage to the port of redelivery. While the parties could then estimate the time needed to complete that voyage, how could they know what would be the market rate of freight two weeks later, and so calculate the amount to be paid down by the charterer for the estimated overlap? The charterer did pay hire at the charter rate for the overlap, which was received without prejudice by the owners before this libel was filed. In Straits of Dover S. S. Co. v. Munson (D. C.) 95 Fed. 690 and Anderson v. Munson (D. C.) 104 Fed. 915, Judge Addison Brown had occasion to consider time charters for a flat period which contemplated a possible overlap. He held that the charterer might require the steamer to make a reasonable voyage, even if it would overlap, paying in such event only the charter rate for the period of overlap. The last voyage in the present case was obviously a most reasonable one.

The decree is affirmed.

TSUIE SHEE et al. v. BACKUS.*

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2784.

1. ALIENS ⟸32(8)—DEPORTATION—CHINESE PERSONS—EVIDENCE.
On habeas corpus to obtain the discharge of a Chinese woman, ordered deported, though she applied for admission to the United States as the wife of a native-born Chinese citizen of the United States, evidence *held* insufficient to show that the applicant was not given a fair hearing or that the order of deportation was not justified.

2. ALIENS ⟸32(6)—DEPORTATION—GROUNDS.
An order of the immigration authorities, deporting a Chinese woman applying for admission to the United States as the wife of a native-born Chinese citizen, cannot be vacated because based on a letter taken from the trunk of the alleged husband, even though such letter were obtained by a search in violation of Const. Amend. 4; the evidence not being used against the owner of the trunk.

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Application by Tsuie Shee and another for a writ of habeas corpus

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

* Rehearing denied October 8, 1917.

against Samuel W. Backus. From a judgment denying the writ, petitioners appeal. Affirmed.

See, also, 218 Fed. 256.

Joseph P. Fallon, of San Francisco, Cal., for appellants.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

GILBERT, Circuit Judge. The appellant, a Chinese woman, who applied for admission to the United States at the port of San Francisco as the wife of a native-born Chinese citizen of the United States, was denied the right to land, on the ground that her relationship as the wife of the citizen had not been established to the satisfaction of the immigration officials. On appeal to the Department of Labor, the decision of the officials was affirmed. The appellant thereafter filed her petition for a writ of habeas corpus, on the ground, among others, that proper official action had not been taken by the Department of Labor. The court made the writ temporary, pending a review of the record by the proper official of the Department of Labor. Upon a showing of subsequent action by that Department whereby the record was properly reviewed on appeal, the court discharged the writ.

[1] On the appeal to this court from the order discharging the writ, it is contended, first, that the hearing accorded the appellant by the immigration officials was unfair, in that an honest effort was not made to arrive at the truth by methods sufficient to amount to due process of law. We find that the record contains no substantial evidence to sustain this contention, and in fact the appellant fails to direct our attention to any particular definite feature of the investigation which she relies on to show that the hearing was unfair. The immigration officials and the Department of Labor were influenced by two phases of the evidence. The first was the contradictory statements made by appellant and by Quan Wy Chung, her alleged husband, on their separate examinations. The second was the contents of certain papers found in the trunk of Quan Wy Chung while he was still in the immigration station. The most important of these papers was a coaching paper for the alleged wife, containing the names of her father, mother, grandfather, and grandmother, and other items. It was wrapped in a paper on which was inscribed, in Chinese:

"Please deliver the within contents to Quan Choey Quock, for him to coach Tsuie Shee on. Sent by Tsung Quock."

Quan Choey Quock was another name of Quan Wy Chung. There were other papers in the trunk, the contents of which showed that Quan Wy Chung had been engaged in the business of importing Chinese women for prostitution, and Chinese men in violation of the law. Irrespective of what may be said of the contradictions between the testimony of the alleged husband and wife, it is clear that the evidence in the papers found in Quan Wy Chung's trunk was sufficient to discredit all representations that the appellant was the wife of Quan Wy Chung.

[2] But it is said the action of the immigration officials in searching the baggage of Quan Wy Chung without his consent was a violation of the Fourth Amendment to the Constitution. If the case before us were an appeal from a judgment in a criminal case, in which the owner of the papers in the trunk had been convicted by means of the evidence so acquired, and after a demand for the return of the papers, the judgment might be reversible, under the authority of Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. But the evidence was not used against Quan Wy Chung. It was used against the appellant, who, as the immigration officials have found, was not his wife. We have nothing to do with the remedy of Quan Wy Chung for the invasion of his constitutional right. The question here is whether a judgment based upon evidence so obtained is void. We have no hesitation in holding that it is not. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

The judgment is affirmed.

LEVERING v. PAOVA OIL CO. et al.

(Circuit Court of Appeals, Second Circuit. June 4, 1917.)

No. 205.

1. BROKERS ⟸8(1)—ACTIONS—COMPENSATION—BURDEN OF PROOF.
Plaintiff, who claimed commissions as a broker in effecting a sale of oil and gas properties for defendants, has the burden of proving he was defendants' agent in the transaction, and that defendants agreed to pay him the amount claimed.

2. BROKERS ⟸88(2)—COMPENSATION—ACTIONS—EVIDENCE—SUFFICIENCY.
In a suit in which plaintiff claimed commissions for effecting a sale of oil and gas properties for defendants, evidence *held* insufficient to carry the case to the jury, not showing plaintiff's employment or defendants' agreements to make payment.

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

Action by Richard Levering against the Paova Oil Company and others. There was a judgment for defendants, the complaint being dismissed at close of plaintiff's evidence, and he brings error. Affirmed.

Clifford Seasongood, of New York City (Nelson L. Robinson, of New York City, of counsel), for plaintiff in error.

George L. Roberts, of Pittsburgh, Pa., and Cravath & Henderson, of New York City (Stuart McNamara, of New York City, of counsel), for defendants in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. The plaintiff, who was employed by the vendees of certain oil and gas properties in Oklahoma, seeks to have the

court constitute him as agent also of the vendors. He demands a judgment against them for $35,000 as commissions. The defendants insist that the plaintiff never was their agent in negotiating the sale but always acted for the vendees. The terms of sale expressly provided that if the defendants would reduce the purchase price of the property from $850,000 to $700,000 they would not be required to pay commissions and that the $700,000 agreed upon as the purchase price was to be paid in full without deduction for commissions or charges in any form or manner. Notwithstanding this agreement the plaintiff seeks to compel the defendants, as before stated, to pay him a commission of $35,000 for alleged services rendered by him to the defendants who were the vendors of the said Oklahoma oil and gas properties. This property was sold to parties represented by M. S. Abrahams by the defendants on or about September 4, 1912, for $700,000.

[1, 2] It is manifest that the burden is upon the plaintiff to prove by a preponderance of evidence, first, that he was the defendants' agent in the transactions referred to; and, second, that the defendants agreed to pay him $35,000 for his services. Neither of these propositions is established. On the contrary, the proof shows that the plaintiff was Abrahams' agent in the negotiations, that the sale was to be for $700,000 net and that the defendants should not be liable for any commissions based upon the sale. In other words, it was understood that there should be no deduction from this sum for commissions or for any other charges. That sum represented the lowest price the defendants would consent to receive. Judge Grubb states the situation concisely as follows:

"As I see it, the responsibility in this case is on the court, because on the plaintiff's own testimony he is not entitled to recover. Therefore I think it is a question for determination by the court and not for the jury. If there was a conflict of testimony, the jury would have had to determine, but there being no conflict in the testimony, taking all the testimony into consideration, the plaintiff has not made out a case. Therefore I dismiss the complaint."

We think this ruling was fully justified by the proof as there seems to be a total failure to prove a contract or obligation on the part of the defendants to pay the plaintiff anything. He was not employed by them and was under no obligation to act for them. The terms on which they agreed to sell were for $700,000 net. The proposition that this fund was to be depleted by commissions to the agent of the vendees is wholly unsupported by the proof. Abrahams and those with him distinctly agreed to pay expenses and commissions so that the defendants would receive the property for $700,000 without deductions for expenses or commissions. It seems to us that the testimony is barren of any proof that the plaintiff was agent of the defendants. He never asserted it during the time the negotiations were being carried on and never during that period, demanded any compensation from them. In fact, his position was hostile to the defendants' interests. He was endeavoring to get the defendants to reduce their price from $850,000 to $700,000 and it was only when he succeeded in getting the price reduced by $150,000 that the sale went through.

If the plaintiff had insisted that, in addition to the $150,000 reduction

in the price, the vendors should pay the commissions of the brokers employed by the vendees, the sale never would have gone through. It is too late now to change the terms of the agreement which made the sale possible.

The judgment is affirmed with costs.

SPENCER v. PATEY.

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

No. 254.

1. APPEAL AND ERROR ⟸840(2)—REVIEW—JURISDICTION.
On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of the appellate court, and then of the lower court, which must be disposed of, though not raised by the parties.

2. COURTS ⟸23—JURISDICTION—CONSENT.
Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court.

3. CITIZENS ⟸2—JOINT-STOCK COMPANIES.
A joint-stock association is not a citizen, and its status in the federal courts must be judged by the citizenship of its members.

4. COURTS ⟸322(3)—FEDERAL COURTS—JURISDICTION.
As a joint-stock association is not a citizen, and its status in the federal courts must be judged by the citizenship of its members, a complaint alleging that plaintiff was a citizen and resident of New Jersey, and that defendant was a joint-stock association with its principal place of business in New York, does not allege facts requisite to give the federal courts jurisdiction for the ground of diversity of citizenship.

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

Action by Edward Patey against Caleb S. Spencer, as treasurer, etc. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss the complaint.

This case comes here on writ of error to review a judgment entered upon the verdict of a jury in favor of the plaintiff, Edward Patey, in the sum of $2,100 for injuries sustained by him by reason of the alleged negligence of the defendant. The parties will be hereafter designated as they appeared in the court below, as plaintiff and defendant.

Edward V. Conwell and George W. Smyth, both of New York City, for plaintiff in error.

R. Frank Thompson and Leonard F. Fish, both of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] It is unnecessary to discuss the merits of this controversy for the reason that we are convinced that the District Court for the Southern District of New York, where the case was

tried, had no jurisdiction. In Railway Co. v. Swan, 111 U. S. 379, at page 382, 4 Sup. Ct. 510, at page 511, 28 L. Ed. 462, Mr. Justice Matthews says:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

[2] Jurisdiction cannot be conferred by consent or the failure of the parties to raise the question in the trial court. Minnesota v. Northern Sec. Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870; Great Southern Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

[3, 4] In short, if the court has no jurisdiction it cannot proceed, and when this appears, whether in the trial court or the appellate court, there is no alternative but to decline to entertain the cause. This being the law, we turn to the record and find a controversy of which the District Court has no jurisdiction upon the allegations or the proofs. The complaint alleges upon information and belief that the defendant is "a joint stock association, with its principal business in the borough of Manhattan, city of New York, and that the said Caleb S. Spencer is the treasurer thereof." It alleges further that "the plaintiff was and still is a resident of the city of Jersey City, state of New Jersey." Manifestly the complaint contains no allegation of adverse citizenship and fails to state facts which confer jurisdiction upon the District Court for the Southern District of New York. There is no proof as to the citizenship of the defendant other than an allegation that it is "a joint-stock association with its principal office and place of business in the borough of Manhattan, city of New York, and that the said Caleb S. Spencer is the treasurer thereof." In short, we think it must be assumed that there is no proof whatever of facts giving this court jurisdiction.

As the record now stands, the action is brought by a resident of New Jersey against a joint-stock company having its principal office in the city of New York. A joint-stock association is not a citizen and its status in the federal courts must be judged by the citizenship of its members. There is no allegation or proof in the record as to the citizenship of the members of the defendant association. Taylor v. Weir, 171 Fed. 636, 96 C. C. A. 438. The complaint and the proofs fail to state a cause of action of which the District Court had jurisdiction. Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Thomas v. Ohio University, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. Ed. 160.

We think the judgment should be reversed with costs and the cause remanded to the District Court with instructions to dismiss the complaint without prejudice.

SINGH v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2861.

1. ALIENS ⟸53—DEPORTATION—GROUNDS OF DEPORTATION.
Where aliens entered the United States surreptitiously and without inspection, they may be deported irrespective of other grounds of deportation.

2. ALIENS ⟸54—DEPORTATION—PLACE OF DEPORTATION.
Under Immigration Law Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (Comp. St. 1916, §§ 4269, 4270), declaring that on deportation the alien be deported to the country whence he came, together with section 35 (Comp. St. 1916, § 4284), declaring that the deportation of aliens arrested within the United States after entry and found to be illegally therein shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States, an alien, a native of India, who unlawfully entered the United States from Canada, should be deported to India, where it did not appear that he had acquired a domicile in Canada.

3. ALIENS ⟸54—DEPORTATION—DOMICILE.
That an alien was in British Columbia for 11 months, and for 8 months of that time worked at a lumber mill, living in the company house, does not show that he acquired a domicile in Canada, so as to warrant his deportation to Canada from the United States instead of to the country from whence he came.

4. ALIENS ⟸54—DEPORTATION—DOMICILE.
That an alien purchased land in Canada does not show that he had a domicile there, so as to warrant his deportation from the United States to Canada instead of to the country from whence he came.

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Petition by Dhanna Singh against the United States of America for a writ of habeas corpus. Writ denied, and petitioner appeals. Affirmed.

Joseph P. Fallon, 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.

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

GILBERT, Circuit Judge. The appellant, an East Indian, and a British subject, entered the United States at San Francisco in 1908. He worked as a laborer at various places in California and Oregon. In 1912 he visited Canada, where he remained two weeks. Thereafter he returned to the United States and resumed his occupation of laborer until April, 1914, when he went to British Columbia. There he remained until March 1, 1915, when he surreptitiously re-entered the United States. He was arrested on a warrant which charged him with having entered the United States from Canada without inspection. Upon a hearing thereafter had before the immigration officials, he was ordered deported to India. A petition for a writ of habeas

corpus was filed in his behalf, and in connection therewith the record of the Bureau of Immigration in the deportation proceedings was considered by the court below. The court denied the writ. There is no showing that the hearing was unfair.

[1] The fact, which is not denied, that the appellant re-entered the United States surreptitiously and without inspection, is sufficient in itself, irrespective of other considerations, to justify the order of deportation. Ex parte Li Dick (C. C.) 176 Fed. 998; Ex parte Hamaguchi (C. C.) 161 Fed. 185; Williams v. United States, 186 Fed. 479, 108 C. C. A. 457; Ex parte Greaves (D. C.) 222 Fed. 157.

[2] But it is contended that the writ should have been issued for the reason that the warrant of deportation directs that the appellant be returned to India instead of to Canada, the country from which he last entered the United States. The provisions of sections 20 and 21 of the Immigration Laws (34 Stat. 898), containing the expressions that the alien "be deported to the country whence he came," and that he be "returned to the country whence he came," must be construed together with section 35, which provides:

"That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

The order of deportation, therefore, properly required that the alien be returned to the trans-Pacific port from which he embarked for the United States unless the evidence showed that he acquired a domicile in Canada.

[3, 4] He testified that during the 11 months while he was last in British Columbia he worked 8 months at a lumber mill, living in the company house at the mill, and that thereafter he wandered around, looking for a job. These facts are not sufficient to show that he acquired a domicile in Canada, or that he is entitled to be returned there on his deportation. The fact that he owned real estate in British Columbia is relied upon as evidence that he was domiciled there. It appears that in the years 1911 and 1912, he, together with other Hindus, purchased an interest in certain lots in British Columbia. But the acquisition of this interest in real estate some two years before he went to Canada is not enough to show that he was domiciled there, and no other fact is presented or relied upon. There was no error, therefore, in the warrant of deportation. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967; United States v. Sisson (D. C.) 220 Fed. 538; United States v. Sisson (D. C.) 220 Fed. 541; Ex parte Chin Him (D. C.) 227 Fed. 131; Ung Bak Foon v. Prentis, 227 Fed. 406, 142 C. C. A. 102; Wallis v. United States, 230 Fed. 71, 144 C. C. A. 369; Bun Chew v. Connell, 233 Fed. 220, 147 C. C. A. 226.

The judgment is affirmed.

SINGH et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 16, 1917.)

No. 2860.

1. ALIENS ⟸53—DEPORTATION—GROUNDS OF DEPORTATION.
Where aliens entered the United States surreptitiously and without inspection, they may be deported irrespective of other grounds of deportation.

2. ALIENS ⟸54—DEPORTATION—PLACE OF DEPORTATION.
Where aliens, natives of India, were discovered surreptitiously entering the United States from Canada, they were properly ordered deported to India, where they denied having been in Canada, and there was no evidence that they had acquired any domicile there or had remained there any length of time.

Appeal from the District Court of the United States for the First Division of the Northern District of California.

Petition by Gujar Singh and Inder Singh for a writ of habeas corpus. Demurrer by the United States being sustained and writ denied, petitioners appeal. Affirmed.

Joseph P. Fallon, of San Francisco, Cal., for appellants.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

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

GILBERT, Circuit Judge. The appellants, who are natives of India and British subjects, entered the United States at San Francisco in the years 1907 and 1909, respectively. In April, 1915, they were arrested on a warrant charging them with having entered the United States from Canada without inspection. Thereafter, and after a hearing before the immigration officials, they were ordered deported. A petition for a writ of habeas corpus was filed on their behalf, to which the United States demurred, and, on the hearing of the demurrer, the record of the Bureau of Immigration in the deportation proceedings was introduced and considered, whereupon the court sustained the demurrer and denied the writ. On the appeal two questions are presented: First, whether there was evidence that the appellants entered the United States from the Dominion of Canada, a short time prior to their arrest; and, secondly, whether they could be deported to India. We find in the record substantial evidence on which the immigration officials could find that the appellants entered the United States from Canada, and that Gujar Singh entered the United States on April 16, 1915. There was evidence that he was taken from a box car of the Great Northern Railway, at Sand Point, Idaho, on the morning of April 22, 1915; that he was wearing shoes made in Ontario, and a cap with a London trade-mark, and had Canadian bills in his possession; that Inder Singh entered the United States by walking across the border near Gateway, Mont., having $2 in his possession. There was evidence that both of the appellants at first admitted that they had entered the United States from Canada, but on the hearing they

denied that they had ever been in Canada, and said they had been working in sawmills along the border.

[1] The fact, as found by the immigration officials, that the appellants entered the United States surreptitiously, and without inspection, is sufficient ground for their deportation, irrespective of the further ground found by the immigration officials that they were likely to become public charges. See cases cited in Dhanna Singh v. United States, 243 Fed. 557, — C. C. A. —.

[2] The appellants are in no position to question the validity of the order of deportation on the ground that it directs that they be returned to India instead of to Canada. They denied under oath that they had ever been in Canada, and there is no evidence that they had acquired a domicile there, or had remained there any length of time. See cases cited in Dhanna Singh v. United States, 243 Fed. 557, — C. C. A. —.

The judgment is affirmed.

MARCONI WIRELESS TELEGRAPH CO. OF AMERICA v. DE FOREST RADIO TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Second Circuit. May 18, 1917.)

No. 206.

1. PATENTS ⟸312(2)—SUIT FOR INFRINGEMENT—OPINION EVIDENCE.
   Theories concerning phenomena observed in wireless telegraphy, which are not the same as were held by the witnesses a short time before, and which they admit are only theories, are not legal evidence.
2. PATENTS ⟸16—VALIDITY.
   That a patentee does not understand his own mechanism will not invalidate the patent, if it is described and produces a new result.
3. PATENTS ⟸36—INVENTION—MECHANICAL EMBODIMENT OF THEORY.
   To constitute patentable invention, in addition to a theory or mental concept, there must be a tangible reduction to practice; and the transformation of a laboratory experiment into a successful and useful mechanical device is evidence of such tangible reduction to practice and of invention.
4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DETECTOR.
   The Fleming patent, No. 803,684, for a detector used in wireless telegraphy, discloses patentable invention and a meritorious device, and is valid; also *held* infringed.
5. PATENTS ⟸155—DISCLAIMER—PURPOSE AND EFFECT.
   A disclaimer is valid which only abandons something claimed in the patent, but not needed, without broadening or enlarging any claim, and leaving the claims fully supported by the original specification.
6. PATENTS ⟸328—VALIDITY—DETECTOR.
   The De Forest patent, No. 841,386, for a detector for wireless telegraph apparatus, is void as inoperative.
7. PATENTS ⟸328—INFRINGEMENT—DETECTOR.
   The De Forest patents, No. 824,637, No. 836,070, No. 867,876, No. 867,877, No. 867,878, and No. 979,275, all for detectors for wireless telegraph apparatus, *held* not infringed.

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

Suit in equity by the Marconi Wireless Telegraph Company of America against the De Forest Radio Telephone & Telegraph Company.

Decree for complainant, and dismissing counterclaim, and defendant appeals. Affirmed.

For opinion below, see 236 Fed. 942.

The plaintiff (hereinafter called Marconi) brought this action against defendant (hereinafter called De Forest) alleging infringement of claims 1 and 37 of patent dated November 7, 1905, issued on application of John Ambrose Fleming, filed April 19, 1905 (No. 803,684). The claims in suit are as follows:

"1. The combination of a vacuous vessel, two conductors adjacent to, but not touching, each other in the vessel, means for heating one of the conductors, and a circuit outside the vessel connecting the two conductors."

"37. At a receiving station in a system of wireless telegraphy employing electrical oscillations of high frequency, a detector comprising a vacuous vessel, two conductors adjacent to, but not touching, each other in the vessel, means for heating one of the conductors, a circuit outside of the vessel connecting the two conductors, means for detecting a continuous current in the circuit, and means for impressing upon the circuit the received oscillations."

After action begun, plaintiff entered a disclaimer "to the combination of elements set forth in claim 1, * * * except as the same are used in connection with high-frequency alternating electric currents or electric oscillations of the order employed in Hertzian wave transmission," and also to certain words of the specification referring to low frequency currents.

Action was brought, not only against the present appellant, but Dr. Lee De Forest individually. The bill as to him was dismissed, and no appeal taken thereto. Defendant answered, and set up a counterclaim (practically a separate action), alleging that Marconi had infringed and was infringing certain claims (not necessary to specify) of the following patents belonging to defendants, viz. Nos. 867,876, 867,877, 867,878, and 979,275, which four issues resulted from division of a single application filed February 2, 1905. The counterclaim alleged, further, infringement of patents Nos. 824,637 and 836,070. Of these, 836,070 is a division of an application thought to cover both inventions and filed January 18, 1906. Defendant also counterclaimed upon patent 841,386, application filed August 27, 1906. Thus the counterclaim was tried on the foregoing seven patents, of which the first four antedate Fleming. The counterclaim, however, also set up two other patents, Nos. 841,387 and 879,532, both of date, not only later than Fleming, but later than any of the other and above enumerated patents. As to these plaintiff permitted defendant to take a decree at or shortly before trial.

The lower court (Mayer, J.) held that De Forest had infringed both the claims in suit of the Fleming patent, and that Marconi had not infringed any of the claims of the patents set up in the counterclaim and not confessed. All of defendant's patents had been issued on applications of Dr. Lee De Forest, and will hereinafter be referred to collectively as the De Forest patents. From a decree granting injunction on the Fleming patent, and dismissing the counterclaim, De Forest took this appeal.

Frederick P. Fish, of New York City (Philip Farnsworth, Harrison F. Lyman, and George F. Scull, all of New York City, on the brief), for appellant.

J. Edgar Bull, of New York City (L. F. H. Betts and Ramsay Hoguet, both of New York City, on the brief), for appellee.

Before COX, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The subject-matter of this action is a "detector." That word will be used in this decision as signifying any device, or piece of apparatus, which, when energized, actuated, or acted upon by or by means of the so-called Hertzian waves, enables man, through the senses of hearing or sight, to understand signals based upon the intentionally regulated emis-

sion or propagation of the waves aforesaid. The patent of the bill is said to cover and protect a detector, hereinafter called the "Fleming valve." Defendant uses a detector which it calls the "audion." Plaintiff asserts that, while the audion may be for some practical purposes an improvement on the Fleming valve, it is nevertheless an infringement, and it has given evidence of faith in its own theory by admitting infringement of the two patents (hereinabove specified) which essentially describe one form of audion—known herein as the "three-electrode" apparatus.

Defendant, not content with this admission, insists: (a) That the Fleming valve was not patentable, considering the state of the art at date of application; (b) that the valve and the audion utilize and depend for efficacy upon wholly different operations of nature; and (under its counterclaim) (c) that the De Forest patents still in suit cover devices in principle identical from the earliest to the latest, which patents Marconi has infringed by using a device named by the defendant the "two-electrode" audion.

It is said that Dr. De Forest disclosed by his earlier patents, and before Fleming filed his application, a theory which, reduced to practice, resulted in the perfected audion of the confessed patents, wherefore the device of every one of the De Forest patents is (by defendant's witnesses) called an audion, although that word was not coined until shortly before applications for the confessed patents were filed. To paraphrase an argument, it is said that Marconi cannot logically confess judgment under two patents, and yet deny infringement of the earliest De Forest inventions, because they all constitute a connected, logical, coherent development of a single inventive thought or application of a scientific theory.

[1] These contentions have opened the door (without objection, or very little) to a mass of opinion evidence, which in our judgment is of no legal value. Much of this record arises out of the mystery still notoriously enveloping the wave movements of the imponderable ether; that is, out of the nature of phenomena by which none of our five senses are directly affected. It consists of opinions or theories concerning such phenomena—opinions necessarily subject to revision, perhaps in a few months. The principal producer of such evidence (if it can be so called), Mr. Pickard, for the defendants, admitted repeatedly that the views he advanced on the witness stand he had not entertained a little time earlier, though he had apparently given his abandoned theories more publicity than normally attaches to testimony in a patent cause. He would probably be the last to assert that his present opinions are final, even for himself. To call such theorizing evidence is a misuse of the word; for the patent law can deal little in such matters. Neither a process of nature nor the discovery thereof is patentable. Man-made statutes permit to be protected and monopolized only some perceptible means or certain method of harnessing or utilizing forces, however mysterious, uncertain, or perhaps incomprehensible. The only question in this case is whether some known operations of nature were, by proved, tangible, and visible implements, harnessed and made useful; if so, he who first did it may be protected in what he did in accordance with statute laws.

Why a given device works, or the theory of its functioning is a fascinating inquiry; but, unless that "why" can be proved within the very modest limits of legal evidence, opinion evidence becomes the rampant speculation of this transcript. It is usually impossible for trial courts to limit opinion evidence (for fear of losing something of value), but efforts in that direction are much needed in the interest of celerity and clarity. Counsel introducing experts who use the witness chair as a rostrum confer no benefit on their clients.

The Fleming valve as a detector confessedly, and the actual commercial "audion" (as we are convinced) consist essentially in the utilization by visible and tangible means of what has long been known as the "Edison effect," which means the fact that, when there is introduced into the ordinary incandescent electric lamp bulb an electrode other than the incandescent filament (such unheated electrode being connected with the positive terminal of the lamp), a current flows from the incandescent electrode to the cold one, in such wise that variation in the electromotive force, producing incandescence, will be reflected or reproduced in the circuit connected with the cold electrode, such variations being capable of measurement by a galvanometer. Edison, Patent No. 307,031.

Utilization of the Edison effect does not mean that the use of Edison's apparatus or any modification thereof as a detector was easy or simple. The admitted fact that years passed, and detectors of various kinds from the coherer to the crystal acquired vogue, before any one thought of using Edison's curiosity of electricity for the discovery or translation of Hertzian waves, is proof enough on this point. Fleming was the first to disclose an apparatus for this purpose. His specification declares that he "rectifies" the alternating current transmitted from the antenna. Defendant's witnesses declare that rectification means converting "the received alternating current into direct currents," and they spend much time in attacking Fleming's theory of the operation of his own device.

[2] But the law is not concerned with why the process called rectification takes place, or how it is accomplished, further than to observe that variations in group frequencies of an alternating current passing through an incandescent lamp filament produce in a manner analogous to the observed Edison effect a direct pulsating or intermittent current in the cold electrode circuit, and that these pulsations or intermittances mark the kind of current whose varying energies can be read with a galvanometer or a telephone. Whether Mr. Fleming's theories of rectification were right or not has nothing to do with the question of invention or validity. The patentee may not understand his own mechanism; but if he shows and describes it, and it produces a new result, the law is satisfied. Van Epps v. United, etc., Co., 143 Fed. at page 872, 75 C. C. A. 77. Therefore the first question (as stated by appellee) is substantially this: Was it invention to use, "as a detector of wireless waves, an Edison hot and cold electrode lamp"? This is a question of fact, and we arrive at the conclusion of the lower court that at the date of Fleming's application it was not known to men skilled in the radio art that a rectifier would act as a detector, or that anything that would rectify oscillations of low frequency could rectify

waves of the order used in radio communication. Edison's patent stated a fact and suggested a tantalizing mystery, because even he did not pretend to state, or assert that he knew, why his "effect" took place. His disclosure remained (so far as we can discover from this record) a laboratory problem until Fleming applied it (whether with a wrong theory or a right one is immaterial) to a new and very practical field of usefulness.

[3] While "invention" is a word the definition of which the courts do not attempt (McClain v. Ortmayer, 141 U. S. at page 427, 12 Sup. Ct. 76, 35 L. Ed. 800), many of the elements contributing to its signification may be and have been described; there must be more than a theory or mental concept, viz. a tangible reduction to practice (Corrington v. Westinghouse, etc., Co., 178 Fed. at page 715, 103 C. C. A. 479), and the transformation of a laboratory experiment into a successful and useful mechanical device is evidence of such tangible reduction to practice and of invention (Westinghouse, etc., Co. v. New England, etc., Co., 110 Fed. 753, 49 C. C. A. 151). In this case, while it is true that Fleming's detector uses the Edison effect every time it detects, the step from a toy to a use suggests what was said in Hobbs v. Beach, 180 U. S. at page 392, 21 Sup. Ct. at page 409, 45 L. Ed. 586, viz. that while there was an analogy there was not similarity between the functions of the patented device and of the alleged anticipating apparatus. The point is not capable of much argument, the appeal is to a kind of conscience, and the court or jury intuitively and conscientiously feel either that invention is absent, or that something akin to genius is displayed in the visible, tangible result of the mental concept.

[4] We have no doubt that Fleming's patent displays invention, and of a very meritorious device. Assuming, now, the validity of the patent, it is upon the question of infringement that this record has been filled with theories, until it is necessary to call firmly to mind that what is complained of as an infringement is not a theory or a function, but a thing compact of glass and metal, made and sold by defendant as the "three-electrode audion" or "P N detector."

Defendant insists that even if Fleming's patent is valid, even if the audion may exhibit at times the Edison effect, yet, since knowledge of that phenomenon antedated Fleming, they and all the world can avail themselves of Edison's knowledge, even in detectors, if their detectors function in a different way or produce substantially different results from those of Fleming (Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935). Accordingly it is asserted that the audion is not merely an incandescent light bulb with two cold electrodes (instead of one) inside it, but an apparatus in which the bulb contains "a substantial amount of gaseous medium" essential to operation of the device, and, further, that a certain arrangement of circuits, the use of condensers, and the introduction of a battery into the cold electrode circuit, are all elements which in combination constitute the audion, produce the "audion effect," and render the completed whole a different thing from anything Fleming thought of.

The "audion effect" is more specifically this. The battery circuit produces a constant current through the telephone. The input or arriving oscillations, passing through a condenser, and thence from in-

candescent filament (and grid) to the battery circuit, would not of themselves be normally strong enough to excite the telephone; but they can and do produce changes in the battery current sufficient for that purpose. They (so to speak) pull a trigger, and this trigger action is the audion effect, wherefore the audion is not a rectifier, but an "amplifier." It seems clear to us that some of the foregoing is disingenuous, and more immaterial. The "gaseous medium" of the audion is nothing but the commercial vacuum of the ordinary electric light bulb —air being a gas, and the bulb containing some residual air. In other words, defendant uses the same "vacuous vessel" that Fleming does.

As for the "trigger action," "audion effect," and such-like clever phrases, they merely hide the real inquiry, viz. how do the high frequency oscillations, or any part of them, or their electrical result or influence, get into the indicator or battery circuit, no matter what they do after arrival? Plainly it is done just as in the Fleming valve. This is the one act, or step, which is essential to either a valve or an audion being a detector, and Fleming's invention consisted in producing a detector, which Edison did not do. A detector must act on alternating currents. This it is that makes defendant an infringer by the manufacture and sale of what may be, and probably is, an improved detector.

[5] The contention that Fleming's patent, whatever its original merit or lack thereof, was voided by an unlawful disclaimer, is without substance. The mistake (if there was one) was in claiming something not needed, and the disclaimer abandoned what was not wanted, without broadening or enlarging any claim; it also left the claims fully supported by the original specification. No injury to defendant, or any one else, is shown. The procedure is within Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968, and our former decisions in Simplex, etc., Co. v. Pressed Steel Co., 189 Fed. 70, 110 C. C. A. 634, and Strause, etc., Co. v. Crane Co., 235 Fed. at page 129, 148 C. C. A. 620.

[6, 7] The position of defendant in respect of the counterclaim patents has been given, but, as put by counsel, it is as follows:

"De Forest was the first inventor of a detector comprising a local circuit, containing a battery and a telephone, this circuit having terminal electrodes in a gaseous medium such as air, made conductive by electrode heating by electric means."

This is not the whole thesis, but it is enough for present purposes. The position thus defined amounts to asserting that, if defendant can show that the inventor had one thought running through his mind, and produced a series of patents for what from time to time appeared to him the best current embodiments of that thought, therefore any one who constructs another apparatus, utilizing the same theory of action, must be an infringer of the whole line of patents.

While not accepting such view of the law, we shall first ascertain what visible objects plaintiff has made, sold, or used which are said to infringe the counterclaim patents. The detectors called by defendant "Marconi's earlier infringement" or the "two electrode audion" are especially complained of, though, since it is agreed that the "two" and "three electrode audions" operate on the same basic principle, no rea-

son appears why defendant must not contend that the same things which admittedly infringe the confessed patents also infringe all the counterclaim patents.

But, even on defendant's summary of these De Forest patents, there can be no infringements if, as matter of fact, the patentee (1) was not the first to disclose a detector with the enumerated characteristics; or (2) never disclosed or patented as an element of his device "terminal electrodes in a gaseous medium such as air"; or (3) if the devices of the counterclaim patents still in suit are for any reason different in kind from those covered by the confessed patents; or (4) if the patents in suit on the counterclaim are inoperative or invalid.

(1) De Forest was certainly not the first to disclose or invent a detector comprising a local circuit containing a battery and a telephone, and we find it true that the so-called "two-electrode audion" is no more than a Fleming valve with and in a circuit with adjuncts antedating both De Forest and Fleming.

(2) The expression "gaseous medium, such as air," is an endeavor to conceal what we regard as the plain disclosure of all the counterclaim patents based on original applications dated February 2, 1905, and January 18, 1906, viz. that the patentee's fundamental concept was to produce conductivity by heating. He thought and taught that heated air, or the heated gases of (e. g.) halogen salts, when the point of dissociation into positive and negative ions was reached, produced a medium favorable to conductivity. Neither of plaintiff's devices operates on any such principle; whether there is any merit in De Forest's disclosure is immaterial.

(3) We agree with the court below that the radical difference between the disclosures of the first six counterclaim patents and anything shown to have been used by Marconi is apparent on inspection; because none of De Forest's devices utilize a commercial vacuum, or what defendant's expert called a vacuum of the order of an ordinary electric light.

(4) The seventh counterclaim patent (841,386) is proved to be inoperative. The patentee declares that by "suitably varying the length of interelectrode medium" he can make the audion "per se selectively responsive." Assuming this last phrase to mean "make it work," defendant at the trial did not do it, and we think refused to try.

It follows from the foregoing that we hold patent No. 841,386 void, and all the other patents of the counterclaim (still in suit) not infringed.

It is not often that any case contains so much history as does this one. It is true that Dr. De Forest, through the whole line of the counterclaim patents, sought after a commercially useful detector, and ultimately produced one; but it is not true that he consistently followed one concept or theory and tried to reduce that to practice. He began with the heated gas theory; he ended with the three-electrode audion, employing the commercial vacuum, and before he produced that success he learned of Fleming's invention and the latter's address before the Royal Society. He promptly used the knowledge so acquired, and it is the endeavor to connect these differing lines of effort and conceal their lack of normal connection that has produced the theorizing of this record, and also the persistent, use of the word "audion" as applied

even to the earliest De Forest patents, which are of dates before that word was coined.

Among the curiosities of evidence in this record are numerous extracts from technical periodicals giving the opinions of the authors on the subject-matter of this suit. One from The Electrician, of November 21, 1913, is a just comment on the cause:

"We think that Dr. De Forest might be more generous in his acknowledgment of the work of Dr. J. A. Fleming. Our readers generally will probably agree that the audion, although differing widely from the Fleming valve, is an offshoot of it."

The decree below is affirmed, with costs.

FIZZELL v. LOURIE MFG. CO.

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

No. 2194.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—TIRE SETTER.

The Henderson & Lourie patent, No. 933,834, for an edge-grip tire setter, was not anticipated, and discloses patentable invention and utility; claims 2, 3, and 5 also *held* infringed.

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

Suit in equity by the Lourie Manufacturing Company against Robert Fizzell. Decree for complainant, and defendant appeals. Affirmed.

Taylor E. Brown, of Chicago, Ill., for appellant.

W. Clyde Jones, of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

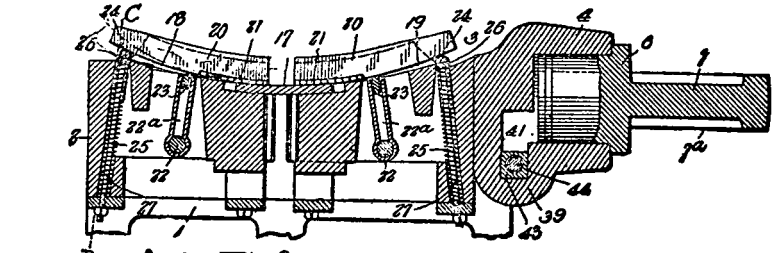
MACK, Circuit Judge This is an appeal from the decree of the District Court, granting an injunction and accounting for the alleged infringement of claims 2, 3, and 5 of letters patent No. 933,834, granted September 14, 1909, to Henderson and Lourie, on an application filed January 17, 1906, for an edge-grip tire setter. These claims are as follows:

"2. In a tire setter, the combination of gripping blocks provided with means for engaging the edge of the tire, and means for yieldingly supporting the blocks to conform to the curvature of the tire; said means comprising a yielding support on which said blocks rest and adapted to be engaged by the tire."

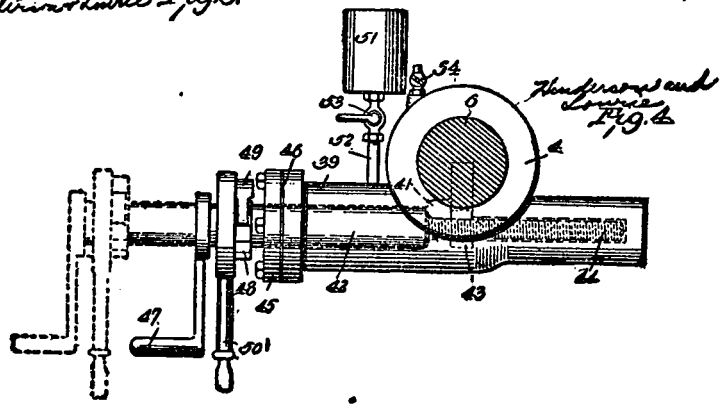
"3. In a tire setter, the combination of gripping blocks provided with means for engaging the edge of the tire, and a plate on which the blocks rest with their rear ends; said plate being yieldingly supported and adapted to be depressed by the tire to adjust the blocks to the curvature of the tire."

"5. In a tire setter, the combination of a frame, a stationary head block secured thereon, a second head block movable on the frame, gripping blocks movable in said head blocks, a hydraulic press mounted upon the frame and provided with a piston rigidly connected with the movable head block, means for moving each pair of gripping blocks in unison and relatively to their respective head blocks, and means adjacent to said means for moving the gripping blocks whereby fluid is forced into said hydraulic press to impart movement to said head blocks."

The following drawings will assist in the understanding of the issues:

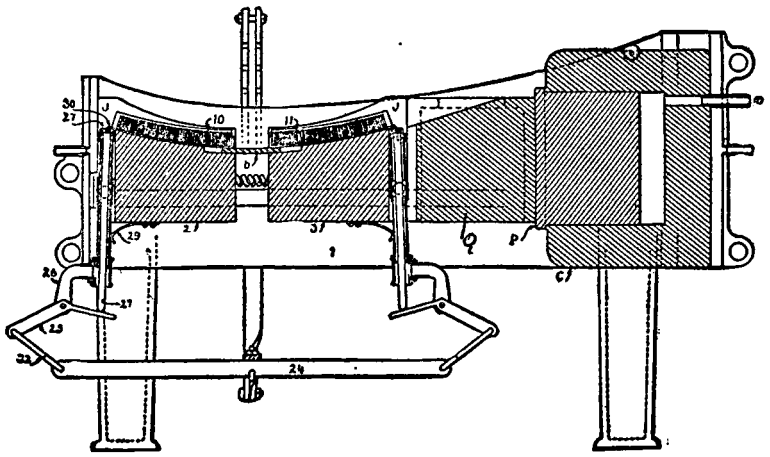


Headstock of Lurie Fig. 3.



Thompson and Lowe Fig. 4

Complainants Exhibit Drawing Working Parts Defendants Machine



Various methods are used for setting steel tires on vehicle wheels, the object of all being to contract the circumferential length of the tire, so that it will firmly grip the felloe of the wheel and be securely held there by friction. The oldest method, and one which is still in limited use, is hot setting by hand. This consists in removing the tire from the wheel, reducing its diameter to the desired length by cutting out a piece, welding its ends together, and heating the tire so that it may be slipped over the felloe. As the tire cools, it contracts and grips the felloe firmly.

The oldest method of setting tires by machine is the face-grip method. This process does away with the necessity for cutting and welding. The tire is removed from the wheel and usually heated at a point on its periphery. This heated portion is clamped between jaws, which grip the tire on its inner side or face, and which are forced towards each other by mechanical means, so as to upset or compress the metal between the two sets of jaws.

More recently cold-setting machines capable of setting the tire while on the wheel have come into use. These machines are of two sorts, edge-grip and full-circle. In the latter, the upsetting mechanism, consisting usually of hydraulically actuated cylinders, is applied radially at a plurality of points on the tire, so that the inward motion of the pistons compresses the tire and causes it to fit the felloe snugly. As these full-circle tire setters are large in size and comparatively expensive, they are used chiefly in wheel factories and are found in only a few larger blacksmith shops.

The machines of the edge-grip type, to which the patent in suit belongs, are simpler and less expensive. The upsetting occurs at one place only, and is produced by two pairs of gripping jaws, which engage the edges of the tire, and which, when moved toward each other, cause the tire between the two pairs of jaws to be compressed or upset, so that its circumferential length is reduced, with the result that it will fit more closely about the felloe.

"The object of the invention" in suit, according to the specifications, "is to so construct an edge-grip tire setter that it can be operated by hydraulic pressure. A further object is to provide improved means for adjusting the gripping blocks, so as to conform to any shape and diameter of the wheel." The machine, as described in the specifications, consists of two blocks or heads, a fixed head *2* and a movable head *3*, mounted on a frame. These heads are spaced and held apart by a coiled spring *14*. To allow tires to be set firmly in the machine, the head blocks are provided at either side with projecting jaws *18* and *19*. The oblique inner edges of each jaw incline towards each other and towards the outer ends of the heads, so that they form a converging channel. In this channel is inserted a pair or set of gripping blocks or jaws *20*, which are wedge shape and adapted for engagement with the beveled inner surfaces of the projecting jaws. When the gripping jaws are moved longitudinally outward with respect to the head block on which they are mounted, they will be forced inwardly on account of the oblique surfaces of the projecting jaws, and the teeth on the gripping jaws will engage the edges of the tire. This longitudinal movement,

with its resulting lateral movement, is effected by means of levers *22*, fulcrumed in each of the heads and provided with upright jaws *22a*, which engage with pins *23* on the under side of the gripping blocks. Each lever is adapted to operate one set of gripping jaws, so that each set will move in unison upon the head which supports it.

The inner ends of the gripping blocks rest on the plate *17*, which bridges the gap between the two head blocks; the outer ends rest upon a transverse bar *24*, which is supported by a U-plate *26* attached to the upper end of a yielding spring-controlled bar *25*. When a wheel is placed in the machine between the gripping blocks, it will rest at its bottom or lowermost point upon the supporting plate; while the rising arc of the tire will strike the bar *24*, forcing it down until the arc of the gripping jaws substantially coincides with the arc of the tire, so that the teeth on the jaws will properly grip the tire. After the gripping blocks have thus been adjusted to the curvature of the tire, and, by means of the longitudinal or wedging action above described, brought into preliminary gripping engagement therewith, the movable head block *2* is drawn towards the stationary head block *3* by hydraulic force.

A hydraulic press, consisting of the cylinder *4* and piston *6*, is mounted upon the frame. The piston *6* is provided with the cross-head *7*, which is connected with the movable head by parallel rods *9*, placed at each side of the heads *2* and *3*, and extending through sleeves on the side of each head. Liquid for operating the press is obtained from the tank *51*, which is connected by the transversely arranged cylinder *39* and the passage *41* with the cylinder *4*, in order that the liquid may be admitted back of the piston *6* so as to drive it forward. This forward action is communicated through the cross-head *7* and the rods *9* to the movable block, which is thus drawn toward the stationary head. The pressure required to drive the liquid into the cylinder *4* is afforded by means of a screw piston *42*, *44*, operated by a crank arm *47*, or by a ratchet arm *50*, both of which are placed near or adjacent to the levers *22* so that one operator can conveniently operate both.

The machine used by the defendant and manufactured by the Keokuk Hydraulic Tire Setter Company, which is alleged to infringe the patent in suit, is of the same general type and style as the patented machine. It is an edge-grip tire setter with a movable head block *3* and a stationary head block *2*, with hydraulic means of drawing the heads together, with gripping blocks *10*, *11*, mounted upon the heads and capable of a wedging movement therein and of adjustment to the curvature of the tire to be upset. The machines, however, are not similar in all respects. The adjustment of the gripping blocks to the periphery of the tire in the defendant's machine and the preliminary gripping of the tire is effected in a somewhat different manner. The gripping blocks do not rest directly on the head blocks, but are mounted on plates *30*, there being one such plate for each set of gripping blocks. Unlike the patent in suit, in which the outer ends of the gripping blocks are normally held up and are depressed to fit the curvature of the tire, in the defendant's machine, the outer ends of the blocks must be raised in order to conform to the arc of the tire; while, in the patented structure, the outer ends of the blocks are depressed by the

weight of the wheel, in the defendant's machine they are elevated by the vertical plungers *27*, which slide vertically within the tubular setting levers *26*, and are adapted to be forced upward by the foot lever connections *25*, *22*, and *24*. The effect of the foot pressure upon the bar *24* will be, first, to raise the gripping jaws to fit the arc of the tire, and, second, after the downward pressure of the wheel resists further vertical motion, the setting levers *26* will begin to move, their lower ends being drawn together and their upper ends cast apart. This longitudinal movement of the upper ends of the setting levers carries each of the plates *30* with the set of gripping blocks that rests upon it outward, and thus produces the wedging action by which the initial gripping of the tire is effected.

The position of the movable and stationary head blocks in reference to the location of the hydraulic press is reversed on the defendant's machine. The cylinder of the hydraulic press is mounted on the end of the frame opposite the end of the frame which carries the fixed block. A filler block is interposed between the piston *P* and the movable head block *3*. When the hydraulic fluid is admitted into the cylinder in which the piston moves, the piston, the filler block, and the movable head are caused to move toward the fixed head, with the result that the distance between the two heads is reduced and the upsetting of the tire thereby brought about. Although the piston is not physically connected with the movable block, mechanically the two move together just as they would if they were so connected. A plunger pump is used on the defendant's machine in place of a screw displacer pump.

The defendant assails the validity of all these claims in view of the prior art as evidenced by the patents adduced and the prior public use of the West hydraulic edge-grip tire setter, and denies infringement, if the claims should be deemed valid. Claims 2 and 3 are essentially subcombinations; the vital feature is the means for yieldingly supporting the gripping blocks or the plate on which their outer ends rest, so that they may readily adjust themselves to the arc of the tire. This is a conception involving invention and utility. Is it novel in view of the prior art and use? Several prior patents show means for manually adjusting the gripping blocks to the periphery of the tire by the insertion and advancement of wedge-shape blocks beneath them. Such adjusting means requiring the operator consciously to determine the extent of the adjustment clearly do not constitute an anticipation of the patented structure, in which the supports of the gripping blocks, yielding to the downward pressure of the wheel, automatically—that is, without any conscious directive effort on the part of the operator—cause the curvature of the blocks to conform substantially with the curvature of the tire.

The defendant's attack on the novelty of the invention is based chiefly, however, upon the public use of the West machine. Each of the four gripping jaws of the West machine has a spring applied to hold its outer end normally, but yieldingly, elevated. While the West machine, therefore, does possess yieldingly supporting means for its gripping blocks by which the blocks are adjusted to the periphery of the tire, it has no single support or plate for the two gripping blocks

on the same head, so that they may be raised or depressed in unison, but the vertical adjustment of each of the four gripping blocks is separate and independent.

The evidence fully warrants the conclusion that this absence of correlation in the vertical movement of the gripping on the same head is not a minor defect, but a very serious one, impairing the commercial value of the machine and destroying its practical utility. When one of the springs is weak, when its resilience is impaired by accumulations of dirt and waste, or when for any other reason one of the springs does not function properly while the other spring on the same head does, the jaws will not properly engage the tire, and the wheel will be marred. The results obtained by the use of the West machine were so unsatisfactory that it was withdrawn from the market in 1900. The want of correlation, the lack of connection between the movement of the gripping blocks on the same head, was doubtless one of the chief causes of its commercial failure.

The machine described in the specifications provides means by which the gripping blocks are not only yieldingly supported, but are yieldingly supported in such a way that the gripping blocks on each head move in unison. This is because the spring is applied not to each gripping block, but to the U-plate *26* which supports not a single but a pair of gripping blocks. This correlation of the movement of the blocks in pairs marks a distinct advance over the West machine, an advance calculated to overcome the gravest objection to automatic adjustment through yielding supports and to give commercial worth to a feature theretofore discarded as impracticable and valueless. The patentees' conception of the necessity for correlating the movement of the jaws and his provision of means for accomplishing this marked a patentable advance in the art over the West machine.

This vertical movement of the gripping blocks in unison relative to the head blocks is the necessary result of the means designated in claims 2 and 3—in claim 2, a yielding support; in claim 3, a yieldingly supported plate; in each instance, not for each block separately, but for each pair of blocks.

As to infringement of claims 2 and 3. These claims do not embody a pioneer invention. As the patent examiner pointed out, invention lies wholly in the character of the means whereby the adjustment of the gripping blocks to the periphery of the tire may be automatic. If the same result had been accomplished by the defendant by substantially different means, the charge of infringement would fail. But changes in or improvements upon the patented structure, embodying the essential features thereof, utilizing the conception underlying it, and falling within a fair range of equivalents, do not enable defendant to escape this charge. The essence of the invention in claims 2 and 3 is the yielding means by which the gripping blocks in pairs or sets are adjusted to the arc of the tire, an adjustment occasioned by the supporting means yielding to the downward pressure of the wheel.

Defendant urges that yieldingly supporting means constitute but a specific kind of automatic adjustment and that as in his view his machine is not automatic, he does not infringe. He fortifies his contention by referring to the file wrapper to show that claims for means of

automatic adjustment were rejected as being too broad in view of the prior art. Conceding his construction of the plaintiff's claims, defendant's conclusion as to his own machine does not follow. Despite the fact that a voluntary act is required initially, a process may be none the less automatic; a machine, though started by pressing a button or moving a foot lever, may none the less in its operation respond to the specification of an automatic device. The yieldingly supporting means specified in claims 2 and 3 are automatic in the sense that the adjustment results from the downward pressure of the wheel and not from the conscious and deliberate measuring by or the conscious directive effort of the operator. In the defendant's machine the operator first places his foot upon the treadle; it is, however, through no conscious directive effort or deliberate measuring on his part, but by their contact with the wheel, that the initial upward movement of the blocks ceases and the lateral and longitudinal movement begins.

If the foot pedal is pressed down before the wheel is inserted, or if a heavy pedal is used, or a weight placed upon the pedal, the gripping blocks will be lifted or elevated, so as to fit the curvature even of the smallest wheel. When a wheel is then placed in the machine, the gripping blocks will be depressed, just as in the patent in suit, so as to conform to the curvature of the tire. Counsel for the defendant themselves suggest that weights would be mere mechanical equivalents for the resilient means described in the specifications of the patent in suit. The evidence justifies the conclusion that the pressure on the foot pedal is equivalent to a weight. It is to be noted that the support in claims 2 and 3, while yielding, is not, as in other claims, elastically yielding; it is not limited to a spring yield. While at first blush defendant's method of adjustment appears markedly different from that employed in the patent in suit, in conception and practical application it is essentially the same. In both, the gripping blocks in pairs by substantially equivalent methods are adapted through the longitudinal and lateral movements to the varying widths and by the vertical movement to the varying diameters of the wheels. We hold claims 2 and 3 valid and infringed.

The validity of claim 5 is assailed as a mere aggregation and as lacking in invention. The elements are all old. Wedge-shape gripping jaws capable of longitudinal and lateral movement, by which the preliminary gripping of the tire is effected, are found in numerous patents. In Francis, No. 843,392, and in Hackney, No. 862,471, means are afforded for the pair of gripping blocks to act longitudinally and laterally in unison. In Brooks, No. 600,117, Tice, No. 568,643, House, No. 690,523, and Hackney, No. 862,471, by the insertion and advancement of wedges the gripping blocks may be vertically adjusted to conform to the periphery of the tire, though the adjustment of each block is independent of the adjustment of the other. Hydraulic presses had been used on full circle machines for many years. Denham, No. 717,084. Smith, No. 387,823, for upsetting I-bars, includes a hydraulic press to impart movement to the movable block in the direction of the stationary blocks. Hydraulic means were similarly employed on the West hydraulic tire setter.

But, until the patent in suit, no one had constructed an hydraulic edge-grip tire setter that was efficient in operation or commercially successful. The West machine had three hydraulic presses, each operating independently of and unconnected with the other—one to draw the head blocks together, and one on each side to move the gripping jaws on each head laterally so as to engage the edges of the tire. The determination of the amount of pressure required to effect a proper engagement of the tire and the blocks called for the exercise of careful and discriminating judgment on the part of the operator. If the sidewise pressure is too great, as is often the case, the tire will be kinked or crushed; if the force is insufficient, as is frequently the case, the side grips will slip and mar the tire and felloe. The machine as a whole is complicated, clumsy, difficult to manipulate, and uncorrelated in its operation; that it was a commercial failure and abandoned is not denied.

Defendant contends, however, that even if the West machine is not an anticipation, nevertheless its use of hydraulic means to impart movement to the head blocks, in conjunction with the teachings of the patents to Tice, Brooks, House, Francis, and Hackney, demonstrate that plaintiff's structure involves no patentable advance. The mere substitution of manual for hydraulic pressure, or hydraulic for hand power, does not ordinarily involve invention. But the novelty of claim 5 lies in combining on such a machine, in which the initial gripping is manually effected, a hydraulic press for the final gripping and for drawing the head blocks together, means for adjusting the gripping blocks longitudinally and laterally in unison relative to their respective head blocks, and accessibly located hand or possibly other power means for operating the hydraulic press.

While the patent examiner originally rejected as a mere aggregation a claim quite similar to claim 5, he was finally convinced that the several elements did form a combination, and that, in thus creating this unitary structure, there was invention. The new claim contained the additional statement that the means for operating the hydraulic press should be adjacent to the means by which the wedging action of the gripping jaws is produced; in our judgment, however, the grant was also based upon a justifiable conviction that the first action was erroneous. The device of claim 5 is a unitary structure, each element co-operating with the others in the manner and for the purpose hereinabove stated.

Support for the ultimate conclusion is found in the fact that, despite the patents to Brooks and Tice, with their means of effecting the preliminary gripping of the tire, Smith's use in 1888 of hydraulic means to draw head blocks together for the purpose of upsetting I-bars, and a similar use in the West edge-grip tire setter, manufactured between 1897 and 1900, Henderson and Lourie, in 1905, were the first to construct an effective, operative, and commercially successful edge-grip tire setter, suitable for the ordinary repair work in a blacksmith shop. They first grasped the importance of using, but limiting the use of, hydraulic power in such machines, by not applying it to obtain the preliminary gripping, for which purpose such power is dangerous, because

it may be excessive, but by adopting it both to effect the final grip and then to impart movement to the head blocks after the engagement of the tire with the machine had been secured by means of gripping blocks capable of an exact and correlated adjustment. The commercial success fortifies the strong presumption of validity.

As infringement of claim 5 was not and could not be controverted, if the claim is valid, the decree must be affirmed.

AMERICAN SAFETY DEVICE CO. v. LIEBEL-BINNEY CONST. CO.

(Circuit Court of Appeals, Third Circuit. July 3, 1917.)

No. 2204.

1. PATENTS ⟸313—SUIT FOR INFRINGEMENT—DISMISSAL ON MOTION.
The court has power to dismiss a bill for infringement on motion, on the ground that the patent is void for lack of invention shown on its face; but such power should only be exercised where the matter is free from doubt, and where invalidity so clearly appears that no testimony can change its legal aspect.

2. PATENTS ⟸328—VALIDITY—SCAFFOLD.
The Foster patent, No. 763,274, for a scaffold, is void on its face for lack of invention, in view of the prior art.

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

Suit in equity by the American Safety Device Company against the Liebel-Binney Construction Company. Decree for defendant, and complainant appeals. Affirmed.

C. P. Goepel, of New York City, and Clarence P. Byrnes, of Pittsburgh, Pa., for appellant.

Wallace R. Lane and George Mankle, both of Chicago, Ill., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is a bill charging the defendant with infringement of Letters Patent No. 763,274, issued June 21, 1904, to Clair Foster, and assigned to the plaintiff. At the opening of the hearing the defendant moved to dismiss the cause on bill and answer, upon the ground that the patent is void on its face. The District Court granted the motion and dismissed the bill without an opinion. The plaintiff brings this appeal, specifying error to the court, (1) in holding the claims of the patent invalid, and (2) in so holding upon the face of the patent and without taking proof.

[1] Upon the matter of procedure it is sufficient to say, that the power of a court in patent litigation to dismiss a bill on demurrer (or on its modern equivalent, a motion to dismiss) upon the ground that the patent is void for lack of invention shown on its face, is not open to question. Victor Talking Machine Co. v. Hawthorne and Sheble Mfg.

Co. (C. C.) 168 Fed. 554; Hogan v. Westmoreland Specialty Co., 154 Fed. 66, 83 C. C. A. 178; Wills v. Scranton Cold Storage and Warehouse Co., 153 Fed. 181, 184, 82 C. C. A. 355; Chinnock v. Paterson Co., 112 Fed. 531, 533, 50 C. C. A. 384. If the patent is manifestly invalid on its face, the court may stop short at the instrument and dismiss the bill (Brown v. Piper, 91 U. S. 37, 44, 23 L. Ed. 200), even when the question of validity is not raised by the pleadings (Slawson v. Grand Street R. R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576).

This is very considerable power, hence courts of this circuit have been careful to heed the admonition, that in its exercise a court should declare a patent invalid upon its face only where the matter is free from doubt and where invalidity so clearly appears that no testimony can change its legal aspect. Wills v. Scranton Cold Storage and Warehouse Co., supra; Hogan v. Westmoreland Specialty Co., supra.

We therefore approached the consideration in this case with appropriate caution; yet we are forced to say, that a careful study of the pleadings and elaborate briefs does not alter the conviction reached upon first view that the patent is one, which, failing even to suggest invention, shows invalidity on its face.

[2] The subject of the patent is a scaffold. It consists simply of pairs of steel cables hanging from outriggers of a building; cross-bars secured to each pair of cables by bolt clamps; boards resting on the cross-bars forming a platform; the platform being extended by multiplying the number of cross-bars, and being raised and lowered by adjusting the bolt clamps. The original of this conception, long used and never patented, was either the familiar boatswain's chair or painter's hanger, whichever was first in the art years ago. There followed scaffolds of many designs, varied to meet the requirements of building construction in the change from low masonry to high steel frames, embodying almost always the elemental idea of those primitive devices. Among them we shall mention only the patent to Clark, No. 673,384 (1901), which constituted an advance in the art of no very considerable degree. It consisted of outriggers from which were suspended perforated metal strips or ribbons in pairs; cross-bars fastened to each pair of strips by means of bolts or pins in the perforations; planking on the cross-bars forming a platform; platform being extended by increasing the cross-bars and adjusted by shifting the pins at the points of perforation. With Clark in the prior art, all that Foster did was to substitute steel cables for metal ribbons and bolt clamps for perforation pins. All that he obtained over Clark was the greater flexibility of steel cables, and adjustability without reference to predetermined positions. Did this involve invention? We think not. Is there sufficient doubt about it to justify the taking of testimony in an attempt to overcome the immediate conviction that invention is lacking? We think not.

The decree below is affirmed.

NEW YORK SCAFFOLDING CO. v. LIEBEL-BINNEY CONST. CO.

(Circuit Court of Appeals, Third Circuit. July 3, 1917.)

No. 2205.

PATENTS ⟸328—INVENTION—SCAFFOLD-SUPPORTING MEANS.

The Henderson patent, No. 959,008, for a scaffold-supporting means, discloses merely a different construction of the device of the prior Murray patent, No. 854,959, without any real improvement, and is void for lack of patentable invention.

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

Suit in equity by the New York Scaffolding Company against the Liebel-Binney Construction Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of ORR, District Judge:

This is an ordinary patent suit in which United States patent No. 959,008, for "scaffold-supporting means," issued May 24, 1910, to E. H. Henderson is involved. The defenses are that the patent is invalid for want of invention and that, if the patent be valid, yet defendant has not infringed. The claims of the patent in issue here were in issue in certain other litigation brought by the plaintiff herein against one Whitney in the District Court of the United States for the District of Nebraska. The result in that litigation was that the Court of Appeals of the Eighth Circuit, by a divided court, reversed the court below and adjudged the claims 1 and 3 of the patent valid. This present case has been under consideration for some time in the hope that this court would reach the same conclusion that was reached by the Circuit Court of Appeals of the Eighth Circuit. New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138. The rule of comity does not demand that a judge of another court shall "abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals." Mast, Foos & Co. v. Stover Manufacturing Co., 177 U. S. 485–489, 20 Sup. Ct. 708, 710 (44 L. Ed. 856).

The necessity of scaffolding in all building operations of magnitude has ever been apparent. Originally, scaffolding was made to rest upon the ground and was increased in height as the building of the structure demanded. The expense of scaffolding necessarily increased with the height of the scaffolds. The natural result was that when the builder could drop his scaffolding from the top of the building with less expense than would be required to raise it from the ground he naturally did so. So with respect to the exterior decoration of a building, when the painter's ladders were not long enough to reach to the height required, the painter devised means by which he could sustain a platform, or as it is often called, a painter's stage or boat, from the roof of the building. The painting of a vessel's hull at sea involved necessarily the dropping of a platform or a plank from some supports made to rest upon or above the deck. The swinging of a boat from the davits would suggest a means by which the painter's stage used in the painting of a vessel could be swung. To those who are accustomed to observe, it is a matter of common knowledge that many men use different means to accomplish the result at which they may all aim; but it is also observed that men in the same art will oftentimes use the same means to accomplish the end sought, although there may have been great distance between them and no communication.

Utility is often urged as an important factor in determining patentability, but utility must be connected with invention in order to have weight in such determination. Having found that there was no invention in the Henderson device, a consideration of its utility is of slight value, yet the extent to which

the plaintiff uses the device of the Henderson patent, if it be less in degree than the extent to which other devices controlled by it, intended to accomplish the same purpose, are used, some light, though little, may be thrown upon the question of novelty, which is also a material element of patentability.

The plaintiff is not a manufacturer of devices, but is the holder and owner of patents under which licenses have been granted to the Patent Scaffolding Company, which constructs or causes others to construct the devices alleged to be covered by the patents. The practice of the Patent Scaffolding Company is not to sell the devices, but to rent them to contractors who may require the use of scaffolding in the erection of tall buildings. By judicious advertising and by permitting contractors to have the devices for the necessary period, at less than what it would cost to construct them, the Patent Scaffolding Company has created a large business, and the plaintiff receives substantial returns under the licenses granted by it.

The facts as revealed by the testimony negative the suggestion that there is anything novel in the device of the patent in suit. The demand created for the device is not the result of its novelty combined with utility, but of the business methods of the Patent Scaffolding Company.

We find from the specifications of the patent what Henderson desired to attain as expressed in the following language: "My invention relates to an improved means for supporting scaffolds used in connection with the construction of buildings and their repair. Scaffolds for this purpose are preferably of the swinging type supported by cables from outriggers temporarily secured to the upper part of the building. It has been the practice in the past to associate hoisting means with the cables at the outriggers and in some cases it has been proposed to use such hoisting means in connection with the cables on the scaffold to adjust the height as required in connection with the work. My invention relates to an improved form of hoisting mechanism carried by the scaffold for securing the same to the cables, the upper ends of which are connected to outriggers, generally temporary in character, secured to the upper portion of the building."

It is to be noticed in that language that Henderson recognized the prior use of scaffolds of the swinging type, supported by cables from outriggers, and that he recognized the use of the hoisting means in connection with the cables on the scaffold to adjust the height as required, in connection with the work. Henderson did not have to say, what every one knew, that as part of a scaffold floor, pieces were used extending between and resting upon cross-beams called putlogs.

In considering the claims in suit, we find that, in addition to these various elements, Henderson claimed a combination with U-shaped bars in which the crossbeams or putlogs are laid, upon which the floor pieces are sustained. The claims are as follows:

Claim 1: "A scaffold consisting in the combination of crossbeams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

Claim 3: "A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a crossbeam laid in and extending between each pair of such U-shaped bars, a floor laid upon said crossbeam, a drum rotatably supported between the upwardly extending side members for each of said U-shaped bars, and means for controlling the rotation of said drum."

The support of the hoisting device by the side members of the metal bar is found in United States patent to Murray, 854,959, dated May 28, 1907. In the United States patent to Bowyer and Casperson, No. 382,252, under date of May 1, 1888, is found a painter's stage in which there is a continuous metal bar extending around the under side of and upwardly holding one end of the plank upon which the painter rests. A similar one must be at the other end. The plank rests upon the lower part of that bar, just as the crossbeam rests upon the lower part of the U-shaped bar called for in the patent in suit. The plank, of course, is not large enough to afford support for bricks or mortar,

but if that plank support, as called for in the Bowyer and Casperson patent, be placed at right angles to the building and used as a putlog, and a similar plank resting in the same way be used as another putlog, upon which floor pieces can be placed, the arrangement would be the same as contemplated by Henderson in the patent in suit, so far as the resting of the beam upon the metal which forms the base of the U-shaped bar. The erection of outriggers for the support of the Bowyer and Casperson devices, arranged as suggested, would accomplish the same result as the device of Henderson and just as satisfactorily.

This court is not unmindful of the difficulty of ascertaining what is and what is not invention. In every case of a rearrangement of old parts it is urged that, because such rearrangement seems simple and natural, the court must avoid falling into the error of holding that there is no invention. It is insisted that the device under consideration would be found in prior patents and publications, if it were so simple to the men who claimed invention as appears after the patent has been granted. The argument is good where the patented device has filled a long-felt want and has immediately leaped into favor upon its own merits; but it is not sound where the device is one which has become widely used by reason of extensive advertising and reasonable charge for its use. It is a matter of observation that of recent years patents have been multiplied beyond precedent and not in proportion to the increased population. Many of them, which have each very slight variations from the other, are found in the same art. In many suits brought upon such patents it has developed that the method of the patent has been a shop practice for years, or that the device of the patent has been used by artisans to accomplish the result which the patentees hoped to secure especially for himself.

It was the intention of the framers of the Constitution that inventors could only be protected. It is well said by Judge Strong in Pearce v. Mulford, 102 U. S. 112–118, 26 L. Ed. 93: "But all improvement is not invention, and entitled to protection as such. Thus to entitle it, it must be the product of some exercise of the inventive faculties, and it must involve something more than what is obvious to persons skilled in the art to which it relates." It seems clear that to a person skilled in the art of making or adjusting scaffolding, if he had a Bowyer and Casperson patent and the Murray patent before him, the arrangement of Henderson would be obvious if he desired to use it.

In the neighborhood of 70 per cent. of the scaffolding devices put out by the Patent Scaffolding Company are used, and are intended to be used, in accordance with the disclosure of the Murray patent. No. 854,959. The Patent Scaffolding Company in its catalogue in illustrations illustrated the Murray arrangement, and not the Henderson. According to the claims of the Henderson patent in suit, the frames of the machines are intended to be parallel with the wall of the building upon which they are to be used. The plane of the frames of the Murray machines are intended to be in the plane of the putlog which, of course, must be approximately at right angles to the building in order that the flooring of the scaffolding resting thereon may be extended along the side walls of the building. The putlogs indicated in the Murray patent consist of two pieces of angle iron bolted together in connection with the frames in which the hoisting devices are supported. This arrangement of the Murray patent makes the portions of the angle iron where they are connected with such frame equivalent to the bottom part of the U-shaped frame of the Henderson patent. In connection with the frames described in the Henderson patent in suit, in more than two-thirds of the machines used, the putlogs are the angle irons of the Murray patent and the bolts connecting the two angle irons with each frame rest upon the lower part of the "U" of the Henderson frame; that is to say, the Henderson frame, at this lower part, extends between the two pieces of angle iron below the bolts connecting the same. It therefore appears that in the vast majority of the frames used the putlogs do not extend through the frames as called for in the patent in suit, nor could they do so, because, as we have said, the vertical plane of the frame is in the vertical plane of the putlogs. This conclusion is strengthened by the fact that, while the plaintiff put in evidence a large number of photographs show-

ing the frame of the Henderson device, it did not put in evidence any photographs showing the use of the Henderson device and the putlog in the same relation as contemplated by the Henderson patent. The Henderson patent has not supplanted others, nor has the influence of its owner been exerted to that end. It barely represents a step in the art. It does not disclose invention.

In view of the conclusion reached by this court that claims 1 and 3 of the patent in suit are invalid, it is unnecessary to do more than touch upon the matter of infringement. The evidence of infringement is meager, and yet, if the claims of the patent in suit were to be held valid with a range of equivalents, infringement would be found. The defendant uses a device, known as the Whitney scaffolding device, which was the subject of the litigation in the case in the Eighth circuit above referred to. 224 Fed. 452, 140 C. C. A. 138. If the patent in suit were held to be valid to the exact form as described in the specifications, infringement would not be found, because the Whitney device does not appear to be an imitation of the Henderson device. While similar, they are not so like each other that builders would be deceived and take one for the other.

Another matter should be referred to. At the trial in this case, Whitney, who was the defendant in the suit in the Eighth circuit, was permitted to intervene in the suit in this court, without objection by either party. After the trial, the plaintiff moved for permission to file a supplemental bill, in which the only new matter alleged was the intervention of Whitney in the present case and the final determination of the case in the Eighth circuit against Whitney's contention. It was not pretended that such decision would operate as res adjudicata, because the liability of the defendant in this suit could not be the liability of Whitney. As the case stood at the time of the motion, the plaintiff in this case and the plaintiff in the litigation in the Eighth circuit were one and the same person; but the defendant in this case was different from the defendant in the case in the Eighth circuit. While the decision in the Court of Appeals in the Eighth circuit might have been conclusive upon Whitney with respect to the validity of the patent in suit, yet it would not be conclusive upon the Liebel-Binney Construction Company, for the reason that the latter did not have its day in court.

The court is of the opinion that the plaintiff is not entitled to file its supplemental bill and has refused the motion.

The bill in this case must be dismissed, at the cost of the plaintiff. Let a decree be drawn.

C. P. Goepel, of New York City, and Clarence P. Byrnes, of Pittsburgh, Pa., for appellant.

Wallace R. Lane, Robert H. Parkinson, and George Mankle, all of Chicago, Ill., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is a suit for infringement of Letters Patent No. 959,008, issued to E. H. Henderson, May 24, 1910, and is here on the plaintiff's appeal from a decree of the District Court dismissing the bill on the ground of invalidity of the patent.

The patent is for scaffold-supporting means. The claims in issue are 1 and 3. The alleged infringing scaffold used by the defendant was known as the Whitney scaffolding device, manufactured and leased by Egbert Whitney under a junior patent. (Letters Patent No. 998,270 to Whitney.)

In the erection of modern steel frame structures, contractors have found it more economical to rent scaffolds than to buy them. This suit is a part of a controversy between rival scaffold renting con-

cerns. In other litigation instituted by this plaintiff against another defendant, involving the validity of the same claims of the Henderson patent and infringement by the same device of the Whitney patent, the Circuit Court of Appeals for the Eighth Circuit, reversing the District Court for the District of Nebraska, held the claims valid and infringed. New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138. In reaching an opposite conclusion in this case upon precisely the same issues and upon substantially the same facts, the learned District Judge hesitated, as do we, in disturbing the force of a decision of a court of coordinate jurisdiction and in preventing uniformity of decision by yielding to his own convictions. Yet we feel this is a case where comity, being a rule of convenience intended to persuade, not to command (Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 20 Sup. Ct. 708, 44 L. Ed. 856), should not prevail against an opposite judgment when based upon clear conviction.

The matters which induced the District Court to its judgment, holding invalid a patent previously declared valid by another court, are fully set forth in its opinion, supra. These appeal to us with like convincing force. We shall consider them briefly.

In determining whether Henderson's device was a contribution to the art, involving invention, though narrow, or was merely a departure from the art by formal changes in prior devices, we must inquire what Henderson did and what problem he solved.

Scaffolds are as old as buildings; and scaffolds of different types have conformed time out of mind to the types of buildings upon which they were used. When buildings were low, scaffolds likewise were low, and were constructed along lines of greatest convenience, namely from the ground up. When structures increased in height, scaffolds likewise increased in height to a point where the elements of cost and danger induced a change. Then instead of being built from the ground upward they were suspended from the roof downward. When this change was found expedient, the art went for information to other arts in which scaffolds, by reason of their peculiar uses, had never been built upon the ground but had always been suspended from above. Among these was the seaman's art, in which was found the boatswain's chair, a simple contrivance made of a board with ropes through each end after the manner of a child's swing, which converge toward and are connected with a main rope slung from the mast-head or cross-tree, and passed through an overhead block and returned to the operator, by which he raised or lowered his position along the mast. Then there was the painter's stage or hanger, which is nothing more than a longer board, the ends of which are attached to ropes suspended from the ship's rail, capable of being raised and lowered from above or by blocks from below, and used by sailors when painting the ship's sides. The painter's stage was brought to land and conveniently used upon buildings. It consisted of a plank or planks used as a platform resting on cross-bars, the ends of which were held by ropes passed through blocks, which in turn were suspended from large metal hooks so shaped as to securely grasp the roof of the building. This platform was readily adjusted by block and fall to any elevation.

This crude but much used device was improved by Bowyer and Casperson in their Patent No. 388,252 (1888) by arranging in one structure an enlarged cross-bar or putlog and a drum by which to operate the overhead block and fall and elevate and lower the platform, which extended from one putlog to the other.

Platforms of both the crude and improved types were sufficiently steady for sailors and painters who did their work while sitting, but they were not sufficiently firm and steady for the heavier and more active work of bricklayers. As the demand for overhanging scaffolds increased with the increasing height of modern buildings, Clark (Letters Patent No. 673,384—1901) disclosed a mason's platform for such buildings by hanging perforated metal ribbons or strips in pairs from projected out-riggers, attaching putlogs to each pair, and suspending platforms on the putlogs. The platform was adjusted by pinning the putlogs at different positions in the perforations. Foster secured a patent (No. 763,274—1904) for substituting steel cables for the metal ribbons and bolt clamps for the pin fastenings of Clark, which, though held invalid by this court for want of patentable invention (American Safety Device Co. v. Liebel-Binney Construction Co., 242 Fed. —, — C. C. A. —), was a scaffold in the art prior to Henderson. Scaffolds made like Clark and Foster in multiple pairs were found to possess rigidity, but they were adjustable only by changing the putlog sustaining bolts and pins, with loss of time and risk of injury. Cavanaugh overcame these difficulties by a patented device (No. 796,807—1905) for elevating scaffolds of this type by drums positioned on the out-riggers but operated by chains suspending loosely to the platform. Murray (No. 854,959—1907) improved upon Cavanaugh by changing the position of the drums from the projecting out-riggers to the platform. The hoisting mechanism of Murray consists of a drum with bearings mounted in upright arms of a rectangular metal frame connected and stiffened at the top and bottom by metal rods. The metal frame serves the double purpose of holding the drum in position and of affording a place for engagement with a putlog. To the lower part of the metal frame is rigidly attached one end of a putlog, the other end being similarly attached to the metal frame of another like hoisting mechanism. The drums in pairs are then connected with the pairs of steel cable of Foster. The platform extending from putlog to putlog may then be raised or lowered by winding or unwinding the drums in pairs. In this arrangement the drum frames are placed edgewise the building. This is to be noted because it is the principal thing, which, it is claimed, distinguishes Murray from the patent in suit.

This was the art when Henderson entered it. Henderson took the drum of Murray, positioned it in a drum frame in the same way and for the same purpose, but he made the frame U-shaped instead of rectangular, and changed the position of the frame and drum from edge to the building to flat with the building, thereby permitting a putlog to be loosely placed and held within the bend of the U. Much stress has been laid in this and other litigation on this difference in position of the drum and manner of engagement of the putlog. In this difference patentable invention is claimed, and has been found.

224 Fed. 452, 140 C. C. A. 138. This is the only difference we discern between Murray and Henderson. We are not satisfied that by this difference Henderson made any improvement, patentable or otherwise. He provided a loose and unfastened putlog in place of the fixed and fastened putlog of Murray, and lessened the fixity and rigidity of the whole platform, thereby correspondingly lessening the security of the workmen, which is just the opposite of what was pressed throughout the argument as the important consideration to induce masons to work with heavy materials upon swinging platforms. But however that may be, the evidence is that although Henderson followed Murray and claims to have improved upon his device, the Patent Scaffolding Company advertises only the Murray device, and seventy per cent. of the scaffolds it puts out and rents are the Murray device.

We do not see what problem was presented to and solved by Henderson. He did what Murray had already done, but did it in a different way. Patentable invention does not reside in mere difference, either of construction or result. The difference in construction is small indeed, involving nothing more than mechanical skill. The difference in result is a small saving of space upon the platform. This saving does not appear to have been demanded before the patent or valued after it. Finding no new problem presented or solved and no real improvement made, we cannot conceive patentable invention in Henderson's formal changes from the prior art. We are therefore of opinion that Claims 1 and 3 of the patent are void for want of patentable invention.

The decree below is affirmed.

CHAMPION SHOE MACHINERY CO. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, First Circuit. June 16, 1917.)

No. 1245.

PATENTS ⇐328—INVENTION—MACHINE FOR NAILING SHOE SOLES.

The Casgrain patent, No. 864,951, for a machine for nailing shoe soles, claim 4, *held* invalid for lack of patentable novelty, in view of the prior art, and especially of the Cutter patent, No. 582,579.

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Suit in equity by the United Shoe Machinery Company against the Champion Shoe Machinery Company and another. Decree for complainant, and defendant named appeals. Reversed.

For opinion below, see 235 Fed. 139.

John H. Bruninga, of St. Louis, Mo., for appellant.

Alexander D. Salinger and Frederick P. Fish, both of Boston, Mass., for appellee.

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

DODGE, Circuit Judge. The District Court has held claim 4 of United States patent 864,951, issued September 3, 1907, to Louis A. Casgrain, upon an application filed August 4, 1898, and now owned by the appellee, valid and infringed by both the corporations, who were defendants below. One of them had bought and used the machines held to infringe; the other had made and sold said machines. The defendant last referred to is the only appellant before us.

In the opinion of the District Court (United Shoe Machinery Co. v. Farmington Shoe Mfg. Co., 235 Fed. 139) the important features of the patent, of the machines held to infringe, and of the earlier patents relied on by said defendant, are so clearly and fully set forth as to render much description in detail of the construction and mode of operation of the various mechanisms there referred to unnecessary in this opinion.

The contention that the claim in suit is invalid in view of the prior art is first to be considered. The claim is for the combination, in a machine for inserting fastenings, of the following old elements:

(1) A horn or work support.
(2) A main driving shaft.
(3) Mechanism controlled by said shaft to depress the horn periodically.
(4) A clutch for said shaft.
(5) Controlling means to throw said clutch into operation.
(6) A treadle.
(7) Operating connections between said treadle and said means to start the machine.
(8) Positive connections between the treadle and horn, to raise the latter manually (i. e., operated or controlled by the workman or operator) when the machine is started.

The appellant says that all the elements of the above combination, operating in substantially the same manner, are found in two prior United States patents, both of them expired: One, No. 566,359, August 25, 1896, to Weeks & Tuttle, for a sole-nailing machine; the other, No. 582,579, May 11, 1897, to Solomon M. Cutter. Many other prior patents were referred to in the answer, but it is upon these two that the appellant mainly relies. The questions to be determined involve more especially the elements above identified as (4) to (8) inclusive.

As to the Weeks & Tuttle patent, the machine it describes has three treadles, side by side and separately operated. By depressing one of them the clutch is thrown into operation and the machine thereby started, which continues to run while this treadle is kept depressed, which treadle has no connections operating either to raise or to lower the horn or work support. By the depression of another treadle alongside the first, the horn is raised into working position before the machine starts; when so raised, it is locked in working position, and the same treadle cannot be operated to lower it. By depressing a third treadle, after the machine has been thrown out of operation by release of the second treadle, the horn is unlocked and lowered from its working position. Although the second treadle may be said to have "positive connections" between it and the horn, we agree with the District Court in being unable to regard the mechanism which this patent de-

scribes as an anticipation of the patent in suit, wherein depression of the single treadle used first starts the machine, and, after that has been done, raises the horn to working position, wherein it is kept until stopping of the machine, which is permitted by release of the same treadle, lowers the horn automatically. We do not find described by Weeks & Tuttle either the same combination or the same mode of operation as that described in the patent and covered by the claim in suit. Nor can we hold that a combination wherein the same depression and release of a single treadle was made to do what had before required the operation of three independent treadles added nothing patentably new to the art.

Such an addition to the art, however, had been made before the filing of Casgrain's application by the later Cutter patent, with regard to which a much more serious question is presented. This patent describes mechanism like that of the patent in suit, in that by the depression of a single treadle the horn is first raised and the machine thereafter started. Once so started, the machine continues to run until the treadle is released; its release permits automatic stoppage of the machine, and from such stoppage lowering of the horn automatically results. The difference here important between Cutter's mechanism and that of the Casgrain patent in suit lies in the fact that Cutter's "connections between the treadle and the horn, to raise the latter manually when the machine is operated" are not "positive," like those of the patent, but yielding, as more fully explained below. The Cutter mechanism includes another treadle, also having connection with the horn; but its functions need not be considered for the purposes of this case.

The connections between Casgrain's treadle and horn, whereby depression of the former is made to raise the latter, include a toggle, which lifts or lowers the horn as it is straightened or yields, and this is true, also, of the mechanism described in both the above prior patents. But in the patented mechanism that depression of the treadle which ultimately throws in a clutch, and thereby starts the machine, must first have completely straightened the toggle, and by so doing have raised the horn into its desired operative position, wherein it is supported by the straightened toggle, and cannot yield downwardly, except as permitted by the horn spring, whose upward pressure holds the horn when in said operative position, with the work supported thereon, against the piercing and nailing mechanism, while the machine is being operated. The horn spring is relied on to accommodate itself to any differences in thickness of the work so supported; and the toggle is necessarily straightened as above, before the machine starts, without regard to any such differences in thickness, because the connections whereby depression of the treadle tends to straighten the toggle admit of no yielding, whatever resistance may be encountered to such straightening. A yoke attached to or forming part of the treadle has rigidly secured to it an upturned arm, pivoted to the toggle joint by a rigid link, so that, in the language of the specification, "depression of the end of the treadle * * * will act through the upturned arm * * * and link * * * to positively straighten or set the toggle

and thereby elevate the horn," etc.—the toggle being thus fully straightened and set before the treadle can be so far depressed as to move the controlling means whereby the clutch is thrown into operation and the machine started.

In Cutter's earlier mechanism the treadle also operates through a link to straighten a toggle, whose straightening lifts the horn. But Cutter, as his specification distinctly states, does not propose that the toggle shall necessarily be fully straightened before the treadle is so far depressed as to start the machine; he intends that in case "stock of greater thickness than that just nailed" is on the horn for nailing, the horn shall be raised before the machine starts, only "as far as possible." He points out that, in such a case, positive connections would require the exertion of force enough in depressing the treadle to overcome the influence of the horn spring, in order to fully straighten the toggle before the point of depression could be reached at which the treadle operates to start the machine; and he therefore provides a "yielding connection," whereby, after raising the horn as far as permitted by the thickness of the stock supported on it, depression of the treadle is continued, without having first to overcome any resistance of the horn spring, until it has operated the starting mechanism. Cutter's toggle is left, in such a case, not quite straightened or set when the started machine first brings the awl down into the stock; but it remains under the tension of the spring which makes the treadle connection "yielding," whereby it will be straightened or set as soon as the feeding mechanism after the first descent of the awl, so relieves the opposed tension of the horn spring as to let the stock and awl move toward the driver.

It is undisputed, as was said in the opinion below, that complete straightening of the toggle before the machine is started is desirable in machines of this kind. Cutter's mechanism secured this advantage whenever the stock at the time supported on the horn was not thick enough to require any compression of the horn spring in order to straighten the toggle. Casgrain's mechanism secured it in all cases, without regard to any differences in thickness of the stock, compressing the horn spring, if necessary. The appellant contends that, although Cutter's mechanism provides a treadle connection which is to yield as above when extra thick stock is being supported, in order to avoid the necessity of extra force on the treadle, his patent nevertheless in effect discloses and his claims cover a structure comprehending positive as well as yielding connections, and so capable of securing the above advantage whatever the thickness of the stock on the horn. One of Cutter's claims (No. 15) calls only for "a connection between the treadle and the toggles whereby said stock support is automatically raised when the treadle is operated to start the machine and automatically lowered when the treadle is operated to stop the machine," etc. But nowhere in his patent is any structure having other than yielding connections described or shown, although two forms of yielding connections are described and shown.

Although it is true also, as the file wrapper shows, that, in the Patent Office, Casgrain's application was at first rejected in view of Cutter's patent, and finally issued because of the argument that the positive con-

nection shown by Casgrain could not be construed to be the same as the yielding connection of Cutter; and although it may well be true that Casgrain improved upon Cutter from a practical point of view by making the connection positive instead of yielding, we are unable to regard the improvement so made as one involving invention upon Casgrain's part. We are of the opinion that, so far as any invention was involved in either combination, the advantage of making depression of the single treadle first wholly straighten the toggle, and start the machine after but not until this was accomplished, was really secured by Cutter, leaving nothing to be done beyond mechanical adaptation in order to change Cutter's yielding connection into a positive connection or to substitute the latter for the former.

Casgrain provides no way of avoiding that necessity for extra pressure on the treadle which Cutter distinctly pointed out as involved in the use of a positive treadle connection whenever thicker stock happens to be on the horn; he simply accepts the necessity and rejects Cutter's way of avoiding it. The commercial success shown to have been attained by Casgrain's machines as marketed by the defendant tends to show that in practice such necessity has not proved to be a serious disadvantage. But we fail to see how, in so accepting it, Casgrain really did anything which Cutter had not shown him how to do. We are therefore unable to agree with the District Court in its conclusion that the mechanism covered by the claims in suit was the result of an exercise of the creative faculty amounting to inventive thought.

It may be here mentioned that Cutter's mechanism, as described in his patent, includes also means for adjusting the position of the horn by hand according to the thickness of the stock to be operated on, the due use whereof would result in the full straightening and setting of his toggle at the proper point of depression of the treadle in all cases, its connection with the horn then operating no differently than if it were positive and without capacity for yielding. But in most cases no resort to his hand adjustment was needed, as above shown, to make his treadle connection operate as if it were unyielding so far as straightening and setting the toggle is concerned. When not required to yield, it was to all intents and purposes a positive connection.

It is true there is no proof that machines made according to Cutter's patent have been practically used; but it is also true that there is no proof that such machines would be incapable of successful practical operation, and we see no reason for supposing that they would be so incapable. The most that is claimed in this direction is that, whenever the toggle was not fully straightened or set, the first nail thereafter driven by the started machine might fail to be properly driven; and this is the full extent of the advantage secured by the only deviation made by Casgrain from the combination described by Cutter, which has any importance for the purposes of this case. It does not seem to us that this amounts to patentable novelty in function or mode of operation. We must therefore hold the claim invalid for want of such patentable novelty, in view of the prior art.

The above conclusion renders it unnecessary to consider the ques-

tions of infringement raised, validity of the claim being assumed, as to either form of machine made and sold by the appellant.

The decree of the District Court is reversed, and the case remanded to that court, with directions to dismiss the bill; and the appellant recovers its costs of appeal.

K–W IGNITION CO. et al. v. TEMCO ELECTRIC MOTOR CO.

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

No. 2934.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—SHOCK ABSORBER.
   The Thompson patent, No. 1,072,791, for a shock-absorber for automobiles, while narrow, was not anticipated and is valid; also *held* infringed.
2. PATENTS ⟸129—SUITS FOR INFRINGEMENT—DEFENSES—ESTOPPEL.
   A condition of a sales agency contract, binding the agent to recognize and respect all rights under the patent, is extinguished by the termination of the contract, and in a subsequent suit the agent may contest the validity of the patent.
3. COURTS ⟸290—SUIT FOR INFRINGEMENT—JURISDICTION—UNFAIR COMPETITION.
   Where, in an infringement suit, the patent is held valid and infringed, a claim for unfair competition arising out of the infringement may be considered in the accounting of profits and damages, although the parties are citizens of the same state.

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

Suit in equity by the Temco Electric Motor Company against the K-W Ignition Company and Joseph A. Williams. Decree for complainant, and defendants appeal. Affirmed.

A. F. Kwis, of Cleveland, Ohio, and A. J. Hudson, of New York City, for appellants.

H. A. Toulmin, of Dayton, Ohio, for appellee.

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

SATER, District Judge. The defendants (appellants) seek a reversal of the decree of the District Court adjudging them infringers of the Thompson patent, No. 1,072,791, issued in 1913, of which the plaintiff (appellee) is the owner.

[1] The object of the patentee was to provide a shock-absorber which would make riding in a Ford automobile easy. He accomplished this by supplying a set of quickacting coiled springs in connection with the set of slowacting and friction-retarded leaf springs originally built into the vehicle. The compression and recoil of the two sets of springs occur at different times, in consequence of which their respective pulsations are not synchronous. The result of this is that the vibrations which would otherwise be transmitted to the frame of the vehicle are absorbed within the springs. The availability of the device

for use is such that the owner of a Ford automobile, without the services of a mechanic, and without disturbing the operation or construction of his car, may, with slight instruction, remove the usual hanger which supports each end of each leaf spring and insert the plaintiff's attachment in its stead. The absorber consists of a coiled or torsion spring inclosed in a cylindrical metal casing or hanger capable of an upward and downward sliding movement on a guide or stanchion whose lower end is bolted to the axle. The stanchion supports the torsion spring, limits the side movements of the leaf spring, and is provided at its upper end with a nut or stop which restricts the upward movement of the casing. Immediately surrounding the guide is a cylindrical collar, whose upward end broadens out after the fashion of a washer and rests on top of the coiled spring and against the inner side of the upper closed end of the casing. When a shock from the movement of the car is sustained, the lower end of the collar contacts with a washer resting on a platform or shelf on the guide at the lower end of the casing, which shelf limits the casing's downward movement. On the side of the casing next to the end of the leaf spring is an eye, through which a link passes connecting the leaf spring with the shock-absorber and tending to hold the casing at the upper end of the guide. The effect of the arrangement is such that the recoil of the torsion spring begins before the full effect of the shock to the wheels can be transmitted through the leaf spring to the body of the car and its occupants. Riding is thereby made easier.

The desirability of shock-absorbers has been such as to tempt many inventors to cultivate the field pertaining to that particular art, and, as is quite usual in patent cases, the defense of anticipation as well as of nonpatentability is interposed. The Williams device for a wagon spring, No. 203,863 (1878), which defendants' expert thinks most closely approaches that of the plaintiff, differs so radically as to prevent its adaptability to an automobile. The auxiliary spring, whether it be rubber or steel, is not mounted and cannot be mounted on or interposed between the axle and leaf spring, as is essentially necessary in the Thompson device, but is attached on its outer side to side bars extending about the length of the wagon bed and secured to and supported by the axles, which are remote from the spring, and is connected by a rod directly to the rather remote leaf spring below. As the side bars possess some degree of flexibility, a third spring element is also thus introduced. Haskins, whose patent, No. 330,023 (1885), is also relied on by defendants as anticipatory, distinguishes his spring arrangement from and claims an improvement on that of Williams. His purpose was to overcome in vehicles the motion or jolt caused by the movement of the horses. In his form, shown in Fig. 5, to which the defendants' expert directs special attention, the leaf spring connects immediately to the helical spring, which in turn is attached by a body loop to the platform or bed of the vehicle. The shock from the wheels passes through the leaf spring first. The coiled spring is not between the axle and the leaf spring, and no one suggests how, within the terms of the patent, a construction is permissible or possible thus to place it. The result which he obtains and his manner of obtaining it are not the

same or substantially the same as those secured and employed by Thompson. The Anger device, covered by patent No. 1,031,612 (1912), is unlike the plaintiff's, in that it is primarily built into the car and is not constructed as a separate or a separable part. His entire spring arrangement must be built and put in place at the factory—the axle which is split or separated into two parts being thus specially made in order to admit of the use of his mechanism. No guide is employed to support the spring, nor does the construction admit of the use of a guide, or of a variation even approximating the plaintiff's structure. The remoteness of the other alleged anticipatory patents is such that they need not be mentioned. The Haskins and Anger patents were cited against Thompson when his application was pending in the Patent Office, but were satisfactorily differentiated from his improvement. The Williams and the Haskins inventions were designed for use on horse-drawn vehicles long prior to the conception of the powerful, heavy, swift-moving automobile, and no one attempted to adapt them, or either of them, to vehicles of that kind. The merit and simplicity of the Thompson device were immediately recognized, and it promptly went into extensive use. Salesmen, before seeing it and without the use of any advertising matter, found many ready buyers. The demands of the trade exceeded the ability to supply it. Although its parts are old, they have been so brought together as to produce in a new way a better result than had been attained by anything that preceded it in the art. It is a narrow patent, but it involves invention and is valid.

[2] The defendant company was the plaintiff's exclusive sales agent. Their contract provided that the defendant company would not manufacture or endeavor to manufacture plaintiff's spring and would respect its patent rights then existing or thereafter acquired, and was terminable by mutual agreement. It proved to be highly profitable to both parties, but, a controversy having arisen between them regarding the price of the springs, it was terminated at the defendant company's instance. The above-mentioned prohibitory features perished along with the residue of the contract and the defense of nonpatentability may therefore be properly made. Dueber Watch Case Mfg. Co. v. Robbins, 75 Fed. 17, 26, 21 C. C. A. 198 (C. C. A. 6); Computing Scale Co. v. Stimpson Co., 104 Fed. 893, 895, 44 C. C. A. 241 (C. C. A. 6). Before the termination of the contract, the defendants, to avail themselves of the demand for plaintiff's device, made preparations for manufacturing and marketing a new shock-absorber strikingly like that of plaintiff, and shortly thereafter offered the same for sale. Its guide or stanchion is divided. At the top of the lower portion, which fits into the hole in the Ford axle, is a platform which serves substantially the purpose of the platform on the Thompson guide. An outside cylindrical cover may be used or not, as the manufacturer chooses; but, if used, it serves no purpose other than to inclose the coiled spring. The efficient casing or hanger which acts on the torsion spring is inside instead of outside of such spring and immediately surrounds the upper end of the upper part of the guide. The lower end of this portion of the guide is affixed to a link which connects it with the leaf

spring. Its upper end, to limit the upward movement of the spring, has a projection which fits into a cavity on the bottom of the cup-like formation which the hanger is made to assume. The hanger's cup-like top fits over the top of the coiled spring, and, when a shock is received by the wheels, produces precisely the same action on the spring as does the casing or hanger in the plaintiff's spring. The hangers in the two respective absorbers differ in form, but not in function. The springs in a Ford automobile equipped with defendants' device receive shocks in the same order, operate in the same manner, and produce the same results as those in a Ford car on which the plaintiff's springs are used.

[3] The defendants' product, which has the same general shape and size and bears the same general black enameling and gold label as the plaintiff's was offered to the same trade to which, and under the same name by which, the plaintiff's device had become known. The printed instructions for attaching defendants' shock-absorbers to a car were in the main a verbatim copy of those that had accompanied the plaintiff's device when put on the market. It would be idle to say that the plaintiff, keeping within the strict terms of its patent, could not put upon the market the same device that the defendants have been making. The plaintiff's patent being valid, the unfair competition feature arising out of the infringement, the subject-matter of the suit, can be cared for in the accounting for profits and damages, although the parties are citizens of the same district. Ludwigs v. Payson Mfg. Co., 206 Fed. 60, 65, 124 C. C. A. 194 (C. C. A. 7); U. S. Expansion Bolt Co. v. H. G. Kroncke Hardwood Co., 234 Fed. 868, 874, 148 C. C. A. 466 (C. C. A. 7); Leschen Rope Co. v. Broderick, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710.

The judgment of the trial court is affirmed. Its further proceedings will be in accordance with the conclusion here reached.

R. E. DIETZ CO. v. BURR & STARKWEATHER CO.

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

No. 239.

1. PATENTS ⟸28—DESIGN PATENTS—ESSENTIALS TO VALIDITY.
The rules for interpretation of design patents are not different from those applying to other patents, and to give validity to such a patent there must be originality and the exercise of the inventive faculty, and the design must also be pleasing and attractive to the eye.

2. PATENTS ⟸28—DESIGN PATENTS—ESSENTIALS TO VALIDITY.
It is immaterial that the subject of a design patent may embody a mechanical function, provided the design per se is pleasing, attractive, novel, useful, and the result of invention.

3. PATENTS ⟸328—VALIDITY—DESIGN FOR LANTERN.
The McArthur design patent, No. 42,488, for a design for a lantern, is void, as not showing a design which appeals to the æsthetic sense, and also for lack of invention.

4. PATENTS ⟸328—INVENTION—TUBULAR LANTERNS.
The Bergener patent, No. 962,114, and the Erb patent, No. 962,135, each for a tubular lantern having the tubes stiffened, respectively, by longitudinal and by transverse ribs or corrugations, *held* void for lack of invention.

Cross-Appeals from the District Court of the United States for the Western District of New York.

Suit in equity by the R. E. Dietz Company against the Burr & Starkweather Company. From the decree, both parties appeal. Modified on defendant's appeal.

For opinion below, see 236 Fed. 763.

The bill alleged infringement of design patent to McArthur, 42,488, and of two mechanical patents, viz. that to Bergener, No. 962,114 (claim 1), and to Erb, No. 962,135 (first and only claim). The claims in suit are as follows:

Bergener: "1. A tubular lantern having tubes which are each composed of two substantially half-round half-tubes, stamped of sheet metal and secured together by seams on the inner and outer sides of the tubes, and each half-tube being formed between said seams with a hollow longitudinal rib thrown out on the half-round surface of the half-tube, substantially as set forth."

Erb: "A tubular lantern having tubes composed of stamped half-tubes of sheet metal which extend in a continuous piece from end to end and are provided between their ends at intervals with hollow transverse stiffening beads, said half-tubes being joined on opposite sides by overlapped seams, substantially as set forth."

The trial court dismissed the bill as to the design patent and sustained both of the mechanical patents. Both parties appealed.

Wilhelm & Parker, of Buffalo, N. Y. (Arthur E. Parsons, of Syracuse, N. Y., and Karl E. Wilhelm, of Buffalo, N. Y., of counsel), for plaintiff.

Frederick F. Church and G. Willard Rich, both of Rochester, N. Y. (L. J. Whittemore, of Detroit, Mich., of counsel), for defendant.

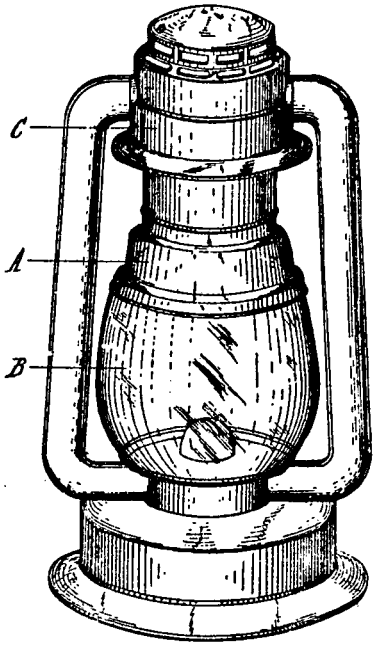
Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The patents in suit relate to making lanterns, and especially tubular lan-

terns. The word "lanthorn," and the fact that it is obsolete, sufficiently suggests the antiquity of lantern-making; while 26 years ago, in R. E. Dietz Co. v. C. T. Ham (C. C.) 47 Fed. 320, an action relating to improvements for tubular lanterns, it was noted that the "industry is crowded to repletion." In such an art McArthur's design patent appears, with specification, as follows:

"The accompanying drawing represents a perspective view of a tubular lantern embodying this design. The characteristic feature of this design consists of the upwardly contracted or downwardly flaring shape of the chimney *A*, which extends from the globe *B* to the top *C* of the lantern frame. I claim: The ornamental design for a tubular lantern as shown and described."

The drawing is shown below.



This record suggests two questions as to this patent : (1) Is the subject matter patentable as a design? (2) Is invention revealed?

It is established as matter of fact that the reasons for making lanterns in the shape exhibited by McArthur are not æsthetic, that ornamentation is not a purpose, nor does the style rest on a desire to please the eye. While some of these objects may be incidentally attained, the business or commercial reason for making McArthur's style of lantern is to reduce to a minimum the glass employed in lantern construction.

[1] The construction of design patents has often been considered in this court; always, we think, in consonance with the ruling cases—Gorham v. White, 14 Wall. 528, 20 L. Ed. 731, and Smith v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606. To entitle an inventor to the benefit of a design patent there must be originality, the inventive faculty must be exercised, mere mechanical skill is not enough. Cary, etc., Co. v. Neal, 98 Fed. 617, 39 C. C. A. 189; Steffens v. Steiner, 232 Fed. 862, 147 C. C. A. 56. The test for invention is the same for design as for mechanical patents. Strause, etc., Co. v. Crane Co., 235 Fed. at 131, 148 C. C. A. 620. All design patents appeal to the eye; they must present something pleasing and attractive (Mygatt v. Schauffer Co., 191 Fed. 836, 112 C. C. A. 350), and relate to appearance and to matters of ornament. The utility of the patent depends on the effect upon the eye, not to any new function; and such appeal is to the æsthetic emotion. Rowe v. Blodgett, etc., Co., 112 Fed. 61, 50 C. C. A. 120. The object of the statute is to encourage the origina-

tion of objects "which give pleasure to the sense of sight." Mygatt v. Schaffer, 218 Fed. 831, 134 C. C. A. 515.

Mere change in construction, displaying no originality and no added beauty, cannot be the subject of a design patent. Mygatt v. Schaffer Co., supra. An applicant for a design patent formerly did no more than submit a picture or diagram of his design, but when a specification is filed with the drawing (as is now the practice), it must be construed together with the claim and drawing, as is the established rule in respect of other patents. The rules of interpretation are not different from those regulating other patents, and a design claim may (like any other) be restricted to the specific form shown. New York Belting Co. v. New Jersey, etc., Co., 53 Fed. 812, 4 C. C. A. 21; Ashley v. Tatum Co., 186 Fed. 339, 108 C. C. A. 539.

[2] While design patents are not intended to protect a mechanical function, or to secure to the patentee monopoly in any given mechanism or manufacture as such, it is immaterial that the subject of the design may embody a mechanical function, provided that the design per se is pleasing, attractive, novel, useful and the result of invention. Ashley v. Weeks, etc., Co., 220 Fed. at 901, 136 C. C. A. 465. But it is the design that is patented, not the mechanism dressed in the design.

[3] Applying these rules to the matter in hand, we are of opinion that McArthur's lantern, or any lantern looking like that of the design, does not appeal to the æsthetic sense, and represents nothing more than a convenient shape for an article always purchased and used for what it will do—not for its looks. We further believe, in the light of a long line of tubular lanterns, beginning with that of Irwin (patent 105,083, July 5, 1870), and continuing especially through Betts (patent 340,274, April 20, 1886), that nothing more than the skill of a mechanic was involved in shortening a glass globe and lengthening a metal chimney, and McArthur did no more. For these reasons the lantern shown discloses no invention, which forbids any patent, nor does it make any appeal to the eye, or the æsthetic sense, which forbids a design patent.

[4] The two mechanical patents are entitled as relating to "tubular lanterns." Bergener says his object is "to stiffen the tubular frame and to avoid imperfections in the shape of the tubes." Erb states as his object "to stiffen the tubes of the tubular frame in a simple, inexpensive, and effective manner." Bergener accomplishes his result by putting a longitudinal rib on each half-tube of the lantern frame, and says:

"These ribs serve not only to strengthen and stiffen the tube, but also to draw or stretch the sheet metal as it is being shaped between the dies, in stamping the half-tube out of a flat blank."

Erb's result is reached by making transverse ribs on each half-tube, and he asserts that:

These "ribs take up the surplus of metal in shaping the half-tubes from flat blanks between dies, and so draw the metal tight * * * and prevent buckling of the metal."

The quoted statements of the specifications, as explained by evidence, mean that a ribbed half-tube made from a flat blank can be more accurately joined to its fellow by the closing dies, than is the case with unribbed halves. It is stated in evidence, "by forming this rib it stiffened the metal in the center, and that prevented the metal from spreading." The same witness said there was no difference in kind, between the transverse and longitudinal ribs, but that in his opinion the short or transverse indentation was "the better of the two." Put into legal phrase, this means that it is a function or attribute of ribbed tube-blanks, to resist the distorting action of dies more successfully than does plain tubing.

If the fact is proven (which is doubtful), it is more doubtful whether it was invention to discover the function; for ribbing or corrugation of metal is confessedly old, and we fail to see that the ribs in question are doing any other work or performing any other function when in a closing die or other stamp, than ribs or corrugations have done ever since they were first used long before the dates of these patents—i. e., they strengthen the metal and assist in resisting strains or stresses of any and every kind.

But whether claims might have been drawn protecting what we regard as a mere function is immaterial, for the claims in suit cover nothing but lantern tubes presenting "hollow longitudinal ribs" (Bergener) and "transverse stiffening beads" (Erb). Under such claims as these, since ribbed lantern tubes per se are at least as old as the Orphy patent of 1888 (390,699), it is plainly impossible to protect what is at best a new use or newly observed virtue of an old device, viz. the corrugation or ribbing of metal. The claims cover nothing but a stiffener (in itself old) applied to the tubular form of lantern construction, which is also of itself old. Such claims are void for lack of invention.

The decree below is modified, and the cause remanded, with orders to dismiss the bill, with costs in both courts.

HEMMING MFG. CO. v. CUTLER-HAMMER MFG. CO.

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

No. 2368.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—INSULATING MATERIAL.
   The Muller patent, No. 869,321, for an insulating material and process of making the same, describes a process which, if followed, produces a substance which is worthless as an insulating material; also *held* not infringed, if conceded validity.

2. PATENTS ⟸99—VALIDITY—CLAIMS FOR NEW PRODUCT.
   Although claims for a new product, having definite characteristics by which it may be identified and which distinguish it from the process by which it is made, are not limited to the product as made by the disclosed process, nevertheless product claims are not sustainable, unless the specification discloses at least one practicable way in which to make the product.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit in equity by the Hemming Manufacturing Company against the Cutler-Hammer Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

This is an appeal from a decree dismissing for want of equity appellant's bill for alleged infringement of the Muller patent 869,321, October 29, 1907, for insulating material and method of manufacturing the same.

The claims in suit and the material parts of the specification are as follows:

"By my invention, I provide a fire-proof electrical insulating material which has a high specific resistance sufficiently near to that of rubber or porcelain to make it satisfactory in the electrical art. It will withstand as high a degree of heat as it will be subjected to in practice without loss of its insulating properties, whereby it may be used in place of porcelain and it may be worked with tools practically as easily as wood. It takes a screw-thread very satisfactorily. Moreover, it may be also molded into shape in the same manner as rubber or porcelain and does not require the use of heat in its manufacture. It does not shrink as porcelain does in molds and costs very much less than hard rubber or porcelain to produce.

"The invention will now be described in its preferred embodiment when such embodiment is a solid.

"In carrying out my invention, for making solid, fire-proof, electrical insulating material, I combine a fire-resistant material, for example, asbestos, preferably in a comminuted state, by means of a binder consisting of a bituminous material whose fusing point is substantially as high as that of mineral pitch—that is, relatively high for a binding material of this kind, dissolved in a suitable volatile solvent (such as benzol or other volatile hydrocarbon, for example) of such bituminous material, the proportions of the binder and fire-resisting material being such that a consistent plastic mass is formed which is then subjected to heavy pressure, preferably in a cold state, and dried by the evaporation of the solvent whereby a solid fire-proof and hard insulating material is obtained, having all the desirable properties required in the art.

"In order to distribute the pitch uniformly between the asbestos fibers or particles and to entangle the latter at the same time, the asbestos is intimately mingled with the volatile pitch solution and then heavily compressed preferably in a cool state and dried by evaporation as stated. In the solid material thus produced, the firm consistency of pitch after compression and evaporation of the volatile solvent makes the asbestos fibers non-hygroscopic and the solid product is in fact so non-inflammable that it may be subjected temporarily to an electric arc without being burned up and without being softened.

"In view of the fact that the bituminous material, such for example, as mineral pitch will burn at a relatively low temperature whereas when combined, as in my invention, the product is practically fire-proof, it is probable that this paradoxical action is due to the fact that in the completed material produced by my invention, asbestos is the chief fire resistant material, while the pitch seems merely to impregnate and coat the particles of asbestos and to cement them together, the amount of pitch being so minimized that the pitch in the completed material constitutes a substantially non-inflammable factor. It is possible that the ability of the pitch to resist high temperatures to which the material may be subjected without softening or igniting, is due to the fact that the relatively thin layers of the binding material are protected by the asbestos from access of oxygen. When the particles or fibers of the fire-resisting material are cemented together by the binder, and the mass is subjected to heavy pressure for condensing or initially hardening it, the pitch remaining in the compressed mass is minimized in quantity and is present in what may be designated as approximately filmiform layers or coatings and although made from a material which in ordinary relations is easily inflammable are, nevertheless, practically non-inflammable and practically non-softing, as is proven by subjection of samples to the electric arc. Herein

lies a reconcilement of antagonisms, the theory of which I do not pretend to precisely understand, but which I have hereinbefore set forth according to the best of my present understanding. By the gradual evaporation of the solvent (I recommend a volatile hydrocarbon, especially benzol, for use as a solvent), my new solid product is given a peculiar character, which, although the product is refractory and hard, permits the product to be worked readily with tools and in molds without anything more than ordinary wear and tear.

"In my process of making insulating material, I preferably prepare a binder consisting of 100 parts of the bituminous material, such as mineral pitch, dissolved at about normal temperature in approximately 20 parts by weight of a volatile solvent, such as benzol, or the like. This solution is mixed, preferably without the application of heat, with a preferably comminuted natural asbestos in the proportion of 20 to 75 parts of the solution to 100 parts of the fire-resisting material to form a consistent plastic mass, which may be molded or otherwise compressed into the desired shape. The consistency of the mass will depend upon the proportions of the ingredients within the limits mentioned and may be varied according to the properties desired in the product.

"Instead of using asbestos only, I may mix with it a suitable heat, water and fire-proof filler, such, for example, as quartz or kaolin; for example, 100 parts of the asbestos may be mixed with from one to 100 parts by weight of the filler which is preferably a finely pulverized, inorganic body. This mixture of the asbestos with the finely pulverized, inorganic heat, water and fire-proof filler is then combined with the binder in the same manner and in substantially the same proportions as hereinbefore described.

"The volatile ingredient of the compressed product is permitted to evaporate therefrom by exposure to air whereupon the product is hardened by the evaporation of the solvent. If desired, the compressed mass may be subjected to heat for the purpose of hastening the evaporation.

"The resultant product has a high degree of hardness, may be worked with facility by means of tools, takes a high polish, possesses extraordinary power of resistance to many acids and alkalies, is not hygroscopic and its resistance to heat and to the electrical current is very high. For example, it has been shown that a sample of my new product having an average thickness of 10.95 millimeters had an insulation resistance of more than 5,000,000 megohms, and that when the sample of my new product was placed in an arc, a black smoke was emitted; the samples being red hot and burned with a yellow flame, which continued for a second or two after the sample had been removed. After exposure to the arc, the sample had a steel blue appearance. It was consumed very slowly, three minutes' exposure slightly rounding the edges. It did not soften. By reason of these various properties, my new product is admirably adapted for employment as an electrical insulating material. Moreover, owing to the low cost of the materials employed in its manufacture and the relatively simple process required to produce it, the insulating devices in any desired form may be made at such a low price as to render the material capable of general use in the arts.

"My new material may be used for other purposes than electrical insulation, but that use is its peculiar and most striking field. If it is desired, the unpressed plastic mass above described may be used as a fire-proof non-conductor in many situations where it may be allowed to harden in situ.

"When the composition is compressed the voids or spaces occurring between the asbestos fibers or particles are substantially filled up, although it is probable that the evaporation of the solvent effects a certain degree of porosity in the compacted mass, the possible porosity enhancing the insulating capacity of the mass, while its exterior skin is more hardly condensed."

The claims in suit are:

"2. An insulating material consisting of a hardened mass comprising fragments of fire-resistant material cemented together by a bituminous material having a relatively high fusing point, the bituminous material being only sufficient in quantity to fill substantially the voids whereby the resistant properties of the fire-resistant material are made effective.

"3. An insulating material comprising a hardened mass comprising asbestos fragments cemented together by a pitch having a relatively high fusing point,

the pitch being only sufficient in quantity to fill substantially the voids whereby the resistant properties of the asbestos are made effective."

"5. A non-hygroscopic, fire-proof, electrical insulating composition comprising asbestos mixed with a solution of pitch and evaporatable pitch solvent, the pitch serving in the composition, after evaporation of the solvent, as a substantially fire-proof binder and also as a non-hygroscopic coating for the asbestos, the pitch also serving to fill the voids."

"8. A compressed non-hygroscopic, fire-proof, electrical insulating composition comprising asbestos with an evaporatable solution of bituminous material which serves in the compressed composition, after evaporation of the evaporatable constituent of said solution, as a substantially fire-proof binder and also as a non-hygroscopic coating for the asbestos, the bituminous material also serving to fill the voids."

"10. The method of manufacturing insulating material which consists in dissolving a bituminous binding material having a relatively high fusing point in a volatile solvent for such material, then incorporating therewith a fragmentary fire-resisting material in such proportions that in the completed product the binding material will only be sufficient in quantity to fill completely the voids, then pressing said mass into shape and drying it.

"11. The method of manufacturing insulating material which consists in dissolving a pitch having a relatively high fusing point in a pitch solvent, incorporating therewith a fire-resistant filler in such proportions that in the completed product the binding material will only be sufficient to fill completely the voids, then molding said mass into shape and drying it."

"16. The method of making non-hygroscopic, electrical insulatng material consisting in mixing asbestos with a solution of pitch and pitch solvent; and then compressing the mixture into desired form and filling the voids, and then hardening the compressed mass by evaporation of the volatile hydrocarbon."

Appellant's commercial article, known by the trade-name "Gummon," is made by the following process:

By the use of heat coal-tar pitch is dissolved in a non-volatile heavy coal-tar oil, such as anthracene oil; to this liquid mixture is added a quantity of benzol, a readily volatile light coal-tar oil; into this is then mixed a quantity of comminuted asbestos; the compound is then pressed into molds; and the product is then placed in an enclosed oven and subjected to heat, the temperature being gradually increased up to about 500° Fahrenheit.

Appellee's alleged infringing product is manufactured as follows:

Commercial coal-tar pitch is heated from 250° to 300° Fahrenheit; it is then dissolved in a light coal-tar oil; when this mixture has cooled to about 150° Fahrenheit a certain proportion of benzol is added; after the mixture has cooled to room temperature a definite weight of china-wood oil is stirred in; this solution and short fibered asbestos are then put into a mixing machine and agitated for about two hours; after coming from the mixing machine the product is screened and placed on trays to dry from 24 to 48 hours, during which time the benzol entirely evaporates from the material; the compound is then placed in cold molds and without the application of heat is subjected to a pressure of from 4,000 to 10.000 pounds per square inch; and the molded articles are finally placed in a closed oven and subjected to heat for 24 hours, the temperature gradually being increased to from 500° to 600° Fahrenheit.

China-wood oil, above mentioned, has the characteristic when heated of coagulating into a rubber-like condition.

Charles Neave, of New York City, for appellant.

W. Clyde Jones, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] Is appellee's process within the teachings of the patent? In Muller's

disclosure the first step is to take mineral pitch, or its equivalent, and dissolve it preferably "at about normal temperature" in a volatile solvent, such as benzol, or its equivalent. While heat in this first step is not excluded, the patent very clearly contemplates that the bituminous material and the volatile solvent shall be of such a character that a solution will result from their being put together without extraneous heat. In other words, if heat is to be used at all, it would be only for the purpose of taking somewhat more quickly a step that could be taken without the use of heat. At the next step the fire-resisting material, such as asbestos, or its equivalent, is mixed into the solution until a consistent plastic mass is formed. This plastic mass is then placed in molds and subjected to heavy pressure "preferably in a cold state." And the final step is thus prescribed in the specification:

"The volatile ingredient of the compressed product is permitted to evaporate therefrom by exposure to air, whereupon the product is hardened by the evaporation of the solvent. If desired, the compressed mass may be subjected to heat for the purpose of hastening the evaporation."

Thus an examination of the patent makes manifest that Muller's process, in what he declared the most desirable way of practicing it, consisted in a succession of steps each of which was to be taken at normal temperature.

In the trial court oral testimony of experts was heard with regard to the results obtained by practicing the teachings of the patent. The trial judge found, and we also find, that the undisputed evidence demonstrates that the Muller process, practiced according to the teachings and disclosures of the patent and by persons both learned and skilled in the production of plastic compositions for insulating materials, produced a product which, after exposure to the air for more than a year, could be distorted by hand, was readily soluble in benzol, and when exposed to the flame of an alcohol lamp gave off visible vapors in 5 seconds, ignited in 30 seconds and crumbled in 45 seconds; and that such a product was valueless as an insulating material.

Undisputed expert testimony discloses that "a volatile solvent is one that boils at a temperature below the boiling point of water." This is true of benzol; but it is not true of the light coal-tar oil in which appellee dissolves the already molten pitch by means of heat, and without the use of heat this first step of appellee's process would be commercially impossible. The subsequent addition of benzol is necessary to thin the mixture so as to offset the coagulating tendency of the china-wood oil. And when the asbestos has been mixed in and the composition has been screened and placed on trays to dry, the benzol entirely evaporates from the granular mass, and not from the molded article as in the process of the patent. In appellee's process heat is absolutely necessary in order to bring about the rubberization of the china-wood oil. Furthermore, the final subjection of the molded article to heat is essential for the expulsion of the light coal-tar oil in which the molten pitch was primarily dissolved, and finally the prolonged subjection to the increasingly high degree of heat in a closed oven is requisite to the hardening and the rendering unin-

flammable of the finished product by volatilizing and driving off the heavier oils that remain in commercial pitch and which volatilize at from 500° to 600° Fahrenheit.

Appellant learned to make "Gummon" from Muller in a factory in Germany. If Muller, when he wrote the specification of his patent, had already developed the "Gummon" process, in which the anthracene or other heavy coal-tar oil is not vaporizable without a high degree of heat and in which the non-vaporizable residue of the anthracene oil acts somewhat in the finished product as china-wood oil does in appellee's product, he carefully refrained from giving the necessary recipe for making the product; and if the process claims in suit have any vitality, if the patent for the process is not void on account of vagueness and inadequacy of disclosure (Western Electric Co. v. Ansonia Co., 114 U. S. 447, 452, 5 Sup. Ct. 941, 29 L. Ed. 210), we are quite convinced that appellee does not infringe.

[2] Though claims for a new product which has definite characteristics by which it may be identified and which distinguish it from the process by which it is made, are not limited to the product as made under the disclosed process (Rubber Co. v. Goodyear Co., 9 Wall. 796, 19 L. Ed. 566; Hide-ite Leather Co. v. Fiber Co., 226 Fed. 34, 141 C. C. A. 142), nevertheless product claims are not sustainable unless the specification discloses at least one practicable way in which to make the product.

The decree is affirmed.

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

(Circuit Court of Appeals, Second Circuit. June 11, 1917.)

No. 247.

1. APPEAL AND ERROR ⊂⊃1009(1)—REVIEW—FINDINGS OF FACT ON ORAL TESTIMONY.
   The difference between spoken word and printed page is something that rightly gives to a decree following open trial and dealing with facts a weight not easily overstated.
2. CONTRACTS ⊂⊃147(1)—RESCISSION—GROUNDS.
   When persons, natural or artificial, use words in contract making falling short of or going beyond intention, they must abide by the result of their efforts, unless a new agreement supersede the failure, mutual mistake of fact be shown, or fraud be established.
3. EVIDENCE ⊂⊃462—PAROL EVIDENCE.
   That a written contract is merely one to make a contract subsequently must appear from the contract made, and cannot be shown by parol.
4. CONTRACTS ⊂⊃165—ORAL AGREEMENTS COLLATERAL TO WRITTEN CONTRACTS.
   A parol agreement, made contemporaneously with a written contract, to be enforceable must be in respect of a matter distinct from that covered by the writing.
5. CORPORATIONS ⊂⊃399(4)—REPRESENTATION BY OFFICERS—VALIDITY OF CONTRACT.
   The officers of a corporation are its agents, and if they act within their actual authority, or even within the apparent scope thereof, in making a contract, the corporation will be bound.

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6. PATENTS ⇐209(1)—CONTRACT TO GRANT LICENSE—VALIDITY.

A written agreement, executed on behalf of complainant corporation in the office of its counsel, after repeated negotiations between the parties, by which it contracted to grant a license to defendant under a patent, *held* valid and binding and to entitle defendant to a specific performance.

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

Suit in equity by the Bijur Motor Lighting Company against the Eclipse Machine Company and Vincent Bendix. Decree for defendants on original bill and for defendant Bendix on counterclaim, and complainant appeals. Affirmed.

For opinion below, see 237 Fed. 89.

The plaintiff (hereinafter called "Bijur Company") owns the patent described in the document below given, covering an invention of Joseph Bijur, its president. The bill alleged in usual form infringement by the defendants, who, admitting in substance that they were using Bijur's invention, asserted a right so to do as licensees, and (by counterclaim) demanded that plaintiff be required specifically to perform the contract under which they justified and denied (as a conclusion of law) the infringement asserted.

This alleged contract, which sufficiently defines the relation of parties contended for by defendants, is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Vincent Bendix. [L. S.]"

The foregoing is typewritten, except signatures of Allen and Bendix, which are admittedly genuine.

Plaintiff replied, in effect, that this paper was never intended to be a contract; was nothing but a tentative scheme for a business arrangement, of which the fruition was to depend on Bendix proving a scope and value in his German patent which it was never shown to possess; and that the appearance of contractual finality exhibited by the document in question resulted from fraud on the part of Bendix.

The District Judge, after a trial in which all the actors were examined in open court, held that defendant's position was justified by the evidence, dismissed the bill on the ground that Bendix was, and had been since the date of agreement, entitled to a formal license, with authority to sublicense the Eclipse Company, and on the counterclaim decreed that such license be given within 60 days. Plaintiff took this appeal.

Bijur is an inventor, with considerable experience in management and exploitation of patents. He entirely controlled the Bijur Company, not so much by stock ownership as by his personality and the fact that the company existed largely, if not wholly, in the hope of profiting by his inventions. He had several times made contracts for and in the name of his company, without consulting his board of directors. Allen is a relative of Bijur's, a stockholder in the Bijur Company, and an employé, with wide but not very accurately defined duties.

While the application for Bijur's patent was in the office, Bendix filed an application of his own, covering matter sufficiently close to Bijur to give rise to an interference if demanded. Nevertheless "by inadvertence," as the examiner stated, Bijur's patent issued without notice to Bendix, or knowledge thereof on the part of the latter. Thereupon the commissioner advised both parties of the facts, and suggested steps still open to Bendix if he wished to contest. Pending his application Bendix had agreed to license Eclipse Company under his expected patent. Dunn is president of that corporation, and he, as financier for Bendix, preferred some settlement with Bijur to litigation in Patent Office or court.

Bijur had no patent in Germany; Bendix had applied for one, and Bijur hoped that Bendix's German rights would "dominate" the device of one Rushmore, which was already offered in the German market. There was also a pending American application for an apparently similar or allied contrivance by one Remy; this is the matter referred to in article 8 of the above agreement.

In this situation of affairs, Allen, Bijur, and Bendix at various times talked over what each party had to offer toward a union of forces, to the profit of all and avoidance of litigation and competition.

On July 9, 1914, Bijur and Allen, Bendix, and Dunn met at the office of Bijur's patent counsel, no other lawyer being present. Several hours were spent in discussion, and a stenographer was present who noted in shorthand what was dictated to her as the result of talk. At the end, there existed in shorthand the agreement above set forth, except the signatures and attestation clause. The latter was added by the stenographer from some form book or

the like. Dunn and Bijur left without seeing the result of the stenographer's labors, and on departure Bijur specifically authorized Allen to "sign for" the Bijur Company. Bendix and Allen did sign in duplicate in the presence of Bijur's counsel, and each departed with an original document.

Subsequent study of Bendix's German application did not satisfy Bijur and his counsel that its probable claims were wide enough to suit them, and on August 4th counsel notified Bendix's attorneys in writing that the document above set forth was not a contract, and that "all negotiations were closed." Subsequently Bendix bought up the Remy invention, though the plaintiff on August 5th notified the vendors that Bendix had no contract or agreement as to the Bijur patent.

Defendants then proceeded to act upon their asserted rights, and this suit resulted.

George W. Wickersham, E. Henry Lacombe, and Walter H. Pollak, all of New York City, for appellant.

John B. Stanchfield, of New York City, Samuel E. Hibben, of Chicago, Ill., and Alexander D. Falck, of Elmira, N. Y., for appellees.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The foregoing facts we consider established; so did the lower court in substance; and from that decision we should hesitate to depart, were we inclined so to do. The difference between spoken word and printed page is something that rightly gives to a decree, following open trial and dealing with facts, a weight not easily overstated. Brookheim v. Greenbaum, 225 Fed. 763, 141 C. C. A. 89.

From these physical facts, we infer that all the men who met on July 9th at counsel's office intended to make a contract, if they could agree on terms, and we think the incentives to agreement obvious and considerable. Each had something to give or give up, constituting consideration.

That a contract was made must also be found. It was a corporation's contract, but that statement assumes that men intended to make, and did make, such corporate agreement. Men may contract in such incomplete, obscure, informal, or even illegal terms that their intention is not carried out by the form of words they sign; they may also sign a writing plain, formal, and of a legal import beyond the purposes or desires of some of the contracting parties. Corporations may do the same things; they have no thoughts or purposes other than those of the men controlling them.

[2] When persons natural or artificial use words in contract making falling short of or going beyond intention, they must abide by the result of their efforts, unless a new agreement supersede the failure, mutual mistake of fact be shown, or fraud be established.

There was no fraud in this instance; the plaintiff's allegations in that behalf are not supported by the evidence. Nor was there any mutual mistake.

Of the men talking together on July 9th, it is evident that Allen, Dunn, and Bendix departed feeling that their desires were accomplished. Bijur deposes that he regarded the whole matter as tentative, and dependent on the worth of Bendix's German patent, while his attorney seems to have confined his activities to furnishing clerical conveniences,

after dictating to the stenographer much of the language afterwards written out. If he and Bijur did regard the signed document as no more than notes of talk, they neither said so at the time, nor inserted any such limitation in what they caused or permitted to be formally executed.

Recognizing that relief from the writing relied on by defendants is not obtainable on grounds of fraud or mistake, plaintiff asserts that the paper which looks like a contract is incomplete because its enforcement depended upon approval of, or satisfaction with Bendix's German patent claims; which would not serve Bijur's turn at all, unless they "dominated Rushmore."

[3] There are "contracts to make a contract" if one party thereafter choose so to do. American, etc., Co. v. Simon, 140 Fed. 529, 72 C. C. A. 45; Id., 153 Fed. 1020, 82 C. C. A. 675. But such singularity must appear in the contract made; the incompleteness must there be completely apparent; it cannot be created by parol. No suggestion of Bijur's reservation can be discerned in this document.

[4] It is also possible that the parties to a written contract may contemporaneously make another oral agreement, on a matter as to which the writing is silent. But such oral arrangement, to be enforceable, must be in respect of a matter distinct from that covered by the writing; one party cannot by parol set up in the guise of a separate contract something which devitalizes the writing, and changes or aborts the stated purposes thereof. Seitz v. Brewers' etc., Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837; Harrison v. Fortlage, 161 U. S. 57, 16 Sup. Ct. 488, 40 L. Ed. 616. To accept this written agreement as meaning what plaintiff contends for is to violate the rule just stated. While we think that no oral contract is proven, none is asserted that is enforceable.

[5] Plaintiff further urges that the attempted execution of the contract was not such as to bind the Bijur Company. Any corporate act presupposes a delegated authority (Bank v. Dandridge, 12 Wheat. at 70, 6 L. Ed. 552), but the manner or method of that delegation is a matter with which third parties are little concerned. The officers of a corporation are its agents, and if they act within their actual authority, or even within the apparent scope thereof, the corporation will be bound; the by-laws which ordinarily prescribe corporate methods are private regulations as to the outside world. Rathbun v. Snow, 123 N. Y. 349, 25 N. E. 379, 10 L. R. A. 355. We have said that as matter of fact Mr. Bijur had made contracts for the corporation, without especial authority from the directors. The instances are not numerous, but they are the only like contracts proved from the company's history; they related to matters similar to that under consideration, and are sufficient proof (taken in conjunction with the other evidence) to establish a habit or course of business. It is obvious that, if this contract had been signed by Mr. Bijur personally, it never would have occurred to anyone connected with the Bijur Company to cavil at the technical sufficiency of execution. If he had such power, he expressly delegated it in pursuance of a course of business, and Sun, etc., Co. v. Moore, 183 U. S. 643, 22 Sup. Ct. 240, 46 L. Ed. 366, is applicable.

[6] It is also alleged as error that the court below granted specific performance at the instance of defendants, although (1) Bendix himself broke the contract, and (2) the Eclipse Company did not unite in the contract, was not a party to it, and cannot be itself decreed to perform.

(1) Bendix did not break his portion of the agreement; he complied therewith and purchased the Remy invention, although the plaintiff apparently sought to prevent such performance. In view of what Bendix actually did, the question whether plaintiff's conduct did not absolve him from even attempting acquisition from Remy need not be discussed.

(2) The Eclipse Company was made defendant herein solely as an alleged infringer; it is entitled to no specific performance and has obtained none. All its rights in and to the patent in question and under the contract made must be worked out through Bendix. The decree complained of is that a license such as was contemplated by the agreement must be given to Bendix. We have not the form of such license before us, but assume that, by the terms thereof, what Bendix may by sublicense give to the Eclipse Company will be (or has been) accurately defined in accordance with the language of the contract between plaintiff and Bendix. At all events, plaintiff's rights against Eclipse Company are a part of its rights against Bendix as licensee. The Eclipse Company's estate is but carved out of that conferred on Bendix.

From whatever angle viewed, this litigation ultimately presents an effort to change the plain meaning of a written document. The execution and delivery of that particular paper may have been ill advised; it may not even express Mr. Bijur's wishes or all of them; but it is clear, a corporate act, not obtained by fraud nor based on mutual mistake of fact, and therefore cannot be varied nor set aside.

Decree affirmed, with costs.

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

(Circuit Court of Appeals, Second Circuit. June 11, 1917.)

No. 269.

1. SPECIFIC PERFORMANCE ⟸105(3)—DEFENSES—LACHES.
Two firms, engaged in costly litigation with each other over their respective rights under patents on paint removers, and their members, entered into a compromise agreement, whereby the C. Co. was to be organized and take title to all of the patents and permit each firm to manufacture and sell under all patents. The individual members of the firms agreed to assign to the corporation all improvements or inventions then or thereafter made by them relating to paint removers; to execute an agreement in its favor that they would, without further consideration, disclose and assign to it all inventions already made, or thereafter made, and to furnish further documents necessary to effectuate the objects indicated. One of the parties having severed his connection with the corporation and the firm of which he was a member in 1911, organized a new company, which manufactured a paint remover under a patent obtained on his application. On having his attention called to the agreement to assign inventions to the C. Co., he replied that the formula was not his own, and by every means sought to keep the C. Co. from learning who devised his new remover, and whether he or the company owned the patents. The facts, however, were brought out in an infringement suit in 1915 or 1916, and soon after the grant of an injunction in that suit the C. Co. sued to compel an assignment of the patent. *Held*, that the suit was not barred by laches, the defendants not having been lulled into security, and not having changed their position in reliance on plaintiff's inaction.

2. CONTRACTS ⟸68—PATENTS ⟸183—AGREEMENTS TO ASSIGN INVENTIONS—REQUISITES AND VALIDITY.
The agreement for the assignment of all improvements or inventions thereafter made did not lack formality or consideration.

3. PATENTS ⟸183—AGREEMENTS TO ASSIGN FUTURE INVENTIONS—VALIDITY.
The agreement to assign future improvements or inventions was not invalid, as constituting a mortgage upon the future operation of man's brain, though not limited as to time, as the intent was to safeguard a particular business.

4. PATENTS ⟸183—AGREEMENTS TO ASSIGN FUTURE INVENTIONS—ANNULMENT.
The agreement was not annulled by the action of the corporation in paying a salary or retainer to one of the parties for supervising chemical experiments looking to new or improved remover devices, as none of the parties was bound to invent or attempt to invent anything, and, even if the corporation did discharge such party from the contract, another of the parties could not complain, but remained bound.

5. SPECIFIC PERFORMANCE ⟸108—RELIEF AWARDED—INJUNCTION.
In a suit to compel the assignment of the patents to the C. Co., an injunction restraining defendants from any future use of the patents or inventions was in proper form, as the individual defendant and the company which took with notice were contractually excluded from any use of the patents or inventions.

6. COURTS ⟸407(5)—CIRCUIT COURT OF APPEALS—SCOPE OF REVIEW.
Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1916, § 1121]) § 129, provides that, where an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals, notwithstanding an appeal upon final decree might be

taken directly to the Supreme Court. *Held*, that on an appeal from an interlocutory decree, in a suit to compel an assignment of patents, granting an injunction and directing an accounting, the propriety of the injunction was the only matter reviewable, and the court could not determine whether it was proper to grant an accounting as against a trustee ex maleficio.

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

Suit by the Chadeloid Chemical Company against the H. B. Chalmers Company and another. From an interlocutory decree granting an injunction and directing an accounting, defendants appeal. Affirmed.

See, also, 242 Fed. 71, — C. C. A. —.

The bill, filed in May, 1916, demands that defendants convey or have conveyed and transferred to plaintiff two patents (1,066,251 and 1,079,635), issued to one Dunham in 1913, on applications of the individual defendant Chalmers, and also all other "formulæ improvements and inventions made or devised by Chalmers relating to paint and varnish removers." Injunction against dealing with or in or disposing of said patents, formulæ, etc., was also prayed for, as was further relief. The decree enjoined defendants from any further use of Chalmers' patents or inventions, directed their conveyance to plaintiff, and ordered that an account be taken of profits resulting to defendants from the manufacture, etc., of removers under said patents, and of damages suffered by plaintiff by reason of the wrongful retention of the same by defendants. This appeal is under section 129, Judicial Code.

A paint remover is a chemical compound for softening and cleansing from wood, etc., hardened paint or varnish, without the application of heat. This suit is the latest chapter of litigation over the business in removers established upon the Ellis patent (714,880) as a foundation. Plaintiff company owns that patent, which has been much contested and very broadly sustained.[1]

Ellis' patent issued in 1902, plaintiff was organized in 1905, and immediately acquired it, under circumstances and for reasons shadowed forth by the fantastic name "Chadeloid," which is a composite of Chalmers, Ellis, and Elting, with some flavor of Adelite and Phenoid.

The patentee Ellis and defendant Chalmers, as partners, and afterwards shareholders in the Ellis-Chalmers Company (hereinafter called Ellis Company), owned the patent until 1905, sought a market for the remover which they called Phenoid, and fought infringers. This produced an action against the Adams & Elting Company (hereinafter called Adams Company), which made and sold Adelite. Such suit was pending and very expensive in the winter of 1904–5.

On January 17, 1905, an agreement in writing was made between Ellis Company, Adams Company, and Elting, Adams, Chalmers, and Ellis, reciting the ownership of the Ellis patent by Ellis Company, of sundry patents and applications therefor by Adams Company, and the pendency of the aforesaid suit, and agreeing that said suit be abandoned, the validity of Ellis patent recognized, the Chadeloid Company (this plaintiff) organized with the four individual contracting parties and (semble) their counsel as directors, that Chadeloid stock be distributed in a manner agreed upon (making Chalmers a large share-

[1] Chadeloid Co. v. De Ronde Co. (C. C.) 146 Fed. 988; Chadeloid Co. v. Chicago, etc., Co. (C. C.) 173 Fed. 797; Id. (C. C.) 180 Fed. 770; Chadeloid Co. v. Daxe (C. C.) 180 Fed. 1004; Chadeloid Co. v. Thurston (D. C.) 220 Fed. 685; Chadeloid Co. v. Wilson (D. C.) 220 Fed. 681; Id., 224 Fed. 481, 140 C. C. A. 189. In the Southern District of New York, the corporate defendant was enjoined as an infringer—on motion for preliminary injunction in the usual patent suit, in April, 1916.

holder), that the Ellis and all other existing or thereafter acquired paint remover patents belonging to the parties should forthwith be assigned to the newly formed company, and that both Adams Company and Ellis Company should have free license to make, use, and sell under the Ellis and all other patents then or thereafter acquired by Chadeloid Company and relating to removers. Finally all the natural persons contracting, covenanted to assign to the intended corporation "all improvements or inventions which any of the parties hereto may have made, or may hereafter make, relating to paint and varnish removers" and to "execute an agreement in favor of said Chadeloid Chemical Company that [they] will without further consideration disclose and assign to said company all inventions which [they] may now have made or may hereafter make relating to removers"; and also specifically give "the right to apply for letters patent thereon." There was also a covenant to furnish further documents, as might appear necessary to effectuate the objects indicated.

Accordingly and on February 27, 1905, Chadeloid Company having been created, Adams, Elting, Ellis, and Chalmers in one writing, "severally" covenanted and agreed as they had in the previous month contracted to agree. A nominal or $1 consideration is specified as moving from Chadeloid Company to each of Chalmers et al., and the contract is under seal.

The effect of this business arrangement was to make a holding company for the Ellis and all other existing and future paint remover inventions, made by any party to the agreements referred to. The holding company (this plaintiff) was a convenience or method of keeping the peace between Adams and Elting and their corporation on the one hand and Chalmers and Ellis and their corporation on the other. Each licensed concern could manufacture under all the owned patents, and they pooled their interests as to infringers, against whom the campaign indicated by the list of decisions just given was then opened, with sufficient success to make an income for the holding company out of royalties resulting from such vigorous legal warfare, of which (by agreement) the Adams-Elting side of the bargain paid four-fifths of the cost for two years, or until (as the event proved) Chadeloid Company became self-supporting.

Chalmers continued to be actively concerned in Ellis-Chalmers Company until 1911, when he sold his interest, having previously disposed of his Chadeloid stock. Soon thereafter he organized the defendant Chalmers Company a concern always controlled by himself. He had apparently become dissatisfied with the action of Chadeloid Company in paying a salary or retainer to Ellis that chemical experiments looking to new or improved remover devices might be conducted under the latter's supervision. But he also probably intended to start a rival business, for on October 11, 1911, he applied for the patent subsequently issued as 1,079,635. Then or shortly thereafter he sent to plaintiff a sample of his "Chalco" remover, was told that it infringed Ellis, and had his attention called to his agreement of 1905. He replied that he doubted the validity of the agreement, but that the "Chalco" formula was not his own, but that of "one of the greatest chemists of the country," although he had the right to use it.

Formal notice was promptly given H. B. Chalmers Company that the articles sold by it were infringements, and when in 1913 the earliest Chalmers patent issued, demand for its assignment was at once made by plaintiff upon Dunham. It appears by the answer herein that Dunham was the secretary of Chalmers Company, that the applications had been assigned to him as secretary, and that the inventions were always the company's property, although the patents were not formally assigned to defendant corporation until May, 1914. When demand was made on Dunham, he disclosed none of these facts to plaintiff, and from his attitude it was a fair inference that he personally was or might claim to be a purchaser for value.

The exact nature and ingredients of a chemical compound are not easily discoverable by analysis, and even after both Chalmers' patents had issued defendants did not apprise plaintiff that what was being sold by Chalmers Company was a remover of Chalmers' invention, made under his patents and according to the disclosures thereof, which patents were the property of the corporate defendant.

It does not appear just when these particulars were discovered by plaintiff. In 1915–16 Chalmers Company was sued as an infringer of the Ellis patent, and the facts referred to should there have appeared. This action was instituted very soon after injunction granted ut supra in the infringement suit.

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

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

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as as above). Of the very numerous objections to recovery made by defendants, we notice the following: (1) Plaintiff's demand is barred by laches; (2) it is based on a contract unlawful because unconscionable in its scope, and avoided by its failure to limit a time after which Chalmers et al. would be free to keep their own inventions; (3) Chalmers was discharged by plaintiff's new or further agreement with Ellis; (4) plaintiff is not entitled to such an injunction as was granted, nor (5) to any accounting.

[1] (1) The facts as we have found them do not rest on undisputed evidence. On several points Chalmers himself has testified at variance with our findings. We are, however, satisfied (as was the court below) that the material occurrences were as given above, and that by every means in his power Chalmers, well remembering and fearing his agreements of 1905, sought to keep plaintiff in puzzled uncertainty as to who had devised his new removers, and whether he or his company owned the patents covering them—if they really were the removers of the patents.

This view of the facts completely exonerates plaintiff from the charge of laches. Defendants, after fullest notice, proceeded to create and expand a business which they knew to be obnoxious both to an ordinary patent suit and such action as the present; never have they been lulled into security or changed their position in reliance on plaintiff's inaction. A party who compels one inquiring for facts to play hide and seek for them is not in a position to claim laches, at least after the passage of so short a time as is here relied on. Whether any, or what, length of years would suffice, is not now presented for decision.

[2, 3] (2) The agreements of 1905 did not lack formality or consideration. Nor did they constitute that mortgage upon the future operation of a man's brain which has often been viewed with disfavor. Aspinwall v. Gill (C. C.) 32 Fed. 697. Their plain intent was to safeguard the future of one particular business, that of paint removers. This is not unconscionable, nor in unreasonable restraint of trade. Westinghouse, etc., Co. v. Chicago, etc., Co. (C. C.) 85 Fed. 786; Dick v. Fuller (D. C.) 198 Fed. 404, and cases cited. Nor does failure to limit the time during which the agreeing parties were to surrender inventions vitiate the contract. Thibodeau v. Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480. The case cited is of an agreement

between employed and employer, and the contract was upheld as a reasonable protection of the master's business. The contract in this case was for the protection of what was in effect the business of the four men who bound themselves, and the same result is reached by the same reasoning.

[4] (3) There was no new agreement with Ellis in the sense of an annulment of that of 1905. None of the contracting parties was bound to invent or attempt so to do; they only agreed that, if they did make inventions of a certain kind, they would disclose and assign the same. Ellis was employed to work as an experimenting chemist, which is quite a different matter. But even if Chadeloid Company had discharged Ellis from his contract, Chalmers had no right to complain. He had severally contracted, and remained bound, even though Ellis had been released. If the conduct of Chadeloid Company in giving such release was injurious to Chalmers as a shareholder, his remedy plainly did not consist in breaking his own agreement.

[5] (4) Defendants seem to think that the injunction issued is such as is usually granted in an action on a patent. This is only true in the sense that, having been compelled to surrender patents that do not belong to them, they are forbidden to manufacture what the patents disclose. This last is what does happen to some rare infringers who have an erroneously issued patent covering absolutely nothing not already patented. But Chalmers and his company (which took with ample notice, and is but another name for Chalmers himself) should have *disclosed* and *assigned* these very inventions; therefore they are contractually excluded from any use of them, and the injunction was in proper form.

[6] (5) The court below granted an accounting as against a trustee ex maleficio. Whether this was within the rules of equity is not now before us. The decree appealed from is interlocutory. We can review it only by force of the statute now contained in section 129, Jud. Code. An appeal under this section brings up nothing but the propriety of granting or refusing an injunction or receivership, as the case may be. Procedure not specifically covered by the statute remains unchanged thereby. The question of accounting must await final decree and is unaffected by this appeal. Kilmer v. Griswold, 67 Fed. 1017, 15 C. C. A. 161; Howe v. Dayton, 210 Fed. 801, 127 C. C. A. 351, and cases cited; Lederer v. Garage, etc., Co., 235 Fed. 527, 149 C. C. A. 73.

Decree affirmed, with costs.

BESSER v. MERRILAT CULVERT CORE CO.

(Circuit Court of Appeals, Eighth Circuit. June 18, 1917.)

No. 4702.

1. PATENTS ⇐328—VALIDITY—CORE FOR CONCRETE CULVERTS.
The Besser patent, No. 952,869, for a metallic core for concrete culverts, *held* void, on the ground that the device is not practically useful.

2. PATENTS ⇐47—VALIDITY—"USEFUL" DEVICE.
The term "useful," as used in the patent law, when applied to a machine, means that the machine will accomplish its purpose practically when applied in industry.

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

Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

Suit in equity by Charles A. Besser against the Merrilat Culvert Core Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 226 Fed. 783.

Ralph Orwig, of Des Moines, Iowa (W. P. Bair, of Des Moines, Iowa, on the brief), for appellant.

Harold J. Wilson, of Burlington, Iowa (W. E. Jackson, of Burlington, Iowa, on the brief), for appellee.

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

AMIDON, District Judge. This suit is brought to restrain infringement of patent No. 952,869, issued to the plaintiff, Charles A. Besser. The answer sets up invalidity and noninfringement. The trial court dismissed the bill, largely on the defense of noninfringement, claiming that plaintiff's patent was greatly restricted by what occurred in the patent office while the application was pending. We think both defenses have been made out, but that the decree can best be rested on the ground of invalidity.

[1, 2] The patent relates to a metallic core for concrete culverts so constructed as to expand and contract, and thus be adapted to culverts for different sizes. The core is made of curved, galvanized plates overlapping and sliding upon each other, and operated by an internal mechanism by which the core can be expanded and contracted. Claim 4 of plaintiff's patent (being one of the claims alleged to be infringed) makes resiliency of the plates an element of the patent. A study of the evidence shows that resiliency is an indispensable feature of the mechanism, if it is to be useful and workable. The cores are made of galvanized iron. That is the only material that is sufficiently strong and cheap to be commercially available. But galvanized iron is not resilient. On the other hand, it is flexible. A curved plate made of

that material, and subjected to pressure so as to remove the curvature when expanded, will not return to its original form when the pressure is removed. That is the fatal defect of plaintiff's invention. It embodies no device to secure resiliency or provide a core which, when it has once been expanded and then subjected to the pressure of the superimposed concrete, will return to its original form. This is made plain by Exhibit 46 at page 71 of the record. Only six of plaintiff's cores have been made, and when tried and expanded for the large-sized culverts, the plates have been so bent that the edges extend far out from the plates which they overlap, and the mechanism is thus rendered inoperative. In other words, plaintiff's invention is "new," but it is not "useful." The term "useful," as contained in the patent law, when applied to a machine, means that the machine will accomplish the purpose practically when applied in industry. It is to be given a practical and not a speculative meaning. It means that the machine will work and accomplish the purposes set forth in the specifications. Even if the machine can be made to accomplish the purposes specified, it is not useful, within the meaning of the patent law, if from its inherent nature it will accomplish the purpose only to such a restricted extent as to make its use in industry prohibitive. This has been the interpretation put upon the term in the patent law from the earliest decisions to the present time. Bliss v. Brooklyn, Fed. Cas. No. 1,546; Chandler v. Ladd, Fed. Cas. No. 2,593; Troy Laundry Mach. Co., Limited, v. Columbia Manufacturing Co. (D. C.) 217 Fed. 787. These views are fatal to plaintiff's machine. It would work as a core if it was started at the smaller size and expanded through the range of its expansibility. After that had been done, however, it would not work when contracted for smaller sizes. The expense of the machine made it worthless in the industry if its use was thus restricted. To be sure, it is well established in patent law that a machine need not be perfect in order to be patentable. If it will accomplish the purposes set forth in the specification practically in industry the patent is valid, although the machine may be greatly improved by the addition of some new element. If, however, it will not work practically in industry when constructed according to the claims and specifications, it is not useful, and cannot be sustained upon a showing that it can be made to work by a small improvement. That is the objection to the suggestion of plaintiff here that if a wire be applied to his machine it can be made to work some. See Bliss v. Brooklyn, Fed. Cas. No. 1546. Plaintiff had a new idea. It was valuable in industry. Unfortunately for him, however, an idea is not patentable. Only a machine is patentable, and when plaintiff undertook to embody his idea in a machine he did not give it an expression which would work in industry. His machine, therefore, was not patentable.

The defendant has met this difficulty by attaching a system of torsion springs to the plates, so as to produce and maintain the desired resiliency. This new element is fundamental to the structure, and defendant, by adding it, was the first to embody the invention in a workable and useful form.

The decision of the trial court was right and is affirmed.

MILLER PASTEURIZING MACH. CO. v. RICH.

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

No. 197.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—ICE CREAM FREEZER.

An order granting an injunction against infringement of the Hoefler and Schantz patent, No. 921,837, claim 2, for an ice cream freezer, reversed, on the ground that, after full hearing, the claim had since been held void by the Circuit Court of Appeals of another circuit.

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

Suit in equity by the Miller Pasteurizing Machine Company against Paul J. Rich. From an order (216 Fed. 192) granting an injunction, defendant appeals. Reversed.

This is an appeal by the defendant from an order granting an injunction restraining the defendant from infringing claim 2 of patent No. 921,837. The order suspended the issuing of the injunction until after the decision of this court.

Henry D. Williams and William S. Pritchard, both of New York City, for appellant.

Edward R. Alexander, of Washington, D. C., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. We think the order holding that Exhibits A to E inclusive infringe claim 2 of the patent and granting an injunction should be reversed for the following reasons:

First. Claim 2 is for a combination having a large number of elements. The validity of the claim is questioned by the defendant and we are not convinced that the claim can be sustained.

Second. Infringement is denied by the defendant both as to his original and present construction and the questions thus presented are vital and deserve serious attention.

Third. The Circuit Court of Appeals for the Third Circuit has, since the decision of the District Court in the present case, handed down a decision holding that the patent in suit is invalid. The District Judge of the Middle District of Pennsylvania had followed the decision in this case and his decision was reversed by the Circuit Court of Appeals. A copy of this opinion has been handed us, as it was decided at the October term of the court and has not yet been printed in the reports.

Referring to the claim in question Judge McPherson says:

"With one exception all the elements named in this narrow and specific claim are old in the art (see patents to Miller, to Walker, and to Thompson); and the new element—namely, the swinging joint with axial and radial pas-

sages—is an old and well-known device, altho it had not as yet been used in the construction of freezers. Evidently therefore the claim is for a combination or a subcombination of old elements, and in such a situation the rule is, that while the combination may still be patentable a patent should only be granted if the old elements have been so combined as to operate in a new way or to produce a new and useful result. Tried by this established test, we think the claim in suit cannot be upheld. Every element therein described operates in the same way as before, and, while the result is not precisely the same, the difference is so slight that we do not feel justified in pronouncing the machine either new or useful in a patentable sense. So far as appears, the chief, if not the only, advantage in the construction lies in the fact, that when the scraping knives need sharpening—and they need it only about once a week—they are more accessible and can probably be removed more conveniently from a machine that tilts than from a machine that is fixed in place. In other respects we do not see that the patent affects the usual operation of a freezer in any degree that needs attention. The brine flows in the same way and by the same course; the mixture to be frozen is the same and is subjected to the same cold; it is removed in the same way, and its quantity and quality are apparently what they were before. Neither is the patented combination used even in the frequent cleaning of the freezer; this is accomplished by an old method, which requires no tilting of the can. In short the evidence discloses nothing more than this: the product is unchanged, and so is the mode of operation, except that the tilting of the freezer permits the knives to be taken out somewhat more rapidly and conveniently."

We are clearly of the opinion that a claim which has been held invalid by a court of co-ordinate jurisdiction should not be held valid by this court and especially so upon an appeal from an order for a supplementary injunction. To say the least, the validity of the claim is in doubt and an injunction should not issue in a doubtful case.

The order is reversed.

WALTER S. NEWHALL CO. v. BALTIMORE & O. R. CO.

(District Court, D. Maryland. June 23, 1917.)

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—APPARATUS FOR THAWING MATERIAL IN FREIGHT CARS.

Patent No. 1,044,230, for apparatus for thawing material in freight cars, covers means for thawing coal which has become wet and frozen in the cars, so that it may be readily unloaded when the cars are lifted and dumped, as is usual at large coal terminals. Such apparatus consists generally of a long train shed having one or more tracks provided with doors for closing the ends and having a blower house overhead, where air is heated and blown through pipes or ducts under and around the cars and then sucked back to be reheated and used over. *Held*, that the patent was not anticipated, but covers an invention of a pioneer character, and is entitled to a liberal construction and a broad range of equivalents. Claims 20 and 23 also *held* infringed, and claims 7 and 11 not infringed.

In Equity. Suit by the Walter S. Newhall Company against the Baltimore & Ohio Railroad Company. On final hearing. Decree for complainant.

Bates & Macklin, of Cleveland, Ohio, Edwin F. Samuels, of Baltimore, Md., and Robert M. Morgan and Albert H. Bates, both of Cleveland, Ohio, for plaintiff.

Duncan K. Brent, of Baltimore, Md., and Otto Moat, for defendant.

ROSE, District Judge. The plaintiffs are the owners of letters patent No. 1,044,230, issued to them November 12, 1912, for an apparatus for thawing material in freight cars. They say the defendant, the Baltimore & Ohio Railroad Company, has infringed.

The quickest way to unload a car of coal or similar material is to lift the car up and turn it over. It is the cheapest, also, where the volume of traffic to be handled is large enough to justify the expense of installing the necessary machinery. It has at least one drawback. The coal may be damp or wet. In cold weather it will freeze. When freezing, it adheres firmly to the bottom and sides of the car. Various devices for loosening it have been used. Gangs of laborers have jammed the car sides with heavy poles or beams. They break the ice, but they hurt the car. There was another method not quite so crude. Points were put on the lower ends of pieces of gas pipe. These pipes at the other end were connected with steam hose. The points of the pipes were forced down into the coal and the steam turned on. The weather being cold, the steam condensed rapidly, it froze on the cars, wheels, tracks, platforms, ship's decks, etc. The laborers employed found the work unpleasant, and occasionally, from bursting pipes, somewhat dangerous.

The plaintiffs were in the employ of a company in the business of unloading coal at a South Amboy terminal of the Pennsylvania Railroad Company. They set out to find some better way of thawing coal. One scheme after another which occurred to them was tried and abandoned. They finally hit on that embodied in the patent in suit. At a cost of $50,000 necessary apparatus was installed at South

Amboy in 1911. It has been used there ever since. Nearly 2,700,000 tons of coal have been thawed by its use, at an average cost of about 1⅓ cents a ton as compared with the previous cost of 4 cents. The work has been done with very much less damage to the cars and equipment and very much more comfort to every one concerned. Another and larger plant of the same kind has recently been installed at South Amboy, and a third at Greenwich Point, near Philadelphia. All of them are doing good work.

Reduced to its simplest form, the apparatus consists of a long train shed capable of housing a number of cars. It is provided with doors by which its ends can be closed. On top of it there is a blower house, in which air is heated and while hot blown or driven through appropriately arranged ducts and conveniently placed openings in them, so that it is thrown upon the bottom and sides of the cars to be thawed. The air is then sucked back, to be again heated and again driven through the shed. In the patented device the shed has a ceiling, and a roof above the ceiling. The space between the two is used for the air ducts to and from the heater and blower system. It is divided into three longitudinal flues by means of two vertical partitions. Each partition, together with the wall next to it, forms the duct through which the hot air is driven through the heater and in the blower into the shed for distribution to the cars. The space between the two partitions forms the duct through which the air, which has been used, and to a degree cooled, is sucked back into the heater and blower. From the hot-air ducts descend a number of discharge ducts, located in the inner facings of the shed walls. These vertical flues are open at their lower portions toward the track end. The heated air is forced through the horizontal ducts and down through the various vertical ducts, and is discharged at the track level, where it passes under and around the cars and, rising upwards, is drawn into the central duct through openings therein. It is then sucked back through the central duct directly into the blower room. It is then again heated, and is forced out once more into the shed, and in this manner is kept in constant circulation. The shed is made wide enough to cover the number of tracks it is desired to use in connection with the thawing plant. When it is built for more than one track, it is divided by substantial partitions into as many compartments as there are tracks. The preferred and usual form of construction covers two tracks, and quite a number of the claims of the patent in suit are limited to a two-track structure.

The evidence leaves no question that the plaintiffs were the first who ever thawed cars or their contents by such a system. Early in 1914 the defendant needed greater coal pier facilities at Curtis Bay. It thought it might be desirable to install machinery by which the cars could be lifted and dumped. If that was done, a thawing plant would be required. The defendant entered into correspondence with the plaintiffs. Various interviews took place between them and its officials. The war came on, and nothing more was done until the end of August, 1915. Then the interviews and correspondence began anew. Plans and photographs of plaintiffs' device were submitted to

defendant's engineers. They were invited to bid for the erection of the plant. They did so. Apparently defendant regarded their price as too high, and it arranged with the Surety Engineering Company for the installation of a similar plant. The latter gave bond to protect the defendant against the consequences of an infringement of plaintiffs' patent, and has through its counsel conducted the defense in this case.

What the defendant wanted was a plant as near like plaintiffs' as it could get, without paying plaintiffs for it. The Engineering Company took plaintiffs' patent and set out to make a device which would work like plaintiffs', but upon which plaintiffs' claims could not be read. This was a somewhat difficult task, because the plaintiffs are the pioneer inventors and entitled to a broad construction of their claims. The defendant has set up many patented devices in the prior art. It is significant that not one of them was for a thawing plant. All or nearly all of them were for drying fruit, bricks or lumber. The conditions under which such processes are carried on are unlike those necessary in a thawing apparatus. No one of them ever suggested anything to the plaintiffs, to defendant, or anybody else who was seeking to solve this thawing problem. It is in evidence that as early as 1908 the American Blower Company described in its catalogue a means for heating and ventilating roundhouses. One of the advantages claimed for this device was that the warm, dry air discharged in the pits under the locomotives quickly removed the ice and snow from the latter, leaving them thoroughly dry. The conditions to be dealt with, however, were quite different from those involved in the thawing of trains, and the disclosures then made fall far short of anticipating plaintiffs' device. For some years an effective thawing apparatus had been desired by railroad companies. These had at their command large capital and the best engineering and mechanical brains of the country. When the defendant wanted a thawing plant, its mind turned to plaintiffs' apparatus, and not to any existing form of heating roundhouses or to any drying device, whether in use or embalmed in the Patent Office morgue. It saw that the plaintiffs had made the location and construction of their hot-air and return ducts or flues elements of many of their claims, and it sought to escape these by the obvious expedient of arranging these ducts somewhat differently. It carries downward directly from the blower house the entire supply of hot air intended for one shed to flues running through the shed, and along the shed walls on or near the track level. At convenient intervals it supplies openings through which the air is forced out to the cars. The blower rooms are similarly located in each structure. The hot air is discharged at the same points. In each it is carried to the place of use by flues or ducts. They are unlike only in the circumstance that in plaintiffs' the flues are first horizontal and then vertical, while in defendant's the opposite is true. The difference between the means used for returning the air to the blower room are as unsubstantial. Defendant does not provide a return duct running the length of the train shed. Through an opening connecting the upper portion of the shed with its heating

and blowing apparatus it sucks back the air. From other of plaintiffs' claims defendant has sought to escape by equally unessential changes in the arrangement of its heaters and blowers and of their connections with the train shed. In all this it has been so successful that plaintiffs have been able to claim infringement of but 4 of their 23 claims, viz. Nos. 7, 11, 20, and 23.

The elements of claim No. 20 are: (1) Two train sheds side by side. (2) Individual hot-air and return ducts for each shed. (3) A blowing apparatus connected with the ducts of both sheds. (4) Dampers adapted to restrict the action of such apparatus to either shed. Defendant says that it does not use the third and fourth of these, but its expert admits that it has dampers by the operation of which one of its heating and blowing units can, in an emergency, be used, though less efficiently, in the other stall. This quite satisfies plaintiffs' claim.

The elements of claim No. 23 are: (1) A train shed. (2) A blower room located at an intermediate point at the top of the train shed. (3) A pair of blowers in said blower room discharging in opposite directions. (4) Means for conducting air from such blowers through the train shed and returning it to the blower. (5) Means for heating such air. Defendant asserts that its apparatus does not contain the third element, in that its pair of blowers do not discharge in opposite directions. This contention can be sustained only by an unjustifiably narrow construction of the claim.

Plaintiffs' seventh claim is for a combination made up of the following elements: (1) A long narrow compartment having a trackway adapted to inclose several cars. (2) Closures for the ends of the compartments. (3) Air ducts located in the upper part of the compartments adjacent to the roof. (4) Down-take flues connected with those of the ducts which are for hot air, said flues being open on the inner sides near the bottoms. (5) Return duct, located adjacent to the roof and communicating with the upper portion of the room. (6) A blower and casing adapted to receive air from the return flue and force it across a heater into the hot-air ducts. (7) Means for controlling the admission of fresh air. The last of these defendant says it has not; but the doors and windows in its blower house serve the purpose sufficiently well. I am, however, reluctantly constrained to agree with defendant that the third and fourth elements are limited to the specific construction of air ducts, shown in plaintiffs' patent. If so, this seventh claim cannot be read upon the defendant's structure, nor for a like reason can the eleventh.

It follows that the four claims in suit are valid, but that defendant does not infringe either 7 or 11, but does infringe 20 and 23. A decree in accordance with this conclusion may be drafted.

KOENIG v. MORRIS.

(District Court, E. D. New York. June 19, 1917.)

PATENTS ⇐316—SUIT FOR INFRINGEMENT—JURISDICTION TO GRANT DIFFERENT RELIEF.

Where it has been determined that a suit for infringement will not lie because of defendant's ownership of an interest in the patent, the jurisdiction of the court under the patent statute is exhausted, and unless some other ground of jurisdiction exists, such as diversity of citizenship, it cannot retain the suit to grant relief by way of accounting.

In Equity. Suit by William J. Koenig against Israel Morris, doing business as the Dandy Novelty Company. Dismissed for want of jurisdiction.

Isaac B. Owens, of New York City, for plaintiff.
George W. McKenzie, of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. This action was tried in equity for infringement of patent and for an accounting. It appeared that the defendant had obtained from an original purchaser a one-fourth interest in the patent rights of the plaintiff and had also succeeded to a one-fourth interest in a partnership which for a term of years was formed between the patentee and the original purchaser to put the device upon the market. It appears from the record that since that time the plaintiff had been manufacturing the article in question without accounting to the defendant, and that the defendant had been manufacturing the article without accounting to the plaintiff. This situation has resulted from ordinary differences between the plaintiff and defendant in their firm relations. The defendant sought to dismiss the action upon the ground that infringement of the patent could not be charged against one who held by assignment a share in the patent rights, without reference to the amount or interest in the patent which he might hold. Drake v. Hall, 220 Fed. 905, 136 C. C. A. 471; Central Brass & Stamping Co. v. Stuber, 220 Fed. 909, 136 C. C. A. 475; Blackledge v. Weir & Craig Mfg. Co., 108 Fed. 71, 47 C. C. A. 212; Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co. (C. C.) 108 Fed. 77.

The plaintiff sought to add to the charge of infringement of patent, and as a reply to the defense just mentioned, an allegation that he had been defrauded in the original assignment of an interest in the patent, and that he could therefore disavow that assignment and charge the defendant as an infringer, who had no rights to the patent itself. The situation was so apparent, and the parties seemed to be so plainly pursuing their different ways with belief in their own good faith, that the court, with the consent of both parties, substantially allowed an amendment of the pleadings during the trial and pending the decision of the case. The action was thus modified upon the finding by the court that the plaintiff had, in such a way as to be bound, assigned a one-fourth interest in the patent. The action was changed into one for an accounting and the defendant was directed to pay to the plaintiff

three-fourths of his net profits, after deducting a suitable amount for his own services. Kinsman v. Parkhurst, 59 U. S. 289, 15 L. Ed. 385; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43. The defendant then changed attorneys, and application was made to reopen the action so as to allow the defendant to claim a one-fourth interest in the net profits of the plaintiff, over and above the cost of production, with reasonable compensation to the plaintiff for his services.

The parties thereupon agreed, in hearings before the court, to work out some basis for a computation of what would be equivalent to a royalty or to agree upon some method by which the placing of the device upon the market could be treated as the efforts of one concern. The formation of a corporation, which should make use of the abilities of both the plaintiff and the defendant, and which should divide the net profits on the basis of three-fourths and one-fourth, was suggested, while in another form the defendant agreed to give up any right to the patent and to manufacture, under royalty, if the plaintiff would not enter into business rivalry in the same territory. The parties have not succeeded in any agreement upon the course to be pursued. The matter has now been submitted upon the defendant's objection that no accounting can be compelled, so long as the finding that he is a one-fourth owner in the patent shall stand.

It is evident that the period of partnership for which the parties originally agreed has long since expired. No partnership as such is shown by mere assignment of patent. Drake v. Hall, supra. No damages for unlawful use of the patent right can be granted in the action. Mathers v. Green, 1 Law Reports, Chancery Appls. (29 and 30 Vict.) 29. It would be a strange illustration of the futility of a resort to a court of equity and a striking example of an invasion of rights where no remedy, even in equity, could exist, if a party by purchase of a share in the net proceeds of a patent, could thereby enter into competition successfully with the original patentee and force him out of the market by monopolizing the patent in the territory where both parties were operating. The broad authority given to a court of equity to do substantial right would imply that a court should not allow itself to be made helpless by the interposition of a technical defense, which would avail only to the particular cause of action for damages by reason of infringement of the patent, which cause of action is ordinarily brought into equity through the asking for an injunction. In the present action, the action is brought into equity through an application for an accounting, based upon a charge of fraud and of a continuation of partnership rights, where no extension of the partnership has in terms been entered into. But, when it has been found that no right of action for infringement of patent will lie, the jurisdiction of a court of the United States has been exhausted unless some other ground, such as diversity of citizenship, gives the court jurisdiction over the subject-matter of the action. In the cases cited above, where any relief in the way of an accounting was granted, the court was not ousted of jurisdiction, when it held that a suit for infringement was not possible. In the present case there has been no final decree. The matter is still in the court, and it is the court's duty, when its juris-

diction is exhausted, and when it has no power to litigate any further issues, to dismiss the action, although the parties have not raised the question of jurisdiction. Consent will not confer jurisdiction over parties to hear an issue which is not within the jurisdiction of the court to hear and determine, as soon as it has been held that no basis of valid jurisdiction exists.

The present action cannot be heard as an action for infringement. The court, therefore, has nothing which it can hear, and the action must be dismissed, as both parties are shown by the record to be citizens of the state of New York, and no basis for the exercise of jurisdiction over them or their differences as to their contractual relations can be found.

SPEIDEL et al. v. N. BARSTOW CO.

(District Court, D. Rhode Island. July 27, 1917.)

No. 60.

1. WAR ⊂=10(2)—ALIEN ENEMIES—RIGHT TO MAINTAIN SUIT.
An alien enemy resident in his own country is under disability during the war to institute and maintain a suit in this country, but this disability does not attach to alien enemies resident in this country.

2. WAR ⊂=10(2)—SUIT FOR INFRINGEMENT OF PATENT—EFFECT OF WAR.
A cause of action for infringement of a patent is indivisible, and where complainants in an infringement suit were partners and subjects of the German government, some residing in this country and some in Germany, on the declaration of a state of war between the two countries, the court will not dismiss the suit without prejudice as to the nonresident complainants, nor will it dismiss it entirely, but will stay it during the continuance of the war.

In Equity. Suit by F. Speidel and others against the N. Barstow Company. On motion to dismiss bill. Denied.

See, also, 232 Fed. 617.

Arthur P. Sumner, of Providence, R. I., for plaintiffs.

Cook & Cook, of Providence, R. I., for defendant.

BROWN, District Judge. The case is before the court upon the following motion:

"1. And now comes the defendant herein and respectfully represents to this honorable court that, as appears of record in the pleadings herein, the plaintiffs are Fredrich and Eugene Speidel, citizens of the German Empire, and subjects of the German Emperor, and residents of Pforzheim in the Grand Duchy of Baden, and Wilhelm Forstner and Walter Forstner, subjects of the German Emperor and residents of Providence, Rhode Island.

"2. That, as this honorable court has judicial notice, a state of war now exists between Germany and the United States.

"3. That the plaintiffs herein are, therefore, alien enemies, and are without right to ask for or obtain the relief sought by said bill while said state of war continues.

"Wherefore the defendant moves that this action be abated, and that the bill of complaint herein be dismissed without prejudice."

The bill for infringement of letters patent 890,896 was filed February 9, 1916, before the declaration of a state of war. It alleges that the plaintiffs are the lawful owners of the patent, and are copartners in business under the firm name of F. Speidel Company, with a regular and established place of business in Providence, R. I. It prays for an injunction, for an account of profits and damages, and also prays for threefold damages.

[1] It is conceded by plaintiffs' counsel that an alien enemy resident in his own country is under disability during the war to institute and maintain suit. That this disability applies to Fredrich and Eugene Speidel seems well settled by authority. According to good authority, however, this disability does not attach to the alien enemy plaintiffs resident in this country. Story's Equity Pleading, §§ 51–53, 724; Cooper's Chancery Pleading, 246, 247; Story's Pleadings in Civil Actions, pp. 10–12. See, also, a useful collection of authorities in "The Co-operator," June, 1917, p. 51 et seq.

It is unnecessary, however, to review the authorities, in view of our conclusion as to the proper order in this case.

[2] Assuming for the purposes of this motion that two of the plaintiffs are not under disability to sue, while two are under such disability by reason of their enemy nationality and their residence in Germany, the plaintiff suggests that to preserve the jurisdiction of this court the bill may be dismissed without prejudice as to the nonresident plaintiffs. The result of this, however, would be to expose the defendants to two suits for the identical subject-matter, and, should the defendant prevail in the first suit, the decree would afford it no protection against a second. Furthermore, an injunction would inure to the benefit of the nonresident as well as of the resident plaintiffs.

It seems entirely impractical also to proceed to an accounting of damages and profits and to make a decree therefor, and possibly a decree for threefold damages, and to provide that it should not give to the nonresidents profits or damages to which, during war, they would have no right.

The defendant is entitled to contest the validity of the patent in a single suit, and, if liable for profits and damages, there is but a single liability. The defendant could not be called upon to pay two judgments for profits and damages, one upon a suit by the resident plaintiffs, and one upon a suit by the nonresident plaintiffs after the termination of war and of their disability. "The monopoly granted by letters patent is one entire thing and cannot be divided into parts," except as authorized by the patent laws. Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923; Pope Mfg. Co. v. Gormully (No. 3) 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 423. The plaintiffs, therefore, are asserting and the defendant denying an indivisible right; and the defendant can be liable only to a single money judgment for violation of that right.

These seem insuperable objections to a dismissal without prejudice to the plaintiffs, leaving two plaintiffs to prosecute the suit. But, even were equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix) applicable, and if it could be read to confer upon this court a discretion thus to pro-

ceed, such discretion could not be so exercised as to expose the defendant to the burden and risks of two litigations and two judgments.

The proper course in my opinion is that followed by Judge Speer in Plettenberg, Holthaus & Co. v. I. J. Kalmon & Co. (D. C.) 241 Fed. 605, a case where all the plaintiffs were alien enemies resident in Germany, and which seems specially appropriate in a case where there is personal disability of some but not all the plaintiffs—to suspend the suit and all proceedings therein during the state of war, or until further order.

The defendant may present a draft order accordingly.

BABCOCK LUMBER & LAND CO. v. FERGUSON et al.

(District Court, W. D. North Carolina. June 29, 1917.)

1. JUDGMENT ⇐660—ERRONEOUS JUDGMENT—CONCLUSIVENESS.

In a suit to remove a cloud from complainant's title to land alleged to be within the Eastern District of Tennessee, defendants, claiming under a grant from the state of North Carolina, by plea in abatement and answer raised the issue that the land was situated in North Carolina, and this issue was decided against them. Subsequently a petition for a bill of review on the ground that undoubted testimony had been discovered that the land was in North Carolina was denied, and the decree affirmed by the Circuit Court of Appeals and the Supreme Court. *Held*, that the decree confirmed complainant's title to the land, though the land was east of the line subsequently established by the Supreme Court as the true line between the two states.

2. JUDGMENT ⇐17(3)—PROCESS TO SUPPORT—SUBSTITUTED SERVICE.

Where a decree was entered by default in the District Court for the Eastern District of Tennessee, after substituted service in North Carolina upon a resident of that state, who failed to appeal or plead, he was bound by the judgment.

3. QUIETING TITLE ⇐7(2)—CLOUD ON TITLE—INSTRUMENTS CONSTITUTING CLOUD.

A deed from those claiming title to land which was declared void in a prior suit was a cloud upon the title to the land which should be removed.

4. ADVERSE POSSESSION ⇐100(1)—EXTENT OF POSSESSION—EXTENDING POSSESSION TO BOUNDARIES.

A complainant in possession of all lands within a common boundary described in the bill in a suit in which his title was confirmed was in possession of the whole of the land within such boundary, unless an adverse possession to some designated part or parts had intervened, though the land consisted of several distinct parcels, each claimed by one of several adverse claimants.

5. ADVERSE POSSESSION ⇐74—COLOR OF TITLE—DECREE CONFIRMING TITLE.

A decree purporting to confirm complainant's title to land in a suit to remove a cloud and successive deeds from those claiming under such decree were color of title, and uninterrupted possession thereunder for more than seven years gave title, even though the decree did not operate to confirm the title.

6. INFANTS ⇐24—ADVERSE POSSESSION—SUSPENSION BY INFANCY.

Where limitations had begun to run in favor of one in the adverse possession of land while a claimant of the land was living, the latter's death and the minority of his heirs did not affect the operation of the statute.

In Equity. Suit by the Babcock Lumber & Land Company against J. W. Ferguson and another. Decree for complainant.

Merrimon, Adams & Adams, of Asheville, N. C., for plaintiff.

F. A. Sondley and M. W. Brown, both of Asheville, N. C., for defendants.

BOYD, District Judge. The facts in this case are substantially these: The complainant in this case derives title under the decree in the Hebard Case, hereafter referred to, in the following manner: That is, Hebard sold and conveyed by deed the lands involved in the Tennessee suit to P. C. Blaisdell and others, on the 16th day of July, 1900; P. C. Blaisdell et al. sold and conveyed the lands to the Smoky Mountain Land & Lumber Company on the 28th day of January, 1901; and the last-named sold and conveyed them by deed to the Babcock Lumber & Land Company, the present complainant, on the 8th day of May, 1907.

Charles Hebard filed a bill in equity against D. W. Belding and others, in the Circuit Court of the United States for the Eastern District of Tennessee, on the 16th of January, 1896. Among the defendants named in the bill was R. L. Cooper, of Cherokee county, N. C. Cooper was served with subpœna on the 30th day of March, 1896, under the provisions of the act of Congress authorizing substituted service. He failed to appear and answer, and a decree pro confesso against him was taken on the 14th day of August, 1896.

The purpose of Hebard's bill was to remove cloud from title to about 40,000 acres of lands alleged in the bill to be located in the Eastern District of Tennessee. Included within this 40,000 was 640 acres which was claimed by R. L. Cooper by virtue of grant No. 8573, issued by the state of North Carolina on May 26, 1888, and this last is the tract involved in this controversy, and which J. W. Ferguson and J. C. Blanchard claim to have purchased and to have title therefor at the time of the bringing of the present suit. There were a number of small tracts or parcels of land claimed by various persons defendants, included within a common boundary of the land of which Hebard alleged that he was owner and in possession.

A final decree was entered in the cause on the 10th day of June, 1899, in which it was decided by the court that Hebard was the owner of the land within the boundary alleged, that he was is possession of the same, and that the several titles or interests claimed by the defendants were invalid and void, among such titles being the grant to R. L. Cooper.

In the suit the location of the line between North Carolina and Tennessee was in controversy, made so by the averments in the bill; but on the 9th of March, 1898, a plea in abatement was overruled, and then the issue was raised by the answer of one or more defendants, particularly in that of J. W. Cooper, who was the father of R. L. Cooper, and who also set up a claim to some part of the lands described in the bill. But the court held that the lands described in Hebard's bill were in the state of Tennessee, and, as before stated, decreed Hebard the owner and in possession, and that the claims of the defendants were void.

In 1909 a petition was filed in the Circuit Court of the United States for the Eastern District of Tennessee, praying for a bill of review, assigning especially as a basis for the prayer that undoubted testimony had been discovered after the entry of the decree showing that the true line between the states of North Carolina and Tennessee was farther west than Hebard's bill represented.

In the meantime, in 1904, R. L. Cooper had died leaving a widow and two minor children, but the latter were made parties to the petition by next friend. Pending this proceeding W. R. Hopkins and others became interested as owners of the lands claimed by the defendants in the original bill, and the Smoky Mountain Lumber Company became a party by reason of having purchased the lands embraced in the original bill, or at least a part of the same, from Hebard, in which purchase was included the tract now in controversy.

Finally leave to file a bill of review was denied by the trial court on the 8th of September, 1909, and in a case stated, in Equity, D. W. Belding, M. M. Belding, A. N. Belding, Henry Stix, Nathan Stix, and others against Chas. Hebard, and in a case stated, William R. Hopkins and others against Chas. Hebard, an appeal from the decision of the court denying leave to file a bill of review was taken to the United States Circuit Court of Appeals for the Sixth Circuit on the 29th of October, 1909.

The principal basis, as before stated, upon which the bill of review was sought and insisted upon was "that the newly discovered evidence showed that the lands claimed by the complainant in the original case were to the east of the true boundary line between the states of North Carolina and Tennessee, and within the state of North Carolina, and not within the boundaries of the state of Tennessee, and for this reason the Circuit Court of the United States for the Eastern District of Tennessee was without jurisdiction over the said land or to determine the title thereto." Upon this appeal the Circuit Court of Appeals affirmed the ruling of the trial court (194 Fed. 301, 114 C. C. A. 261), and thereupon the case was carried to the Supreme Court of the United States, which latter court at October term, 1914, affirmed the decision of the Circuit Court of Appeals (235 U. S. 287, 35 Sup. Ct. 26, 59 L. Ed. 232); and at the said term the case instituted by the state of North Carolina against the state of Tennessee, having for its purpose the definite determination and settlement of the true line between the two states, was determined (235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97), locating the true line between the states farther west, so as to leave a part, if not all, of the lands involved in the original Hebard bill on the North Carolina side of the line, and within this part was included the tract claimed by R. L. Cooper, and which is the subject of the present controversy.

[1] Upon these facts the court here is called upon to determine whether or not the decree in the Hebard Case in the United States Circuit Court for the Eastern District of Tennessee had the effect to confirm the title of Hebard to the land described in his bill; notwithstanding, it was afterwards ascertained, when the true line between the states of North Carolina and Tennessee was established, that a

part of the lands were in North Carolina, and particularly, as before stated, that part of it now in controversy here.

After mature consideration, I have come to the conclusion that under the law as declared by the Circuit Court of Appeals in this circuit, in the case of Anderson et al. v. Elliott, 101 Fed. 609, 41 C. C. A. 521, the complainant is the owner of the Cooper tract, and that defendants, who claim under R. L. Cooper, are estopped by the Hebard decree to deny complainant's title. In that case Stevenson and others, in a suit against Lovingood and others, brought in the Circuit Court of the United States for the Eastern District of Tennessee, obtained judgment for the possession of certain lands alleged to be situated in Monroe county, Tenn. Among the defendants was Jasper Fain, whom it was afterwards discovered lived in Cherokee county. He was brought into court by substituted process, under the provisions of the act of Congress of March 3, 1875, c. 137 (18 Stat. 470), but he did not appear or file answer or other pleading. The case proceeded to judgment, and the plaintiff was declared to be the owner of the lands described in the pleadings, and the claims of title set up by defendants were declared invalid. The land which Fain claimed and which was involved in the suit turned out, upon a settlement of the true line between North Carolina and Tennessee, which took place after the judgment in the suit referred to above, to be in North Carolina. Execution was issued to dispossess Fain, and the marshal for the Eastern District of Tennessee proceeded with the process for the purpose of ousting him; but when he went to the premises of Fain he agreed to vacate later on if he was allowed to remain undisturbed at that time. After that Fain declined to vacate, and the marshal, with a posse, came again with the writ of possession, and went upon the lands for the purpose of executing it, when Fain caused him and his posse to be arrested upon a warrant issued by a justice of peace of Cherokee county, for, as was charged in the warrant, unlawful and malicious trespass, a proceeding founded upon a statute of the state of North Carolina. The offense alleged against the officers was based on the fact that they went upon the lands for the purpose of executing a writ issued from the state of Tennessee.

When under arrest these officers sued out a writ of habeas corpus from the judge of the United States District Court for the Western District of North Carolina, who upon a hearing refused to discharge them, and an appeal was taken to the Circuit Court of Appeals for the Fourth Circuit, where the decision of the District Judge was reversed, and the petitioners for the habeas corpus discharged. The opinion in this case, which is Anderson et al. v. Elliott, reported in 101 Fed. 609, 41 C. C. A. 521, particularly decides the principal question in the case now in hand. The second paragraph of syllabus reads as follows:

"A defendant personally served with process in a suit in a federal court to recover land, who makes default, is bound by a judgment therein awarding possession of the land to the plaintiff, and he cannot attack its validity on the ground that the land is situated in another state, and beyond the jurisdiction of the court, where the boundary line between the two states is in dispute, by instituting proceedings in the courts of the state in which he claims to reside, and causing the arrest of the marshal therein for attempting to execute such judgment."

His honor, Judge Goff, then the presiding judge of the Circuit Court of Appeals for the Fourth Circuit, delivering the opinion, in the course of it, uses the following language:

"It appears from the evidence that for some years past a controversy has existed, at the point where said land is located, as to the true boundary line between the states of North Carolina and Tennessee, and it seems that the authorities of both of those states have claimed and exercised authority and jurisdiction over the land in controversy. The plaintiffs in said suit claimed title to the land under grants issued by the state of Tennessee, and in their bill they alleged that it was located within the boundaries of that state, and that it was within the jurisdiction of the United States Circuit Court for the Northern Division of the Eastern District of that state. That court found, as a matter of fact, that the land was within its jurisdiction, and decreed that the plaintiffs were entitled to the possession of the same. It is needless, so far as the questions now at issue are involved, for us to consider the character of said suit, whether it was instituted on the equity or the law side of the court, and whether or not the proceedings therein were regularly conducted, for the reason that, so far as the parties now before us are concerned, they are bound by the decree rendered therein. Clear it is that said court has jurisdiction of such suits—a jurisdiction expressly granted by statute—and equally clear is it that all the parties to the controversy were regularly before it. The defendants to the suit could have made the defense before that court which they desire now to make in this proceeding—that is, that the land as a matter of fact is situated in North Carolina, and not in Tennessee—but for reasons of their own they failed to do so, and they will not now be permitted to raise that question."

As I see it, the decision of the Supreme Court in the case of North Carolina v. Tennessee, 235 U. S. 1, 35 Sup. Ct. 8, 59 L. Ed. 97, whilst not deciding the point directly, re-enforces and gives strength to the foregoing quotations from the opinion in Anderson et al. v. Elliott; for as stated in the facts, at the same term of the Supreme Court at which the state line case was decided, the petition for review in the Hebard Case was pending on appeal from the Circuit Court of Appeals for the Sixth Circuit, and the decision of the Court of Appeals denying leave to file a bill of review was affirmed. In the concluding paragraph, in the latter case, Mr. Justice McReynolds, who delivered the opinion of the court says:

"Notwithstanding our conclusion in the proceeding between the states of North Carolina and Tennessee, where the established facts in respect to the location of the dividing line were for the most part the same as those disclosed in the record now before us, we think the decree of the Circuit Court of Appeals was right, and it is accordingly affirmed."

In the course of the hearing of the present case, the question was raised by the defendants as to the validity of what is known as substituted service of process from the federal courts. I think that the case of Anderson et al. v. Elliott, supra, settles that question also, at least as to this circuit; for in the opinion will be found the following:

"All of the defendants to said suit were duly served with process within the district where the suit was brought and in which they resided, except Jasper Fain. As to him service was made under the provisions of section 8 of the judiciary act of March 3, 1875 (chapter 137, 18 Stat. 470 [Comp. St. 1916, § 1039]). The defendants were all regularly summoned to appear, and ample time was given them, as required by law and the practice thereunder, in which to plead, and take all proper steps to protect their interests, as the same were affected by said writ."

[2] I go further, and say that, taking the law as I understand it to be declared in the case of Anderson et al. v. Elliott, that where a decree was entered by default in Tennessee, after substituted service upon the defendant who fails to appear or to plead and permits judgment by default, he is thereafter bound by such judgment.

[3] Adopting this view, the decree in the Hebard Case puts an end to the North Carolina grant to Cooper, under which the defendants in the present case claim; and in view of the fact that the defendants here hold a deed from those claiming title under the North Carolina grant, which was declared void in the Hebard Case, I am of the opinion that this deed, so derived, itself constitutes a cloud upon complainant's title which should be removed, and that the deed held by defendants should be delivered up to be canceled.

[4] Now, coming to the question of possession which has entered into this case. It was ascertained as a fact, and so declared by the Circuit Court of the Eastern District of Tennessee in the Hebard Case, that the complainant was the owner and in possession of all of the lands within a common boundary set out in the bill. The court must necessarily have taken this view, otherwise a bill to remove cloud from title would not have been sustained. The complainant, therefore, being in the possession within a common boundary surrounding the entire land, was in the possession of it in its entirety, or, in other words, was in possession of the whole of it, unless an adverse possession of some designated part or parts of it had intervened. The mere fact that there are several distinct parcels, each claimed by one of several defendants, would not affect, in my opinion, the question. If this be true, then the possession of the whole body of land of which Hebard was declared to be the owner began at least as far back as the entry of the final decree in the Hebard Case, which was in 1899.

[5] I find no sufficient evidence to warrant the conclusion that this possession beginning at that time has been interrupted. The Hebard decree, even if it did not confirm title to the lands, I think was color of title; and it is my view of the law, further, that the successive deeds from Hebard to Blaisdell, from Blaisdell to the Smoky Mountain Land & Lumber Company, and from the latter to the present complainant, are all color of title, and the possession under these instruments beginning, as stated, at the time of the decree, and continuing uninterruptedly for more than seven years from the beginning of the possession to the bringing of this suit, that the title of the complainant had by law ripened when the bill was filed.

[6] The point is made that when R. L. Cooper died his children and heirs at law were minors, and that the statute of limitations would not run as against them; but the statute having begun to run at the time of the entry of the Hebard decree, whilst Cooper was living, then the fact of his death, and that his heirs were minors, would not affect its operation—in other words, that it would continue notwithstanding such intervention.

If the views expressed are consistent with the law, then the complainant would be the owner of the lands in controversy whether the Hebard decree confirmed title or not, and the bill in the present case

alleges actual possession on the part of complainant, and the answer of the defendants, as I construe it, practically admits that averment. So that in any view of it, according to the law as I understand it, I am constrained to hold that the complainant is the owner and in possession of the land in controversy, and that defendants' claim to title is fictitious and void; therefore it is declared by the court now to be a cloud upon complainant's title.

A decree will be drawn in accordance with the views herein expressed.

OHIO BRASS CO. v. HARTMAN ELECTRICAL MFG. CO.

McTIGHE IMP. CO. v. SAME.

(District Court, N. D. Ohio, E. D. May 5, 1917.)

COURTS ⊂=347—FEDERAL COURTS—PLEADING—SET-OFF AND COUNTERCLAIM.

The purpose of the provision of equity rule 30 (201 Fed. v, 118 C. C. A. v) permitting a defendant in his answer to "set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him" is to simplify pleading only, and not to create a new equity practice, and it does not authorize the setting out of any cause of action cognizable in equity, regardless of whether or not it is a proper subject of set-off or counterclaim.

In Equity. Suits by the Ohio Brass Company and by the McTighe Improvement Company against the Hartman Electrical Manufacturing Company. On motions to strike counterclaim from answers. Motions granted.

Brown, Nissen & Sprinkle, of Chicago, Ill., for plaintiffs.

Albert Lynn Lawrence, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. These two suits are based upon the same patent, alleging infringement by the defendant. The answers deny infringement and challenge the validity of the patent sued on. In addition thereto each answer pleads a counterclaim as follows:

"And this defendant pleads, by way of counterclaim, that the plaintiff individually and acting in conspiracy with its putative licensee, Ohio Brass Company, of Mansfield, Ohio, and others unknown to the defendant, has damaged and is damaging this defendant, by unlawful and unfounded threats of suit against its customers, and by unfair competitive methods and business practices, all with respect to said 'Simplex Bond,' to an extent not yet ascertained by this defendant, but here alleged in excess of the statutory amount of three thousand dollars ($3,000), exclusive of interest and costs, and it therefore prays an accounting and recovery of the actual damages incurred."

These motions are to strike out this counterclaim, and three grounds are urged in support thereof:

(1) That these allegations are not sufficient to state an equitable cause of action.

(2) That the facts contained therein, even if amplified and properly pleaded, would state an independent cause of action in equity and not a counterclaim within the meaning of the second part of new equity rule 30 (201 Fed. v, 118 C. C. A. v).

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(3) That the cause of action therein contained being cognizable in a federal court only because of diversity of citizenship, and the plaintiff not being an inhabitant of the Northern district of Ohio, but of New Jersey, this court cannot take jurisdiction without the consent or waiver by plaintiff of his privilege of being sued in his home district.

An exhaustive examination of the authorities was made by me shortly after the argument and submission of these motions. I have found them to be in conflict, and have withheld an announcement, in the hope that I might find time to write and file a suitable opinion. However, not finding sufficient time so to do, I am now filing this announcement and memorandum in order not to delay parties in preparing for trial.

Manifestly the first objection is well taken. The counterclaim, as pleaded, consists primarily of a few conclusions of law and fact. It does not set forth operative facts sufficient to constitute a cause of action.

I am of opinion that the motions should also be sustained on the second ground. It is upon this proposition that the authorities are in hopeless conflict, and an attempt to reconcile them is manifestly impossible. A large number of federal judges construing and interpreting the latter part of new equity rule 30 have reached a conclusion which requires this motion to be granted, while a number of others have reached the opposite conclusion. I am of opinion that the weight of reason and argument is with the former group, and have decided to adopt that ruling and adhere to it until a different ruling is made by some tribunal whose authority is controlling upon me.

The line-up of federal judges in favor of the ruling now being made is as follows: In Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C.) 204 Fed. 103, Circuit Judge Dodge; in Williams Patent Crusher & P. Co. v. Kinsey Mfg. Co. (D. C.) 205 Fed. 375, District Judge Hazel; in Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 208 Fed. 419, Circuit Judge Lacombe; in Adamson v. Shaler (D. C.) 208 Fed. 566, District Judge Geiger; in Atlas Underwear Co. v. Cooper Underwear Co. (D. C.) 210 Fed. 347, District Judge Geiger (reiterating his holding in 208 Fed. 566); in Klauder-Weldon Dyeing Machine Co. v. Giles et al. (D. C.) 212 Fed. 452, Circuit Judge Dodge (reiterating holding in 204 Fed. 103); in Sydney v. Mugford Printing, etc., Co. (D. C.) 214 Fed. 841, District Judge Thomas; and in Christensen v. Westinghouse Traction Brake Co. (D. C.) 235 Fed. 899, District Judge Thomson. The best statement of the reasons for the holding made in these cases is by Judge Thomson in the case last cited.

The line-up against the ruling is as follows: In Marconi Wireless Telegraph Co. v. National, etc., Co. (D. C.) 206 Fed. 295, District Judge Chatfield; in Salt's Textile Mfg. Co. v. Tingue Mfg. Co. (D. C.) 208 Fed. 156, District Judge Martin; in Electric Boat Co. v. Lake Torpedo Boat Co. (D. C.) 215 Fed. 377, District Judge Rellstab.

The contention is made that in United States, etc., Bolt Co. v. Kroncke Hardware Co., 234 Fed. 868, 148 C. C. A. 466, the Circuit Court of Appeals, Seventh Circuit, adheres to the ruling of the cases last cited. The Circuit Court of Appeals was reviewing the judgment of Sanborn, District Judge, in the same case, reported 216 Fed. 186,

and reversed Judge Sanborn's decision on jurisdictional grounds only. A careful examination of both opinions convinces me that attention was given almost entirely to the jurisdictional question involved, namely, whether a counterclaim might thus be brought into the case without diversity of citizenship, or some other grounds of federal jurisdiction, and not upon the true meaning and construction of new equity rule 30. I do not regard the decision as giving any substantial support to the defendant's position.

That part of new equity rule 30 involved is as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

This rule was intended to simplify equity pleading, and not to revolutionize equity practice. All agree that it cannot enlarge the jurisdiction of a federal court, or of a court of equity. The set-off or counterclaim must manifestly, therefore, be one cognizable in a court of equity; that is, it must be such as could be made the subject of an independent suit in equity. Manifestly, also, the jurisdiction of the federal court cannot be enlarged by this rule. Obviously, it seems to me, the purpose of this rule was to simplify pleading only, and not to create a new equity practice, and thus permit, under the guise of setting up a set-off or counterclaim, the bringing forward of any matter which will make an independent cause of action cognizable in equity.

Attention is directed to the permissive, or latter, part of the rule. The defendant may, without cross-bill, set up any set-off or counterclaim, and a pleading in that form shall have the same effect as a cross-suit. The intention, it seems obvious, was to dispense with the formal cross-bill, or the formal cross-suit, but not to change or to enlarge the practice and jurisdiction of equity.

The reply is made that this construction restricts the permissive part of the rule, so that it has no greater effect than the mandatory or preceding part. This does not follow. The mandatory counterclaim is obviously a substitute for the common-law remedy of recoupment, and is intended to be strictly so limited. The permissive part is intended to provide for the set-off and the statutory counterclaim previously cognizable in equity. Equity had jurisdiction whenever equitable reasons existed to entertain a suit to protect the right of set-off. A counterclaim is of statutory origin and has no well-defined meaning. Its nature and extent differ in different states. One characteristic of a counterclaim common to all jurisdictions, however, is that it is a matter to be brought forward as an answer to and in extinguishment of the claim made by the plaintiff, and it differs from the common-law recoupment chiefly in that the defendant, asserting a statutory counterclaim, is permitted, not only to extinguish the plaintiff's claim, but to recover judgment for the excess, if any, due him.

The minority reasoning construes set-off or counterclaim as synonymous with cause of action cognizable in equity, as these words are

used in equity rule 26 (201 Fed. v, 118 C. C. A. v). If the framers of this rule had intended this consequence, they could easily have expressed that intention by using the words "cause of action cognizable in equity," instead of "a set-off or counterclaim which is the subject of an independent suit in equity." There is a wide difference between a cause of action cognizable in equity and a set-off or counterclaim which may be the subject of an independent suit in equity. The minority reasoning ignores this distinction. It breaks down all difference between a cause of action cognizable in equity and a set-off or counterclaim.

Such in brief are the reasons making for the majority contention, and which have led me to sustain the motions on this ground. This conclusion renders unnecessary a consideration of the third ground. An exception may be noted on behalf of the defendant to this ruling.

In re H. & L. JARMULOWSKY. Ex parte BORTZ. Ex parte ATTIE BROS.

(District Court, S. D. New York. July 14, 1917.)

1. BANKS AND BANKING ⟸159—DEPOSIT OF CHECKS—EFFECT.
Where checks indorsed in blank are deposited with a bank, and an immediate credit is entered in the passbook to the depositor, the checks at once become the property of the bank, but the bank's right to the checks depends upon the depositor's immediate and unconditional right, not merely as a favor, to draw upon the deposit, and, if the depositor did not have such right until collection, the bank did not become the owner; hence a bank does not become the owner of checks deposited with it, where the passbook expressly declared that deposits of checks should not be drawn against until collected.

2. BANKS AND BANKING ⟸159—DEPOSIT OF CHECKS—EFFECT.
Where the passbook of a depositor declared that deposits of checks should not be drawn upon until collection, the bank does not become the owner of checks deposited with it, unless such rule is expressly waived, and the depositor given the right to draw at once, though the depositor may be allowed to draw on such deposits as a matter of grace.

3. BANKS AND BANKING ⟸166(2)—DEPOSITS—RIGHTS OF DEPOSITOR.
Where private bankers, at the time they received deposits of checks, knew of their insolvency, and such checks were not collected until after possession of their assets was taken by the bank examiner, the receiver, appointed by the bankruptcy court, cannot, the checks having been subsequently collected, retain the proceeds as against the depositors.

In Bankruptcy. In the matter of the bankruptcy of H. & L. Jarmulowsky. Ex parte petitions by Benjamin Bortz and Attie Bros., opposed by the receiver. Order for petitioner on the Bortz petition, and for reference on the Attie Bros. petition.

This cause comes up upon petitions by depositors of two private bankers hitherto doing business in the city of New York, under the following circumstances: The petitioners opened accounts with the private bankers some time before May 10, 1917, on the opening of which they received passbooks which contained as part of the conditions under which the account should be kept, the following language: "Deposits of currency or coin may be drawn against after deposit, but deposits of checks shall not be drawn against until collected." On the 10th of May the depositors deposited certain checks

In their account with the private bankers and received immediate credit in their passbooks for the same. The checks were in each case drawn by persons other than depositors, and were made payable, some in the city of New York, and some without. Nothing appeared on the deposit to indicate whether or not the depositor was to have the right immediately to draw upon the checks, and that question is to be determined upon the bare facts as stated. On May 11, 1917, the bank examiner of the state of New York took possession of the assets of the private bankers, who never opened their doors after May 10th. The checks so deposited on the 10th were not collected until the 11th or later, and the petitioners now claim that the bankers received them as trustees, and for collection only, and that they are entitled to the proceeds of the collection in the hands of the receiver.

The respondent, who is the receiver, appointed after the state superintendent of banks took possession, files an affidavit alleging that the rule contained in the passbooks was expressly waived by one of the petitioners, Attie Bros., and that it was customary for the bankrupts to allow their regular business customers to withdraw money against uncollected checks. The petitioners likewise allege that the bank was insolvent, and known to the private bankers to be insolvent, on May 10th, when the checks were received.

Norman M. Behr and Virginius V. Zipris, both of New York City, for petitioners.

Milton M. Sittenfield, of New York City, for receiver.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] The question as stated in St. Louis & San Francisco Railroad v. Johnston, 133 U. S. 566, 576, 10 Sup. Ct. 390, 33 L. Ed. 683, is in principle only a question of fact; i. e., whether the bank, on receiving the check, intended to become the owner and give the depositor an immediate credit, or whether the intent was that the bank should hold the checks for collection, and that the depositor should have no credit until the proceeds were received. It is pretty generally accepted law that, where nothing appears but the receipt of the checks indorsed in blank or for deposit, and an immediate credit in the passbook to the depositor, the checks at once become the property of the bank and cannot be followed. Metropolitan National Bank v. Loyd, 90 N. Y. 530; Lyons v. Union Exchange Bank, 150 App. Div. 493, 135 N. Y. Supp. 121; Cragie v. Hadley, 99 N. Y. 131, 133, 1 N. E. 537, 52 Am. Rep. 9 (obiter); St. Louis & San Francisco R. R. Co. v. Johnston (C. C.) 27 Fed. 243; Brooks v. Bigelow, 142 Mass. 6, 6 N. E. 766. The bank's right, however, depends upon the depositor's immediate and unconditional right, and not merely as a favor, to draw upon the deposit, and if it appears that the depositor did not have such right until collection the bank does not become the owner. Scott v. Ocean Bank, 23 N. Y. 289; King v. Bowling Green Trust Co., 145 App. Div. 398, 129 N. Y. Supp. 977; Beal v. Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291; Re State Bank, 56 Minn. 119, 57 N. W. 336, 45 Am. St. Rep. 454; Balbach v. Frelinghuysen (C. C.) 15 Fed. 675. Beal v. Somerville, supra, indeed, throws a little doubt upon the general rule, and seems to imply that the presumption is that the bank receives for collection unless the contrary appear. Where the checks are indorsed for collection only the case is of course beyond any question; for example, in Balbach v. Frelinghuysen, supra, where the indorsement was for collection, but the depositor could draw at once, the indorsement prevailed.

[3] Applying these rules to the case at bar, it is quite clear that the private bankers would have become the owners of the checks at once, but for the provision in the passbook, "Deposits of checks shall not be drawn against until collected." In Attie Bros.' case, the receiver alleges that this provision was waived and that the depositor was expressly given the right to draw at once. It will not be enough, however merely to show that the bank had permitted the depositors to draw. Nothing short of an agreement, express or implied by the course of dealing, to modify the passbook, will answer. On this issue of fact the receiver is entitled to be heard, and there must be a reference. At the time of the reference, if the receiver makes good his claim that the provision in the passbook was expressly modified, it will have to be determined whether the private bankers were insolvent, and knew of their insolvency at the time of receiving the checks. If so, under well-established principles, the receiver cannot hold the proceeds.

The order will be for the petitioner on the Bortz petition, and for a reference on the Attie Bros. petition. The matter of the rent deposit was disposed of on the argument.

In re AARONS.

(District Court, D. New Jersey. July 18, 1917.)

BANKRUPTCY ⇐385—COMPOSITION—PROOF OF CLAIMS.

Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549 (Comp. St. 1916, § 9596), declares that, on a confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed, but, that when the composition is not confirmed, the estate shall be administered in bankruptcy as provided. The section, though requiring an examination of the bankrupt in open court, or at a meeting of his creditors, and the filing of schedule of his property and list of his creditors, does not require proof of claims. Section 57n (Comp. St. 1916, § 9641) declares that claims shall not be proved against an estate subsequent to one year after adjudication. *Held*, that such section obviously does not apply to compositions, and, the matter being left for bankruptcy court to determine in accordance with equitable principles, a creditor, listed as such, who did not prove his claim within a year, may thereafter apply to the court and participate in funds deposited with the clerk for composition, for, funds having been deposited by the bankrupt for payment of such claim, it would be manifestly inequitable to allow the bankrupt to defeat payment of the claim, because it was not proven.

In Bankruptcy. In the matter of the bankruptcy of Michael Aarons. Application of J. W. Sullivan & Co., a corporation, to participate in funds deposited for composition, notwithstanding petitioner's failure to prove its claim within one year from adjudication. Petitioner allowed to prove claim and participate in fund.

Bilder & Bilder, of Newark, N. J., for applicant.
Barney Larkey, of Newark, N. J., for trustee.

DAVIS, District Judge. An involuntary petition in bankruptcy was filed on March 4, 1915, against the bankrupt in the above-stated cause,

upon which he was adjudicated a bankrupt on the following day. On March 8, 1915, the bankrupt filed his schedules in bankruptcy, included in which was the claim of the said corporation, an unsecured creditor, for the sum of $542.54. The bankrupt made an offer in composition to his creditors of 40 per cent., 20 per cent. in cash and 20 per cent. in notes. A dividend of 20 per cent., declared by the referee March 19, 1915, did not include the claim of the corporation, because it did not prove its claim against the bankrupt within one year after the adjudication, assuming that, since this was a matter in composition and the offer of the bankrupt included the claim, the dividend, in accordance with the schedules and offer of the bankrupt, would be paid without the necessity of proving the claim. Sufficient money was deposited with the clerk to pay the per centum offered on this claim, as well as on others which were proved within the year after adjudication. The question to be determined is whether or not the failure to prove a claim included in the bankrupt's schedules, and not disputed, in a composition in bankruptcy, within one year from the adjudication, forfeits the right to share in the offer made by the bankrupt.

Neither the Bankruptcy Act nor the rules of this court in terms prescribe the time within which a claim must be proved in a composition case. The provision of section 57n of the act, it would seem, does not apply to composition cases. Section 12 of the act provides that:

"Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

In composition cases, the act provides certain things which must be done, such as examination of the bankrupt in open court, or at a meeting of his creditors, the filing of the schedule of his property and list of his creditors, etc.; but in such cases it has left to be administered by courts of bankruptcy, in accordance with equitable principles, many details, among which is the distribution of the consideration, composition fund, and proof of claims set forth in the schedules of the bankrupt.

In the absence of fraud or mistake, the bankrupt is bound by his schedules. There is no intimation of fraud or mistake in connection with the claim in question. It is not disputed by the bankrupt. One of the conditions upon which confirmation of the composition was made, and the passing of the estate back into the hands of the bankrupt, was the agreement of the bankrupt to pay 40 per cent. of the claim in question along with the other claims. The court recognized this claim and had all the essential elements thereof before it. The money with which to pay the same was deposited with the clerk of the court and is now in his hands. The bankrupt in effect says:

"True, I included this claim in my schedules, do not dispute its correctness, and agreed to pay 20 per cent. thereof in cash, and in consequence had my estate returned to me; but the claimant did not prove his claim within one year, and therefore I should not be compelled to pay it, although I made no such condition in my offer."

This would be most inequitable. It would doubtless be a better practice for the creditors to prove their claims, and to do so within one year; but as Judge Coxe in the case of In re Basha & Son, 29 Am. Bankr. Rep. 225, 200 F. 951, 119 C. C. A. 335, said with reference to a creditor in a similar situation:

"Was not the bank excusable for not having filed a formal proof? We think it was, and that the court should have permitted it to be filed nunc pro tunc."

The claim may be proved at this time, and payment will be ordered, in accordance with the application, upon filing of the claim.

SANDS et al. v. JAMES CARRUTHERS & CO., Limited.

(District Court, S. D. New York. July 11, 1917.)

COURTS ⊜321—FEDERAL COURTS—JURISDICTION—SUITS BETWEEN CITIZENS AND ALIENS—ASSIGNEES.

Under Judicial Code (Act March 3, 1911, c. 231) § 24, par. 1, 36 Stat. 1091 (Comp. St. 1916, § 991), providing that no District Court shall have cognizance of any suit upon any chose in action, in favor of any assignee, unless such suit might have been prosecuted in such court to recover upon such chose in action, if no assignment had been made, where aliens assigned a claim against a Canadian corporation for breach of contract to a citizen of New York, a suit by his administrators was within the jurisdiction of the District Court, as the court would have had jurisdiction of a suit by the alien's administrators, if citizens, and the imputed incapacity of the assignee could not have a greater effect than the original incapacity of the assignor.

At Law. Action by Esther H. Sands and another, administrators of the estate of Willard J. Sands, deceased, against James Carruthers & Co., Limited. On motion to remand. Motion denied.

Motion by the plaintiffs to remand for lack of jurisdiction under the following circumstances: A firm of Belgians made a contract for the sale of wheat with a Canadian corporation. After an alleged breach, the Belgian firm assigned the chose in action to one Sands, a citizen and resident of New York. The plaintiffs, who are Sands's administrators, and residents and citizens of New York, sued the defendant in the state court; the defendant removed on the ground of diversity of citizenship, and the sole question raised is whether, under section 24, par. 1, and section 28, of the Judicial Code (Comp. St. 1916, § 1010) the fact that Sands's assignors were aliens bars this court of jurisdiction.

Gordon S. P. Kleeberg, of New York City, for the motion.

Henry B. Potter and Frederic G. Bastian, both of New York City, opposed.

LEARNED HAND, District Judge. It has been accepted law since Chappedelaine v. Dechenaux, 4 Cranch, 306, 2 L. Ed. 629, that the restriction in section 24, paragraph 1, does not cover the devolution by operation of the law of a chose in action from a testator to his executor;

such officers are not "assignees." The point was somewhat summarily considered in Chappedelaine v. Dechenaux, supra, but it was deliberately passed on in Childress v. Emory, 8 Wheat. 642, 5 L. Ed. 705. On the other hand, the word "assignment" is very literally considered, and an assignment by operation of law is held to be within the restriction, if the grantees are called "assignees." Sere v. Pitot, 6 Cranch, 332, 3 L. Ed. 240. In Mayer v. Foulkrod, Fed. Cas. No. 9,341 (1823), Justice Washington and Judge Peters held that the Circuit Court had jurisdiction in a case precisely like this, except that it was a legacy which was assigned. The assignee was a citizen of Maryland, and so were his executors. The defendant was a citizen of Pennsylvania, and it did not appear whether or not the legatees were citizens of Pennsylvania, which must affirmatively have appeared if the fact was relevant. The jurisdiction of the Circuit Court was upheld; the court treating the case as precisely similar to Chappedelaine v. Dechenaux, supra. Now it should be said of Mayer v. Foulkrod, supra, that under the later decisions (Ingersoll v. Coram, 211 U. S. 335, 361, 29 Sup. Ct. 92, 53 L. Ed. 208, and Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374), legacies are not treated as choses in action, but as property. However, the court raised no such point, and supposed that the decision was necessary under the facts.

The statute does not literally apply to the case, because the suit is not "in favor of any assignee," but of his administrators. As I have said, the statute is treated somewhat verbally (Sere v. Pitot, supra), but in this case it is not necessary to be verbal. There is no more reason to impute to Sands' administrators his personal incapacity to sue, because he was an assignee, than to impute it to them if he had been himself an alien. If the assignor's administrators had sued, this court would certainly have had jurisdiction, as I have shown, and the effect of section 24, paragraph 1, is only to extend the effect of their alienage to the assignee. Certainly it is unlikely that Congress should have meant to put the assignee, with his imputed incapacity, into a different position from the assignor with his original incapacity. That, however, would be the effect of a remand here.

Mr. Justice Hotchkiss, in the state court, took the motion under advisement, and I am glad to accept his conclusion.

Motion denied.

McGILL v. COMMERCIAL CREDIT CO.

(District Court, D. Maryland. June 17, 1917.)

1. BANKRUPTCY ⟸303(3)—PREFERENCES—EVIDENCE—SUFFICIENCY.
In a suit by a trustee in bankruptcy to recover a sum of money paid by the bankrupt to defendant, evidence *held* insufficient to show that defendant and the bankrupt conspired to defraud other creditors of the bankrupt.

2. BANKRUPTCY ⟸166(1)—PREFERENCES—KNOWLEDGE OF PARTIES.
In determining whether defendant, which received an assignment of accounts due a bankrupt, had knowledge that such assignment would effect

a preference, the standard of conduct is an external standard, and takes no account of the personal equation of witnesses produced as experts.

3. BANKRUPTCY ⊂=303(3)—PREFERENCES—EVIDENCE—SUFFICIENCY.
In a suit by a trustee to recover from defendant on account of a transfer by the bankrupt which was preferential in fact, evidence *held* to show that defendant's officers had reasonable cause to believe that a preference would result from the assignment demanded and received from the bankrupt.

4. BANKRUPTCY ⊂=160—INSOLVENCY—TEST.
Unlike the common law, one is not insolvent under the Bankruptcy Act when the fair value of his possessions exceeds the amount of his debts, though he may not be able to discharge them when due in lawful money.

5. BANKRUPTCY ⊂=303(3)—PREFERENCES—INSOLVENCY.
In a suit by a trustee to set aside an alleged preferential transfer by the bankrupt, evidence *held* to establish the bankrupt's insolvency at the date of the transfer.

6. BANKRUPTCY ⊂=303(1)—INSOLVENCY—BURDEN OF PROOF.
A trustee in bankruptcy, suing to set aside an alleged preferential transfer by the bankrupt, has the burden of establishing the bankrupt's insolvency at the date of the transfer.

7. BANKRUPTCY ⊂=303(1)—ACTION—INSOLVENCY—PRESUMPTION.
Extreme insolvency, in the bankruptcy sense of the word "insolvency," at the time of the filing the petition in bankruptcy, raises a rebuttable presumption of insolvency during the preceding four months, sufficient, in the absence of any evidence that the bankrupt situation during these months changed for the worse, to sustain the burden resting on the trustee to show insolvency at the time of the making of the transfer alleged to be preferential.

8. BANKRUPTCY ⊂=159—PREFERENCES—WHAT CONSTITUTE.
Where a bankrupt who was insolvent assigned accounts receivable to defendant, who was charged with knowledge that it was receiving a preference, such transfer, as it in fact preferred defendant and was made within four months of bankruptcy, is subject to attack as a preference.

9. BANKRUPTCY ⊂=185—TRANSFERS SUBJECT TO ATTACK—STATE STATUTE.
In view of Bankruptcy Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, the trustee in bankruptcy of a New York corporation may recover property transferred by the corporation where the transfer was subject to attack under New York Stock Corporation Law (Consol. Laws, c. 59) § 66, declaring that no conveyance, assignment, or transfer of any property of a corporation which has refused to pay any of its notes or other obligations when due, or any payment made, judgment suffered, lien created, or security given by it when insolvent, or its insolvency is imminent, with intent to give a preference, shall be valid; for the broad language of the section in the Bankruptcy Act shows that the trustee in his attack on preferences was not restricted to those declared to be invalid by the act itself.

10. CORPORATIONS ⊂=537—TRANSFERS—"INSOLVENCY."
Under the New York statute, "insolvency" is a general inability to answer in the due course of business the liabilities existing and capable of being enforced.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insolvency.]

11. CORPORATIONS ⊂=544(5)—INSOLVENCY—PREFERENCES—VALIDITY.
A transfer by an insolvent New York corporation, which effected a preference, cannot be sustained under the New York statute, though the cred-

itor receiving the preference had no knowledge or notice of the corporation's insolvency.

12. CORPORATIONS ⟸544(6)—INSOLVENCY—PREFERENCES—VALIDITY.
Under New York Stock Corporation Law, § 66, declaring invalid transfers by an insolvent corporation intended to effect a preference, the assignment of accounts to defendant cannot be sustained on the ground that defendant became a creditor of the corporation only through the fraud of the insolvent corporation's officers.

13. BANKRUPTCY ⟸303(3)—CORPORATIONS—PREFERENCES—EVIDENCE—SUFFICIENCY.
Where a conveyance by a New York corporation was attacked on the ground that it effected a preference, evidence *held* to show that it was the intention of the corporate officers to effect a preference.

14. CONSTITUTIONAL LAW ⟸162—CORPORATIONS ⟸540—DUE PROCESS OF LAW—INSOLVENCY LAWS.
Though no state may impair the obligation of a contract, New York Stock Corporation Law, § 66, declaring preferential transfers by insolvent corporations to be invalid, is not open to attack in its application to a nonresident creditor, debts furnishing the basis for the transfer not being questioned.

15. CORPORATIONS ⟸540—TRANSFERS—WHAT LAW GOVERNS.
A New York corporation, which subsequently became a bankrupt, sold accounts receivable to defendant, a foreign corporation having its office in Maryland. The contract required the New York company to tender such accounts at defendant's Maryland office, from whence the purchase price was transmitted to the New York company. Officers of the New York company converted moneys received on some of the accounts sold, and at a meeting of the officers of the defendant and the New York company, had at its home office, it was agreed by such company to assign to defendant a sufficient number of accounts to make good the money converted. At that time the New York company was insolvent. *Held*, that the assignment, which was subject to attack under Stock Corporation Law, § 66, took place in New York, the New York company there making the agreement, though the accounts were transmitted to defendant at Maryland, and hence the assignment could not be sustained on the ground that the section was applicable only by giving it an extraterritorial effect.

16. CORPORATIONS ⟸542(1)—INSOLVENCY—PREFERENCES—CONTRACTS.
In such case, the fact that the contract between defendant and the New York company, after providing for the retention of a large percentage of the purchase price of the accounts in defendant's hands until the assigned accounts were paid, declared that no payments of any such remainder should be made so long as any accounts purchased were affected by any breach or violation of any warranty, but such remainder might be held and applied to the payment of any such accounts, cannot take the transfer, which was preferential, out of the province of the statute, on the theory that, when defendant once got the accounts into its hands, it was entitled to reimburse itself for moneys previously converted by the New York company.

17. BANKRUPTCY ⟸163—FRAUD OF BANKRUPT—TRUSTS.
Where a bankrupt, which assigned accounts to defendant, converted payments received on such accounts, but defendant could not trace such conversions into other unassigned accounts, it cannot, on the theory of the trust, sustain a subsequent assignment of other accounts which worked a preference.

Bill by Charles H. McGill, as trustee of William H. Rich & Son, against the Commercial Credit Company. Decree for plaintiff.

Rosenberg, Levis & Ball, of New York City, Sykes & Nyburg, of Baltimore, Md., and Robert P. Levis, of New York City, for plaintiff.

Leo Oppenheimer, of New York City, and Sylvan Hayes Lauchheimer, of Baltimore, Md., for defendant.

ROSE, District Judge. William H. Rich & Son, Inc., is, or was, a New York corporation. In the borough of Brooklyn, in the county of Kings, in that state, it was for some years extensively engaged in making and selling umbrellas and similar articles. Upon its own petition filed on the 15th of May, 1915, it was adjudicated a bankrupt by the United States District Court for the Eastern District of New York. It will be called the bankrupt. In due course the plaintiff, Charles H. McGill became its trustee, and will be so styled. The defendant is the Commercial Credit Company. It has a Delaware charter, but its business is carried on in or from Baltimore, in which, or in the suburbs of which, all its principal officers reside. It has waived objection to being sued here.

On the 17th of February, 1915, it was an unsecured creditor of the bankrupt for upwards of $55,000. To pay or secure this sum the bankrupt, between the date named and the 5th of the succeeding April, assigned to the defendant outstanding accounts due it by various customers, to the aggregate amount of something over $71,000. From these the defendant has paid itself in full. The trustee seeks to recover what the defendant thus received. He rests his case upon three distinct grounds. They will be stated here, not in the order in which they appear in his bill of complaint, but in that in which it will be most convenient to discuss them. They are:

First. The bankrupt and the defendant conspired to defraud the other creditors of the former.

Second. The assignment was a preference voidable under the Bankrupt Act.

Third. It was a preference voidable under the Corporation Law of New York.

Of these in their order:

The Alleged Conspiracy to Defraud.

[1] Defendant furnishes, at a price, cash to merchants and manufacturers upon the security of the accounts due them for their wares. This business has in late years reached large proportions. It flourishes because it enables the seller of goods, so soon as he has shipped them, to turn into money a larger percentage of their price than it would be ordinarily possible for him otherwise so promptly to do. Under the trade usage of some countries, buyers of goods, upon receipt of bill of lading, accept drafts for the price, payable at an agreed time after sight. Where this is done, there is no demand for the special form of banking in which the defendant is engaged. The seller simply discounts his draft at a bank. The latter does not have to take expensive precautions to prevent the seller from collecting it when due or from applying the proceeds to his own use. It therefore can afford to discount such paper at its usual rate. Where the

maximum legal rate of interest is 6 per cent. the cost to the bank's customers for such an accommodation will not reach 8 per cent., even taking into consideration the balance which under such circumstances a bank would expect its customers to maintain. Such discounting of commercial bills impairs no one's credit. He who does it is not anxious to conceal the fact. It so happens in this country that in most lines of business it is unusual for buyers to accept drafts, and it is rather uncommon for those who are prompt pay to give notes for their purchases. But here, as elsewhere, men always want to make and sell all the goods for which they can find a profitable market, and sometimes, in order to tide over what they persuade themselves are fleeting embarrassments, they are willing to make large sales at or even below cost. They need the use of more money than they have or can borrow upon their personal credit alone. They seek to use as security the sums due them by their customers. In America these are ordinarily in the form of open accounts and in that form alone. Such an account is by no means as good a security as a customer's note or bill, and it necessarily costs more to discount. All defenses available as against the seller of goods may be made against it in whomsoever's hands it may come, whether they be breach of warranty, failure in quantity or quality, set-off, or what not. Such drawbacks to the availability of open accounts are inherent. There are others which are imposed by the present point of view of many bank and credit men, who question the wisdom of doing business with those who sell their accounts. They say that one who does so has freed himself from one of the most effective checks upon overtrading; that such sales make it exceedingly difficult, if not impossible, for any one dealing with him to be sure what unpledged assets, if any, he has; and that he is handicapping himself by paying more than the ordinary bank rate for money. Most men who sell their accounts are anxious to keep the fact secret. That cannot be done if notification of the sale be given to the customer whose account has been sold. Yet the withholding of such notice still further reduces the security value of the account, and compels the purchaser to take various expensive and troublesome precautions, for which in the long run the seller must pay. The debtors of the seller make their payments to him. The buyer keeps a staff of auditors, clerks, and perhaps other agents, busy in trying to make sure that he gets all the money which the seller receives from a sold account. In spite of all this watchfulness, he not infrequently fails to do so. In this as in other forms of collateral banking, there is a tendency to look more to the security than to either the moral or financial worth of the borrower. It was Bagehot, I believe, who years ago acutely observed that, in the long run, lending on the commercial credit of the maker of negotiable paper was safer than lending on collateral of any kind.

The poorer or the more troublesome the security, the more the borrower must pay for the loan. One of defendant's witnesses said that the money received by the seller of accounts cost him on an average from 15 to 16 per cent. That fact makes the seller all the more unwilling that any one should suspect that he sells his accounts. De-

fendant seeks, as it must, to meet the seller's wishes. In many cases it thinks it necessary to insist that the very checks with which the seller's customers pay his account should be turned over to it. If it passes such checks through its own bank in the ordinary way, its indorsement may tell the story to the drawer of the check. To prevent such a possibility, the defendant, in pursuance of a formal resolution of its board of directors, agrees with its banks that the number "54" stamped on the back of checks shall constitute its indorsement. The checks of the bankrupt's customers which came to defendant were so indorsed. It wanted to supervise the bankrupt's dealings with its customers without giving any of them reason to suspect that there was any relation between it and the bankrupt. For that purpose the bankrupt was required to rent a post office box in its own name, but to turn the key over to defendant's agents. The latter, calling themselves for the purpose the Eastern Audit Company, requested statements from some of the bankrupt's customers.

In the absence of statute to the contrary, the purchaser of accounts is not required to notify the debtor. If he does not, he takes the risk that the latter may pay the seller, but as against third persons he acquires good title to the account. Such a buyer is therefore under no legal obligation to tell any one he has bought an account, and, unless the circumstances are peculiar, it is not easy to argue that he is under any ethical call to do so. But defendant was not content with merely keeping its business to itself. It went further in this, and, as it says, in many other cases. For the sole purpose of preventing some people from suspecting the truth, it did what it otherwise would not have done, and it continued to do these things after it knew the bankrupt's creditors, or some of them, had become exercised over a report that the bankrupt was selling accounts, and after it had reason at least to suspect that the bankrupt was not making truthful answers to the questions which on this subject its creditors were putting to it.

It was on September 4, 1912, that the defendant began the purchase of the bankrupt's accounts, and within the next two years it bought them to the aggregate amount of over a million dollars. In March, 1914, some rumors that the bankrupt was selling its accounts reached some of its creditors, and they spoke to its president on the subject. He was much exercised, and on the 21st of that month wrote Mr. Duncan then president of defendant:

"It was reported to me yesterday that a house in New York makes the assertion that we sell our accounts receivable. * * * I thought it advisable to write you personally to have you investigate the possibility of a leak on the part of any of your staff. In this office we naturally do all we can to keep this private, and I believe that we succeed. * * * I shall be glad to have you consider this strictly confidential, and give me your views regarding the matter as early as possible."

Mr. Duncan answered that he was surprised, and added:

"We do everything possible to keep the names of all of our customers strictly confidential. * * * We would do all but fire any clerk that gave out such confidential information about any of our customers. I regret very much indeed that any one should have heard of this matter, although it may

be an assumption, and if there is anything further that I can do please let me know."

On March 24th the bankrupt wrote:

"One of our large creditors, who feels very friendly toward us, telephoned me that this same rumor had reached him. * * * Will you kindly send to me by return mail sketch of just how you indorse checks that we send to you from our customers, also the indorsement you use when we send you our check."

Mr. Duncan replied:

"I can't imagine how any concern could have learned that you were selling some of your accounts. Your customers' checks are not indorsed by us at all, as the indorsement stamp furnished to you is all that appears on same, the number '54' being accepted by all of our banks instead of our name. Your checks are indorsed, 'Pay to the order of Philadelphia National Bank, William H. Grimes, Treasurer.' Of course, the name of the bank changes according to where the check is deposited, but our name never appears on any checks. We suggest that your checks be made to your own order, and our regular indorsement stamp that you have be put on same, instead of being made payable to Mr. Grimes, Treasurer. * * *

"By the way, inasmuch as one of your large creditors who is friendly toward you talked to you about the matter, won't you kindly tell me frankly the result of his talk?"

There is no evidence that the question with which Mr. Duncan closed the above passage above quoted was ever answered, but it is testified that in that same month of March, 1914, the bankrupt's president told a creditor that the rumor that it was selling its accounts was a "damn lie."

The form of indorsement first used by the bankrupt was, "Pay to the order of ——— Bank, William H. Grimes, Treasurer." Subsequent to this correspondence it became, "Pay to the order of any bank or banker, William H. Rich & Sons, '54' Brooklyn." The number "54," it will be recollected, was that by which defendant was known to its bank.

On April 11th in the same year—that is to say, a few weeks subsequent to the correspondence above quoted—Frederick Vietor & Achelis, to whom the bankrupt was then indebted, as it was at the time of its adjudication, wrote that they heard it was having its accounts advanced upon without notice to its customers. They asked to be fully advised on that question. The bankrupt at once replied through its president, who apparently conducted all its correspondence:

"We believe that after pleasant business relations of more than a quarter of a century, you will accept our assurances that there is absolutely no truth in the suggestion."

On the same day the bankrupt sent the letter of Frederick Vietor & Achelis, or a copy of it, to Mr. Duncan. Apparently it did not tell him what answer it made, but it did say:

"I do not know what your experience has been with these sort of houses, but around here they seem to attach considerable unfavorable importance to the subject at issue. Kindly send inclosed letter back to me by return mail, and let me have your assurance that this is strictly confidential between you and myself. By this I mean I think it advisable for you not to bring it up with any of your people. Under the circumstances, I will ask you to accept

my personal check in payment of accounts that have been paid to us by checks drawn on New York banks. For a few days it seems to me this would be the safest way to handle the business between us. Meanwhile, of course, any checks belonging to you drawn by our customers on out of town banks we will continue to send to you."

On the 16th of April, Mr. Duncan answered. In the letter he assured the bankrupt that as long as it continued to pay its bills it would have no trouble in getting all the goods it wanted to buy, and attributed the trouble the bankrupt was having to competitive sources, and stated that the firm who wrote to the bankrupt did millions of business like the defendant's except that the customers were notified, and then continued:

"I suppose you mean you want to send your personal check for accounts drawn on New York banks by customers located in New York, which will be satisfactory to us. Out of town customers, whose checks are on New York banks other than those with which you deal, will reveal nothing if sent to us. Your frequent checks to us on your bank will quicker arouse its curiosity than the present method in force. Our suggestion is that you send your check only for your New York customers' accounts, or for all customers whose checks are on your banks, at the same time sending, as heretofore, the customers' original checks so they can be checked up according to our usual system and they will be returned to you the same day as received without fail. * * * This matter will be treated in the strictest confidence between Mr. Grimes, you, and myself, and I assure you again that I can't imagine how the information got out."

Months later defendant arranged with the bankrupt ways in which it could supervise the bankrupt's accounts without anybody other than themselves being the wiser. Indeed, the post office box, before referred to, was not rented until some time in the succeeding October.

The plaintiff contends that from such of the above facts, which were admittedly known to Mr. Duncan, he, as a reasonable man, must have felt sure that the bankrupt would make false answers to its creditors' inquiries, and when the defendant thereafter actively aided it to keep secret the fact that the latter was selling its accounts, defendant made itself a party to the bankrupt's obtaining credit by false representation. It is to be regretted that a corporation of the financial responsibility of defendant, and whose president and other officers are men of high standing and of unquestioned integrity, have drifted into such a position that the charge made by the plaintiff cannot be set aside as mere reckless abuse. For at least 2,000 years the ease of descent to unpleasant depths has been proverbial. Defendant knew it had a legal and moral right to say nothing about what it was doing. It had good business reasons for wishing that no one should know it was buying the bankrupt's accounts. It assumed, perhaps without much reflection, that it had a right to do something more than merely keep its mouth shut. It did things for no other purpose than to prevent anybody suspecting that it was dealing in bankrupt's accounts.

Defendant continued to make use of its ingenious devices for concealment after it knew, or at all events must have strongly suspected, that by so doing it was aiding the bankrupt to make some of the latter's other creditors believe that it was not selling accounts. One may keep his own counsel, but it is doubtful whether any one is ever justi-

fied in doing anything for the purpose of concealing the truth from one who has a legitimate interest to discover it. At all events, one who begins to do so must be always on the watch if he would stop at a point beyond which it is clear no one should go. Large corporations, with many employés, run some exceptional risks when they sanction such practices. Nevertheless, regrettable as were some of the things which defendant did, no one of them, nor all of them combined, sustain the claim set up by the trustee. As his charges have been spread upon the records of the court, and as they have not been sustained in fact, it has seemed best to say so; but by so doing it is not intended to intimate that, even if the evidence had been other than it is, the trustee would have had a right of action. It may well be that the only persons who could sue therefor would be the individual creditors who had been deceived to their hurt.

The Alleged Bankrupt Preference.

[2, 3] Was there a preference voidable under the Bankrupt Act? The transfer of assets operated as a preference in fact. The other unsecured creditors of the bankrupt will receive not more than 12 per cent. of their claims. Mr. Duncan acted for the defendant in securing this assignment. When he did so, did he have reasonable cause to believe that a preference would result? He says he then thought the bankrupt was solvent, yet he knew that defendant's auditor had made monthly examinations of the bankrupt's books, that attempts to verify its accounts had been made through the use of the post office box already mentioned, that bankrupt had successfully evaded all these precautions by keeping a false set of books, and had thereby fraudulently appropriated to its own use a sum then known to reach at least $25,000, and which subsequent investigation proved amounted to $55,000. He knew that the bankrupt's president, when he caused this to be done, was well aware that defendant on its letter-heads carried this standing warning: *"We Prosecute Every Case of Loss Through Dishonesty."*

Nevertheless, he claims that he believed bankrupt's statement of its condition on the last day of the year 1914 to have been true, or substantially true, and by that the value of the bankrupt's assets exceeded all it owed its creditors by the sum of $328,000. He explains that he thought the statement was true, although he knew the books were false, because the former bore the indorsement of some one who signed himself "Certified Accountant." Who this accountant was, or what was his standing, if any, in his profession or in the community, Mr. Duncan did not know or apparently try to find out. Defendant put on the stand a number of persons connected with concerns in the same line of business as it, and some experienced bankers. It offered to prove by them that the facts known to Mr. Duncan, when he demanded and received the assignment of accounts, would not constitute reasonable cause to believe that the bankrupt was insolvent. Upon objection, this testimony was excluded.

In another class of cases the Supreme Court laid down a rule believed to be here applicable:

"The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned." It is not "coextensive with the judgment of each individual." The Germanic, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610.

The president of the bankrupt had, for an indefinite number of years, carried on a large business. He seems to have had good credit. There is no suggestion that he had not a respectable standing in the community. For the sake of dishonestly getting $25,000 for a corporation practically all of whose stock was owned by him or his son, he induced his bookkeeper to forge accounts. I am not prepared to hold that such facts, when known to one whose money has been thus taken, do not constitute reasonable ground to believe that the corporation is insolvent. Defendant says that, in spite of its warning as to prosecution, many business men, without giving much thought to the matter, do apply to their own use proceeds of accounts which they have already sold. That can well be, but it has nothing to do with the case at bar. One who devises an elaborate system of false bookkeeping to conceal such diversion has thought much about it. It may be that sometimes the business for which such criminal things have been done may nevertheless be solvent, but one who knows that they have been done, before dealing with him who did them, will ask for better proof of solvency than a statement furnished by the very man who caused the books to be falsified.

Moreover, Mr. Duncan then knew that many of the bills then owing by the bankrupt to its merchandise creditors were overdue. He was demanding the assignment of the only assets from which, within any reasonable time, the bankrupt could meet those already too long postponed obligations. He could not have failed to anticipate what would be the probable, if not certain, result. Defendant points to the fact that after the completion of the transfers of the accounts now in controversy—that is, subsequent to April 5th—it bought other acccounts and paid for them in cash, as evidence that it did not believe the bankrupt insolvent. The assignment of the accounts protected defendant. The president of the bankrupt had been too badly and too recently frightened to make it probable that he would take any more chances of going to jail. Under such circumstances, the greater the probability that the bankrupt would fail, the more reason would the defendant have to give such aid as would postpone bankruptcy until four months had elapsed from the date of the assignments now disputed.

It follows that it must be held that Mr. Duncan had reasonable cause to believe that a preference would be brought about by the assignment which he demanded and received.

Was the Bankrupt Insolvent When the Assignment was Made?

[4, 5] The common-law test of insolvency has the merit of simplicity and comparative certainty. It is usually possible to find out whether, on any particular day, the alleged bankrupt was able to pay his debts then due, in lawful money; but in panic times, and during the earlier portions of the periods of depression which follow, an enormous majority of merchants are always unable to do so. Congress felt that

a man ought not to be forced into bankruptcy if, at a fair valuation of his possessions, he has more than he owes. Just and reasonable as this standard is, it is difficult to apply in practice. What is a fair valuation of any man's property? It is easy to say that it is a price which a man who is willing but not forced to sell can get from some one who has use for the property, but who is under no compulsion to buy it. It often is very hard to find out what that price is. The wisdom of the congressional definition is however to be measured by the cases it keeps out of the bankruptcy court rather than by its workings in those which come in. It is quite possible that in the majority of the cases actually tried the application of the common-law test would serve justice better, for by the time most of them come before the court nothing can be done for the debtor, the only person Congress was anxious to protect. He is then broken in fact if not in law. The controversy is narrowed down to a fight among his creditors as to whether some one or more of them may retain property they obtained from him within the four months preceding the filing of the bankruptcy petition. Doubtless Congress was unwilling to complicate the working of the law by prescribing one test of solvency in one set of circumstances and a different one in another. Yet such a distinction would have much in its favor. The debtor's property may be worth as much or a little more than he owes, provided it can be sold in due course and for its reasonable value. It may be certain that if it be forced upon the market, and his estate be further burdened by the expenses of legal liquidation, his creditors will receive much less than the face of their claims. Such a man is, within the meaning of the bankrupt law, solvent, and may pay any of his creditors whom fear or favor make him anxious to satisfy. Nevertheless those who receive, and it may be extort, such payment, may feel sure that the debtor will not be able to go on and must very shortly go to the wall. They may know perfectly well that the very payments to them will precipitate the crash by depriving him of resources which, if wisely used, might postpone or perhaps prevent disaster. Such creditors seek preferences and get them in fact though not in law. Under such circumstances it is exceedingly difficult to apply the bankruptcy test of solvency to a debtor's condition on any particular day preceding the filing of the bankruptcy petition. The effort is to find out not what a real buyer and a real seller, under the conditions actually surrounding them, do, but what a purely imaginary buyer will pay a make-believe seller, under circumstances which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out.

In the instant case, all the difficulty, and nearly all the controversy, is as to the true value of the bankrupt's assets on the 17th of February, when the assignment at issue was made. The defendant admits that the bankrupt then owed to unsecured creditors nearly $234,000. The trustee makes this total $236,500. They differ as to the sum of $2,600, which was, upon the bankrupt's books, then carried as a debt due to certain of its officers. The amount represented a dividend declared on its stock on the 1st of January, 1915, and which defendant truthfully

says was never earned. It will not be necessary to pass on the question thus raised. The bankrupt had something over $9,500 in bank. There was due it not quite $51,000, one-half of which was the estimated value at the time of a sum owed it by a single insolvent corporation, all of whose stock it owned. It had in San Francisco and other places certain samples, the cost price of which was $3,300. These valuations seem sufficiently high, but the parties have agreed to them.

The bankrupt owned certain machinery. The one witness who testified as to its value said it was worth $15,000. He seems to have known what he was talking about. The real estate, at the time the assignment of accounts was made, was mortgaged to the extent of some $62,000. It was subsequently further incumbered, and, by the time the trustee sold it, it was subject to liens, including taxes, interest, etc., aggregating $71,500. After repeated efforts to dispose of it at private sale, it was sold at public auction for $71,800. Had there been no testimony on the subject, I should see no special reason why it might not have been properly valued at what it brought. It is true it had to be sold without delay, but it was not recklessly forced upon the market. Time enough seems to have been taken to get out of it the most that anybody was willing to pay for it. Nevertheless, the trustee is doubtless bound by the value of $115,000 placed upon it by a witness he put on the stand. The opposing expert for the defendant says it was or should have been worth $138,265. I am satisfied both from the actual test of the market and the comparison of the two depositions themselves, as both experts were examined out of court, that the one who fixed the lower price valued the property at a sufficiently high figure. Upon that assumption the net value of the real estate on the 17th of February, over and above the mortgages then on it, was $53,000. At that time the bankrupts' total assets, exclusive of the stock of merchandise, did not amount to $132,000, as against an admitted indebtedness of $234,000. On this part of the case the only serious controversy possible is as to the worth of the merchandise the bankrupt then had. If that equalled or exceeded $102,000, the bankrupt must upon this record be adjudged as then solvent; otherwise not. The defendant says its value was about $146,000. The trustee says it was at the most only $81,000. There are two inventories in evidence, one taken by the bankrupt at the end of December, 1914, the other by the receiver five months later. If either was correct, and if the bankrupt's books were accurately kept, both sides agree that it would be possible to find out with approximate accuracy how much merchandise the bankrupt had on the 17th of February. There is no difference between them as to the proper method of making the calculation, but each denies the correctness of the inventory upon which the other relies, and both are forced to admit that the books were so untruthfully kept that any calculation based upon them leads to absurd conclusions. If the December inventory of the bankrupt be used as the basis of the calculation, the books purport to show that there was on hand in May goods worth from $100,000 to $200,000 which did not come into the receivers' hands. If from the receivers' inventory, through the use of the books the calculation be carried back, it will appear that the value of the bankrupt's merchandise on the pre-

ceding 31st of December was represented by a minus quantity. With such proof positive of the worthlessness of the books upon which each side relies, for calculating the value of the stock on the 17th of February, it is idle to waste time upon the results to which either of them come. If the books are obviously false, no greater reliance can be placed on the inventory, the sum of which purports to figure in the bankrupt's statement of December 31, 1914. It is true that the defendant has produced as a witness one who was, but is no longer, in the employ of the firm of accountants engaged by the creditors' committee to examine the bankrupt's books. He says that, from somewhat cursory examinations and tests of that inventory, he is inclined to believe that it is substantially accurate. It however appears from his and other testimony that the statement of which the inventory formed a part purported to show that on the 31st of December, 1914, the bankrupt's assets exceeded its liabilities by the comfortable margin of $328,000. In all probability the bankrupt was then already broken. If there was any margin to the good, it must have been of the smallest. The statement was false by at least $300,000. All sorts of devices were used to force such a showing. An inventory is the asset which usually is the easiest to inflate. When all else in the balance sheet was false, it is impossible to believe the inventory to have been true.

[6-8] The burden of proving insolvency in February is on the trustee. Has he sustained it? He has shown that in May the insolvency was hopeless and extreme. The estate seems to have been carefully and honestly administered. The creditors will not realize more than 12 cents on the dollar. If in February the bankrupt was solvent in any sense of the term, its condition in the next three months must have undergone a radical change for the worse. Of such a change there is no evidence. Conversion to their own use of bankrupt's money by those in charge of its affairs cannot be presumed merely from evidence that they were unscrupulous persons. It is highly probable that between February and May goods were sold at low prices. During the earlier part of that period the bankrupt's president must have felt himself under urgent pressure to make sales, for only by so doing could accounts be created to supply defendant's demand for assignments. There is no evidence, however, that such sales were in sufficient quantity or at sufficiently low prices to turn a concern which in February was solvent, even in the limited bankruptcy sense, into the sorry financial wreck it was in May. Both authority and common sense are at one in holding that such a showing sustains the burden resting upon the trustee.

It follows that there has been made out every element necessary to establish a preference voidable under the Bankrupt Act.

The Alleged Preference under the Corporation Law of New York.

[9] Section 66 of the Stock Corporation Law of New York provides, in effect, that no conveyance, assignment, or transfer of any property of a corporation which has refused to pay any of its notes or other obligations when due, in lawful money, nor any payment

made, judgment suffered, lien created or security given by it, when it is insolvent, or its insolvency is imminent, with intent to give a preference to any particular creditor over other creditors of the corporation, shall be valid. It is further provided that every person receiving, by means of any prohibited act or deed, any property of the corporation, shall be bound to account therefor to its creditors, stockholders, or other trustees, and it is declared that every transfer, assignment, or other act done in violation of the preceding provisions shall be void.

The Circuit Court of Appeals for the Second Circuit has held that a trustee in bankruptcy may recover property the transfer of which this state statute declared void. Grandison v. Robertson, 231 Fed. 785, 145 C. C. A. 605. In that case the trustee's authority was derived from section 67-e of the Bankruptcy Act (Comp. St. 1916, § 9651); but in Cardoso v. Brooklyn Trust Co., 228 Fed. 333, 142 C. C. A. 625, the conveyance set aside was made nine months before bankruptcy, and the trustee relied upon the provisions of section 70-e. Under the construction placed upon this state statute by the highest court of New York, its application is not limited to cases in which the corporation has refused to pay its notes or other obligations when due. It is declared that the enactment was intended to prevent unjust discrimination and preferences among creditors of insolvent corporations or those bordering on insolvency. Cole v. Millerton Iron Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Caesar v. Bernard, 156 App. Div. 724, 141 N. Y. Supp. 659; Id., 209 N. Y. 570, 103 N. E. 1122.

[10-12] Within the meaning of the New York statute, insolvency is a general inability to answer in the course of business the liabilities existing and capable of being enforced. Brouwer v. Harbeck, 9 N. Y. 589. For its application it is not necessary that knowledge or notice of the insolvency shall have been brought home to the creditors receiving the preference. Brouwer v. Harbeck, supra. And it is, of course, immaterial, as it is under the Bankruptcy Act, that the defendant became a creditor of the bankrupt through the fraud of the latter's officers. Atkinson v. Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178.

Defendant says that the assignments were valid, even if they were subject to the New York statute, because it claims there is no sufficient evidence that the bankrupt intended to prefer it; but it asserts that the New York statute is altogether out of the case, and that for two reasons: First, that it is applicable only when the debtor, being a New York corporation, the preferred creditor is either a citizen or body corporate of that state; and, second, that it renders invalid only such preferential assignments as are made within the territorial limits of the state of New York, as in defendant's view those in controversy were not.

Did the Bankrupt Intend to Prefer the Defendant?

[13] The president of the bankrupt says that when he made the assignment he expected to pay everybody in full and go on in business.

It is hard to believe he had any such expectations. He certainly had no reasonable ground for them. A large part of his very considerable indebtedness for merchandise was overdue. That in itself might not have been presently serious. Others in like case had often triumphed over such a situation. He might well have thought that he could do so if he could keep control of his liquid assets, so that he could from time to time make some shift to pay something to such importunate creditors as could no longer be put off with fair words. But these transactions with the defendant made this practically impossible. He assigned and agreed to assign not only all the good accounts existing in February, but all others to be created in the next few weeks. He was far too shrewd not to foresee the almost if not quite inevitable result. The fact is that he realized the position in which his fraudulent conduct had placed him, and he expressly admits that he felt he must first take care of the defendant. To satisfy the latter, and thus prevent his own criminal prosecution, was his first concern. No serious weight can be now given to his statement that he did not anticipate what actually happened.

Defendant Not a New York Corporation.

[14] Defendant says that the New York statute in question is not applicable, unless the preferred creditor is a resident, a citizen, or a corporation of that state. It cites cases which hold that states' insolvent laws do not release debts due citizens of other states. No state may impair the obligation of a contract. It may not therefore discharge any debts except those which within its territory, after the passage of the insolvent act, have been incurred to persons subject to its laws. As this constitutional prohibition has no bearing upon the statute now under consideration, the cases which apply it are not in point. It is possible to argue that, when Congress said that certain preferences could be set aside, it implied that all others should be valid. In view of the broad language of section 70 of the Bankruptcy Act, the federal courts have felt constrained to reject this contention. Grandison v. Robertson, supra.

Is the New York Statute Applicable if the Assignment was Made Outside of That State?

Defendant says that an insolvent New York corporation, in spite of the statute, may make a valid preferential transfer, when such transfer is consummated outside of the territorial boundaries of the state. It relies upon Warren v. First National Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746. In that case a New York corporation operated a coal mine in Ohio. In the latter state it assigned to an Ohio bank a claim for coal there mined and sold to an Illinois corporation. The court held that the property transferred had been created in Ohio, and had been there parted with to one not subject to the New York law. It said that the charter alone is recognized and enforced in other jurisdictions, and not the general legislation of the state by which the company is created. For this conclusion it cited, among other authorities, Hoyt v. Sheldon, 3 Bosw. (N. Y.) 267. In

the last-mentioned case the transfer was made by an insolvent New Jersey corporation. It assigned a mortgage upon New York property, and the transfer was made in New York. The court there said that the purchaser was not bound to look beyond the charter of the company, or to inquire what were the general laws of New Jersey in regard to the powers and duties of their corporations.

Assuming, but not deciding, that the proposition laid down in Warren v. First National Bank and Hoyt v. Sheldon is sound, the question remains, "What is a charter?" Incorporation by special legislative act is now comparatively rare. In most, if not all, of the states the overwhelming majority of all incorporations are made under the provisions of the general statutes, and the charter or certificate of incorporation of a body corporate shows on its face that it is issued under and in pursuance of the corporation laws of the state granting it. Are not these laws thus made a part of the charter itself? Reference will serve all the purposes of quotation.

Where Was the Assignment Made?

[15] But unless the preference was made outside of New York, it is not necessary to discuss whether the statute has or has not any extraterritorial effect. Defendant points out that, by the terms of the contract under which it had been buying bankrupt's accounts, the latter was required to tender to the defendant, at the latter's Baltimore office, the accounts it wished to sell. This tender was made by forwarding copies of such accounts to the defendant, and the latter at Baltimore decided which of them it would buy. From Baltimore it forwarded to the bankrupt the money for those it bought. The interview at which the defendant's president and the bankrupt agreed to assign sufficient number of accounts to make good the money of the defendant which the bankrupt had improperly converted took place at the bankrupt's office in New York. In pursuance of such agreement, the assignments of such accounts, made out by the bankrupt, were forwarded to Baltimore, and the defendant thereupon notified the bankrupt by mail that the assignments had been accepted. No money passed from the defendant to the bankrupt. Among the cases upon which defendant relies are those in which it has been held that, although sales of liquor were solicited by the seller in prohibition territory, the sales were finally consummated at the seller's place of business, at which such sales were legal. It also refers to cases in which insurance policies were held to be subject to the law of the state in which the insured lived, because in some instances the application provided that the policy should not become effective until the first premium was paid by the insured. The courts have ruled that under such a provision the contract was consummated at the place at which such payment was made. Other authorities have held that the requirements as to notice to policy holders found in the laws of a state under which the insurance company held its charter were intended for the protection of policy holders within that state and no others.

The case at bar, in its practical aspects, is unlike any of these. The thing which the state sought to prevent was not the making of a par-

ticular contract. It wished to forbid the attainment of a specific result; that is, a preferential transfer by a New York corporation in failing circumstances. The state cared nothing whether such transfer required the making of a contract or not. In the broadest definition of a contract one is ordinarily involved in the effecting of such a transfer; but it is not the contract, but the transfer, which is prohibited. It does not make any difference what form the transaction takes, if the transfer is effected thereby. Thus, when an insolvent New York corporation suffered a judgment to be given against it in Maine, it was held that the transaction came within the terms of the statute. Olney v. Baird, 7 App. Div. 95, 40 N. Y. Supp. 202.

When a New York Corporation, in New York, does a forbidden thing, it does something that is subject to the New York law. Some creditor outside of the state of New York may, after all, decide not to accept the transfer. He cannot by postponing, until his return from New York, his formal acceptance of the items which as an aggregate he had demanded in New York, make legal what would otherwise be illegal.

It follows that the trustee is entitled to recover as well under the New York statute as under the bankruptcy law.

[16] It is unnecessary to consider in detail some other contentions made by defendant. It calls attention to the fact that the original agreement for the purchase of accounts, under which the parties had for some years been operating, provided for the retention of approximately 20 per cent. of the purchase price of the accounts in defendant's hands until the assigned accounts were paid, and then said:

"No payments of any such remainder need be made so long as any accounts purchased hereunder are affected by any breach or violation of any warranty hereunder, but such remainder, and any moneys, accounts, or property of the bankrupt which may come into the possession of the defendant, may be held and later applied to the payment of any such accounts."

Under such provision defendant argues it makes no difference how or when the accounts in controversy came to be assigned to the defendant. If it once got them into its hands, it had a right to reimburse itself for the moneys previously improperly converted by the bankrupt. As against the bankrupt, so it would have, except for the provisions of the federal and state law prohibiting preferences. The parties could not contract themselves out of the operation of such statutes as to any property transferred to the defendant in a forbidden manner or for a prohibited purpose.

[17] Defendant's remaining contention is that the moneys wrongfully converted by the bankrupt enhanced the latter's estate. It says it is therefore entitled to be paid out of such estate to the extent of such enhancement. Quite true; but where is the evidence of any enhancement? All that came into the trustee's hands was $44,995.30, a large part of which was the proceeds of merchandise sold by the receiver or trustee. The bankrupt's stock was certainly no larger in May than it was in February. Defendant claims that there was a great many thousand dollars less of it. Four thousand four hundred dollars, or about one-tenth of the total receipts of the trustee, was the

proceeds of the machinery sold, which for the most part had been in the plant for years. And it is no more possible to trace any of the defendant's money into unassigned accounts collected by the bankrupt's receiver or trustee. It must be borne in mind that the trustee, upon the theory now under discussion, is liable only for such property as came into his hands and into which defendant's money can be traced, and of such there is none.

It follows that the defendant must be decreed to pay to the plaintiff the net sums received by it from the accounts in controversy in this case, from which, however, should be deducted a sum equivalent to the same dividend on the amount the bankrupt owes it as has been paid the other unsecured creditors.

MUNRO v. SMITH et al.

(District Court, D. Rhode Island. July 13, 1917.)

No. 67.

1. TRUSTS ⟸371(1)—CONSTRUCTIVE TRUST—BILL.

A bill by the trustee in bankruptcy of a mining company, which alleged that defendants acquired title to mining property for the purchase of which the mining company held a contract, that by their fraud and conspiracy defendants prevented the company from carrying out its contract, and prayed an accounting of secret profits, etc., and that defendants be required to hold the property in trust for the trustee, but made no offer to reimburse defendants for the amounts they expended in acquiring the property, and did not allege any demand on defendants for a conveyance, cannot be treated solely as a bill for the establishment of a constructive trust.

2. MINES AND MINERALS ⟸54(2)—MINING PROPERTY—VALUE.

Where a mining claim was bought under a contract providing for payment of the purchase price in installments, and giving the purchaser an option to abandon his contract, with no other effect than a forfeiture of payments already made, the price fixed in the contract is a most uncertain indication of the cash value of the property, for payments were optional, and might be contingent upon success.

3. CORPORATIONS ⟸183—SECRET PROFITS.

A mining company entered into a contract to purchase a mining claim, payments to be made in installments; the company, which was allowed to go into possession, being given the option to abandon the contract on forfeiture of payments already made. It being difficult to consummate the purchase, as the claim had not proven productive, stockholders of the company, who had made considerable advances, bought in the title of such claims, concealing the fact of their purchase from the company. Payments were continued, but before they had amounted to a sum equal to the price paid by such stockholders, the company defaulted. *Held*, that the company was not injured by the stockholders' secrecy, their reason for keeping their purchase a secret being to prevent requests for extensions, and hence there could be no recovery against the stockholders on account of alleged secret profits.

4. TRUSTS ⟸102(1)—CONSTRUCTIVE TRUSTS—CREATION.

In such case, where the stockholders, being anxious to make a profit and to save the amounts they had advanced to the corporation did nothing to prevent it from consummating its agreement, no constructive trust

can be established on the ground that the interests they purchased were hostile to the interest of the company, where such stockholders offered to continue to make advances to the company on condition that other stockholders made similar advances, and the corporation, which was represented by its fiscal agent and other officers, indicated no intention of acquiring title to the claims in the same manner as the stockholders.

5. TRUSTS ⟸102(1)—CONSTRUCTIVE TRUSTS—FIDUCIARY RELATION.
While breach of a fiduciary relation raises a constructive trust, the existence of a fiduciary relation is a condition precedent to the raising of such trust; hence the fact that stockholders and officers of a corporation, after it had contracted to purchase mining claims, payments to be made in installments, acquired title from the vendors, will raise no constructive trust, on the theory of a breach of fiduciary relations.

6. EQUITY ⟸388—BILLS—FRAUD.
Where a bill of the trustee of a bankrupt mining company, charging actual fraud on the part of defendants, alleged a conspiracy to wreck the company, etc., such bill must be dismissed, where the fraud was not established; the general rule being that, where fraud is charged and is denied, the party making the charge will be confined to that issue.

7. CONSPIRACY ⟸19—EVIDENCE—SUFFICIENCY.
In a suit against stockholders and officers of a mining company, based on the theory that they had conspired to wreck the company and prevent it from consummating a contract to purchase mining claims, payments on which were to be made in installments, evidence *held* insufficient to establish in any way plaintiff's contentions.

8. CONSPIRACY ⟸1—WHAT CONSTITUTES.
That stockholders and officers of a mining company, who had acquired title to mines which the company was attempting to purchase under a contract providing for payment on installments, entered into a reorganization plan with creditors at a time when the company was about to become bankrupt, does not establish conspiracy to ruin the company.

In Equity. Bill by Arthur E. Munro, trustee, against Fred L. Smith and others. Decree for defendants.

Comstock & Canning and Harry M. Holbrook, all of Providence, R. I., for plaintiff.

Richard E. Lyman, of Providence, R. I., for defendants.

BROWN, District Judge. This is a bill in equity, brought by the trustee in bankruptcy of the Big Chief Mining Company, a corporation of the state of Arizona, with its principal office at Providence, R. I., adjudicated bankrupt August 24, 1915, in this court. The defendants are Fred L. Smith, formerly a director, and Charles J. Davol, citizens of Rhode Island, and Frederick E. Browne, formerly resident manager, mining engineer, and statutory agent of the bankrupt, a citizen of California. Mary H. Carroll, executrix under the will of the late Thomas A. Carroll, Esq., was originally, but is not now, a party.

The bill charges the defendants with a conspiracy to defraud and cheat the Big Chief Mining Company of its assets, to render it insolvent, to get for themselves all its property, and that certain acts in pursuance of this conspiracy were done by the defendants, with the effect of causing the mining company to become bankrupt.

The bill prays that the defendants be decreed to hold in trust for the plaintiff certain claims or rights to mining property in Hart, San Bernardino county, Cal., for a conveyance thereof to the plaintiff, for an

accounting and payment of damages and expenses suffered through the alleged wrongful acts of the defendants, for an accounting and payment of secret profits, for an injunction against transfers of property, and the prosecution of certain suits to quiet title, and from further prosecution of certain claims against the bankrupt corporation.

The bill makes reiterated charges of actual fraud, and makes no offer of reimbursement to the defendants of amounts paid by them for the property, which plaintiff prays may be conveyed to him; nor does the bill allege, nor do the proofs show, that at any time before the filing of the bill the company or its trustee in bankruptcy made any demand upon the defendants for a conveyance of the property, or made any offer to reimburse the defendants for their expenditures in acquiring it, although the bill shows that Smith and Davol made considerable payments for the property.

[1] It is impossible to treat the bill merely as one for the establishment of a constructive trust, and to secure for the plaintiff profits actually made by the defendants through breach of fiduciary relations. The burden rests upon the plaintiff to establish its charges of actual fraud.

The Big Chief Mining Company had not acquired full title to its mines or mining claims, but had succeeded to the rights of purchase conferred by a certain contract of May 14, 1910, between the owners of the mining claims (who may be called the Fosters and McCluskeys), and the California Big Chief Mining Company, a California corporation. The bankrupt had acquired rights to purchase the so-called "Jumbo" group of claims at Hart, San Bernardino county, Cal., for the sum of $50,000, payable out of the net returns of mining, in monthly installments, but with the guaranty of certain minimum monthly payments, which varied in amount, but from January, 1911, were required to be at least $450 per month. The contract provided for a forfeiture on nonpayment of a monthly installment after 30 days' written notice. The company, however, was under no obligation to pay the full amount of $50,000.

The Fosters and McCluskeys, owners of the mining claims, were in no sense creditors of the company, for the contract expressly provided:

"The second party shall have the right to abandon this contract at any time, with no other or further effect than a forfeiture of payments made prior to such abandonment, and nothing herein contained shall obligate the second party to purchase the mining claims and property herein agreed by the first parties to be sold."

[2] Under an agreement of this character the full amount to be paid ($50,000), in order to acquire a full title, is a most uncertain indication of the actual cash value of the property. As payments are optional, and may be contingent upon success, the vendor asks more, and the vendee is willing to pay more, than in an outright purchase for cash. Consolidated Arizona Smelting Co. v. Hinchman, 212 Fed. 813, 816, 129 C. C. A. 267.

[3] The first ground of complaint is the purchase by the defendants Smith and Davol of the rights of the Fosters and McCluskeys in the mining claims. The bill alleges that the interests purchased by the defendants Smith and Davol were of the value of the difference between

the amounts already paid by the company on account of the contract and the sum of $50,000; but, as has been said, the amount remaining to be paid in order to acquire full rights is not a proper measure of the actual value of the interest purchased by the defendants Smith and Davol.

In January, 1914, defendant Smith purchased of the Fosters a two-thirds interest in the mining claims for the sum of $5,500. At that time the sum of $17,400 had already been paid by the company, leaving $32,600 still optionally payable by the company at the rate of $450 per month. In September, 1914, the defendant Davol purchased from the McCluskeys the remaining one-third interest, paying therefor $4,700. At this time $21,000 had been paid by the company, leaving $29,000 optionally payable at the rate of $450 per month in order to perfect the company's title. At the time of these purchases the company was earning nothing from its mining operations, which, for lack of funds, had been shut down for some time, but made its payments out of moneys borrowed or contributed by stockholders. The company was considerably in arrears to the defendant Browne for salary and for expenditures made by him, and was in great financial difficulty. Though its mining engineer, Browne, had confidence in its ultimate success, the company was still in the prospective stage. In a report to the company by A. L. Flagg, a mining engineer, dated as late as February 20, 1915, and read to stockholders at a meeting on March 11, 1915, it appears:

> That "the Big Chief Mining property is still in a prospective stage," that sufficient work had been done "to indicate very clearly that it is not a poor man's camp, but, on the contrary, one in which moderately large expenditures must be made to prove the ground."

The assignment by the Fosters and McCluskeys to the defendants Smith and Davol did not change the rights of the company, nor impose upon it any new obligations, but merely put the defendants Smith and Davol in the shoes of the Fosters and McCluskeys. The Fosters apparently were willing to dispose of an interest having a nominal value of $21,000, more or less, for the sum of $5,500 in cash, or a little more than one-quarter of the nominal value, and the McCluskeys to dispose of a one-third interest, having the nominal value of more than $10,000, for the sum of $4,700. The effect was to transfer the outstanding title from strangers to persons who were interested in the company as stockholders and one as a director.

About the time of Smith's purchase from the Fosters, Thomas A. Carroll, Esq., an attorney at law, paid Smith the sum of $1,500, and acquired $^{15}/_{55}$ of Smith's interest. The plaintiff lays great stress upon the fact that the purchases by Smith and Davol were not made directly in their own names, but were made in the names of third parties, and were not disclosed by the defendants, nor known to the officers of the company, until February, 1915. The directors and stockholders were duly informed at a meeting in March, 1915. Payments by the company were continued, covering the period to January 1, 1915.

The discovery of the purchase by Smith and Davol, and of the fact that they had kept their purchase secret, was doubtless a cause of dis-

sension and of dissatisfaction on the part of the company's fiscal agent and others, who were endeavoring to promote the company and to secure funds by borrowing, and giving the lenders blocks of stock as a bonus for lending. It was doubtless, also, a disappointment to find that the defendants Smith and Davol, who had already made considerable advances of money to the corporation upon its notes, were disinclined to make further contributions, except on condition that other stockholders would also contribute to a considerable amount.

Complaint is made that, if the defendants Smith and Davol had not purchased the Foster and McCluskey claims, they would have been willing to have advanced the company more money, and that their purchase of the Foster and McCluskey rights removed from them any further inducement to advance more money. Apparently this situation gave rise to a considerable feeling of hostility to the defendants, which has so colored the view of the situation as to obscure a fair and unprejudiced view of their acts.

The secrecy which is so emphasized as a badge of fraud is satisfactorily explained by Mr. Smith: That he felt that, if he took title in his own name, the company would possibly be backward in the payments and want extensions, etc., and he testified that he did not want the company coming around to ask him to let up, and that he wanted the matter carried along as to payments, and to make a profit; that he expected that the company would complete the payments, and that after he had got his payments out he would make a profit of the difference between what he paid and what would be paid by the company on the contract.

Mr. Smith made no pretense that he was acting solely in the interests of the company in making the purchase. He did so in the expectation of profit from payments to be made by the company under its contract. This expectation, however, has not been realized up to the present time. The company has made payments to the amount of $3,300 since Smith's acquisition of title, which was divided between Smith and Carroll. Davol has received the sum of $450.

It thus appears that the defendant Smith, instead of so far making a profit from the monthly payments, has expended at least $2,200 more than he has received, and that the defendant Davol has expended at least $4,250 more than he has received. There is, therefore, no basis in the facts to warrant a decree for an accounting of so-called secret profits from payments made by the company. Upon any theory of the case it seems clear that, until the company had paid monthly installments to at least the amount of the sums paid by Smith and Davol, it had suffered no damage, and no deprivation of any legal or equitable right.

The company finally defaulted in its payments, before it had paid as much as would compensate Smith and Davol for their outlay, and thus incurred a forfeiture of its right under the original contract.

It seems to be a matter of indifference whether the Smith and Davol purchases were known to the company or not. Until Smith and Davol got their money back, they were entitled to protect themselves by secrecy, and to permit the payments to be made in regular course to the bank, which held the deeds in escrow. Until this time there could

arise no equity in the company to have the benefit of any contract which Smith and Davol had made, assuming that their contract was better than that originally made by the company, and assuming, also, that it was inequitable for them to buy on better terms than the company had assented to.

[4] The plaintiff characterizes the interest purchased as a hostile interest, but it was no more hostile in the hands of the defendants than in the hands of the Fosters and McCluskeys, so long as they sought only payment of the contract price. In acquiring these claims the defendants dealt entirely with a third party, and there is no evidence that the corporation had intrusted any of them with a duty of attempting to acquire the property by outright purchase, or to better a bargain already made. It is expressly stated in the testimony of John M. Welch, the fiscal agent and a director, that the company had never considered the matter of purchasing the Foster and McCluskey claims in this way.

The plaintiff does not in his argument exactly define any duty to the corporation which was violated by these defendants, except the supposed duty of giving to the company an opportunity to purchase the Foster and McCluskey interests, instead of taking them for themselves. There is no evidence in the case which is sufficient to show that the company has in fact lost a valuable opportunity to acquire the property on terms better than those of its contract with the Fosters and McCluskeys. The company was fully represented by other officers and by a fiscal agent. Its contract, with the right of abandonment at will without incurring further liability, had certain advantages, and it was apparent that it would still be necessary for the company to raise considerable sums to develop its mines. Whether the plaintiff would have had a right to any advantages resulting from the acquisition by the defendant of these properties seems, however, a moot question in this case. The mining company had lost all its rights under the contract before the defendants had made themselves good. Unless this forfeiture is in some way attributable to acts of the defendants—if it resulted solely from the inability of the company to raise funds, and if there was no interference by these defendants with the raising of funds—it would seem a matter of indifference whether this forfeiture inured to the benefit of the Fosters and McCluskeys, or to the benefit (if it be a benefit) of the defendants. In either event the vendees retain nothing which ever belonged to the company, except what it had contracted to forfeit in case of nonpayment. The defendants are still left with a mining property, so far unproductive, with its operations shut down, and requiring reasonably large advances for its development—a mining venture still uncertain of success.

It must be remembered that the purchase of mining claims is the purchase of an opportunity to engage in a business equivalent in its results to a manufacturing process, and requiring capital and labor for its development. See Stratton's Independence v. Howbert, 231 U. S. 399, 413, 415, 34 Sup. Ct. 136, 58 L. Ed. 285. It is often more difficult to finance a mining venture than to acquire the mines.

There is in this case no definite evidence as to the value of the claims purchased by the defendants, and it has not been made to appear that

they are worth as much as the defendants Smith and Davol paid for them, or that the company ever was able or desired to buy them at that price.

Upon the evidence I find that the plaintiff has not sustained his allegations that the defendants conspired to wreck the company by preventing it from making its payments. I find as a fact that the bankruptcy of the company was not brought about by any act of the defendants, but was due to the inability of the company to raise the necessary funds to meet its payments and its assessments and expenses of operation; that, even had the defendants refused altogether to put in any more money, this would not have amounted to a legal wrong; but I find that they did contribute certain sums, and were willing to contribute further upon conditions that were not unreasonable.

[5] While the courts maintain with strictness the doctrine that a breach of a fiduciary relation raises a constructive trust, this doctrine requires as its foundation proof of a fiduciary relation. As was said by the Circuit Court of Appeals for the Eighth Circuit, in Steinbeck v. Bon Homme Mining Co., 152 Fed. 333, 338, 81 C. C. A. 441, 446:

"But, like every rule and principle of the law, it is founded in a controlling reason which is its life, and, where the reason ceases, the rule is impotent. The reason is that no one may profit by a betrayal of the confidence of his correlate, and by the use, to the latter's detriment, of knowledge or interest acquired by means of the fiduciary relation. The test of the existence of a constructive trust of this nature is the fiduciary relation, and the betrayal of the confidence reposed under it to acquire the property of interest of the correlate, and, in the absence of either of these indispensable elements, no such trust can arise. Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 648, 61 L. R. A. 176."

In Trice v. Comstock, 121 Fed. 620, 623, 57 C. C. A. 646, 649, 61 L. R. A. 176, the rule is stated broadly:

"From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his cestui que trust, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created."

In the present case there is no evidence that these defendants used their positions or their knowledge to prevent the company from accomplishing its purpose of acquiring the property in accordance with its plans. They took nothing which belonged to the company, and imposed upon it no new burden in accomplishing its purpose.

[6] The plaintiff has cited no case which goes so far as to hold that a purchase of this character, which involves only a substitution of officers or directors or stockholders of a company in the rights of a third party who had previously made a contract with the company, can be regarded as a sufficient basis for the establishment of a constructive trust. In the absence of evidence that a profit has been made, or that they have secured something which is worth to the company more than they paid for it, there seems to be no room for the application of the equitable doctrine as to constructive trusts. But the plain-

tiff cannot avoid the fact that the bill framed by him is a bill which charges a fraudulent conspiracy to wreck the company. This conspiracy could not be completed merely by the purchase of the Foster and McCluskey interests, but could only be effected by preventing the company from making its payments through some unlawful interference leading to forfeiture.

In Hendryx v. Perkins, 114 Fed. 801, 806, 52 C. C. A. 435, 440, it was said:

"A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof. The only exceptions have been in some instances where the bill had a double aspect, so that, therefore, it might be sustained according to its other allegations, even if those charging fraud were not proven. In such cases the proper practice is to expressly dismiss the bill so far as fraud is concerned."

The general rule that, where fraud is charged in a bill and is denied, the party making the charge will be confined to that issue, is cited in Wall and Foss v. Parrot Silver & Copper Co. et al., 37 Sup. Ct. 609, decided by the Supreme Court of the United States June 4, 1917.

[7, 8] The charges of fraud require that we consider more in detail the question whether the defendants did fraudulent acts to prevent the company from making its payments.

The purchase of the claims by these defendants, and the nondisclosure, had, of course, no such effect. On the contrary, the nondisclosure indicates very clearly the desire of the defendants that the company should continue its payments as before. The scheme of securing secret profits by collecting the monthly payments required their continuance for more than 22 months before reimbursement of defendants' expenditures, and for a considerable time thereafter in order to make a profit. This was not consistent with a plan of an early wrecking of the company, or of disabling it from making payments.

Though the bill, in paragraph 22, alleges a conspiracy to prevent the company from raising money for its monthly payments, it is so vague and uncertain in its allegations as to afford no proper basis for proof. It states that defendants knew that monthly installments were being paid out of a $12,500 subscription, and that they knew that the fiscal agent, John M. Welch, "could not comply with conditions laid down by themselves in reference to the aforesaid subscription." This is so feeble a presentation of charges of actual fraud that it might well be wholly disregarded, but for its apparently unjust reflection upon the good faith of Thomas A. Carroll, Esq. Certainly his objection, at a meeting September 21, 1914, to a plan of borrowing $15,000 from strangers, which would afford a commission of $2,250 to the company's fiscal agent, might be taken as evidence of sound judgment, rather than of a fraudulent purpose.

The plaintiff's contention that there was improper interference with the efforts of the company to borrow more money, and that this was the cause of the failure of the company to make its payments, I find not to be sustained by the proofs, which are quite as vague and indefinite as the allegations of the bill.

I find, also, that there was no intention of any of the defendants to do any act to prevent the company from raising other moneys necessary to pay assessments or outstanding bills, but that, on the contrary, the defendants were willing to contribute, and did contribute, for this purpose.

It is also charged that the defendant Browne "was intentionally permitting his claim for unpaid salary to increase from time to time"; that he gathered in certain claims to add to his own, for the purpose of attaching the personal property of the company, as further steps in the conspiracy. This perversion of the company's failure to pay Browne's salary, and a few bills that he had contracted for the company's benefit with his own guaranty of payment, into "steps in a conspiracy," is a most extraordinary and unjustifiable attempt to convert the company's own fault into a part of a supposed scheme of the defendants. The constant efforts of Browne to secure payments from the company, and to induce the company to raise money for this purpose, are a complete answer to this remarkable charge.

It is further charged that Thomas A. Carroll, Esq., while director and attorney for the company, after suit brought by Browne, did advise the California attorneys of the company that the company had no defense to Browne's suit, by reason of which the company allowed judgment to be taken by default, and "did not inform the company of facts within his own knowledge which could be set up in an answer to the Browne complaint and which the complainant avers would be a good and sufficient defense."

So far as appears, there is no basis for this charge of bad faith. The debts upon which Browne brought suit were just debts long overdue, and no grounds of defense are alleged or proved. It certainly was not Mr. Carroll's duty to advise the company that by reason of some far-fetched theory Browne was a party to a fraudulent conspiracy, and his just claims might be defeated for that reason.

If the vague allegations of paragraph 29 of the bill mean or imply anything more than this, such further meaning does not appear. There is no ground for holding this to be a fraudulent act, or other than sound advice. There is no doubt that the defendant Browne was fully justified in bringing suit against the company and attaching its personal property, and that this was entirely consistent with good faith.

It is further argued that the purchase of the interests made Browne, Smith, Carroll, and Davol all hostile to the company, and deprived the company of their services. But the primary interest of Browne was to get payment for his past and present services, and of Smith, Carroll, and Davol to receive the monthly payments from the company. The money required for the monthly payments did not go to Browne, whose interests thus differed from those of the others. So long as the company, by borrowing or by its operations, might be able to take care of its payments, there seems to have been no reason for desiring to harass it or prevent it from continuing.

It seems to be true, however, that in making the purchase it was the intention of Smith and Davol to put themselves in a position which would enable them to carry on the enterprise under a reorganization,

in case of the failure of the company under its then management. There is in the written correspondence much evidence of the intention of the defendants to co-operate in the reorganization of the enterprise.

When failure was imminent, there seems to have been an understanding between the parties that such rights as should be secured by Browne under his attachments and judgments, and such rights as should be secured by Smith and Davol by the exercise of rights of forfeiture and by suit upon notes of the company held by them, should be used by them in reorganizing or in forming a new company. It was a plan for salvage out of an impending wreck, due to the failure of the fiscal agent and other officers to finance the company, rather than a plan to cause the wreck.

In the plans for reorganization the plaintiff finds his principal evidence of a conspiracy or a meeting of the minds of the defendants.

But this is all too late to support the charges of the bill; it is action in extremis, and not the cause of the bankruptcy, which was the result of the failure of long-continued efforts to finance a doubtful mining enterprise, which, under different acts of incorporation and under various names, had not made a profit.

The responsibility for this failure cannot be shifted to the shoulders of these defendants by far-fetched and unjustifiable charges of a fraudulent scheme to wreck the company.

The scheme of fraud set up in this bill was not of the defendants' invention, and the defendants' acts do not fit such a scheme, but are inconsistent with it.

The plaintiff argues at length that, even if the charges of actual fraud are not sustained, a case of constructive fraud is yet made out.

As we have said, there is no ground for a decree for an account of secret profits, for it is proved that there were none. Assuming, for argument, what is not established, that the plan to make profits by receiving monthly rentals was a breach of fiduciary relations, this is now of no consequence, since it was defeated by the company's inability to raise money, and not, as we find, by any acts of the defendants which prevented it from doing so. This plan for "secret profits" from monthly payments disappears from the case, whether its failure was due solely to the inability of the company to pay, or was due to its abandonment by the defendants before any profit was made, upon the alleged adoption of an alternative plan of preventing the company from making the payments. In either aspect, whether defeated or voluntarily abandoned, it was not carried out, and did not result in the payment by the company of more than it must have paid in any event.

There remains in the case only the alleged fraudulent plan of acquiring the full ownership of the mining claims and of disabling the company from completing the purchase, thereby forfeiting its contract rights.

This plan comprehends two essential and inseparable parts, and the supposed illegality of acquiring the claims depends upon the intent to carry out the plan of disabling the company from buying under the contract of May 10, 1914.

Finding as a fact that there was no intent to disable or prevent the company from exercising its rights to purchase, and that this was not done by the defendants, there remains no ground charged in the bill for finding that the purchase of the mining claims by the defendants Smith and Davol was unlawful or inequitable, or in violation of any rights of the company. While acts lawful in themselves may become unlawful as parts of a general scheme, if the general scheme is disproved and the connection is thus broken, a plaintiff cannot be permitted to set up a new and distinct ground for equitable relief that is not pursuant to his bill. He who unjustifiably charges actual fraud done in pursuance of a conspiracy cannot expect the aid of a court of equity in constructing out of the remnants of his case some other case, based upon some different principle of equity not invoked in his bill. United States v. Reading Co., 226 U. S. 324, 372, 373, 33 Sup. Ct. 90, 57 L. Ed. 243. A charge of fraud calls upon a defendant to protect his character, and when there is a failure of proof, or when he has disproved the charge, he is entitled to a full dismissal. Cases in which general charges of fraudulent conspiracy are made, in order to give the color of fraud to many acts innocent in themselves and consistent with legal rights and with an honest intention, require the strict application of the rule when the charges of fraud fail.

These defendants testified before me at length under direct and cross examination. I am satisfied that they, and Thomas A. Carroll, Esq., are unjustly charged with a conspiracy to wreck this company, or to defraud it or their associates. I am of the opinion that they were willing to do their share towards contributing funds to carry on the enterprise, though they were unwilling to assume the burden of carrying the enterprise for the benefit of others who would not contribute.

The plaintiff, in my opinion, has failed to establish any right, based either upon fraud or upon breach of fiduciary relations, to a decree establishing a trust or requiring a conveyance from the defendants Smith and Davol; and there is no just ground for an injunction against any of the defendants, or for granting any relief prayed for in the bill.

The bill will be dismissed.

Ex parte DOSTAL.

(District Court, N. D. Ohio, E. D. August 15, 1917.)

No. 9562.

1. HABEAS CORPUS ⊜51—PROCEEDINGS—PARTIES.
   While an application for a writ of habeas corpus may be made by one person on behalf of another, an application in this form entitles the petitioner to such relief only as might be given if the application were made by the person detained in his own name.
2. HABEAS CORPUS ⊜16—JURISDICTION OF COURTS—DETENTION BY MILITARY AUTHORITIES.
   If a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts cannot interfere by writ of habeas corpus.

3. ARMY AND NAVY ⟸44(2)—MILITARY COURTS—PERSONS SUBJECT TO JURISDICTION.

An enlisted man, occupying and enjoying that status, with all its burdens and obligations, may be detained by the military authorities and tried by a court-martial for any offense against military law.

4. ARMY AND NAVY ⟸44(2, 3)—MILITARY COURTS—PERSONS SUBJECT TO JURISDICTION.

One who enlisted in the National Guard, was accepted, took the prescribed oath, and later took the federal enlistment oath, as prescribed by National Defense Act June 3, 1916, c. 134, § 70, 39 Stat. 201 (Comp. St. 1916, § 3044i), and received pay and clothing over a long period from the state and nation, is a soldier, subject to the jurisdiction of a military tribunal for any offense committed against military law, though he was under 21 when he enlisted, and enlisted without the written consent of his parent or guardian, and though he was an alien, who had not made the declaration of his intention to become a citizen, and though he had a mother dependent upon him for support.

5. ARMY AND NAVY ⟸19—ENLISTMENT OF MINORS—VALIDITY.

A minor's enlistment, without the written consent of his parent or guardian, when such consent is required, is not void, nor is it voidable by him, though he may be released from the service by a timely application of his parent or guardian, having a superior right to his custody or control.

6. ARMY AND NAVY ⟸19—ENLISTMENT OF MINORS—VALIDITY.

Where a minor enlists, without the written consent of his parent or guardian, an application by the parent or guardian for his release must be made with reasonable diligence after acquiring knowledge of the enlistment, and before an offense has been committed by the minor, and after an offense has been committed, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application for a writ of habeas corpus.

7. ARMY AND NAVY ⟸19—ENLISTMENT OF MINORS—VALIDITY.

Where a minor had no parent or guardian living in the United States when he enlisted, the subsequent arrival of his mother in the United States could not have any retroactive effect upon the prior enlistment.

8. ARMY AND NAVY ⟸19—ENLISTMENT OF MINORS—VALIDITY.

As National Defense Act June 3, 1916, permits the enlisting of a minor over the age of 18 without the written consent of his parent or guardian, where one over 18 and under 21, who had enlisted prior to the passage of that act, subsequently took the federal enlistment oath prescribed by section 70 thereof, the defects in his original enlistment were immaterial, and any right of the parent or guardian to reclaim his custody or control was extinguished.

9. ARMY AND NAVY ⟸19—ENLISTMENT OF MINORS—VALIDITY.

The parent or guardian of an enlisted minor may waive the statutory requirement for his written consent, and does waive it by acquiescing with knowledge in the minor's continuance in the service, thus permitting him to draw the pay and emoluments of a soldier.

10. ARMY AND NAVY ⟸18—ENLISTMENT—VALIDITY.

An alien, offering to enlist and accepted as a soldier, cannot avoid his contract of enlistment, and thereby escape liability for service or to punishment, especially as Comp. St. 1916, § 1888, providing that no person who is not a citizen, or who has not made a legal declaration of his intention to become a citizen, shall be enlisted for a first enlistment, is limited to enlistments in time of peace.

11. ARMY AND NAVY ⟸18—ENLISTMENT—VALIDITY.

There is nothing in the treaty between the United States and the government of Austro-Hungary invalidating an enlistment by a native of Austria.

12. ARMY AND NAVY ⊂⊃44(2)—CALLING MILITIA INTO SERVICE OF THE UNITED STATES.

National Defense Act, § 58 (Comp. St. 1916, § 3044), provides that the National Guard shall consist of the regularly enlisted militia, etc. Section 70 provides that enlisted men in the National Guard, whose enlistment contracts contain an obligation to defend the Constitution of the United States and obey the orders of the President, shall be recognized as members thereof, and that others shall not be so recognized until they have signed the enlistment contract and taken the oath therein provided. Section 111 (Comp. St. 1916, § 3045) and Selective Draft Law May 18, 1917, authorize the President to draft all members of the National Guard into the military service of the United States. *Held*, that an order of the President, calling a company and regiment of the National Guard into the federal service, made a member of such company and regiment, whose original enlistment contract contained the obligation prescribed by section 70, and who, when previously called into the federal service, had taken the additional oath prescribed by that section, a soldier of the United States army, subject to military trial or punishment, though he had not consented to be mustered into the military forces of the United States under such order.

13. ARMY AND NAVY ⊂⊃20—CALLING MILITIA INTO SERVICE OF THE UNITED STATES.

Under Const. art. 1, § 8, authorizing Congress to organize and equip armies, and to provide for the common defense, and National Defense Act June 3, 1916, and Selective Draft Law May 18, 1917, the President has authority to draft compulsorily into the services of the United States all officers and enlisted men of the National Guard, and Congress had authority to confer such power; compulsory service being in no way violative of the Constitution.

14. ARMY AND NAVY ⊂⊃18—ENLISTMENT—VALIDITY.

That an enlisted soldier has a mother, of whom he is the only support, does not make void his contract of enlistment.

15. CONSTITUTIONAL LAW ⊂⊃74—JUDICIAL FUNCTIONS—ENCROACHMENTS ON EXECUTIVE.

Under Selective Draft Law May 18, 1917, § 4, authorizing the President to exclude or discharge at his discretion those having persons dependent upon them for support, rendering their exclusion or discharge advisable, dependency is not a matter of which the courts can take judicial cognizance.

Ex parte application by Rudolph Dostal, on behalf of John Hackenberg, for a writ of habeas corpus. Petition dismissed:

James A. Miles and Franklin Rubrecht, both of Columbus, Ohio, for petitioner.

Hubert J. Turney, and E. S. Wertz, U. S. Atty., both of Cleveland, Ohio, for respondents.

WESTENHAVER, District Judge. This is an application by Rudolph Dostal, on behalf of one John Hackenberg, for a writ of habeas corpus. Upon the presentation of the petition an alternative writ was issued, and the defendants, in response thereto, produced in court the body of John Hackenberg and made a return showing the cause of his detention. Evidence was introduced on behalf of the petitioner and of the respondents.

John Hackenberg, the person alleged to be restrained illegally of his liberty, is a native of Austria. He came to this country about June 25, 1914. He enlisted on June 7, 1915, in Company B, Eighth In-

fantry, National Guard of the State of Ohio. At the time of his enlistment he made an application declaring himself to be 21 years of age and a citizen of the United States. He was thereupon accepted as an enlisted man and agreed to serve for a term of 3 years, unless sooner discharged. He also made and subscribed an oath of enlistment. By this oath he declares that he will bear true faith and allegiance to the United States of America and the state of Ohio, that he will serve them honestly and faithfully against all their enemies whomsoever, and that he will obey the orders of the President of the United States, the Governor of the state of Ohio, and the orders of the officers appointed over him, according to the rules and articles of war, and the regulations for the government of the Ohio National Guard.

On June 19, 1916, the company and regiment to which he belonged responded to the mobilization order of the President of the United States for service on the Mexican border. On July 2, 1916, he took the federal enlistment oath prescribed by section 70 of the National Defense Act of June 3, 1916. He was mustered out of the federal service on March 2, 1917. From the time of his enlistment and until he was mustered out he performed all the military duties required of him, and has drawn and accepted pay and clothing. On July 10, 1917, the company and regiment to which he belongs was called into the federal service, pursuant to paragraph 2, section 1, Act May 18, 1917. He reported for duty at the place of rendezvous with his company, and answered "present" to the roll call, and was checked as "present" by the federal mustering officer. On July 30th following, for some reason not developed in the evidence, he was placed under arrest, and has since been in confinement. On August 3, 1917, formal charges were preferred against him for violating the laws of the United States and the Articles of War, particularly violation of the fifty-fourth Article of War relating to fraudulent enlistments.

Respondents' answer shows that he is restrained of his liberty by reason of these charges, and that he will be brought to trial upon them before a court-martial as soon as practicable and without any undue delay.

The evidence shows that he is not, in fact, a citizen of the United States; that he has not made a legal declaration of his intention to become a citizen; that he was born January 22, 1897, and was therefore 18 years and 5 months of age when he first enlisted, and is now under 21 years of age; that no written consent of a parent or guardian was obtained or given before he enlisted; and that, because of his statement touching his age and citizenship in his application for enlistment, no such consent was asked or required. Further, that he had no parent or guardian at the time of his enlistment in the United States, that his mother was then living in Austria, and that she on August 25, 1916, arrived in the United States, bringing with her a younger daughter.

She testifies that she did not know of his enlistment until after her arrival in the United States, at which time he was absent on the Mexican border in service with his company, and that she learned of his enlistment immediately after her arrival. She testifies that she is

without means or ability to support herself and that she is being supported in a large part by him and by a son-in-law.

Upon these facts the petitioner, Rudolph Dostal, contends that John Hackenberg's confinement and detention are illegal upon the following grounds:

(1) That he is under 21 years of age, and that neither at the time of his enlistment, nor since, has his parent or guardian consented in writing to his enlistment.

(2) That he is an alien subject of the emperor of Austria, and has not made a legal declaration of his intention to become a citizen of the United States.

(3) That he has refused to enlist or to be mustered into the service as a soldier in the United States army, under the President's mobilization or draft order of July 10, 1917, and that upon the facts stated he cannot be compelled so to enlist or to be mustered into the service.

(4) That he has a widowed mother living with him in Akron, Summit county, Ohio, of whom he is the only and sole support.

[1] This application is made on his behalf by Rudolph Dostal, his brother-in-law. It is proper practice to make an application by one on behalf of another; but an application in this form entitles the petitioner to such relief only as might be given if the application were made by the person thus detained in his own name. An application may be made by a parent or guardian having a superior right to the custody and control of a person illegally detained, when such person might not himself obtain relief. In similar cases, a parent or guardian has been permitted to obtain the discharge of a minor from military control, when the minor himself might not obtain such relief. Any objection to granting relief in the present case, because the application was made by or on behalf of the person confined, rather than by the parent or guardian entitled to his custody and control, is a matter of form only. If it were necessary, in order that full relief should be granted, according to the rights of the parent or guardian, an amendment could be made, making the mother a party plaintiff. I shall therefore disregard the question of form, and dispose of this case on its merits, as if all proper parties were present asking relief.

[2] It is settled law that, if a military tribunal has jurisdiction to try a person charged with an offense against military law, the civil courts cannot interfere by writ of habeas corpus. In the case of In re Grimley, 137 U. S. 147, at page 150, 11 Sup. Ct. 54 (34 L. Ed. 636), Mr. Justice Brewer, delivering the opinion, said:

> "It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned is not amenable to its jurisdiction, it may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial, and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged. If Grimley was an enlisted soldier, he was amenable to the jurisdiction of the court-martial."

Authorities to the same effect are numerous. See the following: In re Tarble, 13 Wall. 397, 20 L. Ed. 597; Ex parte Dunakin (D. C.) 202 Fed. 290; Ex parte Hubbard (C. C.) 182 Fed. 76; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; U. S. v. Williford, 220 Fed. 291, 136 C. C. A. 273.

[3] The primary and controlling question then is: Was or is John Hackenberg an enlisted man, occupying and enjoying that status, with all its burdens and obligations? If he is, then he may be detained by the military authorities, and tried by a court-martial for any offense committed by him against military law. It is not denied, but, on the other hand, conceded, that a misrepresentation respecting his age and citizenship, whereby he procured and enjoyed the pay and emoluments of a soldier, is an offense against military law, subject to be dealt with according to the fifty-fourth Article of War.

[4] I am of opinion that this question must be answered in the affirmative. His application to be enlisted, and the acceptance thereof, his taking the prescribed oath as a member of the Ohio National Guard, his taking later the federal enlistment oath as prescribed by section 70 of the National Defense Act, his receipt of pay and clothing over a long period, from the state and nation, makes him a soldier, subject to the jurisdiction of a military tribunal for any offense committed against military law. The fact that he was under 21 when he enlisted, or that the written consent of his parent or guardian was not given to such enlistment, or that he was an alien, who had not made a declaration of his intention to become a citizen, or that he had then or now a mother dependent upon him for support does not, in my opinion, make his contract of enlistment void, or prevent the status of a soldier, with its duties and obligations, attaching to him. My reasons for these conclusions, and some observation as to each contention made by the petitioner, will be briefly stated.

[5, 6] (1) It is settled law that a minor, who enlists without the written consent of a parent or guardian, when such consent is required, becomes a soldier. His enlistment is not void, nor is it voidable in any event by him. He may be released from the service by a timely application of the parent or guardian having a superior right to his custody or control. But this application must be made with reasonable diligence, after the parent or guardian has acquired knowledge of the actual enlistment, and before an offense has been committed by him. After an offense has been committed by the minor against the military law, and especially after he has been placed under arrest and charges have been preferred against him, it is too late for the parent or guardian to oust the jurisdiction of the military authorities by an application to the civil courts for a writ of habeas corpus. See the following: Ex parte Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; Ex parte Hubbard (C. C.) 182 Fed. 76; Ex parte Dunakin (D. C.) 202 Fed. 290; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; U. S. v. Williford, 220 Fed. 291, 163 C. C. A. 273; McGorray v. Murphy, 80 Ohio St. 413, 88 N. E. 884, 17 Ann. Cas. 444.

[7] Upon these considerations alone the application should be denied, so far as it is based on his minority, and some further observations lead to the same conclusion. As the law stood when he enlisted (Rev. St. § 1117), no person under the age of 21 years should be enlisted or mustered into the service of the United States without the written consent of his parent or guardian, provided such minor had a parent or guardian entitled to the custody and control of him. Hackenberg had no guardian or parent at that time living in the United States entitled to the custody and control of him. It is at least questionable whether a parent or guardian residing in a foreign country is entitled to the custody and control of a minor residing in the United States. This question was considered and decided by De Haven, District Judge. In re Perrone (D. C.) 89 Fed. 150. In that case an alien minor, whose parents resided in Italy, had enlisted, and shortly after his enlistment a guardian was appointed and qualified in the United States, who then applied for a writ of habeas corpus for the discharge of his ward, because the enlistment had been made without the written consent of his parent or guardian. It was held that the relief asked should not be granted, and this holding seems to me to be based upon sound reasons. Obviously, if there is no parent or guardian entitled to his custody or control, or qualified to give or withhold consent at the time of the enlistment, the contract of enlistment is valid and regular, and, if valid and regular when made, it does not become defective by a subsequent change of conditions. Therefore the arrival in the United States at a later date of Hackenberg's mother could not, it seems to me, have any retroactive effect upon a prior enlistment, regular in all respects when made.

[8] Furthermore, the National Defense Act of June 3, 1916, now permits the enlisting of minors over the age of 18 years without the written consent of the parent or guardian. This act was in full force and effect when Hackenberg's mother came to the United States. Hackenberg, after the passage of this act, and under favor of its provisions, took the federal enlistment oath prescribed by section 70 thereof. It was competent at this date, without the written consent of his parent or guardian, then, to enlist, and as a result of his acts he then became an enlisted man in what is sometimes called the federalized National Guard. The contract of enlistment and his rights and obligations are regulated and controlled by that act. He created in effect by his enlistment oath, taken pursuant to its provisions, and by his acceptance thereafter of pay and clothing, a new status for himself as a member of the National Guard created, regulated, and governed by the National Defense Act. The defects, if any, in his original enlistment as a member of the Ohio National Guard, became thereafter, it seems to me, immaterial and unimportant. Any latent right that the parent or guardian prior thereto might have had to reclaim his custody or control, because his enlistment was without his consent, is extinguished in consequence of these new conditions. His status as a regularly enlisted man under the National Defense Act has become strictly regular, and not voidable by parent or guardian.

[9] Furthermore, the written consent required of the parents or

guardian of a minor is primarily for the benefit of such parents or guardian. It is designed, not merely to protect an immature minor from improvident action, but to preserve the parent's or guardian's right to his custody and service. The parent or guardian may undoubtedly waive the requirement that the consent be in writing. This written consent may undoubtedly be given after, as well as at the time of, the enlistment. It follows, as a consequence, that the parent or guardian may, by acquiescence, with knowledge, after the enlistment, waive all right to relief because written consent was not previously given. This waiver will result from silence or acquiescence while a minor is continuing in the service and drawing pay from the government. In Ex parte Dunakin, 202 Fed. 290, Cochran, District Judge, according to the third headnote, held:

"Where a minor enlisted without the consent of his parent or guardian, and his mother, who was his surviving parent, on learning of his enlistment shortly thereafter, did nothing to repudiate the same or to secure his release, and testified that she would have been reconciled to it, had he remained in the army and not deserted, but that after his desertion she wanted to keep him out of the army, her acts constituted an implied consent to his enlistment."

See, also, the following: State v. Dimick, 12 N. H. 194, 37 Am. Dec. 197; In re Morrissey, 137 U. S. 157 (bottom of paragraph at page 159), 11 Sup. Ct. 57, 34 L. Ed. 644; Ex parte Hubbard (C. C.) 182 Fed. 76 (middle of paragraph at page 81).

In the present case both John Hackenberg and his mother, after the passage of the National Defense Act reducing to 18 years the age above which one may enlist without the consent of the parent or guardian, have acquiesced in his continuing in the service, thus permitting him to draw the pay and emoluments of a soldier. This acquiescence, in my opinion, is the equivalent of a prior written consent, and might of itself be sufficient to bar the mother from the relief here asked.

[10] (2) An alien, who offers to enlist and is accepted as a soldier, cannot avoid his contract of enlistment, and thereby escape liability either for service or to punishment.

An alien, who has not made a legal declaration of his intention to become a citizen, is not obliged to enlist. He is not, under the provisions of Act May 18, 1917, subject to the selective draft. He cannot be compelled or coerced, in the present state of the law, to enlist or perform military service. He may, however, voluntarily offer himself for service as a soldier, and, if accepted, he thereby acquires the status of an enlisted man, subject to all its duties and obligations. The government may not accept him; but, if accepted, he cannot himself plead his want of qualification, nor escape service.

This question was fully considered in U. S. v. Cottingham, 1 Rob. (Va.) 615, 40 Am. Dec. 710. In that case an alien had enlisted, representing himself to be a citizen of the United States, under an act of Congress which prescribes as a qualification for enlistment that all recruits should be citizens of the United States. In the opinion it is said:

"An alien has no right, founded upon any principle either of municipal or international law, to claim exemption from the consequences of his own voluntary engagement, whether for military or any other service. No one supposes

that he labors under a disability in this respect; for though, by such a stipulation, he may by possibility involve himself in difficulties in regard to his allegiance to his native sovereign, that is a matter for his own consideration, and cannot affect the validity of his new obligation. If any authority were necessary for so self-evident a proposition, it would be found, not only in the practice of employing foreign mercenaries, which has prevailed amongst civilized nations in all ages, but in the doctrine as laid down by the most approved writers: Vattel, b. 1, c. 19, § 213; 1 Bl. Com. 370."

It is settled law that eligibility requirements are for the protection of the government, and not for the soldier. If the government waives an eligibility requirement, or if, after enlistment, it does not avail itself thereof to discharge the soldier, the latter cannot urge his want of qualification to obtain his discharge, or to escape punishment for an offense against military law. The law in this respect is best stated by Mr. Justice Brewer in Re Grimley, supra, from which we quote as follows:

"Grimley has made an untrue statement in regard to his qualifications. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contract. Suppose A., an individual, were to offer to enter into contract with persons of Anglo-Saxon descent, and B., representing that he is of such descent, accepts the offer and enters into contract; can he come thereafter, A. making no objection, repudiate the contract on the ground that he is not of Anglo-Saxon descent? A. has prescribed the terms. He contracts with B. upon the strength of his representation that he comes within these terms. Can B. thereafter plead his disability in avoidance of the contract? On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting; is Grimley in any better position? The matter of age is merely incidental, and not of the substance of the contract; and can a party, by false representations as to such incidental matter, obtain a contract, and thereafter disown and repudiate its obligations on the simple ground that the fact in reference to this incidental matter was contrary to his representations? * * * He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status, on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. * * * A naturalized citizen would not be permitted, as a defense to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the state or territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before [the time of] his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void."

United States statutes do not make void the enlistment contract of an alien. His actual situation after enlisting is less favorable than that of a minor, intoxicated person, or one over the age limit, who the law says shall not be enlisted. In all these cases the uniform holding is that the enlistment is none the less valid, although the enlisted man may perhaps be punished for his fraudulent enlistment. Section 1888,

U. S. Compiled Statutes, Annotated, 1916, gives the only disqualification for enlistment applicable to aliens. This section provides that no person who is not a citizen of the United States, or who has not made a legal declaration of his intention to become a citizen, shall in time of peace be enlisted for the first enlistment of the army. It will be noted that this limitation applies only in times of peace; if the United States is at war, the limitation does not apply. It has long been the practice to enlist aliens in the United States army and in the naval service. The practice has been sustained by numerous opinions of the Attorney General of the United States; and Congress, in recognition of the practice, has conferred valuable privileges upon honorably discharged alien soldiers and sailors. It permits them to be admitted to citizenship upon petition, without any previous declaration of intention, and without having a longer residence in the United States than one year. Rev. St. § 2166 (U. S. Comp. St. 1916, § 4355), and section 2175.

[11] The treaty between the government of Austro-Hungary and the United States, cited by counsel for the petitioner, contains nothing in conflict with these rules of law. If it did, the later act of Congress would control, and international complications, if any, resulting therefrom, would be exclusively for the political departments of the government, and are not matters of judicial cognizance. Boudinot v. U. S., 11 Wall. 616, 620, 20 L. Ed. 227; Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; J. Ribas y Hijo v. United States, 194 U. S. 315, 24 Sup. Ct. 727, 48 L. Ed. 994.

[12] (3) Petitioner's contention that Hackenberg has now a right to refuse to be mustered into the military forces of the United States, under the draft order of July 10, 1917, and that until he does consent so to be mustered in he does not occupy the status of a soldier, and is not subject to be dealt with according to military law, is without foundation.

Section 58 of the National Defense Act provides that the National Guard shall consist of the regularly enlisted militia between the ages of 18 and 45 years, organized, armed, and equipped as provided by that act. Section 70 provides that enlisted men in the National Guard of the several states, then serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States, shall be recognized as members of that National Guard. This section further provides that, when the enlistment contract does not contain this obligation, the militiaman shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed the oath therein provided. This oath is one to support and defend the Constitution of the United States and obey the orders of the President.

John Hackenberg's original enlistment contract, dated June 7, 1915, contains the obligation prescribed by section 70. In other words, he had taken the required oath. The adoption, therefore, of the National Defense Act, without anything more, made him a member of the Na-

tional Guard, and subject to the military control of the United States. Furthermore, on July 2, 1916, as already stated, when mobilized for service on the Mexican border, he took the additional oath prescribed by section 70. He served thereafter, and drew pay and clothing allowance, until mustered out of the federal service March 2, 1917. His status is thereby completely established as a member of the National Guard organized, armed, and equipped and controlled by the National Defense Act.

Section 111 further provides that, whenever Congress authorizes the use of the armed land forces of the United States for any purpose, the President may draft into the military service of the United States any or all members of the National Guard; also that all persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to the laws and regulations for the government of the army of the United States. Authority from Congress and a draft order from the President is all the the formality required to make him a soldier of the United States army. He becomes such from the date of the draft order. He is subject to be dealt with as a soldier in the United States army from the date when called into service, which in this case was July 10, 1917.

Furthermore, the act of May 18, 1917, entitled "An act authorizing the President to increase temporarily the military establishment of the United States," called the Selective Draft Law, confers this authority on the President. He is thereby authorized, in view of existing emergencies, to draft into the military service of the United States, in accordance with the provisions of section 111, of the National Defense Act, all members of the National Guard. His draft order, made pursuant to the authority of these two acts, constitutes John Hackenberg a soldier in the United States army; no further act on his part is required to make him subject to military trial or punishment. He stands from July 10, 1917, on the same basis as one called and accepted under the selective draft provisions of the same act, except that by his previous enlistment he has deprived himself of the exemption privileges accorded to persons called for the first time under that act. His failure to respond to the call would have made him liable to punishment as a deserter.

These conclusions follow from the plain language of the law. We are not, however, without pertinent authority. In Houston v. Moore, 5 Wheat. 1, 5 L. Ed. 19, the Supreme Court had under consideration a law drafting the militia of the state of Pennsylvania into the United States army, and the power and authority of Congress and the President under the Constitution was fully reviewed. All of the judges agreed that this power was practically unlimited; that the President, authorized by Congress, might call forth the militia, either by a requisition on the Governor of the state or by direct command to the officers and members of the militia; and that the officers and members of the militia might be made members of the United States army, subject to the orders of the government, and liable to be dealt with pursuant to the Articles of War, from the date of the draft order, or such other time, or under such other conditions as Congress and the President saw fit to impose.

In that case the majority of the court held that the act of Congress made the officers and members of the militia a part of the United States military forces from the time of their arrival at the appointed place of mobilization, whereas Mr. Justice Story was of opinion that this status was imposed from the date of receiving notice of the call; but all the judges agreed that it was competent to make the date of the call the time when the officers and members of the militia became subject to the military control of the United States.

Under Act July 17, 1862, c. 204, 12 Stat. 601, the militia of the several states were drafted into the military forces of the United States, and it was provided that any person failing to report at the place of rendezvous should be deemed a deserter, and might be arrested and sent to the nearest military post for trial by a court-martial. A militiaman failed to respond, and was charged as a deserter. Upon an application to District Judge Cadwallader for a writ of habeas corpus, it was held, on authority of Houston v. Moore, supra, that a member of the militia became a drafted soldier of the United States army from the date of the draft order, and was subject to be dealt with by a court-martial for an offense against the military laws of the United States. In re McCall, 15 Fed. Cas. 1225, No. 8,669.

[13] These cases fully sustain the views above expressed touching upon the force and effect of the National Defense Act and of the Selective Draft Law. They are authority for the proposition that a member of the National Guard becomes a part of the military force of the United States from the date of the draft order. They are also authority to sustain the power of Congress and the President thus to draft compulsorily into the service of the United States all officers and enlisted men of the National Guard. The power to raise, organize, and equip armies, and to provide for the common defense, conferred by the Constitution (article 1, § 8, cls. 10, 11, 12, 13, 14, 15, and 17; section 10, cl. 3) is practically unlimited. Any contention that compulsory service is in violation of the Constitution is utterly frivolous. See, also, In re Tarble, 13 Wall. 397, 20 L. Ed. 597; In re Grimley, 137 U. S. 147 (bottom p. 153) 11 Sup. Ct. 54, 34 L. Ed. 636; Kneedler v. Lane, 45 Pa. 238; Burroughs v. Peyton, 16 Grat. (Va.) 470; Boyse v. United States, 47 Ct. Cl. 333. In Burroughs v. Peyton will be found an exhaustive discussion of this question.

[14] (4) That Hackenberg has a mother, of whom he is the sole and only support, does not make void his contract for enlistment.

[15] Dependency of relatives is not made a ground of disability to enlistment, as is the case of infancy, over age, or alienage. Each applicant may determine this question for himself. He determines it when he applies for enlistment and is accepted. It may thereafter be a ground upon which a discharge may be granted at the discretion of the military authorities, but it does not create an infirmity in the contract of enlistment; much less does it make that contract void, so that he or the dependent relative may procure his discharge by a writ of habeas corpus. It is recognized by section 4 of the act of May 18, 1917, as a ground upon which the President may exclude or discharge, at his discretion, those in a status with respect to persons dependent

upon them for support, which renders their exclusion or discharge advisable. It is not a matter of which the courts can take judicial cognizance.

For the foregoing reasons, I am of opinion that neither John Hackenberg nor his mother is entitled to the relief prayed for. The petition will therefore be dismissed.

THE GULFPORT.

(District Court, S. D. Alabama. June 28, 1917.)

No. 1634.

1. SALVAGE ⟸45—SUBJECT OF SALVAGE—VESSEL CARRIED ABOVE HIGH-WATER MARK.

While a tug was in a sectional dry dock in Mobile river, owned by libelant, for repairs, certain sections of the dock in which the tug lay were driven by a violent storm which also raised the waters of the bay and river across the river and upon the land above the ordinary high-tide line where they were left. Libelant contracted with the owner to replace the tug in the river, the question of liability therefor to be later determined. *Held*, that the contract was a maritime contract, and the service one of salvage, and that a suit to recover therefor was within the admiralty jurisdiction.

2. SALVAGE ⟸1—DEFINITION—"SHORE."

The word "shore," when used in the definition of "salvage," means the land on which the waters have deposited things which are the subject of salvage, whether below or above ordinary high-water mark.

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

3. SALVAGE ⟸16—NATURE OF CLAIM—IMPLIED CONTRACT.

The basis of a claim for salvage compensation is a maritime contract, either express or implied by law from the voluntary rendition of the service.

In Admiralty. Suit by the Ollinger & Bruce Dry Docks Company against the tug Gulfport. On motion to set aside decree for libelant. Motion denied.

Bestor & Young and H. T. Smith & Caffey, all of Mobile, Ala., for libelant.

James A. Leathers, of Gulfport, Miss., and Palmer Pillans, of Mobile, Ala., for claimant.

ERVIN, District Judge. This matter comes on to be heard on the motion to set aside the decree heretofore rendered in favor of the libelant and to dismiss the libel for the reason, as set up in said motion, that the tug Gulfport, which was libeled for salvage, was carried by the water, as raised by the storm of July 5, 1916, high and dry on land above and beyond the ordinary high-water mark.

The facts of this case are that the tug Gulfport was in a sectional dry dock belonging to libelant for the purpose of having certain repairs made upon it, when the violent storm of July 5, 1916, came on, which raised the waters in Mobile bay and river, and through the

combined rising of the waters and the violence of the wind, caused various sections of the dry dock to break away from its mooring on the east bank of the Mobile river and be driven up and across the river and on the marsh on the west bank of the river above the city of Mobile. When the violence of the storm abated and the waters receded, it left three sections of this dry dock, still containing the Gulfport on the marsh above the ordinary high tide line. Libelant had these sections of the dry dock with the tug still in them removed from the land and replaced in the waters of the river. The repairs on the Gulfport were then finished by the libelant, and she was again placed in the water.

Before operations were begun by libelant looking to the replacing of the sections of the dock and tug in the water, a written agreement was entered into between libelant and the owners of the tug, under the terms of which it was agreed that the libelants should have the work of replacing the sections of the dry dock with the tug in them in the water, and pay for doing such work—

"the parties understanding that the dry dock company claims that the towboat company is liable to it to pay a part of the expenses of such removal of the docks and tug and the putting of them into the water, and the towboat company denies that there is any liability on it whatsoever to pay any part of such expenses, and this undertaking being entered into in order that the docks and tugboat may be taken off promptly and the question in dispute between the parties may be settled hereafter. The towboat company further agrees that if hereafter, it should be determined that the towing company is liable to pay some part of the said expenses and cost, then the towing company hereby agrees that the amount of liability shall be taken as $7,700.00; it being the purpose and intent of this agreement that the only matter open for litigation between the parties hereafter is the fact of liability vel non; it being agreed that if the towing company should be held liable, then the measure of such liability is fixed hereby, and no evidence to be adduced to fix the measure otherwise."

On the original hearing of this cause, objection was made that libelant could not recover because no service was rendered directly to the tug, because, the tug being in the dry dock, all the services that were rendered were to the dry dock which contained the tug, and not to the tug, and it was contended that, under the ruling in the Atlanta (D. C.) 56 Fed. 252, and the San Cristobal (D. C.) 215 Fed. 615, there could be no recovery.

The court, after discussing these cases and citing the Lackawanna (D. C.) 220 Fed. 1000, McWilliams v. City of New York (D. C.) 134 Fed. 1015, Guindon v. Cargo of Zenith (D. C.) 197 Fed. 227, A Lot of Whalebone (D. C.) 51 Fed. 916, 110 Bushels of Wheat (D. C.) 120 Fed. 432, Morse v. Pomroy Coal Company (D. C.) 75 Fed. 428, and the Neshaminy, 228 Fed. 286, 142 C. C. A. 577, entered a decree granting relief to libelants.

[1] The question raised by the present motion was not considered in the original hearing, and the sole question for consideration, therefore, is whether a boat which had been deposited by the waters raised during the period of a violent storm, upon the land at a point above ordinary high tide, is a subject of salvage, or, to put the proposition in

a little different way, has the admiralty court power to grant salvage on a commodity which has been so deposited by the water?

I have found no case in which this question is directly considered or decided, nor have the very able and industrious proctors in this case been able to do so.

In the case of The Ella (D. C.) 48 Fed. 569, it appears that the ship was, by the force of a storm, deposited on land above the high tide, and was saved, and salvage was allowed, but in that case, just as on the original hearing in this one, the question now presented was not raised or considered by the court. It was, however, held in that case that a contract to save a schooner so situated was a maritime contract.

It is urged that, as this court has no jurisdiction in marine torts unless they were committed on the navigable waters, so by analogy, if the thing saved was on land, this court has no jurisdiction.

If what was said in Ex parte Phenix Insurance Company, 118 U. S. 618, 7 Sup. Ct. 28, 30 L. Ed. 274, in speaking of a marine tort, viz., "that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction," be true, then the rule should work both ways, and if the "substance and consummation" of the act be on navigable waters, then the admiralty does have jurisdiction, even in tort.

Now, the dock containing the Gulfport was floated by use of a cofferdam and then floated into the river, so that the substance and consummation of this act was in the navigable waters; hence by analogy this court has jurisdiction.

The question of salvage has more frequently been discussed from the standpoint of what may be salved rather than from what place the thing has been salved, and therefore the discussion and definitions and expressions by the courts have been directed rather to the character of the thing salved than to the place from which it has been salved. As said in the case of Cope v. Valentine Dry Dock Company, 119 U. S. 629, 7 Sup. Ct. 337, 30 L. Ed. 501:

> "If we search through all the books, from the Rules of Oleron, to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, * * * which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued."

Again on page 630 of 119 U. S., on page 338 of 7 Sup. Ct. [30 L. Ed. 501], the court says:

> "There has been some conflict of decisions with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast upon the shore. When they have belonged to the ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, ligon, or derelict, and salvage may be claimed upon them."

There is no question that the tug, the subject of this libel, is such a vessel as is liable for salvage, and this is conceded. The contention, however, is that at the time the contract was made and at the time the work was entered upon to float the tug and the sections of the

dry dock, in which it was then placed, the dry dock and tug were above ordinary high tide, and for this reason not subject to salvage.

Numerous authorities are cited to show that the word "shore" means the space between high and low tide, and as the authorities speak of goods cast upon the shore being liable to salvage, it is therefore contended that if the thing be cast further upon the land than the ordinary high tide reaches, this is not on the shore, and therefore is not subject to salvage.

Admiralty courts, while not striving to increase their jurisdiction, have never been given to technical or narrow construction. The discussion by the court in the Cope Case just quoted from shows that the admiralty courts are disposed to give a liberal construction to the terms used in determining whether salvage should be granted or not. If the subject-matter is a subject of salvage, and the service is meritorious, they are disposed to make the allowance.

Now taking the quotation last made from the Cope Case, we see that if goods from a vessel are lost at sea, and cast upon the shore and saved, they are the subject of salvage. Goods ordinarily are lost from a vessel at sea in a storm. Now, if the same storm which causes the loss at sea blows up large waves and should, by the magnitude of these waves, wash the goods higher than the ordinary high tide reaches, it would be, it seems to me, a very narrow construction to say that because the very storm which caused the loss, raised waves which washed higher than the ordinary high tide, and so caused goods to be deposited on land above the reach of ordinary high tide, these goods are not the subject of salvage, though if the storm had abated and the goods had been washed upon the land by the ordinary tide instead of by the force of the storm, and had been grounded by such ordinary high tide, which then receded, leaving these goods just as dry at the time they were saved as they would have been if left by the storm waves, they are subject to salvage, though if they had been left at the height of the storm waves, they would not be. In either case, the goods when saved would be wholly out of the water, and would have been placed where found, by the action of the water, the only difference being whether they were, at the time of being found on dry land, above or below the ordinary high tide. In either case, the initial loss would have been caused by the storm.

There is no magic about the ordinary high-tide line. The true test is was the property lost on navigable waters, either by accident or by storm, and deposited on the land by such waters. Now, in the instant case, this tugboat, being the subject of salvage, and being washed ashore by the force of the storm which raised the waters of Mobile river above the ordinary high tide, we have a case identically similar to the one supposed. It would, it seems to me, be a very narrow construction to deny the right to salvage merely because the storm which washed the boat ashore caused the waters of the river to rise higher than the ordinary high tide, and thereby causing the Gulfport to be carried by the water so raised further in shore than she would otherwise have been. It would be a very narrow construction which would

give salvage where the thing saved was on dry land, though at a point between high and low tide, if it had been deposited by the waters which receded from an ordinary tide, but would deny salvage where the same waters, by force of the storm, placed the same goods upon the land, and when the storm abated, the waters receded, leaving the goods upon the land. It would be an anomaly to say that the forces of the sea could cast a ship upon the shore so high as to cast her outside of the jurisdiction of the courts of the sea. Judge Nelson, in the case of Wortman v. Griffith, Fed. Cas. No. 18,057, uses the following language:

"A distinction, to be practical, should be one of substance and one which strikes the common sense as founded in reason and justice"

—which I heartily concur in. If it were a question whether the goods were in the water or on land, an entirely different question would be presented, but to say salvage must be denied because the goods were placed upon the land by the waters when raised by storm above ordinary high tide, which then receded, seems to me to present a too narrow and restricted proposition for this court to follow. All of the proceedings of the admiralty court are based upon an enlarged and liberal construction of the spirit and purpose to be accomplished by the court within its jurisdiction. The courts of this country have shown a disposition to broaden rather than to narrow the admiralty rules in order to accomplish the purpose intended to be accomplished by these rules. This is instanced in the extension of the jurisdiction to the navigable waters, instead of to the tidal waters, and by including in the subjects of salvage floating rafts of timber and giving a maritime lien to a stevedore, and in many other ways.

"Salvage," as defined in Kennedy's Law of Civil Salvage, is as follows:

"A salvage service, in the view of the court of admiralty, may be described sufficiently, for practical purposes, as a service which salves, or helps to salve, maritime property, when in danger, either at sea, or on the shore in the sea, or in tidal waters, or on the shore of tidal waters."

[2] Now, if admiralty courts as said in Cope's Case while quoting from The Mack, 7 P. D. 126, construe the words "ships" and "vessels" in a broad sense to include all navigable structures intended for transportation, instead of giving the word "ship" the narrow construction contended for, then certainly the word "shore," when used in the definition of salvage, should not receive a narrow construction, so as to limit it to the space between high and low water mark, but should mean, it seems to me, that portion of the land on which the waters, whether by the ordinary rise of the tide or by force of the waves when raised by storms, have deposited things which may be salved. In other words, the word "shore," as used in this and the other definitions of salvage, means, and should mean, the land on which the waters have deposited things which are the subject of salvage. This comes within the definition given by Dunlap's Admiralty Practice, p. 31, where he speaks of the admiralty jurisdiction to entertain suits to recover salvage existing only in cases of maritime salvage "at sea," or

within the high and low water mark." Now high-water mark here, it seems to me, would mean not ordinary high tide, but high water either from tide or storm. The same author on page 24 says:

"It is said by Sir Leoline Jenkins that the jurisdiction of the admiralty ought naturally to arise from the nature of the cause, and not from the place where any bargain or contract is made."

This refers specifically to contracts, but is it not just as true in salvage as in contract? Some authorities define salvage as "service rendered at sea or when the vessel is wrecked on the coast." The Emulous, Fed. Cas. No. 4,480, 24 A. & E. 1183.

"It is equally a salvage service and within admiralty jurisdiction whether the service be rendered at sea or when the vessel is wrecked on the coast." 2 Parsons Ship. and Adm. p. 285.

"If a vessel is driven ashore in a gale of wind, or gets ashore by any accident, she is generally a fit subject for a salvage service." 2 Parsons Ship. and Adm. p. 288.

Again it is said:

"To entitle a salvor to compensation the article saved * * * must, at the time the services are performed, be upon or washed from the sea, or some navigable stream, and must be something used in navigating the stream or sea." The Old Natchez (D. C.) 9 Fed. 476.

If the nature of the cause is a salvage one, viz. the thing saved was imperiled either by accident or by storm, and was deposited by the water on land and was saved by the meritorious services of a stranger, should not a salvage award be made?

It is not always safe to decide a question such as this by a strict definition of the word "shore" where the authorities in defining shore did not have before them the question of salvage of boats or commodities deposited on the land by the force of the winds and waters, but had other ideas in view in making the definition.

For salvage purposes, the word "shore" should, in my opinion, be as liberally defined as the word "ship," and, as so defined, should be that portion of the land lying between low-water mark and the point at which the water, whether by the natural flow of the tide, or by stress of wind and waves, reaches.

This opinion might be stopped here, except for the contention that salvage is neither tort nor contract.

[3] In United States v. Morgan, 99 Fed. 570, 39 C. C. A. 653 (C. C. A. 4th Circ.) the question was whether a suit for a salvage service is "on any contract express or implied" within the meaning of the act of Congress, March 3, 1887, c. 359, 24 Stat. 505, giving jurisdiction of suits against the United States in such cases. The court held that such a service was on a contract express or implied with the United States, saying:

"The first question is, Is it a claim for salvage upon a contract, express or implied, or is it a claim for damages, liquidated or unliquidated, in a case not sounding in tort, in respect of which claim the party would be entitled to redress against the United States in a court of admiralty, if the United States were suable? If it be either, the court has jurisdiction. Salvage is a reasonable reward for services rendered in saving property in danger of perishing from a maritime misadventure by parties under no obligation of duty,

who voluntarily undertake the service. Maude and P. Shipp. 419; Macl. Shipp. 597; The H. M. S. Thetis, 3 Hagg. Adm. 14. It is a reward for service. And the service is rendered in the expectation of the reward. The compensation is supervised and controlled by the court of admiralty, even although there be an agreement as to the amount. The Tornado, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874. But, it having been determined a case of salvage, the right to be compensated is recognized and assumed. It resembles the common-law contract for work and labor done. Only the compensation is allowed upon a liberal scale. Very frequently the compensation for saving property in maritime peril is given only pro opere et labore, as when it is reduced to a towage service, as in the Emily B. Souder, 15 Blatchf. 185, Fed. Cas. No. 4,458, clearly on the implied contract. In other words, the salvor renders the service upon the understanding and expectation that he will be rewarded for it, the amount of the award to be fixed by a court of admiralty, if the salvor and the owner of the property salved cannot agree. A claim for salvage is secured by a lien, and the lien cannot arise except from a maritime contract or a maritime tort. Salvage, clearly, is not a tort. When the effort to save property exposed to perils of the sea is successfully performed, an obligation at once arises upon the part of the owner of the salved property to compensate the salvor for such service."

"It has been determined that services of this character [salvage services to United States vessels and property] give rise to an implied contract." Hartford Transp. Co. v. United States (C. C. D. Conn.) 138 Fed. 618.

"The claim in this action [for salvage] is founded upon an implied contract, based upon the principle that the government has undertaken to do what it ought to do." Cornell Steamboat Co. v. United States (D. C. S. D. N. Y.) 130 Fed. 480, 482; United States v. Cornell Steamboat Co., 137 Fed. 455, 69 C. C. A. 603 (C. C. A. 2d Circ.) 1 A. & E. pp. 660, 661, 662.

"As to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon [making locality the test] is entirely inadmissible, and that the true criterion is the nature and the subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. * * * It is objected that it [marine insurance contract] is not a maritime contract because it is made on the land and is to be performed [by payment of the loss] on the land, and is therefore entirely a common-law transaction. This objection would equally apply to bottomry and respondentia loans, which are usually made on the land and are to be paid on the land." Ins. Co. v. Dunham, 11 Wall. 1, 20 L. Ed. 90.

"Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in admiralty. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction of the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality." The Belfast, 7 Wall. (74 U. S.) 624, 19 L. Ed. 266.

"On principle, it clearly cannot be the moon's attraction, the presence or absence of the tide, which determines the jurisdiction; * * * nor place or locality in matters of contract, but the subject-matter. * * * The jurisdiction can depend upon nothing, in matters on contract, but the subject-matter, the nature and character of the controversy. If that be connected with ships and shipping, commerce and navigation, the admiralty has jurisdiction, otherwise not. In matters of tort, it can depend upon nothing but that the wrong occurred upon the sea, or upon navigable waters, the places where maritime commerce is had are the places over which the admiralty has jurisdiction of wrongs." Benedict's Adm'r. (4th Ed.) § 181.

"Jurisdiction attaches in case of a maritime contract, irrespective of the question whether it is to be performed on land or water." Dailey v. City of New York (D. C.) 128 Fed. 796, 798.

"Many maritime contracts are performed on land, and by persons having no immediate connection with the sea. The services in question are maritime,

because they are a necessary part of the maritime service which the ship renders to the cargo, and without which the voyage could not be accomplished." The Onore, 6 Ben. 564, Fed. Cas. No. 10,538.

"In determining the maritime character of a contract it is not material to inquire where it was made. As long as the subject of the contract is maritime, the contract is maritime. * * * The test to be applied in determining whether a contract is maritime or not is to consider the subject-matter of the contract, and not the object." The Main, 51 Fed. 954, 2 C. C. A. 569.

"A contract to replace a schooner in the water which had been washed upon the land above the high tide line is a maritime contract." The Ella (D. C.) 48 Fed. 569.

Applying the rules above laid down to the facts in this case, I do not see how we can escape the conclusion that this contract between libelant and claimant was a maritime contract. The subject-matter of the contract was the tug Gulfport, then resting in the dry dock, which in turn rested on the marsh. The contract provided that libelant was to have this dry dock and tug removed from the land and replaced in the water, so that the consummation of this transaction would take place in the water, where the tug was at home and of right belonged.

So long as she was on the land, the tug was of no value to her owner or any one else, except for the machinery which might be taken out of her, but as a tug she had no value. As soon, however, as she was placed in the water, she then became again valuable as a tug. Claimant under this contract agrees that libelant should proceed to remove the dry dock and tug and replace them in the water.

It is further agreed that neither, however, waives anything, but that the question of liability or not should be reserved for determination by some court, the parties agreeing, however, that if liability should be found on the part of claimant that $7,700 is the amount of this liability.

The nature of the service, and not the locality of its performance, determines the jurisdiction of the court. There can be no debate, I believe, that the nature of the service in getting a vessel which lies beyond high tide off the shore and afloat is identical with the nature of the service in getting a vessel which lies below high tide off the shore and afloat. Each of the services is the same in the character of the work involved. Each accomplishes the same definite maritime benefit by restoring a vessel to the channels of navigation. Whether we call the latter salvage and the former by some other name can make no difference.

It is further argued that the facts of this case are analogous to the case of repairs made on vessels, where they are hauled up on land by marine railways; that in Ransom v. Mayo, Fed. Cas. No. 11,571, it was held that such a contract was not a maritime contract. It is true, in the opinion in that case, the court does so rule, but the libel in that case was in personam, and charged a breach on the part of the owner of the marine railway, in that he delayed in commencing the work after he had agreed to perform it, and that in hauling the vessel up the ways, by his negligence or want of proper machinery, he suffered the vessel to break from her fastening and slide down the ways into the water and sink, to the great damage of libelant, the ship. The case went up

by appeal from the Southern District of New York to the Circuit Court, where the ruling of the District Court was affirmed by Judge Nelson. Three years later, the case of Wortman v. Griffith, Fed. Cas. No. 18,057, went up from the same court, and was heard by the same circuit judge; the only difference being that the lower court had ruled that a contract between the owner of a shipyard, consisting of a marine railway, cradle, and other fixtures used for the purpose of hauling up vessels out of the water and sustaining them while they were being repaired, filed a libel in personam to recover compensation for the services rendered by the libelant in repairing a steamboat. The lower court held that the contract was a maritime one, and Judge Nelson affirmed this ruling, stating:

"The doubt I have had in the case is upon the objection raised to the jurisdiction of the court, a point not taken in the court below. It is claimed by the counsel for the respondents that the agreement for the service rendered is to be regarded simply as a hiring of the yard and apparatus; and, certainly, if this be the true character of the transaction, there would be great difficulty in upholding the jurisdiction. On the other side, it is contended that the service rendered was a service in the repairs of the vessel, and was as much a part of them as the work of the shipmaster, or the materials furnished by him. There can be no doubt that in cases where the shipmaster, owning the shipyard and apparatus, is employed to make the repairs, the service in question enters into and becomes part of the contract, and is thus the appropriate subject of admiralty jurisdiction. And the question is whether any well-founded distinction exists between a transaction of that character and the present one. The owner of the yard and apparatus, together with his hands, superintends and conducts the operation of raising and lowering the vessel, and also of fixing her upon the ways, preparatory to the repairs. The service requires skill and experience in the business, and is essential in the process of repair. I do not go into the question whether this is a contract made, or a service rendered, on the land or on the water. It undoubtedly partakes of both characters. But I am free to confess I have not much respect for this and other like distinctions that have sometimes been resorted to, for the purpose of ascertaining when the admiralty has, and when it has not, jurisdiction. The nature and character of the contract and of the service have always appeared to me to be sounder guides for determining the question."

If the Ransom Case be treated as a tort case, then there is a distinction between Judge Nelson's ruling in it and the Wortman Case, but that is the only way I can reconcile them.

In the Vidal Sala (D. C.) 12 Fed. 207, where Judge Erskine, commenting on the ruling by Judge Nelson in the two cases just referred to, calls attention to the fact that the ruling in the case of Wortman v. Griffith was three years later, and in fact reverses the ruling in the case of Ransom v. Mayo. He calls particular attention to a portion of the quotation which I have already made from the opinion in the Wortman Case, and then states that he does not see how the two cases can be reconciled. He holds that such a contract is a maritime one and says:

"The employment cast upon the libelants by the contract required, inter alia, care and mechanical and nautical skill in its performance, and the work done must be regarded as a betterment of the steamer herself and as appertaining to marine commerce and navigation, and absolutely essential to render her seaworthy and enable her to prosecute her voyage. I think the whole contract is purely maritime. * * * So far as my researches and

information extend, this is the first time that this precise question has come before this court for decision; therefore it is to me primas impressionis. The maxim of the law is to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice; and without doubt or hesitancy, I pronounce for the jurisdiction and overrule the exceptions."

I agree with Judge Erskine that this was a maritime contract. An order will therefore be entered, overruling the motion.

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

(District Court, N. D. Georgia. July 14, 1917.)

No. 66.

1. ADVERSE POSSESSION ⟸60(6)—PERMISSIVE POSSESSION—RAILROAD RIGHT OF WAY.

Where a telegraph company's occupancy of a railroad right of way for its telegraph line was permissive at all times, and in no sense adverse or under a claim of right, or at least was without any notice of such claim to the railroad company, no prescriptive right was acquired.

2. TELEGRAPHS AND TELEPHONES ⟸20(4)—ACTIONS BY COMPANIES—PLEADING.

In a suit by a telegraph company against a railroad company, on whose right of way it maintained its lines to restrain the railroad company from interfering with the maintenance of its lines, in which it was held that its right of occupancy was measured by its contract with the railroad company, and ended when the contract was terminated in accordance with its terms, an amendment to the bill, setting out copies of papers fully pleaded by description and a statement of their contents in the bill as originally filed, *held* not to have strengthened complainant's case.

In Equity. Suit by the Western Union Telegraph Company against the Atlanta & West Point Railroad Company. On motion to dismiss. Motion sustained.

Wm. L. Clay, of Savannah, Ga., for plaintiff.

R. E. Steiner, of Montgomery, Ala., and Sanders McDaniel, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case is now before the court on a motion to dismiss the bill, notwithstanding the amendment at great length tendered by the plaintiff. The case as originally determined in this court will be found in 227 Fed. 465. The decision of the Circuit Court of Appeals for this circuit, to which the case was taken from this court, is found in 238 Fed. 36, —— C. C. A. ——. It will be seen, from these cases and the opinions of the courts, that the decision of this court was affirmed, with leave to the plaintiff to amend.

The amendment which is now tendered is simply an amplification of what was fully set out in the original bill. The bill now simply sets out copies of a large number of papers, which were fully pleaded, by description and by a statement of their contents, in the bill as originally filed. The amendment is an extensive history of the telegraph company from three years prior to the Civil War down to this time. There

is reliance in this amendment, apparently, on a claim of prescriptive right, and certain papers offered to be treated as color of title in order to work out that prescription; but there is nothing whatever in the bill to show that the occupancy of the railroad company's right of way by the telegraph company was otherwise than permissive. The statutes of the state covering much of the law concerning telegraph companies and the acquirement of rights of way by such companies, as well as the statutes with reference to prescription in Georgia, are set out in the amendment, and much other matter is set out, none of which, I think, strengthens the case made by the plaintiff in its original bill.

[1] There is a letter, attached as an exhibit to the amendment, from Wm. S. Morris, president of the Confederate Telegraph Company, and Thos. H. Wynne, treasurer of that company, which is pleaded here, if I understand it, as color of title, if not as a muniment of title. It is nothing, however, except a description of the operations of the Confederate Telegraph Company during the Civil War, and, as has been said, no claim of prescription can be sustained here, as the whole record shows that the entire occupancy by the telegraph company of the defendant's right of way was permissive, and in no sense adverse or under a claim of right, certainly not with any notice of such claim to the defendant railroad company.

[2] Following this is Exhibit E, which is a transfer by Wm. S. Morris, president of the Confederate Telegraph Company, to the American Telegraph Company, which is that:

"In consideration of one dollar and other valuable considerations, the Confederate Telegraph Company release, quitclaim, and assign to the American Telegraph Company (chartered by the state of New Jersey) all the telegraph lines and property put up or held by said Confederate Telegraph Company within the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana."

Attached to that is a scroll and this language: "[L. S.] The Company have never adopted a seal"—signed, "Thos. J. Wynne, Treas. & Secty. C. T. Co." And next is Exhibit F, which is a contract with the Atlanta & West Point Railroad Company, properly executed by the Atlanta & West Point Railroad Company, John P. King, president, and W. P. Orme, secretary and treasurer, and by the American Telegraph Company, by E. S. Sanford, president, and attested by C. Livingston, secretary, and following this the language:

"The charter of this company does not require a seal, but all contracts must be signed as above. T. H. Wynne."

This paper says:

"The party of the first part [the railroad company] grants to the party of the second part [the telegraph company] the exclusive right to put up a telegraph line or lines on the land and along the railroad of said party of the first part between Atlanta and West Point, and the party of the second part contracts to obtain the annulment of and the delivery to the party of the first part of the written contract made between the Atlanta & West Point Railroad Company represented by their general superintendent, Geo. G. Hull, and Wm. S. Morris, president of the Confederate Telegraph Company bearing date June 28, 1862."

Certain provisions are then made concerning the use of the telegraph lines to be constructed as stated. The American Telegraph Company, it is understood, subsequently transferred and assigned all of its rights to the Western Union Telegraph Company; but whatever rights the Western Union Telegraph Company has been heretofore holding stand on the agreement subsequently made between it and the Atlanta & West Point Railroad Company.

In the agreement of 1902, between the telegraph company and the railroad company, it is expressly provided, as stated in the former opinion in this case, that:

"The provisions of this agreement shall supersede said agreement heretofore mentioned, dated the 17th day of January, 1891, between the parties hereto, and any other agreements between the parties hereto or their predecessors respectively in the ownership or control of their respective properties."

The rights of the telegraph company, under this agreement, were to continue for a period which had expired when the notice herein stated was given. I see nothing in this amendment whatever which gives strength to the plaintiff's case, or which makes a case on which it is entitled to have a decree in its favor. Much law is set out at great length, but there is nothing whatever, so far as I can see, which makes a case under the decision of this court heretofore made, and especially under the decision of the Circuit Court of Appeals, affirming the judgment and decree made here.

The motion to dismiss the amendment, and the bill as amended, must be sustained.

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

(District Court, N. D. Georgia. July 14, 1917.)

No. 67.

INJUNCTION ⇐194—ALTERNATIVE RELIEF—EQUITABLE CONDEMNATION.

The difficulties experienced by a telegraph company in its efforts to condemn the right to maintain its telegraph lines on the right of way of a railroad, on which it had been maintaining its lines under a contract with the railroad, *held* not to authorize a court of equity, in a suit in which injunctive relief against interference with its lines was denied, to effect an equitable condemnation of an easement, for the purpose of making a complete and final disposition of the entire controversy.

In Equity. Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. On motion to dismiss an amendment to the bill. Motion sustained.

Wm. L. Clay, of Savannah, Ga., and Brewster, Howell & Heyman, of Atlanta, Ga., for plaintiff.

Henry L. Stone, of Louisville, Ky., and Tye, Peeples & Jordan, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case, as formerly determined by this court, will be found in 229 Fed. 234, and the decision of the Cir-

cuit Court of Appeals, partly reversing the judgment and decree of this court, is reported in 238 Fed. 26, —— C. C. A. ——. There is a motion to dismiss the amendment now made under the authority granted by the Circuit Court of Appeals, so far as it seeks to set up any rights other than that given to it by the decision of the Circuit Court of Appeals as having been acquired under the deed of February 9, 1898, from the Atlanta, Knoxville & Northern Railway Company to the telegraph company.

The contents of the amendment are very much like those in the case of Western Union Telegraph Co. v. Atlanta & West Point Railroad Co., 243 Fed. 685, already decided, except as to the allegations in the amendment with reference to the endeavor of the telegraph company to obtain by condemnation, under the Georgia statute, the rights which it seeks to acquire and condemn under this bill. The plaintiff first sets out in its amendment the method of condemning property or the acquisition of such rights as it seeks under the laws of Georgia. Statutes are quoted at great length, and also the law as laid down by certain decisions of the courts of the state. Finally coming to the period when the rights given under the contract of June 18, 1884, between the Louisville & Nashville Railroad Company and the Western Union Telegraph Company were about to expire, it is alleged:

"The service which the defendant was called upon and required to perform for your orator under the provisions of said contract of June 18, 1884, increased only slightly as time went by, but the service which the defendant called upon your orator to perform under the provisions of said contract increased with great rapidity, and the telegrams which your orator was requested to send for and in behalf of the defendant, or in its interest, under the terms of the contract, multiplied greatly from year to year. Finding that the service performed by the defendant for it was entirely disproportionate to, and was not adequate compensation for, the services required of it by defendant, your orator, on August 11, 1911, gave to the defendant written notice that one year after that date the said contract of June 18, 1884, would be terminated. Similar notice was at the same time given to each of the railroad corporations who were parties to that contract, or whose railroads had been placed under its operation.

"Efforts were unsuccessfully made by complainant to make agreements with the defendant and the railroad corporations owned or controlled by it for the reciprocal exchange of service which would be reasonable and fair to complainant.

"The attitude of the officers of defendant and of the railroad corporations controlled by it during the time that your orator was attempting to negotiate new contracts, as aforesaid, led your orator to believe that the defendant and the corporations controlled by it, and who were parties to the contract of June 18, 1884, would, upon the termination of that contract under the notice above mentioned, as they soon thereafter did, attempt to force complainant to remove its poles and wires from their respective rights of way and properties. So believing, complainant considered what steps it should take, and what action it should institute, to preserve and protect its telegraph lines, properties, and rights, to prevent interference with, and removal of, the same by said railroad companies, and each of them, and to insure complainant's ability to perform without interruption and perpetually its public or quasi public duties as a common carrier and as a governmental agency."

Then it is said, in paragraph 69:

"The following circumstances and conditions led complainant to believe that it should institute, and caused complainant to institute condemnation proceedings against the Louisville & Nashville Railroad Company and against each

railroad company having lines of railroad owned, leased or controlled by the Louisville & Nashville Railroad Company in each of the several states in which such lines of railroad are situate."

The bill then sets out the extensive lines of railroad owned by the Louisville & Nashville Railroad Company on which the Western Union Telegraph Company has telegraph lines in various states. It is then further alleged (section 69g):

"While complainant knew that it could institute proceedings in equity of the nature instituted by it by the petition filed in this cause, to remove the cloud placed by said railroad companies upon its title, and to secure an adjudication of complainant's rights and title and to enable it by judgment in those proceedings, or by judgment or award in ancillary proceedings, to secure title to the easements it needed, if not then possessed by it, complainant knew that much investigation and research would be necessary to enable it to prepare a proceeding of that character and to conduct the litigation which would ensue under it. * * * The investigation, no matter how diligently pursued or at what expense, would, complainant believed, be unable to disclose all facts pertinent to the ascertainment of the rights of said railroad company and of said complainant; and litigation of the character finally instituted by complainant in this cause, if invoked to protect all telegraph lines, would have to be instituted and pursued in the separate courts having jurisdiction of the territory in which is situate the real estate upon and in which complainant claims easements, interests, and rights for the maintenance and operation of its telegraph lines; such litigation would be exceedingly expensive, and would, complainant believed, be protracted and would cover a long period of time."

The amendment then proceeds:

"Complainant was advised, and believed, that it could, at trivial expense, by condemnation proceedings preserve and secure its easements, rights, and privileges in said land and in said railroad rights of way; that such condemnation proceedings would be speedy and inexpensive; that there was no question but that thereby complainant could protect its rights and easements. * * * Under the circumstances above mentioned, in the situation then surrounding, with the confronting conditions, and in the belief that the said lines of telegraph, their maintenance and operation, would be seriously interfered with and prevented if some action were not taken which would result in speedy relief and protection, the Western Union Telegraph Company decided upon a general course of procedure applicable to each and to all of said railroad companies, to wit, the institution of condemnation proceedings against each of said railroad companies, as, and for the purposes, above mentioned, including the condemnation proceeding instituted in the state of Georgia against the Louisville & Nashville Railroad Company."

It is then alleged (section 70) that:

"After fruitless efforts to reach an amicable agreement with the Louisville & Nashville Railroad Company and its said controlled railroad companies for a new working contract for the exchange of reciprocal service, and after fruitless effort to reach some agreement with the Louisville & Nashville Railroad Company and its said controlled railroad companies whereby its said telegraph lines, easements, rights, and franchises would be secured from molestation or injury and all cloud upon its title thereto removed, complainant reluctantly, under the circumstances and for the purposes above alleged, instituted condemnation proceedings. The laws of the several states in in which said railroads were and are situate imposed, as a necessary condition precedent to the right to institute condemnation proceedings, an effort by complainant to agree with the Louisville & Nashville Railroad Company and each of said other railroad companies upon a compensation to be paid by complainant for the easements, rights, and franchises it desired to preserve, maintain, and secure. Complainant therefore, and under said alleged cir-

cumstances, offered to pay the Louisville & Nashville Railroad Company and each of said other railroad companies whose lines of railroad were covered by the agreement of June 18, 1884, the sum of five dollars ($5) per mile. Complainant believes that this was an exceedingly liberal offer, and was much more than had often been awarded in condemnation proceedings. Complainant made the offer as liberal as it was, desiring it to be so liberal as to insure, if possible, its acceptance, in order to avoid the expense and annoyance incident to the prosecution of condemnation proceedings, and to avoid litigation with said railroad companies, with which it had long had amicable relations which complainant desired continued and maintained. Much to complainant's regret, said offer made by it to defendant and to said other railroad companies was declined. Thereupon complainant instituted condemnation proceedings against each of said railroad companies in each of the states in which their said railroads were and are situate."

In paragraph 71 it is alleged that notice was served upon the defendant:

"That it proposed and intended to acquire from defendant by condemnation so much of its railroad right of way in the state of Georgia as was and is necessary for its use for the purpose of constructing, maintaining, and operating its lines of telegraph thereupon and therealong; that the location of the right of way sought to be acquired was and is substantially that location then and now occupied by the telegraph lines of complainant along the railroad of the defendant in Georgia. These lines of railroad and these lines of telegraph and the easements therefor are definitely and fully set forth in said notice. Complainant in said notice named its assessor, and called upon defendant to name its assessor to meet with the assessor so appointed by complainant, and such third assessor as should be legally selected, at the office of the ordinary of Fulton county, Ga., at 1 o'clock p. m. on the 5th day of February, 1912, for the purpose of ascertaining the value of said right of way, interests, and easements set forth in said notice and consequential damages, if any. Complainant is advised that it is unnecessary to attach as an exhibit or to more fully set forth said notice, but it stands ready to attach a copy of said notice, should defendant desire the same and should the court deem it proper.

"Defendant failed and refused to appoint an assessor, and failed and refused to do anything in aid of, or to participate in, the said condemnation proceedings which complainant sought to institute by the said notice served upon defendant."

In paragraph 72 it is alleged that:

"On the 1st day of February, 1912, the defendant the Louisville & Nashville Railroad Company filed its petition in the superior court of Fulton county, to enjoin the condemnation proceeding which complainant sought to institute."

What was decided in this case is shown in the report of the decisions of the Supreme Court of Georgia in Western & Atlantic Railroad Co. v. Western Union Telegraph Co., 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, and Louisville & Nashville v. Western Union Telegraph Co. (2 cases), 138 Ga. 432, 75 S. E. 477. After stating the finding in these condemnation proceedings in the state court, the bill then proceeds:

"This decision could not, in advance of its rendition, have been anticipated, and was not anticipated, by your orator. Your orator was greatly surprised by these decisions of the Supreme Court of Georgia, which it thinks were a departure from the former decisions of that court, and particularly the decisions in the cases of S., F. & W. Ry. v. Postal Tel. Co., 112 Ga. 941, 38 S. E. 353; Id., 115 Ga. 554, 42 S. E. 1; Atlantic Coast Line R. R. Co. v. Postal Tel. Co., 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734."

After certain other allegations, not believed to be material here, it is alleged that the decisions of the Supreme Court of Georgia violate paragraphs 1, 2, and 3 of section 3 of article 1 of the Constitution of Georgia of 1877, prohibiting the taking of property without payment of just compensation, forbidding the impairment of the obligations of contracts, and prohibiting the revocation of grants except in such manner as would work no injustice to the grantee, and violate paragraph 1 of section 10 of article 1 of the Constitution of the United States, making illegal a law impairing the obligation of contracts, and violates paragraph 1 of article 14 of the Constitution of the United States, making illegal any law depriving any person of life, liberty, or property without due process of law. It is then alleged that the judgment of the Supreme Court of Georgia was made the judgment of the superior court on August 2, 1912, and that:

"On August 5, 1915, the Louisville & Nashville Railroad Company gave the Western Union Telegraph Company the notice specified in paragraph 26 of its bill of complaint, requiring the removal of all of said telegraph lines from said railroad right of way not later than December 1, 1912, and that, upon failure to remove the same by that time, they would be taken possession of, appropriated, and used or otherwise disposed of by the Louisville & Nashville Railroad Company as its own property."

The amendment then sets out that:

"On or about November 19, 1912, your orator, to protect its properties against the threatened action of the Louisville & Nashville Railroad Company, filed its bill of complaint against the Louisville & Nashville Railroad Company in the United States District Court for the Western District of Kentucky."

The contents of that bill are then set out, and it is stated that the court granted a restraining order, and thereafter granted a temporary injunction, which has been sustained by the United States Circuit Court of Appeals of the Sixth Circuit, which decision is reported in 207 Fed. 1, 124 C. C. A. 573. That the defendant opposed and resisted the relief, restraining order, and injunction sought by the telegraph company from the United States District Court for the Western District of Kentucky, not only resisting the relief prayed in the District Court, but appealing from the order granting relief to the Circuit Court of Appeals for the Sixth Circuit. It is then alleged that:

"After the decision rendered by the Supreme Court of Georgia, reported in 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, your orator, on September 13, 1912, moved in the Fulton superior court for a modification of the restraining order granted by it when the judgment of the Supreme Court was made its judgment, and prayed that complainant be permitted to amend its notice of condemnation previously served on the Louisville & Nashville Railroad Company. Thereafter, on November 15, 1912, an order was granted enjoining and restraining the Western Union Telegraph Company from proceeding with its condemnation, and from taking any further steps in said condemnation proceeding for the appointment of an assessor, or for any assessment of the value of the property sought to be condemned; but the order and judgment of the court further provided that 'this judgment is not to be so construed as to prevent defendant from proceeding to condemn in any way in which it is authorized under the law to proceed, other than the proceeding against which injunction was prayed in said petition, without prejudice to defendant amending the present proceeding, if said proceeding can be amended under the law.'

"The Supreme Court of Georgia having held in its decision in S., F. & W. Ry. Co. v. Postal Tel. Co., 115 Ga. 554, 42 S. E. 1, that condemnation proceedings could be amended, the Western Union Telegraph Company, after the said decision had been rendered by the Supreme Court of Georgia as reported in 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, and notwithstanding said decisions were not rendered on an appeal from a final decree, but merely on an order refusing to grant an injunction pendente lite, sought to amend its condemnation proceeding above mentioned, and to meet, as far as possible, the alleged necessities and wishes of the Louisville & Nashville Railroad Company by shifting the location of the easement desired to the opposite side of the right of way. A copy of the amendment is attached.

"On December 3, 1912, the Louisville & Nashville Railroad Company amended its petition for injunction, filed in the superior court of Fulton county, Georgia, alleging therein that said condemnation proceedings could not be amended under the law of Georgia, that the description of the easement sought to be condemned in the original condemnation proceeding could not be changed by amendment, and further charging that the Western Union Telegraph Company had no power under its own charter to condemn property in Georgia. * * * The Louisville & Nashville Railroad Company, in its said amendment to its petition, prayed that the Western Union Telegraph Company be enjoined and restrained 'from proceeding in any way with the condemnation sought to be made by it under and by virtue of said attempted amendment to its proceeding to condemn, and also with any proceeding to condemn any of the rights of way of the Louisville & Nashville Railroad Company in the state of Georgia.'

"Upon this amendment a rule was issued by the superior court to show cause, on December 14, 1914, why the prayer of this amendment for injunction should not be granted, restraining and enjoining the Western Union Telegraph Company meantime from proceeding with said condemnation proceeding.

"An answer was filed by the Western Union Telegraph Company to the amendment to said petition, and, at the March term, 1913, of the Fulton superior court, the rule to show cause came on to be heard upon the pleadings above mentioned and documentary evidence and affidavits, no oral evidence being submitted, and the Western Union Telegraph Company not being entitled to, and being afforded no opportunity to, cross-examine witnesses. On the 6th day of September, 1913, a judgment was rendered by the superior court of Fulton county, denying the injunction sought by the original petition of the Louisville & Nashville Railroad Company as amended. At the instance of the Louisville & Nashville Railroad Company, another order further provided that, the Louisville & Nashville Railroad Company desiring to appeal to the Supreme Court of Georgia, the judgment revoking the restraining order and denying the injunction would be superseded for 35 days from September 6, 1913, and, if a bill of exceptions to the Supreme Court should be filed on or before that date, the said judgment would be further superseded until the return of the remittitur in the cause from the Supreme Court to Fulton superior court."

The Louisville & Nashville Railroad Company carried this case to the Supreme Court of Georgia, as shown by the case reported in 142 Ga. 531, 83 S. E. 126, which decision refers to the decision in the case of Nashville, Chattanooga & St. Louis Railroad Co. v. Western Union Telegraph Co., which preceded it, and is reported on page 525 of 142 Ga. (83 S. E. 123). After this decision was rendered, the amendment states the position of the plaintiff in this suit in this way:

"Under the foregoing conditions, and after the rendition by the Supreme Court of Georgia of its decision reported in 138 Ga., and in 142 Ga. above mentioned, your orator, still believing it incumbent upon it to protect its lines of telegraph and to continue the public and governmental service thereby rendered, because of its obligation to the state of Georgia and to the United States and to the public, under the laws of Georgia and of the United States,

and that it was further necessary so to maintain and preserve said lines of telegraph and the continued operation thereof to prevent great loss to itself in the destruction of its telegraph lines and properties, and to protect itself from innumerable suits for damages and for penalties, to which it would be subjected if said lines of telegraph were destroyed, or their continued operation prevented or interfered with, and, finding that condemnation proceedings under the statutes of Georgia were inadequate to afford it proper relief, was informed and advised by its counsel, and believes, that it was and is entitled to file in this court the petition heretofore filed in this cause, and is now entitled to file this amendment thereto, and is entitled to the relief prayed in the said original bill and herein.

"Your orator, on the 5th day of April, 1915, dismissed its condemnation proceedings against the defendant, and dismissed its other condemnation proceedings in Georgia against the several railroad corporations having or operating lines of railroad in the state of Georgia under the control of, or leased, defendant, and thereafter your orator filed in this court its petition or bill of complaint, to which this amendment is now offered."

The amendment then says:

"It is alleged that the decisions of the Supreme Court of Georgia above mentioned, reported in 138 Ga. and 142 Ga., and particularly the decision of the Supreme Court in the equity case brought in Fulton superior court against your orator, are decisions upon interlocutory injunctions, and are not decisions upon final decree; that said equity cause and the other equity causes instituted against your orator in Fulton superior court by the several railroad companies controlled by defendant are still pending and standing in Fulton superior court for hearing upon their merits.

"In view of the dismissal of said condemnation proceedings and of the institution of this suit, it is improbable that said suits instituted in Fulton superior court against complainant to prevent it from instituting and prosecuting condemnation proceedings will be further pressed or heard until the adjudication by this court of the issues herein raised, and until decree shall have been rendered in this cause determining complainant's rights."

The question here is whether or not the institution of these condemnation proceedings in the state court, and the effort to sustain the same, and the difficulties these proceedings encountered in the courts, are a sufficient reason to authorize the plaintiff's proceeding here with its effort to condemn the right to use the rights of way of the railroad company for its poles and wires. What was said by this court in the Atlanta & West Point Railroad Company Case, 227 Fed. 465, is controlling in this matter, and that was (speaking of the right to condemn in equity):

"This question was presented to the Circuit Court of Appeals for the Sixth Circuit, in Western Union Telegraph Co. v. Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113. That court, through Circuit Judge Taft, said, after quoting from Pensacola Tel. Co. v. W. U. Tel. Co.: 'The authority establishes, if authority were needed, that the telegraph company cannot occupy the line of defendant's railroad without the consent of defendant, or the consent of some predecessor in title, which is binding on the defendant. This, we have seen, is wanting. The suggestion, however, seems to be, if we understand it, that, because of the public necessities, the court ought to use its injunction process and shape its decree so as to effect an equitable condemnation of the easement of way. The court has no such power.'"

The Circuit Court of Appeals, speaking of this matter, in Western Union Telegraph Co. v. Louisville & Nashville R. Co., 238 Fed. 26, said this:

"If in any case where the relations of the parties are such as are shown to have existed between the plaintiff and the defendant, it is competent for a court of equity, upon full and adequate compensation being made, to protect from disturbance such possession as the plaintiff has, and, in the suit in which this is done, make complete and final disposition of the entire controversy arising out of the situation and the relations of the parties (see New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, and Western Union Telegraph Co. v. Ann Arbor R. Co., 90 Fed. 379, 33 C. C. A. 113), the facts averred in the bill in the pending case fall short of showing that it is such a one. It well may be inferred from the averments of the bill, and its lack of averments, that, if the plaintiff had exercised any diligence at all, it could, long before the bill was filed, have acquired by legal proceedings available to it the required rights and easements in the defendant's properties which it has continued to occupy and use after all rights it had therein had ceased to exist. Equitable remedies are not open to a party where the occasion or necessity of his resort thereto is attributable to his own unexplained failure diligently to pursue complete and adequate legal remedies available to him."

The first headnote of the decision of the Supreme Court of Georgia, in Western & Atlantic Railroad Co. v. Western Union Telegraph Co., 138 Ga. 420, 75 S. E. 471, 42 L. R. A. (N. S.) 225, is as follows:

"A telegraph company may condemn a right of way on and along the right of way of a railroad company, when the proposed line of telegraph will be so constructed as to produce no material interference with the railroad company's free exercise of its franchise or with the actual operation of the railroad."

In the case in 142 Ga. 525, 531, 83 S. E. 126, it is simply held, as I understand it, that a condemnation proceeding is not amendable, and that an amendment that sets out a new cause of action cannot be allowed. I do not see how this amendment to the bill gives the plaintiff a cause of action in a court of equity, if it had none before. I do not think this amendment sets out any cause of action against the defendant as to that part of the railroad not covered in its favor by the decision of the Circuit Court of Appeals. The motion to dismiss will be sustained.

The defendant may have until September 1, 1917, to file any answer that may be necessary to that part of the plaintiff's bill upheld in the decision of the Circuit Court of Appeals.

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

(District Court, N. D. Georgia. July 14, 1917.)

No. 24.

EMINENT DOMAIN ⇐172—PROCEEDINGS TO CONDEMN PROPERTY—JURISDICTION OF EQUITY.

A court of equity is not the proper tribunal for a proceeding to condemn the right to maintain telegraph poles and wires on the right of way of a railway company on which they have been maintained under a contract with the railway.

In Equity. Suit by the Western Union Telegraph Company against the Nashville, Chattanooga & St. Louis Railway. On motion to dismiss. Motion sustained.

See, also, 233 Fed. 605.

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

Wm. L. Clay, of Savannah, Ga., and Brewster, Howell & Heyman, of Atlanta, Ga., for plaintiff.

Claude Waller, of Nashville, Tenn., and Tye, Peeples & Jordan, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. Under the right granted by the decision of the Circuit Court of Appeals in this case (238 Fed. 38, —— C. C. A. ——), the plaintiff in this bill has filed quite a lengthy amendment. This amendment is substantially the same as that made in the case of Western Union Telegraph Co. v. Atlanta & West Point Railroad Co., 243 Fed. 685, and Same v. Louisville & Nashville Railroad Co., 243 Fed. 687, which have just been disposed of, and in which brief opinions have been filed.

What has been said in those cases as to the plaintiff's amendment, and particularly what was said in the case against the Louisville & Nashville Railroad Company as to the amendment with reference to the condemnation proceedings in the state court, is applicable to this case. The Western Union Telegraph Company, in its efforts to institute and carry out condemnation proceedings for right of way over the defendant's road from Rome to Kingston, and over three or four miles of the main line of the Nashville, Chattanooga & St. Louis Railway running through Dade county, which had the same objections to that, and in which the same decisions were rendered that were made by the Supreme Court of Georgia in the case against the Louisville & Nashville Railroad. 138 Ga. 432, 75 S. E. 477; 142 Ga. 525, 83 S. E. 126.

I am unable to see in this case, as in the Louisville & Nashville Railroad Company Case, how the effort made by the plaintiff to condemn the right to place its poles and wires on the defendant's right of way, in this proceeding in equity, is strengthened by what it did in the state court. It looks to me more like a decision against the telegraph company as to its right. Independently of where or how the right is asserted to occupy the right of way of the railroad company, it is of no assistance to it in this proceeding. My own opinion, as heretofore stated, is that a court of equity is not the proper place for a condemnation proceeding such as is instituted here. This would be true, I think, whether proceedings had been previously attempted under the state statutes or not.

The other part of the amendment simply amplifies what was before contained in plaintiff's bill, and is not sufficient to add strength to the case here in any way.

The motion to dismiss the amendment will be sustained.

In re KELLY et al.

(District Court, D. Montana. June 13, 1917.)

No. 2860.

1. CONTEMPT ⟸60(3)—PROCEEDINGS TO PUNISH—SUFFICIENCY OF EVIDENCE.
In a proceeding to punish attorneys for defendants in a criminal case for contempt, evidence *held* to show that one of the attorneys intentionally and knowingly visited and conversed with one of the jurors, bought a drink for him, and drank with him, and that he visited and conversed with another juror, and promised such juror introductions to legislators, requested by the juror to promote a proposed bill, and that the other attorney on numerous occasions intentionally and knowingly visited and conversed with the same juror.

2. CONTEMPT ⟸14—MISCONDUCT AFFECTING JURY.
Such conduct of the attorneys constituted misbehavior obstructing the administration of justice, requiring that they be fined.

3. CONTEMPT ⟸14—MISCONDUCT AFFECTING JURY.
While mere chance meetings, passing salutations, or brief conversation on indifferent topics between jurors and counsel, cannot always be avoided, and are not in themselves condemned, lengthy visits and conversations, apart from others, whether or not about the case, drinks, and other hospitality, entertainment, hopes aroused, and favors directly or indirectly granted or promised, are misbehavior obstructing the administration of justice.

4. CONTEMPT ⟸14—MISCONDUCT AFFECTING JURY.
Where attorneys intentionally visited with jurors, conversed with them, made promises, or aroused hopes, and drank with one of them, they were guilty of the intent necessary to make their conduct contempt, though they did not intend to influence the jurors.

5. CONTEMPT ⟸14—MISCONDUCT AFFECTING JURY.
Counsel, who are embarrassed by the advances of a juror during the trial of a case, to relieve themselves of liability for contempt, should bring the matter to the court's attention, instead of encouraging such advances.

Proceedings to punish D. M. Kelly and A. J. Galen for contempt. Defendants fined.

B. K. Wheeler, U. S. Dist. Atty., of Butte, Mont., H. G. Murphy, Asst. U. S. Atty., of Helena, Mont., and James H. Baldwin, Asst. U. S. Atty., of Butte, Mont., for the United States.

L. O. Evans and F. Walker, both of Butte, Mont., and W. T. Pigott, F. W. Mettler, and E. G. Toomey, all of Helena, Mont., for defendants.

BOURQUIN, District Judge. In these contempt proceedings the charges are that respondents were attorneys for two of ten defendants in a criminal case tried herein, and therein were guilty of misbehavior obstructing the administration of justice, in this, viz.: That during intervals of the trial they knowingly visited and conversed with certain members of the jury, "with a view of improperly influencing" them in said case; that with like view Galen so visited and conversed with Juror Warner, furnished him liquid refreshments, and with him partook thereof; that with like view Kelly so visited and conversed with

Juror Brown, and furnished him liquid refreshments; that with like view both respondents so visited and conversed with Juror Warner, and promised to introduce him to members of the Legislature then in session, to secure him support for a proposed bill which Warner was promoting. After some rather technical objections, not argued, respondents pleaded not guilty. Although the record and evidence in the criminal case cannot be resorted to nor considered, because not introduced at the hearing herein, from the evidence submitted at said hearing enough appears to demonstrate said criminal case was of importance, attracted attention, was on trial some two weeks, and respondents' clients were acquitted. There was a total of seven attorneys for the defense, but respondents were the only attorneys for their clients.

[1] Referring to the charge affecting Kelly in relation to Juror Brown, Murphy, assistant district attorney, for the prosecution, testified that one evening during the trial he was with the district attorney in the Placer Hotel lobby, and saw Kelly and Brown talking together, standing about the center of the lobby, for 15 to 20 minutes, Murphy then departing.

Rankin, since said trial attorney for two said defendants convicted, and a sympathetic friend and sometime ally of the district attorney, delighted with the acquittal of respondents' clients, for the prosecution testified that in said lobby, apparently following Murphy's departure, he (Rankin), in conversation with the district attorney, there saw Kelly and Brown talking together; that after some moments witness and the district attorney went into the adjacent barroom and drank with Galen; that Kelly and Brown came into the bar, and the district attorney remarked they were about or going to drink; that Cowley, another attorney for a defendant in the criminal case, was about to or did invite witness and the district attorney to drink; the latter remarked he would not drink with a juror, and moved by discretion witness withdrew.

Juror Brown, a "substantial rancher," old and close friend of Kelly, for the prosecution testified he did not remember talking to Kelly during the trial, in said hotel lobby; that he did not go into the bar with Kelly, but thinks on the occasion referred to he did with De Hart; that Kelly was there and asked him to drink, which he did; that he and Kelly were accustomed to drink together; that (in response to leading questions on cross-examination) he was positive he did not talk with Kelly during the trial, and that the drink no wise influenced his verdict; that when he had drank he thought he should not be there and walked out.

De Hart, for respondents, testified to entering said bar with Brown, but is unable to identify it as the night Kelly and Brown drank together. Galen, respondent, testified that he and Kelly went from Galen's office to said hotel and bar; that a crowd was present and he lost Kelly, but saw Rankin and the district attorney, and conversed with them; that he heard Kelly ask the district attorney to have a drink, and saw Juror Brown alongside or back of Kelly; that to Galen the district attorney criticized Kelly's association with the juror, Galen

responding, "He means no harm;" that he does not know where Kelly went when he and Galen entered the bar, but does not think it was 20 or 30 minutes later that the drink was had, but only an "appreciably short time"; that he did not see Kelly introduce Brown to Cowley; that Brown went out, and the district attorney adversely commented on the incident, Kelly responding he had known Brown a long time, a "high-class citizen," whom a "drink wouldn't bother."

Cowley, for respondents, testified that as he entered the bar Kelly said he was buying a drink; that Brown had drank, and Kelly introduced Brown to witness, Brown then leaving; that the district attorney said he would then drink, but did not want to drink with the juror; that witness said (because of circumstances) he saw nothing "wrong in this," and on cross-examination he testified that if, before he was introduced to Brown, he had been told Brown was a juror, he "would have felt a little bit queer about it."

Kelly, respondent, testified that he knew Brown well for some 10 years; that they were of like politics, and witness had held office in Brown's county; that it was custom for them to drink together; that, going with Galen from the latter's office to the hotel bar, they were separated along the bar; that Rankin withdrew, and witness drank with some parties; that he recalls De Hart and Brown; that he joined the district attorney, Galen, and Cowley, and found they were discussing the propriety of buying a drink while Brown was there; that he assured them Brown was a "very high class citizen," who "certainly would not consider" it; that it never occurred to witness, when buying the drink for Brown, that it was improper and might influence Brown as a juror; that he does not recall conversing with Brown in the hotel lobby, and does not remember introducing Brown to Cowley; that, if he conversed with Brown, it was casual, at no time about the criminal case; that he does not recall having any conversation with Brown during the trial, though he might have, and would not say he did not; that he gave no special invitation to Brown to drink, but included him in the party; that he did not go into the bar with Brown.

In the matter of the charge that Galen furnished liquid refreshments to Warner, while it fails of proof, it appears from Haven's (lawyer, witness at the criminal trial, and associate of the district attorney) testimony that one evening during the trial, in said hotel lobby he saw Galen stand, look, joined by Warner they conversed about a minute, then together went beyond and behind a post (pillar?) and out of Haven's vision, where were only the bar entrance and a stairway descending to a basement toilet room. It also appears from Atkinson's testimony that at the conclusion of the criminal case Warner admitted to the district attorney that he (Warner) had drank with Galen. It also appears that, subpœnaed by the prosecution for this hearing. Warner came to Helena, on the street met Galen, who told him to go to Mettler's office (one of respondents' counsel), which he did, from whence, on call from the district attorney, he went to the latter's office, and said to him he had not drank with Galen, and had not told the district attorney he had drank with Galen. It does not appear whether or not Galen and Mettler knew Warner was subpœnaed by the prose-

cution, when Warner went to Mettler's office. It is not intimated a party should not interview witnesses subpœnaed by the other party. An exclusive right to a witness is not acquired by first subpœnaing him. Witnesses are in aid of justice. Their knowledge is for the benefit of all parties, all of whom, before trial, may rightfully, but discreetly ascertain that knowledge.

Byrn, a government officer, testified that prior to this last incident he heard Warner deny to the district attorney that he had admitted drinking with Galen, then, when this was vigorously disputed, say, if he had drank with Galen, he did not remember it. Galen and Warner testify they did not go into the bar, nor drink together, and Warner that he had not admitted to the district attorney he had drank with Galen, and that when he went to the district attorney's office from Mettler's was not the first time he had to the district attorney denied drinking with Galen. Galen and Warner do not refer to nor identify the incident to which Haven testified.

In the matter of the charge that respondents visited and conversed with Warner and promised to introduce him to legislators, it appears Warner was interested and industrious in behalf of his proposed bill. A stranger to respondents, Warner was recommended to enlist their aid, for that they were ex-Attorney Generals of wide acquaintance, and he sought them out to that end. Warner testified he conversed with Kelly two different evenings, and asked him if he would introduce witness to legislators; that Kelly put him off the first time, did not think Kelly introduced him, though Kelly said something about waiting until after the trial, to talk about the bill, the second time.

Byrn testified that on the evening of the eleventh day of the trial, in the hotel lobby, he saw Juror Warner approach and speak to Kelly, who told Warner he could see him later; that later Warner did approach Kelly, showed him a document, they conversed some ten minutes, and separated. Kelly testified he recalled only two conversations with Warner, both the same evening and in the hotel lobby aforesaid; that Warner showed him the bill, asked what Kelly thought of it, and that Kelly introduce him; that witness answered he knew nothing relating to the subject of the bill, that he did not care to introduce Warner then, and that he had better wait until after the trial; that he felt uncomfortable talking to a juror, a stranger to him, felt necessity to be courteous, and not to offend by a rebuke; that, had it been Brown asking "me for a favor of that kind, I wouldn't have thought anything about it. I no doubt would have introduced him to the people" thereabout.

Warner also testified he might have had two conversations with Galen, only about the bill and requesting introductions; that to the best of his recollection Galen did not introduce him, but will not say Galen did not, he (Warner) met so many; that he does not remember from the jury box asking Galen about one Searls; that maybe at most he talked two or three times about the bill to Galen; that during a certain intermission in the final argument to the jury in the criminal case, in the court corridor, Galen did not put his arm on Warner's shoulder and talk to him. On cross-examination, in response to

a question whether Galen had not said, "I haven't got time to talk to you about" the bill, he answered, "Something similar." In response to other leading questions, he testified that in the said hotel lobby he was talking to one of respondents' clients—defendant and Galen approached and said he would rather Warner did not talk to said defendant, whereupon Warner asked why, Galen answering it did not look right; that he realized his error, thanked Galen, and asked if he could speak to Galen, who assented; that then for the first time he spoke to Galen about the bill; that his verdict at the trial was not influenced by anything said to him by Kelly or Galen.

Byrn testified that, the same evening he saw Juror Warner approach Kelly, he saw Warner seated in the said hotel lobby, there being a fur auction and a dense crowd; that Galen approached Warner, and by the latter was shown a document, some slight conversation between them, Galen handed the document back to Warner and walked away; that he would not be positive one of respondents' clients—defendant did not approach Warner at the time Galen did, and does not believe said defendant was talking to Warner when Galen approached the latter. Byrn also testified that upon this evening in said lobby he saw two other counsel for another defendant approach and speak to Warner, "several words passed," and later saw Warner speak casually to said defendant.

Kirschwing, a good friend of the district attorney, who knew what the latter "was up against" in the trial of the criminal case, and knew "the lobby that was working," for the prosecution testified that durthe certain intermission hereinbefore mentioned he saw Galen and Warner meet near the jury box, saw Warner whisper to Galen, Warner, followed by Galen, walk into the corridor, and there saw them converse, with Galen's arm around Warner's shoulder; that other jurors were scattered about in plain sight of the corridor incident. Haven's testimony in reference to a meeting, conversation, and departure in company of Galen and Warner is heretofore set out.

Galen, respondent, testified that Warner approached or spoke to him some four or five times during the trial—once, when Warner was talking to respondents' client, as related by Warner; again, the next morning, in the courtroom, Warner referring to said incident, said to Galen he (Warner) should have known better; again, at the fur auction, Warner handed Galen the bill, the latter only then conscious of Warner's presence. Galen looked at the title of the bill, handed it to Warner, remarking, "I haven't got time to fool with that," and walked away; again, one morning in the courtroom, in the presence of the district attorney, Warner asked Galen the name of Searls, of whom Galen had told Warner the night before at the hotel, and Galen again told him Searls' name; again, during the intermission heretofore referred to, Galen, nervous from the strain of the trial, he testified, procured a cigarette from one of his clients, went into the corridor, and while he was in meditation smoking, Warner stepped up and said, "I want to talk to you about my bill," to which Galen responded, "For Christ's sake wait until this trial is over;" that no more was said, they had not whispered or spoken in the courtroom, he had not followed

Warner into the corridor, he did not have his arm around Warner, and that at no time did he and Warner speak of the case; that all these several incidents were open, other persons by; that he does not believe he introduced Warner to any one. Neither Warner nor Galen was asked whether or not the latter promised such introduction. It is noted that neither Brown nor Warner was a guest of the hotel of the numerous incidents, and it does not appear respondents were.

Some six witnesses, including counsel for another defendant at the criminal trial, respondents' clients, and jurors, testified for respondents to circumstances tending to disprove Kirschwing's assertion that Warner whispered to Galen before the corridor incident. There is evidence that the jury deliberated upon their verdict all night, and that around midnight Kelly and two others interested, stood for some time upon the street, and looked over at the lighted windows of the jury room. Some claim that they signaled to the jurors is made, not to be treated seriously. It also appears that, immediately after the verdict was received, a defendant and his counsel, meeting Warner in a hotel dining room, invited him to partake of lunch with them, also invited Kelly, Galen, and another of counsel, and all ate lunch together. A few days later, these proceedings were instituted. Having in mind the charges and that the presumption of innocence requires their dismissal unless proven beyond reasonable doubt, and taking note of all matters and things in relation to witnesses and testimony that ought to be considered in the determination of issues, the findings are that during the trial of the criminal case respondent Kelly intentionally and knowingly visited and conversed with Juror Brown, and likewise furnished said juror liquid refreshment and partook thereof with him; that said respondent likewise visited and conversed with Juror Warner, and likewise promised said juror introductions to legislators, requested by the juror to promote a proposed bill; that respondent Galen intentionally and knowingly visited and conversed with Juror Warner.

Positive testimony that Kelly and Brown visited and conversed at length in the hotel lobby is not weakened by their inability to recall it. In view thereof, of their entrance into the bar, drinking together at Kelly's request and expense, the proof is satisfactory that together they went from said visit and conversation into the bar. Kelly, unable to see impropriety in the drink, would see none in the visit and conversation and journey to the bar; unable to see impropriety in visit and conversation with Juror Warner, a stranger, would see none in the like with Juror Brown, a friend, especially when Kelly would unhesitatingly grant favors to the juror friend, but not to the juror stranger. Apparently all present (even Brown) save Kelly and Galen, saw impropriety in Kelly treating Brown. The evidence is clear that Kelly and Juror Warner had a lengthy visit and conversation, that Warner's bill was discussed, that he asked Kelly to introduce him to legislators, that Kelly understood Warner's interest and purpose, and that he gave Warner to understand the introductions would be made after the trial.

Early in the trial Galen consented to Warner's speaking to him. Warner presented his bill to Galen, and the latter learned the former's

desires. Galen told him the name of Searls. At different times there were several exchanges of words between Galen and Warner, in themselves of no consequence, but in all serving to show how counsel and juror gravitated towards each other, like drifting ships upon a calm sea, or steel and magnet, or perhaps like men not averse to reciprocal favors. So on the day the prosecution rested, on a January evening they met in a hotel lobby, conversed, in company walked and disappeared from view, where their continuing journey must be either into the bar or down to a basement toilet.

A private visit, conversation, and journey, arousing warranted suspicion in view of all the circumstances, the burden shifted to Galen to explain, and no explanation was made. What their conversation, where went, how long, are still a mystery. Not identifying, referring to, or denying the incident, Galen and Warner only said they at no time together went into the bar or drank. The court corridor incident, Warner denied in toto. Kirschwing then gave his version, then Galen his. Since this incident was after Galen acquiesced in speech with Warner, after several exchanges between them, after Galen knew Warner's interest and desire in the matter of his bill, after their unexplained conversation and disappearance together, after habit could breed carelessness, after Galen, apparently, saw no impropriety in the association of Kelly and Brown at the bar, and since the evidence in relation to this corridor incident was after the verdict of acquittal and the immediate foregathering of Galen, Warner, and others at lunch, after Galen sent Warner to Mettler, and of which no more appears, all thereof, taken into consideration with all other circumstances properly in proof, stamp Kirschwing's version as more consistent and reasonable. However, involving a main issue, Kirschwing's version is not deemed proven beyond a reasonable doubt, and the incident is taken as perhaps not clear, and as merely illustrative and corroborative of the attraction between Galen and Warner.

[2] In view of and upon these findings the conclusion must be and is that respondents' conduct constituted misbehavior obstructing administration of justice, as charged, and they are and each of them is fined in the amount of $500 and costs. For protection, society depends upon juries. Like all human institutions, the jury system is not perfect; but society is not yet ready to accept any substitute. A philosophical writer declares the system is all that reconciles man to laws. One wonders if it is because the individual man contemplates his sometime violation of law, and hopes he at least may escape via a jury. Jurors, even as judges, are officers of courts and administrators of justice. Indeed, they are judges obligated to impartiality, fairness, and justice. Their oath and duty are to "true verdict render in accordance with the law and evidence in the case." The law and safety of man and property demand that oath be kept, that duty performed.

It follows that jurors must not be subjected to any variety of influence outside the jury box. The law forbids it. Any suspicion that jurors have been improperly influenced, tampered with, is intolerable; for it impairs public confidence in juries and verdicts, creates doubts of the court's ability to do justice, lessens respect for law, incites vio-

lation of law, and encourages primitive force to avenge or remedy wrongs, endangers persons and property, breeds mobs, riots, and lynch law, and makes for disorder, crime, and anarchy. Amongst the influences forbidden is undue familiarity between jurors and counsel. It is the more dangerous, in that proof is difficult, and its extent and effect are indeterminable. Generally founded on friendship or other altruistic basis, its insidious appeal is to man's finer nature; and, though powerful, charged that it has influenced him, he refuses to concede it, and denies its well-known probable effect upon his judgment in determining his verdict. He may be honestly unconscious of it, though moved by it.

[3] All counsel recognize this in their attempts to include their friends and to exclude their opponents' friends, when drawing juries. Drawn by chance, friends properly may be on juries; but during such times it is the duty of counsel to avoid appealing to friendship, to avoid renewing old friendships, as well as to avoid cultivating new ones. It is recognized a practical view must be taken. So mere chance meetings, passing salutations, brief conversation on indifferent topics, between jurors and counsel, cannot always be avoided, and are not in themselves condemned. But lengthy visits and conversations, apart from others, whether or not about the case, drinks and other hospitality, entertainment, hopes aroused, and favors directly or indirectly granted or promised, are under the ban of the law, are misbehavior obstructing administration of justice, and to be penalized according to circumstances. Counsel are strictly forbidden to thus compete for jurors' favor. It is to the credit of the bar that few counsel desire to, and practically all frown it down; for the least of these methods may influence jurors, and all of them arouse suspicion, adverse comment, just resentment, impair confidence, and, if permitted, convert the trial into a tragedy, and transform juries from administrators of justice to purveyors of injustice.

All this is conceded by respondents, but they contend their acts were but casual and commonplace courtesies, open, in proximity to other persons, and so not misbehavior obstructing administration of justice. Unfortunately for respondents, the evidence will not permit construction so favorable to them. When meetings are more or less frequent, and in consequence of the known desire of the jurors, if not of counsel, are unchecked and taken advantage of, are in part by appointment, they have not the quality of casualty. The strategy of openness, the solitude of the crowd, may be safer than secretiveness, when the influence is not brazen importunity and coarse bribery, but is only friendship and favors of courtesy.

[4] It is most disturbing to remember that, respondents' clients charged with felony, Warner entered the jury room and deliberated upon his verdict (of acquittal), with Kelly's promise and Galen's extended hope at least, that after the verdict they, men of rank and influence, would grant him favors ardently desired and solicited by him. And Brown, likewise, with consciousness of friendship renewed with Kelly, an old friend, with memory of a lengthy visit and conversation, subject unknown, with Kelly, and with whom he had during the trial made libation at the shrine of Bacchus. But it is contended respond-

ents had no intent to influence the jurors, that the latter testified they were not influenced, and hence respondents' conduct, while indiscreet, was not contemptuous. Lack of evil intent goes only in mitigation. They knew the jurors; they intended to visit, converse, make promises, or arouse hopes, drink with one of them, all as found herein. That makes up the offense charged. Intentionally adopting certain conduct in certain known circumstances, conduct forbidden by law under those circumstances, they intentionally violated law in the only sense in which the law considers intent. Ellis v. U. S., 206 U. S. 257, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589. Their conduct was intentional, and tended to influence the jurors favorably to their clients. It is not alone a question of ultimate intent, or of mere courtesy, or little monetary value, but it is also a question of the impression the conduct may make upon jurors. Friendship, courtesy, favors, are of the great and enduring forces. In the long run, they are stronger than mere money. Ends are often gained by good impressions created, where direct solicitation would fail. To reciprocate courtesies, hospitality, and favors is a natural impulse. A generous man remembers and responds in some kind. Only the base receive favors and return none. And untrained jurors of distant residence might hastily conclude by their verdict alone could they timely reciprocate counsels' attentions.

The conduct here involved is forbidden because of dangerous tendencies, of probable injury difficult of proof. The scales of justice are of delicate poise, and in a jury's hands may be affected by improper trifles light as air. A juror has no measure for his mental processes. He will not be heard to say this or that did or did not influence him. Public policy forbids, because his mental state is not accessible to other testimony. Mattox v. U. S., 146 U. S. 148, 13 Sup. Ct. 50, 36 L. Ed. 917. It is what respondents intentionally did, and its probable effect, not its intended or actual effect, that is the gist of their offending.

[5] First sought out by Warner, upon whom they are now severe, respondents should have checked his advances. If Warner is to be condemned, more are they; for he was but a layman, they learned in the law, and they told him he could converse with them. They encouraged him to continue to approach them. Warner's approach may have embarrassed them, and they were in duty bound to avoid offending him to their clients' prejudice. But they were equally obligated to avoid encouraging him to the government's prejudice. It would seem they could have relieved themselves of Warner as admirably as Galen relieved their client of Warner. Furthermore, they could and should have brought the matter to the court's attention, and a remedy would have been applied, even to dismissal of the juror. As it is, they have their share of responsibility for a situation that attracted attention, was the subject of "talk," created scandal, and that was calculated to affect the verdict, to say the least.

Perhaps the evil will be better appreciated by assuming a civil suit to have been involved, say a personal injury action against a corporation. Was this misbehavior in behalf of a successful plaintiff, a great outcry would be made anent the "ambulance chaser" and "purification

of the bar"; in behalf of a successful defendant, bitter denunciation would be visited upon the "soulless trust" and "corrupt corporation counsel." There would be some justification for both, and a new trial would be granted as of course. The cases almost unanimously so hold, and all condemn conduct like herein as reprehensible and intolerable.

Note, the new trials granted are for misbehavior obstructing administration of justice, and the conduct, when intentional, is punishable as contempt of court; for contempt of court is nothing but misbehavior obstructing administration of justice. Now, although not always remembered, the government in behalf of society is entitled to fair jury trials, even as persons are. But in criminal cases, though it be deprived of a fair trial by conduct like respondents', the law forbids it to have a new trial. It has no remedy, and can only discipline the offender and discourage imitators, by proceedings for contempt, as here. In general, see Scott v. Tubbs, 43 Colo. 221, 95 Pac. 540, 19 L. R. A. (N. S.) 733, and notes; Sandstrom v. Nav. Co., 69 Or. 194, 136 Pac. 878, 49 L. R. A. (N. S.) 889; Bank v. Gray (Wyo.) 154 Pac. 599; State v. Snow, 130 Minn. 206, 153 N. W. 526; Craig v. Pierson, 169 Ala. 548, 53 South. 803; State v. Clark, 134 Mo. App. 55, 114 S. W. 536; Bradshaw v. Degenhart, 15 Mont. 273, 39 Pac. 90, 48 Am. St. Rep. 677.

Crime, its repression and punishment, is a grave problem. Administration of criminal law, particularly when cases are for any reason important, is sufficiently difficult and ineffective to give color to the publicists' statement that it is a national disgrace. In so far as it is true, it is largely due (not overlooking that ancient rules based on vanished reasons make more to protect criminals against society than to protect society against criminals) to practice akin to those herein condemned. And it is so far true that statistics show this country in criminal law administration far less efficient than England, less than France, Germany, and but little more than Russia. The incident of the lunch is illustrative and significant. In some states it is a statutory offense to "treat" jurors, even after verdict and during the term. In his Penal Philosophy, the jurist Tarde, criticizing the jury system, gives credit to French juries in that, after acquittal, they are not known to "celebrate" with accused, and notes as worthy of mention that Garofalo cites one instance occuring in Italy in 1879. It is feared and lamented such celebrations are not uncommon in this country. See Hotel Co. v. Sooy, 197 Fed. 887, 118 C. C. A. 579; Liutz v. Railway Co., 54 Colo. 371, 131 Pac. 261.

Counsel must remember they, too, are officers of the courts, administrators of justice, oath-bound servants of society; that their first duty is not to their clients, as many suppose, but is to the administration of justice; that to this their clients' success is wholly subordinate; that their conduct ought to and must be scrupulously observant of law and ethics; and to the extent that they fail therein, they injure themselves, wrong their brothers at the bar, bring reproach upon an honorable profession, betray the courts, and defeat justice. When of sufficient extent, when they fail as here, they must, like others, respond at the bar of the court.

BEACH v. KERR TURBINE CO.

(District Court, N. D. Ohio. April 4, 1917.)

No. 9278.

1. REMOVAL OF CAUSES ⟸112—PROCEEDINGS FOR REMOVAL—SETTING ASIDE SUMMONS.
   Defects in the service of summons in an action removed from a state court may be taken advantage of by motion to set aside the service after the removal.
2. COURTS ⟸344—FEDERAL COURTS—SERVICE OF PROCESS.
   Service in an action at law on a foreign corporation in conformity to a state statute is good in the federal courts, unless the notice thus provided does not amount to due process of law.
3. CORPORATIONS ⟸642(6)—FOREIGN CORPORATIONS—DOING BUSINESS—ISOLATED TRANSACTIONS.
   An isolated or single sale of goods in a state by a foreign corporation, or even occasional repetitions of such sales, is not doing business within such state.
4. COMMERCE ⟸40(1)—FOREIGN CORPORATIONS—INTERSTATE COMMERCE—WHAT CONSTITUTES—"DOING BUSINESS IN STATE."
   A foreign corporation, which contracted to sell and install three turbine pumps for the waterworks department of a city, was not engaged in interstate commerce, but was "doing business within the state," while setting up and installing such pumps on the foundations constructed therefor, making the necessary connections, and seeing that they performed the functions for which they were purchased, though the time necessary to complete the contract was short, and the amount of business done not very great.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]
5. CORPORATIONS ⟸668(5)—FOREIGN CORPORATIONS—SERVICE OF PROCESS—"MANAGING AGENT."
   A person sent from the corporation's plant to install such pumps, with authority to hire whatever help was needed in setting up, installing, and connecting them, was its "managing agent," upon whom due process might properly be served, under Gen. Code Ohio, § 11290, providing that, when the defendant is a foreign corporation having a managing agent in the state a service may be upon such agent.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Managing Agent.]

At Law. Action by Charles Beach against the Kerr Turbine Company. On motion to set aside service of summons. Motion overruled.

E. H. Moore and William J. Kenealy, both of Youngstown, Ohio, for plaintiff.

Hine, Kennedy & Manchester, of Youngstown, Ohio, for defendant.

WESTENHAVER, District Judge. This action was begun in the state court, and after removal here by the defendant, a foreign corporation, it moves to set aside the summons. The return shows it was served on one J. W. Storer, describing him as "managing agent of said defendant company at Youngstown, Ohio." Affidavits have been filed in support of the motion and in opposition thereto.

The affidavits in opposition state merely that Storer was the managing agent of the defendant, and as such managing agent had full charge and control of the work of installing certain turbines at Youngstown, Ohio. This is a legal conclusion, except as to the fact that Storer had full charge and control of the work of installation. From defendant's affidavits it appears that defendant bid upon and was awarded the contract for supplying, setting up, and installing three turbine pumps for the waterworks department of the city of Youngstown; that these pumps were manufactured outside of the state of Ohio, at the defendant's factory; that the foundations upon which the same were to be installed were constructed by the city; that the pumps were shipped, delivered, and set in place and installed by the defendant; that the work of installation consisted of putting said turbine pumps in place, making the necessary connections, and seeing that they performed the functions for which they had been purchased and installed; that, in setting up and installing the same, J. W. Storer was sent from defendant's plant with authority to hire help, do what was necessary in the matter of setting up, installing, and connecting the same, and seeing that they performed their functions; that said Storer had authority to hire from one to three men to aid him; that at no time did he employ and have assisting him more than three men; that said Storer was paid a daily wage of approximately $4 per day, and was not regularly employed by the defendant in Ohio, but at its plant in Wellsville, N. Y., and was not its managing agent in Ohio. Plaintiff was one of the men so employed, and was injured while engaged with Storer in this work. It further appears from these affidavits that the defendant, except as may be inferred from the above statement, was not doing business in Ohio, that its principal office and place of business was outside of the state, and that it had not obtained authority to do business nor appointed an agent in the state, as is required by sections 178, 179, General Code of Ohio.

Whether the service thus made is good is not free from uncertainty. If, however, a foreign corporation, on this state of facts, is not doing business within the state, and its agent or representative in charge is not a managing agent upon whom processes may be served, then manifestly a foreign corporation, undertaking a similar work requiring the employment of many men and months or even years for its performance, could not be served within the state in actions growing out of its acts or transactions in connection therewith. Situations occur to the court, and will, no doubt, occur to counsel, in which foreign corporations have obtained contracts requiring one or two years to perform. The facts of the present case present a similar question. The difference is only one of degree, and the rule of law must apply equally to both.

[1] This action having been begun in the state court, service of process is controlled by section 11290, General Code of Ohio, which is as follows:

"When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

It is proper to make this motion here after removal, and defects in the service may be taken advantage of by motion. Cain v. Commercial Publishing Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534.

[2] The section above quoted is the Ohio law relating to service on foreign corporations. In Goode v. Druggists' Ass'n, 16 Ohio Dec. 586, it is said by Judge Spiegel that section 11290 (former R. S. § 5043) provides the only mode of obtaining service of summons on a foreign corporation. This, it seems to us, is an accurate statement. A service in an action at law on a foreign corporation in conformity to a state statute is good in the federal courts, unless the notice thus provided is not adequate according to the rules of due process of law.

The authorities cited in support of the motion are the following: Toledo Commercial Co. v. Glen Mfg. Co., 55 Ohio St. 217, 45 N. E. 197; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Robbins v. Shelby Co., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Horn Silver Mining Co. v. New York, 143 U. S. 314, 12 Sup. Ct. 403, 36 L. Ed. 164; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Milan Milling & Mfg. Co. v. Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135. I have examined all these cases and many others. In my opinion, they are not controlling; in fact, they do not bear on the exact point under consideration. Several of them involve statutes which forbid a foreign corporation to do business within a state without complying with state laws, and in some instances prohibiting action on the contracts if such compliance has not been had. Others involve state statutes forbidding or regulating the doing of business within their limits, or imposing local taxes upon interstate commerce. For instance, Milan Milling & Mfg. Co. v. Gorten, supra, is a case in which a foreign corporation sold, delivered, and put into position some milling machinery in the state of Tennessee. The purchase price therefor was in part evidenced by notes secured by mortgage. An action was afterwards brought to foreclose the mortgage, and the defense was that the contract had been entered into in violation of a state statute forbidding a foreign corporation doing business in the state, except after filing its charter and appointing an agent upon whom process might be served. The statute made contracts entered into in violation thereof nonenforceable. It was held that a single transaction of this character was not carrying on business in the state, within the meaning of statutes of this nature, and that to sell and set up machinery in a state where a foreign corporation had no agency or office was an act of interstate commerce.

The question involved in this action, however, seems to me to be different, and is controlled by other considerations. It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action. The tendency is to hold that whatever is reasonably effective for this purpose is a good service.

Section 11290 of the General Code has been under review in the Supreme Court of Ohio, and in the Circuit Court of Appeals of this circuit. In American Express Co. v. Johnson, 17 Ohio St. 641, the foreign corporation defendant, at the time of service, had a general superintendent for the state, and two or more local agents in the county of Madison, one of whom resided at London, in said county, and kept an office there. At that office he received and forwarded packages for the company, and transacted all the business usually transacted in such receiving and forwarding offices. This service was held good, and that the agent was a "managing agent," within the meaning of this section.

In Baltimore & Ohio R. R. Co. v. Wheeling, Parkersburg & Cincinnati Transportation Co., 32 Ohio St. 117, service was had upon a local agent of the foreign corporation defendant, whose duties consisted in contracting for the transportation of freight and attending to the transfer of freight to and from connecting railroads on through bills of lading. This service was held to be good. In the opinion (32 Ohio St. 135) it is said:

"The Code provides (section 68) that when the defendant is a foreign corporation, having a managing agent in the state, service may be had upon such agent. We agree with the view taken by counsel for defendant in error that the tendency of legislation and the policy of the law is to facilitate the obtaining of service upon foreign corporations. Their business brings them in such close connection with the people of our state that it is desirable they should be made amenable to our laws as far as practicable, instead of having our citizens to seek other jurisdictions in which to enforce their rights."

In Toledo Computing Scale Co. v. Computing Scale Co., 142 Fed. 919, 74 C. C. A. 89 (C. C. A., Sixth Circuit), the foreign corporation defendant was served by delivering the summons to the person who chiefly represented it as agent for the sale of goods in a given subdivision of the state, and who maintained an office or storeroom where goods were kept, but who was paid a commission only on sales as compensation for his services. This service was held to be good, and that such an agent was a "managing agent," within the meaning of this section. District Judge Thompson, in passing on the motion below had distinguished the language used by Judge Jackson in United States v. American Bell Telephone Co., 29 Fed. 17 (opinion, pages 36–42), indicating that a "managing agent" meant a person who had either general or controlling authority of some substantial part of the corporate business, and that "doing business within the state" meant a continuous and extensive series of transactions. Judge Thompson, however, points out that Judge Jackson did not cite the two cases from the Supreme Court of Ohio above noted, and that all of his observations were obiter. Judge Severens, delivering the opinion, cites the Ohio Supreme Court cases, quotes with approval Judge Thompson's criticism, and further says:

"The Ohio Supreme Court evidently intended to give a liberal interpretation to the statute to facilitate the obtaining of jurisdiction over foreign corporations doing business in the state, and held that one who chiefly represented the corporation in a locality where it was doing business was its managing agent

there, and indeed a construction of this statute which restricted the meaning to one who was a general manager would very much limit its utility."

The following cases from the Supreme Court of the United States bear on the question involved more closely than those cited by counsel: Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782.

In Connecticut Mutual Life Ins. Co. v. Spratley, the insurance company had been doing business in the state of Tennessee, and afterwards withdrew all its agents from the state and ceased to write any new business therein. The holders of such policies previously written as continued in force, paid their premiums to the company outside of the state. One of these holders having died, and a controversy having arisen as to the liability of the company, one of its agents, resident at Louisville, Ky., was sent to Tennessee to adjust the loss. While there an action was brought against the company, and a summons served on him as the company's agent. This was held to be a good service. In the opinion it is said that, where the judgment sought against a foreign corporation is personal, it is material to ascertain whether the foreign corporation is doing business within the state; and, if so, the service of process must be upon some agent, so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation. These requirements were met by the facts above stated.

In Lumbermen's Mutual Fire Ins. Co. v. Meyer, supra, the insurance company never had established any agencies or offices in New York. All its policies in New York were written on applications forwarded to the office of the company outside of the state, and not solicited by agents within the state. Whenever losses by fire occurred, the company sent an agent to make settlement. It was held that this was doing business in the state. The service, however, was on a director, resident in New York, but the inference from the opinion is plain that, had service been had on a representative sent with authority only to adjust the loss, the service would have been good, and that such a representative would be a "managing agent." Some of the language used by Mr. Justice Peckham, delivering the opinion, is pertinent to the facts now under consideration. He says, in substance, that when a fire insurance company sends a representative to another state to adjust a loss, it is doing business in that state, as much so as if its agents were there making contracts to carry such risks, and that it would be difficult to describe why the defendant was there if it was not engaged in doing business. So likewise in the present case.

Connecticut Mutual Life Insurance Co. v. Spratley, supra, is of the same character. Bearing on the question, and representing conflicting views of two District Judges, we cite the following: St. Louis Wire Mill Co. v. Consolidated Barb Wire Co. (C. C.) 32 Fed. 802; New

Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.) 130 Fed. 605.

[3] We are of the opinion that making a contract for sale of goods in another state is not doing business in the latter state. An isolated or single sale of goods in another state, or even occasional repetitions of such sales, would not be doing business within that state. The cases cited by counsel for plaintiff, as well as the others herein reviewed support this conclusion.

[4, 5] This, however, is a different question from that here presented. It is true, we are dealing only with a single contract or sale; but the terms thereof required the foreign corporation to come into the state with its agents and employés and perform certain acts—in other words, to do business. After arriving in the state, and while performing its contract of installation, it was not engaged in an act of interstate commerce. During the time it is thus performing these necessary acts, it is entitled to police protection and to the privileges of a citizen of the state of Ohio. In this instance the time necessary to complete the contract may be short, and the amount of business to be done may not be very great. In other cases, to which the same rule must apply, the foreign corporation might remain in the state months, and even years, performing its contract. Is it not during that time doing business, within the meaning of laws authorizing foreign corporations coming into a state and doing business there to be sued; and is it not true that the person in charge of such business is its "managing agent" with respect thereto, upon whom summons may be served? In our opinion, under such conditions, which are the facts of this case, a foreign corporation is doing business in the state, and the person in charge and chiefly representing it becomes a "managing agent" for the purpose of being served with process.

The tendency of legislation and of judicial decisions is and has been to make it easy to obtain jurisdiction of foreign corporations. As was said by Mr. Justice Gray in Barrow Steamship Co. v. Kane, 170 U. S. 100, 106, 18 Sup. Ct. 526, 528 (42 L. Ed. 964):

"The constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

Mr. Justice Peckham, in Lumbermen's Fire Ins. Co. v. Meyer, supra (197 U. S. 418, 25 Sup. Ct. 483, 49 L. Ed. 810), indulges in strong language against the hardship and unwisdom of requiring a citizen of one state to follow a foreign corporation to another state to seek redress in a cause of action arising in the state of which he is a citizen. Moreover, as was said by Judge Severens in the case cited, supra, if the language of section 11290 of the General Code is to be restricted to a general manager, the utility of the statute would be very much limited.

An order may be entered, overruling the motion to quash summons, and giving defendant 10 days within which to answer. An exception may be noted to this ruling.

ROUSH v. BALTIMORE & O. R. CO.

(District Court, N. D. Ohio, E. D. May 19, 1917.)

No. 9472.

COMMERCE ⊜27(5)—INTERSTATE COMMERCE—EMPLOYERS' LIABILITY.

An employé of an interstate railway company, engaged in operating a pumping station furnishing water indiscriminately and contemporaneously to locomotives engaged in interstate and intrastate commerce, is within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), as the test is whether the employé at the time of the accident was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof.

At Law. Action by Floyd Roush against the Baltimore & Ohio Railroad Company. On motion to remand. Motion granted.

Payer, Winch, Rogers & Minshall, of Cleveland, Ohio, for plaintiff.
Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This action was removed to this court from the court of common pleas, Cuyahoga county, on the ground of diversity of citizenship, and plaintiff now moves to remand on the ground that the cause of action stated in the petition is one arising under the federal Employers' Liability Act, relating to injuries sustained by employés of interstate carriers while engaged in interstate commerce, and therefore not removable under section 6 of the amendment to said act approved April 5, 1910 (36 Stat. 291, c. 143, § 1 [Comp. St. 1916, § 8662]).

From the petition it appears that the defendant was operating a system of steam railroads running through Cuyahoga county, Summit county, and Wayne county, Ohio, and other counties and states of the United States; that one of its lines runs from the city of Pittsburg to the city of Chicago, through Warwick, in Summit and Wayne counties; that in connection with the line of railroad defendant owns and operates engines, cars, roundhouses, workshops and water tanks, and particularly a certain water tank, reservoir, and pumphouse near said village of Warwick, on said line of railroad; that said water tank, reservoir, and pumphouse was for the purpose of supplying water to its locomotives, operating on said line, and other purposes pertaining to the business of a common carrier engaged in interstate commerce; and that the defendant was at all times mentioned engaged in the business of interstate commerce, and plaintiff was likewise employed and engaged at the time he sustained the injuries described and complained of. The petition gives a description of this pumphouse, showing its use in furnishing and supplying water for locomotives, and then states that it became necessary for the plaintiff, in the performance of his duties, to ascertain the depth of water in a cistern (which was a part of the pumping station), and that, on removing the hatch of said cistern, and while attempting to make an inspection of the state of the water therein, he was injured by an explosion of gas, which had accumulated in the cistern.

The foregoing are all the allegations tending to show that the defendant was engaged in interstate business, and that plaintiff was, at the time he received his injuries, aiding or participating in an act of interstate commerce. If, upon these facts, the plaintiff was engaged or participating in the interstate business of the defendant, the motion to remand should be granted. If, on the other hand, it was not properly interstate business, then the removal on the ground of diversity of citizenship was proper, and the motion should be denied.

The solution of this inquiry depends on whether or not an employé engaged in operating a pumping station, which furnishes water to be used indiscriminately and contemporaneously for interstate and intrastate business, is within the federal Employers' Liability Act. The test is whether the plaintiff, at the time of the accident, was engaged in interstate transportation, or in work so closely related thereto as to be practically a part thereof. The several state courts of last resort, and the federal courts inferior to the United States Supreme Court, have differed widely in similar cases, and authority may be found supporting either side of the question. In view of this conflict, I rest my decision upon what I believe to be the rule practically settled by the decisions of the Supreme Court of the United States. Those most nearly in point are the following: Walsh v. New York, etc., R. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Pedersen v. Delaware, etc., R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; St. Louis, etc., Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; Illinois Central R. R. Co. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Delaware, etc., R. R. Co. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397; Shanks v. Delaware, etc., R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797; Chicago, etc., R. R. Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941; Minneapolis, etc., R. R. Co. v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358.

In my opinion, the Pedersen Case is controlling. In it the injured employé was an iron worker employed by an interstate employer in the reconstruction, or alteration and repair, of railway bridges. He was engaged in carrying from a tool car to one of these bridges some bolts or rivets, which were to be used that night or early the next morning in repairing a bridge. The repairs consisted in taking out an existing girder and inserting a new one. This bridge was being regularly used in both interstate and intrastate commerce. It was held that he was within the terms of the act; in other words, that his work was so closely related to interstate transportation as to be practically a part thereof. Mr. Justice Van Devanter, delivering the opinion, says:

"Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference, so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and

efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But, independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined, regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See McCall v. California, 136 U. S. 104, 109, 111 [10 Sup. Ct. 881, 34 L. Ed. 392]; Second Employers' Liability Cases, 223 U. S. 1 [32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44]; Zikos v. Oregon R. & Navigation Co. [C. C.] 179 Fed. 893, 897, 898; Central R. Co. of N. J. v. Colasurdo, 192 Fed. 901 [113 C. C. A. 379]; Darr v. Baltimore & O. R. Co. [D. C.] 197 Fed. 665; Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1 [117 C. C. A. 237]. Of course we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce. The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task, which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

Three justices dissented, but the case has frequently been referred to since by the same court with approval, and, although the scope to which its doctrine has been extended both before and since by state and federal tribunals, is not justified, as will appear from later United States Supreme Court decisions, to which reference will be made, the exact principle thus established is now well settled law. Roberts, in his excellent work entitled Injuries to Interstate Employés on Railroads, states the rule in section 27, thus established, as follows:

"Although an employé is at the time engaged in intrastate commerce as well as interstate commerce, as, for instance, an employé on a train hauling both kinds of commerce, or a carpenter repairing a bridge over which both kinds of commerce are carried, yet, if injured under such circumstances, he cannot take his choice of remedy under the state and federal law, for the courts hold that he is then engaged in interstate commerce, and the remedy given by the national act is exclusive."

In section 30 the same rule is restated and discussed at length as now being the established law. In section 40 is reviewed the cases in which it is held that employés assisting in the original construction of tracks, tunnels, bridges, engines or cars, which have never been used as instrumentalities of interstate commerce, are not employed in interstate com-

merce, within the meaning of the act. An examination of these cases will make clear the distinction between such employés, who are not engaged in interstate commerce, but are engaged in original construction, and employés who are held to be so engaged when employed in repairing, renewing, or inspecting instrumentalities which have been devoted to interstate commerce.

In sections 46 and 47, Roberts gives a list of cases adjudged prior to the decision by the United States Supreme Court of the Pedersen Case and others above cited, which he correctly says were decided wrong because in conflict with it. One or two of the later United States Supreme Court cases indicate that the doctrine of the Pedersen Case does not go as far as Mr. Roberts asserts, nor as far as some of the later or earlier cases of other tribunals have extended it.

I am of opinion that the present case is within the rule of the Pedersen Case. The pumping station was an instrumentality being used indiscriminately for interstate and intrastate commerce. The work being performed by the plaintiff was so closely related to interstate transportation as to be practically a part of it. He was not engaged in original or independent work too remotely connected with interstate transportation to be said not to be practically a part thereof. It is true, his work also was necessary in carrying on intrastate transportation; but when the efforts of the employé at the time he was injured may relate to either class of transportation, then he is within the Act, and his right of action is controlled by it. The later United States Supreme Court cases, upon which counsel rely as limiting the Pedersen Case, do not, in my opinion, have that effect.

The Yurkonis Case, supra, is one in which the employé was engaged in mining coal at a mine owned by the interstate carrier, and the coal, after it was mined, was to be used by the employer in its business as a common carrier in interstate commerce. It was held that the fact that the coal, after it was mined and transported, was thus to be used, did not make the operation of the mine or the work of the employé therein interstate commerce. Manifestly this is not inconsistent with the holding in Pedersen and other cases of like nature.

In the Shanks Case, supra, the employé was engaged, when injured, solely in taking down and putting up in a new location a heavy shop fixture in a machine shop of the interstate carrier, in which shop locomotives used in interstate transportation were from time to time repaired and rebuilt. These facts, it was held, did not make the employé's work so closely related to interstate transportation as to be practically a part of it. Applying the test, it was said that the injured employé was not employed, when injured, in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation, and that the connection between his work of removing a shop fixture and interstate transportation was too remote to permit the deduction that he was then engaged in interstate commerce, or in work so closely related to it as to be practically a part of it. This case cites the Pedersen Case with approval, and supports, it seems to me, the rule therein established.

In Railroad Co. v. Harrington, supra, the employé, when injured, was engaged in moving coal from storage tracks in a terminal yard to

coal chutes, where it might thereafter be used indiscriminately in intrastate and interstate service. This was held to be independent work, not closely enough related to interstate transportation as to be practically a part of it.

In Railroad Co. v. Winters, supra, the employé, when injured, was making repairs upon an engine which had been used in the hauling of freight trains which carried both intrastate and interstate commerce. Mr. Justice Holmes, delivering the opinion, says:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine, as such, is not permanently devoted to any kind of traffic, and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."

There is no inconsistency between these statements and those made in the Pedersen Case. On the contrary, they point to the correct distinction. The engine on which the repairs were being made was then idle, and not engaged in either intrastate or interstate transportation. If, like the pumping station, in the operation of which the plaintiff here was injured, the engine had then been permanently devoted to interstate commerce; or was in use in interstate transportation and coincidently in intrastate transportation, a different result would follow from the reasoning of Mr. Justice Holmes.

The motion to remand is granted. An exception may be noted on behalf of defendant.

In re RADCLIFFE.

(District Court, N. D. Ohio, E. D. May 5, 1917.)

No. 6092.

1. BANKRUPTCY ⊂⊃400(1)—CLAIM OF EXEMPTIONS—AMENDMENT.

An Ohio bankrupt, who owned a real estate homestead incumbered to an amount in excess of its value, set forth such fact in his schedules, and also claimed a homestead $1,000 in such real estate in accordance with the provision of Gen. Code Ohio, § 11730; below such claim was a claim for $500 for bankrupt's family, in accordance with section 11737. Subsequently, upon leave given, the bankrupt filed an amended claim of exemption, asserting his claim for an allowance of $500 out of the personalty under section 11738, alleging that he owned no real estate, other than the homestead, from which the exemption provided by section 11737 could be paid. *Held*, that in such case it was proper to allow the bankrupt to amend his schedules, so as to claim the exemption given by section 11738; it being obvious that the bankrupt by claim under section 11730 did not intend to waive his rights to an exemption out of the personalty, and that the first reference to section 11737, which relates only to payments from real estate owned by the bankrupt other than his homestead, was a misprision.

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

2. BANKRUPTCY ⇐396(5)—EXEMPTIONS—HOMESTEAD.
A bankrupt who owned a homestead which was incumbered to an amount in excess of its value, owned no other land. The homestead was surrendered to the mortgagees instead of being sold by the trustee. General Code Ohio, §§ 11730, 11737, provide exemptions out of the real property of insolvents, while section 11738 makes a provision for alternative exemptions out of the personal property. *Held*, that the bankrupt, who was a resident of Ohio, was entitled to exemption under section 11738; the mere fact that he owned land which was incumbered for more than its value not barring his rights.

In Bankruptcy. In the matter of the bankruptcy of D. W. Radcliffe. Proceeding to review referee's order denying the bankrupt's claim of exemption. Order reversed, with instructions.

Harry E. Hammar and George C. Von Beseler, both of Painesville, Ohio, for bankrupt.

B. C. Shepherd, of Painesville, Ohio, for trustee.

WESTENHAVER, District Judge. The bankrupt's reviewing petition in the above matter seeks to reverse the judgment of the referee, refusing and disallowing his claim of $500 exemption from personal estate in lieu of homestead. The referee's finding of facts is not excepted to. The material parts thereof will be briefly stated:

On September 19, 1916, the bankrupt filed his petition in voluntary bankruptcy, and on the 20th of September was adjudicated a voluntary bankrupt. At the time of the filing of the petition, the bankrupt was the owner in his own right and was then in possession of a parcel of real estate, set out in the schedules, consisting of a house and lot in Painesville, Ohio. At the time of the adjudication, and for a long time prior thereto, he was and had been a resident of Ohio, was a married man and supported a family, and this real estate was then and prior thereto had been used by him and his family as a homestead. The bankrupt in his schedules fixed the value of this real estate at $4,000; the appraisers appraised it at the sum of $3,500; it was at and prior to the adjudication subject to mortgages in excess of the sum of $4,000, each and all of which mortgages and notes secured thereby had been executed by the wife of the bankrupt. This real estate was, after hearing and on order of the referee, surrendered to the mortgagees, instead of being sold by the trustee.

The bankrupt was also the owner of certain personal property, a part situated in the Cleveland Trust Company building, which was appraised at $3,000, and was subject to valid liens in the sum of $1,550, and the other part situated in the Utopia building, which was appraised at $2,000, and was subject to a valid lien thereon of $1,531.19. As found by the referee, he had no other real or personal property out of which the $500 claim of exemption in lieu of homestead could be allowed or paid.

The bankrupt in his schedules, as already noted, correctly listed his real estate homestead, gave its value at $4,000, and the mortgage liens thereon at a sum in excess of $4,000. The surrender to the mortgagees was made only because the real estate was worth less than the

mortgages. The bankrupt in schedule B (5) claimed a homestead of $1,000 in this real estate, "in accordance with the provisions of section 11730, General Code of Ohio," and below this claim is the following: "Five hundred dollars provided for bankrupt's family in accordance with provisions of section 11737, General Code of Ohio." Later, on October 23, 1916, upon leave given, the bankrupt filed an amended claim of exemption, in which, after stating his right to claim a homestead exemption, and that the homestead owned by him was subject to liens in an amount which prevented his getting the exemption from that source, and that he owned no other real estate from which, under section 11737, the $500 exemption could be paid, he makes his claim for an allowance of $500 under section 11738, General Code of Ohio, to be paid out of the equity in the two items of personal property above described, or, rather that there shall be set apart to him by the trustee the sum of $500 out of his equity in this described personal property.

The personal property has been sold after a finding by the referee that it was to the best interest of the estate to sell the same in bulk. The referee, as his conclusion of law from the foregoing facts, was of the opinion that the bankrupt was already the owner of a homestead in the mortgaged property, and for that reason denied his claim of exemption. The question now to be considered is the correctness of this conclusion.

[1] In argument no question was raised as to the propriety of permitting the amended claim of exemption to be filed. The amendment was proper. It is evident that the bankrupt did not intend to waive his homestead exemption, or, if it could not be allowed under section 11730, General Code of Ohio, to waive his right to the $500 allowed in lieu thereof from other property. It is true, his claim of $500 is made under section 11737, General Code of Ohio, which provides only for the payment thereof from real estate owned by the bankrupt, other than his homestead; but the bankrupt did not own any other real estate, as his schedules show, and manifestly, therefore, the insertion of "section 11737," instead of "section 11738," was an inadvertence, or clerical error, and not an intentional waiver of his right. The practice of permitting amendments has been approved, and is settled law in this jurisdiction. In re Berman (D. C.) 140 Fed. 761; In re Cora A. Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. R. 586.

[2] I am of opinion that the referee's conclusion is erroneous, and that the bankrupt should be allowed the $500 exemption. It is illogical, to say the least, to assert that the bankrupt has a homestead when it is covered by valid mortgages in excess of its value. It is a perversion of the facts to say that he has received the protection of the humane provisions of the homestead exemption law, when the trustee in bankruptcy declines to burden the estate with the expense of converting that homestead into money, but surrenders the same to the mortgagees. The adjudication dates back to the filing of the petition, and for all practical purposes this real estate, or the equity of the bankrupt therein, became as much the property of the trustee from that date as did any other property owned by the bankrupt. It is therefore incorrect to say that at the time the bankrupt made his claim he

was the actual owner of a homestead. The surrender thereof to the mortgagees is a substitute merely for a sale and distribution by the trustee, and serves no other purpose, except to save the mortgagees and the bankrupt estate from expense.

Admittedly the bankrupt is entitled to this homestead exemption, unless when his right thereto is to be determined he was then the actual owner of another homestead; he is within the description and entitled to the benefit of section 11738; he cannot obtain his homestead exemption under either section 11730 or section 11737. This allowance is not made for the bankrupt's protection alone, but is also a provision for the benefit of wife and children during the critical period of readjustment following insolvency and bankruptcy of the head of the family. The policy of the courts in dealing both with the law and the facts has always been liberal in favor of granting the full benefit of this protection.

In our opinion, the authorities relied on by the referee, and cited by counsel, do not sustain his conclusion. They are as follows: Dwinell v. Edwards, 23 Ohio St. 603; Bartram v. McCracken, 41 Ohio St. 377; Biddinger et al. v. Pratt, 50 Ohio St. 719, 35 N. E. 795; Matter of Cora A. Crum (D. C.) 221 Fed. 729, 34 Am. Bankr. R. 586.

In Dwinell v. Edwards, supra, the only point decided is that, when the home occupied by the family as a homestead is owned either by the husband or the wife, neither can hold as exempt from execution the personal property exemption allowed in lieu of a homestead.

In Bartram v. McCracken, supra, an execution was levied upon the personal property of the head of a family, who at that time owned and was living in a homestead incumbered by a mortgage duly made by the debtor and his wife in a sum greater than its value. No suit to foreclose the mortgage was pending, and no bankruptcy or insolvency administration of the debtor's property had been begun or was in progress. In this situation it was held that the personal property exemption in lieu of a homestead could not be allowed, for the reason that the Legislature did not intend to impose upon the sheriff the duty of ascertaining the existence and validity of and the amount due on incumbrances upon the realty of the execution debtor. No just criticism can be made of this ruling, but its doctrine cannot properly be stretched to cover the situation now under review. A substantial difference in fact and in law exists between the situation of a head of a family occupying an incumbered homestead with creditors, quiescent, and that of the head of a family all of whose real and personal property has been seized and is being administered by the court.

In Biddinger et al. v. Pratt, supra, the only point held is that the owner of a life estate in lands occupied by him as a family residence, who has conveyed his interest to a creditor with an agreement for a reconveyance upon payment of the debt, is still the owner of a homestead, and is not entitled to the personal property exemption provided in lieu thereof. Manifestly this conveyance is only a mortgage, and the amount even of the debt thus secured is not stated in the report of the case.

In the Matter of Cora A. Crum, supra, no principle is announced justifying the citation of it as an authority in support of the referee's

conclusion. As regards the homestead exemption, the point involved was the right of a wife to claim a homestead after another similar claim and allowance had been made to her husband, practically contemporaneously with her claim.

The following cases seem to me more nearly in point, and to support the conclusion to which we have come: Niehaus v. Faul, 43 Ohio St. 64, 1 N. E. 87; Fry v. Smith, 61 Ohio St. 276, 55 N. E. 826; Carter v. Ross, 8 Ohio Cir. Ct. 139; In re Buckingham (D. C.) 102 Fed. 972; In re Assignment of Kraus, 79 Ohio St. 314, 87 N. E. 176. A review of these cases we deem unnecessary. In brief, they hold, among other things, that the right to the exemption must be determined as on the facts existing when the allowance is to be made. In some of them the claim was made months, and even years, after the administration of the insolvent estate had begun. In some it is held that the right to the allowance is to be determined on the facts of the situation as existing when the funds are to be distributed. The liberal construction of the law, and the liberal application of it alluded to by me herein, is fully recognized and sanctioned by them.

The order of the referee denying the $500 exemption in lieu of homestead is therefore reversed, with instructions to allow it from the property referred to. An exception on behalf of the trustee may be noted.

THE JOHN TWOHY.

(District Court, E. D. Pennsylvania. June 12, 1917.)

No. 10 of 1916.

1. SHIPPING ⟸116—LIABILITY OF VESSEL—SHORTAGE IN DELIVERY—EVIDENCE.
   Bills of lading are strong prima facie evidence of the weights given therein, and the burden of showing an inaccuracy in case of a short delivery rests on the carrier; but the presumption may be met by clear and convincing proof that all the goods taken on board were delivered.

2. SHIPPING ⟸132(3)—LIABILITY FOR DAMAGE TO CARGO—BURDEN OF PROOF.
   The burden of proof to show that damage to cargo from sea water was due to perils of the sea, within the exception of the bill of lading, rests on the vessel.

3. ADMIRALTY ⟸124—COSTS—RECOVERY ON ONE OF TWO CLAIMS.
   A libelant, who sues on two claims and recovers on only one, is nevertheless entitled to recover costs, where both were prima facie good, so that the burden of proof rested on the respondent, and both were contested.

In Admiralty. Suit by T. M. Duche & Sons, Limited, against the schooner John Twohy. Decree for libelant on one cause of action, and for respondent on one.

Harrington, Bigham & Englar, of New York City, and Conlen, Brinton & Acker, of Philadelphia, Pa., for libelant.

Howard M. Long, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The respondent schooner was chartered to carry a cargo of bones from Buenos Aires to this port. The

charter party contained the usual provisions as to the condition of the vessel. The freight earnings were based upon cargo tonnage. A dispute arose over the amount. This was adjusted by an agreement upon the deduction to be made from the outturn weight because of the wet condition of a part of the cargo and a settlement made for the net outturn weight thus determined. With this dispute the court has nothing to do. The consignees then filed a libel against the vessel, based upon the double claim of a failure to deliver part of the cargo loaded upon the vessel and the damaged condition of part of the cargo which was delivered. The intake, as evidenced by the statements of the bill of lading, contrasted with the actual weight of the outtake, shows on its face a net shortage of 149,069 pounds. The money sum claimed for short delivery is $1,613.14. The money claim for damaged cargo is $932.24, based upon a net weight of 327,102 pounds of damaged bones, the loss of which is figured at $5.70 per ton of 2,000 pounds. The damage was due to salt water, and the damage claim is based upon the averred unseaworthiness of the vessel.

The defense is a denial of any shortage in the cargo in fact, and this in turn is based upon a further denial of the correctness of the intake weights. The damage to the cargo is attributed to a hazard of the sea, the consequences of which are excepted by the charter party. The entrance of sea water is averred to have been due to the openings of the seams of the vessel following strains to which she was subjected in the tempestuous weather which she encountered. The bearing points of the controversy are thus seen to be two questions of fact. One is of the tonnage of the cargo, which in fact was put aboard the vessel. The other is whether the leaks were due to the condition of the vessel, or were due to heavy weather conditions, which would have caused a vessel of the stipulated seaworthiness to have sprung leaks to such an extent as to have caused the damage which was done. This latter fact question resolves itself into an inquiry into the character of the weather encountered on the voyage.

[1] The case for the plaintiff upon the first question consists wholly of the evidence of the quantity of bone taken on board which is supplied by the receipt given by the master of the vessel therefor. This evidence is not only prima facie, but may be characterized as strong prima facie, evidence. There are several persuasive reasons for so holding. One is what may be termed a reason of convenience, based upon the policy of the law to promote regularity and facilitate the transaction of business. Such evidence is further persuasive, because it is in the nature of a confessing admission, and such a paper has all the force of a self-disserving declaration by a party selfishly concerned not to make the admission unless the declaration speaks the truth. Moreover, the act of Congress, for the purpose of promoting the policy of the law spoken of, commands the courts to hold such documents to "be prima facie evidence of the receipt of merchandise therein described." There is no reason, and no command, however, to regard such evidence as other than strong prima facie evidence, resulting in putting upon the carrier the burden of proving the true state of the facts. The libelants in this case may in fairness be taken to have been

the weighmasters at the taking in and turning out ends of the voyage. If the master of the vessel delivers all the cargo which was taken on board, the only inference to be drawn from a discrepancy in the weights is that one or the other is incorrect. We make such fact finding in favor of the vessel. The testimony is direct and positive, and there is no reason to suspect that all the bones put on board this vessel were not delivered to the consignee. There is not even a suggestion or insinuation otherwise. The libel as to this part of its claim is in consequence dismissed.

[2] A like burden to prove exculpating facts is placed upon the vessel in its effort to relieve itself of the consequences of a portion of the cargo being damaged. The limitation of liability in the charter party is no broader than that incorporated in the act of Congress. The fact to be found in a case such as the instant one is an inference fact. Knowing the cargo, and the course and conditions of the voyage to be reasonably anticipated, is the damage which the cargo suffered one which would have been sustained, if the vessel had been up to the standard of seaworthiness, or is it one which would have resulted, notwithstanding the seaworthiness of the vessel? The respondent schooner is a wooden vessel. All wooden vessels leak, and the proper standard of seaworthiness is not affected by this fact. None the less, if such vessels are in proper condition, they will carry, and that without damage, cargoes such as that with which we are concerned on such a voyage as that which we are investigating. Heavy weather and seas subject sailing vessels to severe strains, which may result in their taking in water without this fact in any degree bearing testimony to their unseaworthiness. The springing of a leak, however, under some circumstances and other conditions of weather, might very strongly evidence and point directly to the conclusion of unseaworthiness. The facts in any particular case are to be found from all the evidence, and in this case the finding is in favor of the libelant, and against the respondent.

[3] The foregoing conclusions lead to a decree sustaining the libel as filed for the sum of $932.24, with an additional allowance for interest, and a further allowance to the libelant for its costs. The libelants having made an unsupported claim, might ordinarily be restricted to the claim of actual damages. The principle upon which such a ruling proceeds is not, however, applicable in the present case for two reasons. The libelants having a prima facie claim, which has been disallowed for the shortage were within their rights in asserting such claim, and as a defense was interposed to that part of their claim which has been allowed, all the expense of a trial hearing has been necessarily incurred. No evidence was introduced to show that the respondents offered the libelants any other redress for the loss of that to which they are found to be entitled or that they had other recourse than to that of filing and proceeding with their libel to a ruling thereon.

The foregoing discussion resolves itself into the finding of two facts: (1) There was no shortage in fact in the tonnage of the cargo as received and discharged by the vessel. (2) A part of the cargo as discharged was damaged, and this damage was done the cargo during the voyage and was due to the unseaworthiness of the vessel; she not be-

ing in the required and warranted condition of being staunch, tight, and seaworthy. The money measure of this damage is $932.24.

The earnestness with which the respective views of counsel were pressed at the argument calls for a further statement fortifying the conclusions already reached. A supporting authority to sustain the measure of the evidentiary value given to the bill of lading is found in the case of James v. Standard Oil (D. C.) 189 Fed. 719, appeal ruling 191 Fed. 827, 112 C. C. A. 341. It is true that the legal effect of the bill of lading being in evidence is to impose upon the master the burden of making satisfactorily clear the correct weight of the cargo taken aboard and discharged by the vessel. It is not, however, an accurate statement to aver, as was positively asserted at the argument, that "there was no evidence to contradict" either the bill of lading weights or the outturn weight figures. The evidence is clear and convincing that all of the cargo which was put aboard the vessel was received by the consignees. If this be the fact, it is persuasive of the existence of an error in one or the other of the stated weights, or of something occurring during the voyage affecting the weight of the cargo. It is frankly conceded that the cargo was not diminished through any human agency. It is admitted to be the fact that such a cargo under ordinary conditions will weigh less when discharged than when taken aboard. Such a discrepancy is looked for, but it would not be expected in a cargo of this size to exceed from 65,000 to 80,000 pounds, while the shortage as figured was substantially twice that. One of the experiences of the voyage affecting the weight of the cargo was that a part of the cargo was wet. The portion thus affected was in the outturn weight figured at 389,407 pounds. The weight of the water was likewise figured at 62,305 pounds. Deducting this added weight of water from the gross outturn weights gives a net outturn of 2,521,276 pounds, which deducted from the weight stated in the bill of lading of 2,670,345 pounds gives the estimated shortage of 149,069 pounds. It is thus seen that if the comparison is made between the gross outturn weights and the bill of lading weights, and allowance is made for the expected reduction in weight, the shortage entirely disappears.

It is argued, however, that it is entirely proper to allow for the added weight of water in the wet part of the cargo, because this weight is known to be there, and it is not proper to allow for the ordinary reduction in weight, because this reduction is due to the bones drying out, and that they did not in fact dry out under the conditions of this voyage, and because of this no lightening of weights should be assumed, and the discrepancy thereby becomes a real shortage. The significance of the fact that the cargo was undisturbed from the time it was shipped to the time it was discharged, it is further argued, is destroyed by the added fact that the vessel leaked, and because of this the fine bone and soluble constituents of the bone was dissolved and pumped out with the water through the scuppers. This brings to the front a rather nice distinction. The libel voices two grounds of complaint. The one is a shortage in delivery. The other is damage to the cargo through its becoming wet, owing to the unseaworthiness of the vessel. It is, of course, true that cargo taken aboard the

vessel and pumped overboard is as much cargo undelivered as if it had been pitched overboard or otherwise destroyed. At the same time the part of the cargo which had been dissolved by the action of the salt water and thus lost to the shipper would be included in any claim for damage made because of the cargo having become wet. It is therefore important to keep clear the distinction between a shortage in the cargo as such and a loss in bulk or weight of the cargo due to the damage from salt water, lest the two claims be permitted to overlap, and in this way there be a double allowance of the damage claim.

There only remains, therefore, to determine whether the shortage in weight is due in whole or in part to the sifting of the fine bone in the undamaged part of the cargo into the wet portion, thereby reducing the otherwise undamaged part of the cargo both in bulk and weight, or whether the difference between the intake weights and outturn weights is due to inaccuracy in one or both. We have positive and convincing evidence of the correctness of the outturn weights. The intake weights, however, are known to us only through and by the bill of lading. This evidence, though acceptable as legal evidence, and though, as already stated, fully in legal effect prima facie justifying a finding of its accuracy, is nevertheless the kind of evidence whose force must yield to other evidence found to be persuasive of facts inconsistent with and contradictory of the accuracy of the weights given in the bill of lading. If these weights were inaccurate, the discrepancy is accounted for, without troubling ourselves to find any other explanation of the shortage. Some light is thrown upon what is the real fact by the circumstance that a part of the bone was put in bags, and the bags were counted and the number stated. When the cargo was discharged, the bags were again counted, and there was found, not only the difference in weight already mentioned, but a difference in the count of the bags. There is a suggestion in the evidence, as bearing upon this discrepancy in the count, that some of the bags might have bursted, or in fact some of them did burst, and the contents get among the loose bone; but this evidence was neither sufficiently definite, nor did it point to a sufficient number of broken bags to account for the difference between the number stated in the bill of lading to have been taken aboard and the count of the number of bags discharged. It being an admitted fact in the case that all the cargo which was taken aboard had been kept under hatches, battened down and undisturbed until the cargo was discharged and the accuracy of the outturn weights and the outturn count of bags not being questioned, the conclusion cannot be escaped that the intake weights and count of bags as set forth in the bill of lading was inaccurate, and we have been unable to reach any conclusion of the extent to which it is inaccurate, other than that measured by the difference between the intake weights and the outturn weights, and the measure of the latter corrected by the analysis of the discharged cargo showing the extent to which the weight had been increased by the presence of water and decreased by the loss of the soluble constituents of the bone. Inasmuch as the latter, as already stated, has been

figured into the damage loss, it cannot again be allowed for as a delivery shortage. For this and other reasons we have reached the conclusion, already stated, that a finding of fact in favor of the respondent upon the shortage in delivery claim is the proper finding to be made.

Respecting the defense of hazards of the sea to the claim made for damages, there is occasion to add little to what is set forth in the finding already made. Such a defense carries with it essentially the thought of vis major. Seaworthiness, as fitness, is necessarily a relative term. So, likewise, are expressions descriptive of weather conditions and of sea. The respondent schooner, when she undertook this carriage, was a reclaimed wreck. This fact has a more or less important bearing upon the probabilities of the real cause of the damage to this cargo. We have not found in the evidence any suggestion even of the thought that, had this vessel been really seaworthy, she would nevertheless, under the stress of weather to which she was subjected, have taken in water to the extent to which she did take it in on this voyage. The only finding which the evidence justifies would be that of the two facts that she did encounter weather which might fairly be characterized as heavy and that she did leak so as to have at times five feet of water in her hold. The important fact is in the finding of whether she leaked not because of her unseaworthy condition, but because of the stress of weather and sea to which she was subjected, or, in other words, did she spring a leak in spite of the fact that she was seaworthy? Hazards of the sea may cause any vessel to spring a leak, but vessels sometimes are in a condition in which they will leak, and, of course, they will leak under conditions of strain due to heavy weather. The difference is to some extent expressed between the two phrases, one that a leaky vessel encountered heavy weather, and the other that a vessel sprang a leak during and because of the heavy weather which she encountered.

The decree to be entered in accordance with the findings made is sufficiently indicated, and a formal decree embodying the findings herein made may be submitted.

THE H. & S. NO. 3.

(District Court, W. D. Washington, N. D. February 20, 1917.)

No. 3394.

1. MARITIME LIENS ⊂=4—LOSS OF CARGO—UNSEAWORTHINESS—EFFECT OF DEMISE.

Claimant demised a scow for 24 months at a monthly rental, the charter party requiring the charterer to protect claimant against any claim arising from maritime accidents, stranding, or collision. Libelant, having contracted to transport a quantity of cement, engaged the charterer to carry a load without knowledge that it was not the owner of the scow. On the way to the port of loading the scow struck an obstruction and was injured, but proceeded and after some repairs loaded and started on its voyage. Owing solely to its unseaworthy condition, caused

by its injury, it stranded and sank, with total loss of its cargo, for which libelant paid the owner. *Held*, that while libelant, as between it and the owner of the cement, was the carrier, as between it and the charterer of the scow it was the shipper, and entitled to a lien on the scow for loss of the cargo through unseaworthiness at the commencement of the voyage, and that such right was not affected by the provisions of the charter party, of which it had no knowledge or notice of facts to put it on inquiry.

2. TOWAGE ⊜9—LIEN FOR TOWAGE SERVICE—WASHINGTON STATUTE.

Intervener furnished towage for the scow under contract with the charterer, both before its stranding and on that trip. Rem. & Bal. Code Wash. § 1187, gives a lien for towage on vessel and cargo. *Held* that, under such statute and the general rule in admiralty, intervener was entitled to a lien on the scow, of equal rank with libelants', for the towage on the trip, when she stranded without his fault, and to a decree for the amount previously earned against the charterer.

In Admiralty. Suit by the Chesley Tug & Barge Company and the Corsby Towboat Company against the scow H. & S. No. 3, the Harper Barge & Lighterage Company, claimant, and C. A. Bailey, with N. M. Nelson intervening libelant. Decree for libelants and intervener.

William H. Gorham, of Seattle, Wash, for libelants.
Jones & Riddell, of Seattle, Wash., for intervener.
C. H. Hanford, of Seattle, Wash., for claimant.

NETERER, District Judge. [1] On the 25th day of January, 1916, the claimant, sole owner of scow H. & S. No. 3, for a cash consideration of $2,400, payable monthly at the rate of $100 per month, chartered the scow to the Bailey Transportation Company of Seattle. It was provided in the charter party agreement that certain improvements should be made upon the scow by the lessee at its expense, and it was further provided that the lessee should save the claimant, owner, "harmless from any and all claims resulting from maritime accidents, collisions, stranding, or damage by the scow to other vessels, and in the event of loss of said scow, the party of the second part [lessee] agrees to pay the party of the first part [owner] the sum of $3,000." Pursuant to this agreement the scow was delivered to the Bailey Transportation Company. Thereafter, in May, 1916, Kaiser, intervening libelant, owner of 3,500 tons of cement located at Bellingham, Wash., contracted with libelant to transport by water from Bellingham to Ebbey Slough, Snohomish county, this cement, for which he agreed to pay 65 cents per ton. In June following libelant contracted with Bailey Transportation Company for the transportation of 380 tons of Kaiser's cement. Bailey, for the Bailey Transportation Company, left Seattle with a scow belonging to the claimant, but demised to Bailey, for Bellingham, and while en route, unknown to libelant, the scow struck a pile or stick of timber and was rendered unseaworthy. Upon arriving at Bellingham, Bailey undertook to remedy the damage done to the scow, and made some repairs, and then loaded upon the scow 380 tons of cement and proceeded to Ebbey Slough, and while en route, by reason of the unseaworthy condition of the scow, it filled and stranded, and the cement became a total loss. After the cement was loaded on the scow at Bellingham, there was no stress of weather or peril of

navigation which contributed to the scow's unseaworthiness or to the loss of the cement. Libelant rendered service in salving and towing the scow from the place of stranding to Seattle, of the reasonable value of $700. After the stranding, Kaiser, in his books, charged libelant with the value of the cement lost. Libelant made no corresponding credit on its books. Thereafter libelant advanced to Kaiser the sum of $1,800 on account of the loss, which Kaiser on his books credited to libelant. Libelant transported the remaining portion of the cement pursuant to its contract, and since the loss of the 380 tons of cement has earned $2,473, which amount Kaiser has credited on his books to libelant, and has not paid libelant the same. The scow was damaged by stranding to the extent of $200. Intervening libelant, Nelson, has a claim against the scow for towage rendered prior to stranding, and on voyage when stranded, in a balance of $307.15. The amount due for towage on the particular trip when the scow stranded was $75. The value of the cement lost was $3,960.

Upon the facts thus established libelant contends that it is subrogated to the rights of Kaiser, the owner of the cement, in the sum of $1,800 advanced, and the further sum of $2,160, balance of $3,960, the value of the cargo lost. Nelson, intervening libelant, contends that he is entitled to a lien on the scow for the full amount of the unpaid towage charge for services rendered in towing the damaged scow; this being a lien which is given him under the laws of Washington. Rem. & Bal. Code, § 1187. This contention the libelant refutes, asserting that the statutes of a state cannot override the general maritime law, and that the lien for wages earned prior to collision is inferior to the lien for damages caused by the collision. The Evolution (D. C.) 199 Fed. 514. The claimant contends that, the demise of the vessel being made with the condition that the owner of the scow shall be held harmless from all claims by reason of collisions, etc., any arrangement made by the libelant with the demisee was made subject to this condition, and that the scow could not be held for any damage which might be occasioned to the shipper, and further contends that, the libelant having assumed responsibility for the damage and having settled the same with Kaiser, and having paid $1,800 on account in cash, and the balance being paid by freight earned, it has no standing in court and was not subrogated to any rights which Kaiser might have had, and further that the Bailey Transportation Company was acting merely as agent for the libelant and the libelant itself was the principal, and the scow being seaworthy at the time it was delivered in Seattle, no claim can be asserted in any event.

I think an analysis of the relations of the parties would, without dispute, show that, as between libelant and Kaiser, libelant was the shipper and Bailey the carrier; that Bailey, as the carrier for libelant, and the scow, are charged with all the carrier's liability as completely as libelant is charged as a carrier for Kaiser; that the Bailey Transportation Company was owner pro hac vice, and that the scow would be holden for damage to the cargo; and that, while libelant is liable to Kaiser for the negligence of Bailey and the unseaworthiness of the scow, by the same token Bailey and the scow are liable to libel-

ant for the negligence of Bailey and the unseaworthiness of the scow. There being no stipulation to the contrary, the libelant had a right to rely on the scow being seaworthy. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. The proof is further beyond dispute that the unseaworthy condition of the scow at Bellingham was at all times unknown to libelant until subsequent to the stranding. It is alleged, and the proofs establish, that the cement was delivered at Bellingham June 26th in good condition on board the scow for transportation; that at the time of the delivery the scow was not seaworthy. The implied warranty as to its seaworthiness as between Bailey and libelant was thus violated, and, while the scow left Seattle to obtain this cargo at Bellingham, it cannot be successfully contended that any relation to the trip could attach to the libelant until the delivery of the cement at Bellingham. While it is true that the libelant agreed to furnish a complete cargo, it was not in any sense a demise of the scow. The relation of the libelant, therefore, was not that of owner pro hac vice, but rather that of a shipper, and was entitled to the guaranties which the law affords in such relations. The Bailey Transportation Company hired the scow, employed all of the help, bore all of the expenses, and became, therefore, the owner pro hac vice. The New York (D. C.) 93 Fed. 495. The libelant, being ignorant of the provisions of the charter party, and no circumstances being presented which would place it upon its inquiry, I think, had a right to rely on the uniform rule that the vessel and the cargo are reciprocally bound to each other. The Maggie Hammond, 9 Wallace, 76 U. S. 435, 19 L. Ed. 772. And, being thus bound, the scow became liable to the cargo for any damage, and the cargo to the scow for any obligations of transportation. Nor does the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [Comp. St. 1916, §§ .8029–8035]) afford any relief to the claimant, the scow being bound to the cargo and the casualty being occasioned by unseaworthiness. The Carib Prince, supra; The Sylvia, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. And this applies, even though the vessel is engaged in domestic trade. Knott v. Botany Worsted Mills, 179 U. S. 69, 21 Sup. Ct. 30, 45 L. Ed. 90.

In the absence of notice or occasion of facts which should put the shipper upon inquiry, the claimant must be held to assume the risks of navigation by holding out his vessel to the world as liable to those with whom she is brought into relations. Hughes, Admiralty, page 342. Claimant, in its brief, states:

"The libelants are principal contractors and directly responsible to the shipper for safe carriage of the cargo; to him they owe a duty to provide a seaworthy vessel; to him they warrant the seaworthiness of the carrying vessel. To the shipper a right of action accrued against the libelants for loss of his cargo. The lien upon the scow was a security for the due performance by the libelants of their contract to carry the cargo safely to its destination or render compensation for its loss in transit. Satisfaction of that obligation by the party obligated exhausted the cause of action necessary to support the lien and exhausted the incidental security; that is to say, the lien."

I think this may be answered by saying that the libelant occupied a dual relation—to the Bailey Transportation Company, as shipper; to Kaiser, as carrier. As between libelant and the Bailey Transportation

Company it had a lien upon the scow for safely carrying the cargo to its destination and to render compensation for its loss in transit. This liability between libelant, as shipper, and the Bailey Transportation Company, as carrier, is not changed by the fact that Kaiser may have sustained the relation of shipper to libelant. This is sustained by sound reason, and I find no authority to the contrary, and I think is fairly sustained by precedent. The New York, supra; The Presque Isle (D. C.) 140 Fed. 202; Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349. The assumption of liability on the part of libelant to Kaiser did not discharge the liability of the Bailey Transportation Company and the scow to the libelant; nor was it necessary to secure an assignment of the cause of action and right of lien by Kaiser to libelant, conceding for the moment that the right of lien could be assigned, as the relation which the scow and the Bailey Transportation Company, carriers bear to the libelant, obviates such necessity; the liability and right of lien being inherent and vesting in libelant, as shipper, under the general rules of admiralty. The suggestion of the relation of principal and surety, as between the scow and libelant, to Kaiser, is not apparent. The doctrine of subrogation, therefore, as contended for by claimant, has no application. No fault can be found with German Bank v. United States, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; but the principle therein enunciated is not applicable to the facts in this case. Nor do I think the disclosed facts show that the holding of The Frances J. O'Hara (D. C.) 229 Fed. 312, The Kate, 164 U. S. 459, 17 Sup. Ct. 135, 41 L. Ed. 512, and The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, aids claimant.

[2] The cargo being lost without any fault on the part of the intervener, Nelson, and his charge for towing being made a lien by the Washington statute and under the general rule in admiralty, he should not be deprived of the rights thus given without any fault upon his part. The cargo and the vessel were both liable to the services which he performed on the trip, and the casualty being occasioned without any fault on his part should not relegate him to an inferior right. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, while not supporting this contention, made the towage claim inferior solely on the ground that the damage was occasioned by reason of negligent towage.

I think a decree should be entered in favor of Nelson, intervener, for $75 and costs, and the sum established as a lien against the scow, the amount being for towing on the particular trip in issue, and for $232.15 against the respondent Bailey, as the Bailey Transportation Company, and in favor of the libelant for $3,960, the value of the cargo, and $500 salvage charge, the salvage charge above this amount being waived, and these sums established as a lien against the scow, and that the libelant should have a judgment in personam against Bailey, as the Bailey Transportation Company, for any difference remaining after applying the proceeds of the sale of the scow to the satisfaction of the amount due, and that libelant is also entitled to receive from Kaiser $410, the difference between $4,370, the amount of transportation charges earned, and $3,960, the value of the cargo.

UNITED STATES v. COWELL et al.

(District Court, D. Oregon. July 16, 1917.)

No. 7308.

1. MONOPOLIES ⟸31—CRIMINAL PROSECUTIONS—INDICTMENT.
An indictment for combining and engaging in a monopoly in restraint of interstate trade and commerce need not set out any overt act, as the combination or contract in any form in restraint of trade constitutes the offense under the statute, and it is only essential to charge the combination or contract.

2. INDICTMENT AND INFORMATION ⟸87(6)—MONOPOLIES—TIME OF COMMISSION OF OFFENSE.
An indictment for combining and engaging in a monopoly in restraint of interstate commerce sufficiently alleges the time of the offense by alleging that the parties were engaged in the unlawful combination or contract between specified dates, as the offense is a continuing one and the parties are transgressing the statute while engaged in the operation of the design or in carrying it into effect.

3. MONOPOLIES ⟸29—CRIMINAL OFFENSES.
All contracts or acts which are theoretically attempts to monopolize, and which in practice have come to be considered as in restraint of trade in a broad sense, are an offense under the statute against monopolies; but contracts not unduly restraining commerce are not prohibited, the standard of reason being the measure used for the purpose of determining whether the particular act is prohibited by the statute.

4. INDICTMENT AND INFORMATION ⟸110(20)—LANGUAGE OF STATUTE—MONOPOLIES.
An indictment for combining and engaging in a monopoly in restraint of interstate trade and commerce must give particulars, and not rely simply on the words of the statute.

5. MONOPOLIES ⟸31—PROSECUTIONS—INDICTMENT.
An indictment alleged that various corporations or companies located in Northern and Southern California, Oregon, and Washington were manufacturing cement for the general trade and engaged in interstate commerce; that they were represented by certain officers and managers, who promoted and carried on the business; that such officers and managers knowingly, by concerted action, carried on the business of such concerns without competition as to the price of their cement, and by the same concerted action prevented the Southern California company from selling or consigning cement for sale in Washington or Oregon, the Northern California companies from selling or consigning for sale in Washington, the Washington company from doing the same in Oregon or California, and the Oregon company as to Washington and California, and had prevented the Northern California and Oregon companies from selling in Oregon otherwise than upon arbitrary and noncompetitive prices fixed and agreed upon in advance; and that by reason thereof consumers had been compelled to pay arbitrary prices greatly in excess of the price at which they would have secured such cement, but for the combination. *Held*, that the indictment was sufficient, as it would enable defendants to prepare their defense and to defeat any subsequent prosecution for the same offense, and enable the court to determine that a combination existed, that defendants were engaged therein, and that the restraint of trade was undue or unreasonable.

6. INDICTMENT AND INFORMATION ⟸87(2)—ALLEGATIONS AS TO VENUE.
The objection that no venue was laid in such indictment was without merit.

S. H. Cowell and others were indicted for offenses. On demurrer to the indictment. Demurrer overruled.

Clarence L. Reames, U. S. Atty., and Barnett H. Goldstein, Asst. U. S. Atty., both of Portland, Or., for the United States.

Fredrick Bausman, of Seattle, Wash., and Veazie, McCourt & Veazie, of Portland, Or., for defendants Eden, Sutherland, Coats, Baillie, and W. P. Cameron.

Teal, Minor & Winfree, of Portland, Or., for defendants Butchart and Moore.

WOLVERTON, District Judge. The indictment herein charges that the defendants, during the period between August 1, 1914, and the finding of the indictment, knowingly and unlawfully engaged in a combination in restraint of trade and commerce among the several states, and by a second count that during the same time they engaged in a monopoly in like restraint of trade. The defendants are officers in some capacity, in control to a greater or less extent, of certain corporations and companies engaged in the manufacture of cement, and in the traffic and sale of the products in states other than where manufactured, as well as in their own states. The companies are classified as the Northern California companies, the Southern California company, the Washington companies, and the Oregon company.

A demurrer has been interposed to the indictment, by which three questions are presented, namely: That defendants are not advised of the time, place, or circumstances upon which the government relies for conviction; that the offense with which it is sought to charge the defendants is not so stated as to afford them, after conviction or acquittal, protection against a second indictment for the same offense; and that the court is not able to determine from the indictment whether a combination existed, or any of defendants engaged therein, or whether the restraint referred to was undue or unreasonable.

[1] First, as it relates to the time charged as to when the offense was committed: The parties were engaged from August 1, 1914, until the finding of the indictment, and by nature the act was continuing in its operation. In a case under this statute, it is unnecessary to set out any overt act. Simply the combination or contract in any form in restraint of trade between the states or with foreign nations constitutes the offense, and it is only essential to charge the combination or contract. Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; United States v. Rintelen (D. C.) 233 Fed. 793.

[2] The combination is not a thing of the instant the minds of the agreeing parties have come to a completed understanding, either expressed or implied. The purpose thereof is an essential element as well, and this may contemplate that its operation shall extend over a period of time. While the parties are engaged in the operation of the design, or in carrying the same into effect, they are transgressing the statute, they are still agreeing to the unlawful offense, and still cohering in the thing that the law condemns. Thus the offense becomes a continuing one, and it is only necessary to allege that the parties were engaged in the unlawful combination or contract between specified dates. By

such allegation, the offenders are apprised of the time of their transgression. United States v. MacAndrews & Forbes Co. (C. C.) 149 Fed. 823.

[3] The next question involves the nature of the offense. This has been settled by the Supreme Court. The statute has been construed to be very broad, and not only this, but very comprehensive. It comprises, says the court in Standard Oil Co. v. United States, 221 U. S. 1,.59, 31 Sup. Ct. 502, 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734:

"All contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense." And, further, it evinces "the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." And "it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

[4] There has since been no digression from this holding, and it is unnecessary to cite the succeeding authorities. Of course, I realize and recognize the authority of United States v. Cruikshank et al., 92 U. S. 542, 23 L. Ed. 588. It is essential in a case like this to descend to particulars, and not to rely simply on the words of the statute in pleading. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

[5] Turning to the indictment, we find various corporations or companies, located in different states, manufacturing Portland cement for the general trade, and engaged in interstate commerce. The companies are represented by certain officers and managers, who promote and carry on their business, being the defendants under indictment. These persons have knowingly, by concerted action, carried on the business of the several concerns named, without competition as to prices in the several states in which they are engaged in the manufacture of their cement, and by the same concerted action have prevented the Southern California company from selling or consigning for sale in either Washington or Oregon, and the Northern California companies from selling or consigning for sale in Washington, the Washington companies from doing the same as it respects Oregon and California, and the Oregon company as to Washington and California, and have prevented the Northern California and Oregon companies from selling or consigning for sale in Oregon otherwise than upon arbitrary and noncompetitive prices, fixed and agreed upon in advance; and it is further stated that, by reason thereof, consumers have been compelled to pay for such cement arbitrary prices greatly in excess of prices at which they would have secured such cement if it were not for the combination.

This, to my mind, states quite clearly the scheme and purpose of the combination. It descends to particulars, and no one need be misled into preparing his defense for something other than as alleged against him. The court knows what the charge is, without the liability of mis-

conception or mistake, and the defendants need not fear that another prosecution can follow after trial upon this indictment.

Apply the standard of reason, which counsel insist that we shall, and then inquire further whether there is an undue restraint of trade or commerce. The indictment does allege that, by reason of these things, the defendants were engaged in undue and unreasonable restraint of trade. We may put this to one side as a conclusion. There is sufficient alleged, however, from which to deduce this very conclusion. The concert of action which implies a combination for marketing their cement in particular locations, and the direct agreement between them for fixing arbitrary and noncompetitive prices for the sale of cement in Oregon, is sufficient to stamp their demeanor as in restraint of interstate trade and commerce. Such a combination is without the elements or indicia of a wholesome agreement, and cannot be so characterized. The following cases are illustrative: Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

The third objection is answered by the foregoing. The same reasoning applies to the objections to the second count.

[6] The objection that no venue is laid is without merit.

Demurrer overruled

TAYLOR v. FRAM et al.

(District Court, E. D. New York. June 18, 1917.)

1. BAILMENT ⊂=21—SENDING GOODS ON CONSIGNMENT—RIGHTS OF THIRD PERSONS.

Where goods are sent to a dealer under a consignment, if title is to be reserved in the consignor, the goods should be so marked or identified, or of such a character as not to deceive innocent parties dealing with the consignee upon the strength of his having such goods as a part of his ordinary stock.

2. BANKRUPTCY ⊂=140(3)—RIGHTS AS TO PROPERTY SENT BANKRUPT ON CONSIGNMENT.

Where goods are sent a dealer on consignment, and title is reserved, goods which can be identified, and as to which passing of title has not occurred, remain the property of the consignor as between him and the consignee, and the creditors and trustee in bankruptcy of the consignee have no better title than the consignee.

3. BANKRUPTCY ⊂=140(3)—RIGHTS AS TO PROPERTY SENT BANKRUPT ON CONSIGNMENT.

Where a bankrupt was furnished by defendants, a wholesale firm, consisting of his brother and brothers-in-law, with goods on consignment, to be sold at not less than the invoice price and accounted for weekly, but the goods were billed as if purchased, and not marked so as to indicate to the public that they belonged to defendants, and to defendants' knowledge the bankrupt handled the goods as if purchased from any jobber, and did not comply with the contract as to accounting for the proceeds, defendants *held* not entitled to goods retaken by them shortly before bankruptcy as against the trustee, because the facts showed fraud in the original contract, and because defendants had so acted as to estop them-

selves from claiming the goods, and because such a breach in the contract as to indicate that the consignee was not carrying out the contract of agency had been condoned.

4. BANKRUPTCY ⊂=287(3)—SUITS BY TRUSTEE—FORM.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 545, as amended by Act June 25, 1910, c. 412, § 2, 36 Stat. 838 (Comp. St. 1916, § 9586), provides that courts of bankruptcy shall have jurisdiction to cause the estates of bankrupts to be collected, reduced to money, and distributed, and to determine controversies in relation thereto. Section 23b, as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1916, § 9607), provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, except suits for the recovery of property under certain sections. *Held* that, where a trustee filed a complaint in the form of a bill in equity to have a consignment agreement under which the defendant furnished the bankrupt goods held fraudulent and void, and to declare the defendants trustees for goods returned to them shortly before bankruptcy, and to have defendants directed to deliver the goods or their value to the trustee, an objection to the form of the suit could not be sustained, though it was not necessary to set aside the consignment agreement, and an action at law to recover a preferential payment was the real purpose of the action, since the action amounted to no more than the exercise of the equitable jurisdiction given the bankruptcy court to recover assets of the estate, especially in view of Act March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, §§ 1251a–1251c), providing that, when a suit at law should have been brought in equity or a suit in equity at law, the court shall order any necessary amendment, and that any party shall have the right at any stage of the action to amend so as to obviate the objection that the suit was not brought on the right side of the court.

Suit by Louis M. Taylor, as trustee in bankruptcy of Charles Epstein, bankrupt, against Isidor Fram and others. Decree for plaintiff.

Samuel J. Rawak, of New York City, for plaintiff.
L. & M. Blumberg, of Brooklyn, for defendants.

CHATFIELD, District Judge. The bankrupt ran a shoe store near the wholesale store of a firm in which his brother was a partner. Being in debt to this firm, he made a contract like that approved in Ludvigh v. Am. Woolen Co., 231 U. S. 522, 34 Sup. Ct. 161, 58 L. Ed. 345, under which he was to receive goods on consignment, sell them at not less than invoice price, and account weekly for those sold. The goods which he ordered were billed as if purchased. His stock gradually increased, and he did not sell or did not account for all the goods which had been delivered to him. A month before bankruptcy he gave a statement, in which he included all these goods in his stock, which he valued at $1,500, and in which he said nothing about consigned goods. At about the same time the defendants refused to let the bankrupt have any more goods, and began an investigation which resulted in an examination of his stock a day or two before he went to the defendants' attorneys and made an assignment under the state law for the benefit of his creditors. On the morning upon which this assignment was made, by defendants' orders, he put into cases and shipped by a moving van, to a store in Manhattan then in the possession of the defendants, goods

which were checked up by a clerk of the defendants, to the value at cost price of $429.73. The bankrupt is also shown by the testimony to have placed a cash register in this van, but there is no evidence that it was ever received by the defendants, and its whereabouts have not been proven.

It appears that, when the agreement to receive goods on consignment was made, the bankrupt owed the defendants the sum of $331.30, and also $100 to the wife of one of the defendants. When the defendants delivered the last item of goods, on the 13th of November, 1915, he had received an additional amount of $1,432.76, and had been credited, in money and merchandise, with the sum of $968.80, which included the sum of $100 repaid for the loan above mentioned. The books show that, when the so-called consignment agreement was made, no change was made in the method of entering items in the ledger, but the account was carried along until the 1st of September, 1916, when a different person seems to have begun making the entries. The old totals were then stricken out, and the account balanced in red ink, in the new handwriting, as of the date of the consignment agreement. No change, however, in the general style of bookkeeping, was made and the defendants continued to credit returns and payments to the general account, without any attempt to keep track, in the ledger, of any particular consignment, or the return of the merchandise included therein. The figures of the books show $431.30 due upon May 25, 1915, and an additional amount of $1,432.76 due November 13, 1915, making a total of $1,864.06. The credits by merchandise and money amounted to $968.80 up to December 11, 1915, and $429.73 in merchandise returned on the morning upon which the assignment was made, total $1,398.53, of which $100 went to the repayment of the loan.

The bankrupt testifies that he never made a return showing what consigned goods he had sold or how much of the consignment he still had on hand. He also testifies that he did not return the cost price for all the sales made, and the figures show that his total indebtedness increased from May to December, by the sum of $134.23. The defendants never demanded from the bankrupt a statement of what he had on hand or of what he had sold. One defendant was the bankrupt's brother and the other two are his brothers-in-law. They made no attempt to collect the previous indebtedness, and evidently had knowledge of his financial condition when he made the assignment. Their own counsel acted as his attorney in so doing. The $100 repaid on the previous loan was credited to the account for consigned goods, and when the shoes from the stock were returned to the defendants they totaled substantially one-third of all the goods delivered to the bankrupt between May and December; but the defendants had never questioned him, nor obtained a statement from him as to the so-called consigned goods which remained in his hands until it was evident that he was insolvent.

[1] It appears that the goods received from the defendants were marked, either by their clerk or by the bankrupt himself, with letters showing the cost price to him and by the initials in ink, "B. S. M.," the initials of the Boston Shoe Market, under which name the defend-

ants did business. The shoes in the bankrupt's stock came from various manufacturers, and were still in the boxes of those manufacturers, but were in no way labeled so that those dealing with the bankrupt could learn, upon ordinary inquiry or inspection, that they were the stock of the Boston Shoe Market. If goods were sent to a dealer under a consignment, and if title is to be reserved in the consignor, the goods should be so marked or identified, or of such character that they would not deceive innocent parties dealing with the consignee upon the strength of his having these goods as a part of his ordinary stock.

[2] As between the bankrupt and the consignor, all goods which can be identified, and as to which passing of title had not occurred, would still be property of the consignor. The creditors of the bankrupt and the trustee in bankruptcy would get no better title than the bankrupt himself. The decision of Ludvigh v. Am. Woolen Co., supra, is to the effect that the bankrupt cannot defeat a claim of title, even by fraudulent acts on his own part with respect to the consigned goods, unless the consignor has so acted with respect to the goods as to enable the bankrupt to hold them out to persons dealing with the bankrupt and using proper care in so doing, and which persons were injuriously affected through those acts and conditions which the consignors might have reasonably expected would follow from their own methods in putting out the goods or in dealing with the bankrupt. In the present case, the balance of the stock was estimated by a dealer at $543.21. It was sold at auction for $299.84, and appraised at approximately the same amount.

Taking the bankrupt's own figures in his statement to creditors, the trustee has charged that the defendants removed at least $1,000 worth of goods; but the testimony is clear to the extent of showing that the wholesale price of the goods returned to the defendants was $429.73. As these goods were taken back by them at that valuation, their market value to the defendants was evidently that much. If an execution had been levied against the bankrupt, and the goods returned to the defendants had been seized under the execution, the bankrupt would have had no title, and the levying creditor would succeed only to his rights. If solvent, the defendants would have been able to compel the sheriff to leave in the hands of the bankrupt those goods which they could show had come from them and were held by the bankrupt under the consignment agreement. But if the bankrupt were insolvent, and if the sheriff had levied upon these goods, the alleged consignors could not obtain the goods, if it could be shown that they had been guilty of an act which would indicate the passing of title, or the assumption of the relation of creditor and debtor, between the alleged consignor and the bankrupt.

[3] The bankrupt in the present case did not advertise himself as an agent, nor have any sign to show that he was selling goods on consignment, and the exact way in which he was doing business was known to all three of the defendants. He had nothing in his store, and the goods sent by the defendants to him had no marks in any way to indicate that they were the Boston Shoe Market's stock, beyond the identification letters, which would not inform other parties that the shoes had not been purchased in the ordinary way. They were aware that the bank-

rupt was thus holding out these goods to those dealing with him as if purchased from any jobber, instead of obtained from them as consignor reserving title. No conditional bill of sale was made or filed, and the relation of debtor and creditor would be indicated from everything concerned with the transaction, even including the memoranda of sales which went with the goods and which were nothing more than bills. The defendants must have known when they examined the books, and certainly in September, when the change was made in the method of keeping books, that the bankrupt was not reporting to them weekly, and that he was already breaking his agreement to hold the goods as agent for the defendants. Such a contract must be lived up to strictly. If variations therefrom are sufficient to indicate a breach or deviation from the terms of the contract, and possible deception or fraudulent dealing with third parties, by the one who is evading or failing to comply with the terms of the contract, then certainly those creditors who have been deceived or misled can claim estoppel, and the trustee in bankruptcy, although standing in the shoes of the bankrupt, can attack the so-called consignment agreement, and can take advantage of the rights of those creditors who, if they had themselves levied execution, would be able to enforce the estoppel just referred to. A transaction which is in form and effect, so far as the public is concerned, a sale, but which the apparent vendor alleges to be, not a sale, but a bailment, will be treated and considered as passing title to the goods in question to the bankrupt: (1) If fraud is shown in the original contract of agency; (2) if the parties to the contract have so acted as to estop themselves from denying the legal effect of acts which they are seeking to explain, and which tend to accomplish what would cause a fraudulent result; (3) where there has been a breach in the contract sufficient to indicate that the consignee was not carrying out the contract of agency, and where the consignor has then so acted upon the breach as to show, with respect to future consignments, that title passed in the transactions and that they were sales, instead of bailments.

The present case comes within all three of these categories. There is sufficient evidence to indicate the lack of good faith in the making of the original contract, inasmuch as the methods under which the contract was to be carried out would almost certainly insure fraudulent results to the public, and the previous dealings of the bankrupt with the defendants did not indicate any intent on his part to honestly act as an agent. He immediately began that course which was to have been expected. He failed to live up to his contract of agency, and throughout acted as a purchaser of those goods which were sent to him as if sold. The existence of the paper agreement was not sufficient to rebut the evidence furnished by the acts of the parties themselves. The defendants are plainly estopped from denying the consequences of their acts to those who were misled by the bankrupt through the course pursued by the defendants. The greater part of the transactions shown were also after evident failure of the bankrupt to live up to his contract, and would thus fall within the last class of acts above referred to, viz., those in which the elements of a sale were present because of the failure to carry out the agreement to act as agent.

For all the reasons, therefore, the plaintiff should recover from the defendants the market value which has been shown of the goods which evidently were received by the defendants after the assignment and when the defendants knew that the bankrupt was in financial difficulties.

[4] The complaint is in the form of a bill in equity to have the consignment agreement held fraudulent and void and to declare the defendants trustees for the merchandise received by them. The plaintiff asked that they be directed to deliver it or its value to him as trustee in bankruptcy. It became evident upon the trial that the defendants were creditors and that their taking of the goods, under the circumstances, was in that sense a preferential transfer. The case of Dean v. Davis, 37 Sup. Ct. 130, decided in the Supreme Court of the United States upon the 8th day of January, 1917, holds that a preferential payment to a creditor may be found void for fraud and for an attempt at concealment of assets of the bankrupt. The present case is similar to this, in that there was no need of a bill in equity to declare the consignment agreement void and for an accounting. An action at law to recover a preferential payment, or to obtain the value of goods secured by fraud, was the real purpose of the action. A summary proceeding would have accomplished the result, unless the defendants objected to the jurisdiction of the court, upon making a claim of title.

But an action in the form of a bill in equity cannot be objected to if it amounts to no more than the exercise of that equitable jurisdiction which is given to the bankruptcy court for the recovery of assets belonging to the bankrupt estate or for the administration of property in the hands of the court, as a part of the estate. The present action is thus brought in a form which, under section 2, subd. 7, and section 23, subd. b, as amended, of the bankruptcy statute, is within the jurisdiction of this court. No objection to jurisdiction has been made, and no question was raised as to the form of the action until the close of the case, when the defendants sought to show a variance in the proof, and thus to object to the jurisdiction of the court over that cause of action which is for the recovery of a sum of money only, which now is asked by the plaintiff. As a matter of fact the accounting prayed for has actually been had during the course of the trial. A decree directing the payment of the sum of money referred to would be possible as a part of strictly equitable relief, and the action has involved the setting aside and declaring void the written instrument which would have been urged as a defense if an action for recovery of the money only had been instituted. Act March 3, 1915, c. 90, 38 Statutes at Large, p. 956 (Comp. St. 1916, §§ 1251a–1251c), substantially disposes of the objection, however, and the relief, to the extent of directing payment by the defendants of the sum of $429.73, will be directed.

UNITED STATES v. D'ARCY et al.

(District Court, D. Rhode Island. October 19, 1916.)

No. 135.

1. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment charging a conspiracy to commit an offense need not set forth the offense which is the object of the conspiracy with the same strictness as in an indictment for a substantive offense.

2. CONSPIRACY ⟸43(6)—INDICTMENT—EXCEPTIONS.
An indictment charging a conspiracy to commit an offense denounced by Harrison Act Dec. 17, 1914, c. 1, 38 Stat. 785 (Comp. St. 1916, §§ 6287g–6287q), relating to narcotic drugs, need not negative exceptions found in the statute defining the offense which was the object of the conspiracy.

3. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment charging conspiracy to commit offenses against the United States defined by Harrison Act Dec. 17, 1914, which alleged a conspiracy to obtain by means of order forms drugs for purposes other than for use, sale, or distribution, in conduct of lawful business, etc., is not bad for indefiniteness.

4. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment, alleging a conspiracy to violate Harrison Act Dec. 17, 1914, which after alleging overt acts charged that defendants at the times and places aforesaid conspired to commit an offense and do the several acts mentioned in connection with their names to effect the object of their conspiracy, sufficiently avers the place of the commission of the overt acts, and the indictment taken as a whole must be interpreted as charging their commission within the jurisdiction of the court entertaining the prosecution.

At Law. John S. D'Arcy and others were indicted for conspiracy to commit offenses against the United States defined by the Harrison Act of December 17, 1914. On demurrers to 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 for conspiracy to commit offenses against the United States defined by the Harrison Act of December 17, 1914, 38 Stats. p. 785, which relates to opium, etc.

[1] It should be observed that the gist of the offense charged is conspiracy, and that in such cases it is not essential to set forth the offense which is the object of the conspiracy with the same certainty and strictness as in an indictment for the substantive offense. Williamson v. U. S., 207 U. S. 425, 447, 28 Sup. Ct. 163, 52 L. Ed. 278.

[2] It is urged that the specific object of the conspiracy as defined in the indictment may or may not be a crime. It is true that under section 2 of the Harrison Act there is a provision that the previous general language shall not apply in certain cases.

The first count which charges a conspiracy to commit an offense by the doing of certain acts apprises the defendants with reasonable certainty that they are not charged with doing these acts under such circumstances as fall within the paragraphs "a," "b," "c," and "d," which follow the words "nothing contained in this section shall apply." These are in the nature of exceptions, and it has been held that an indictment charging conspiracy to commit an offense need not negative exceptions found in the statute which defines the offense that is the object of the conspiracy. United States v. Stone (D. C.) 135 Fed. 392.

Assuming that there may be found in this somewhat confused statute various exceptions to the general definition of the offense, the count does not seem to me insufficient for not expressly excluding what is excluded in the exemptions or enumerations of instances where the act does not apply.

[3] The second count relates to a conspiracy to commit an offense against the United States, to wit, to obtain, by means of order forms issued by the Commissioner of Internal Revenue, certain drugs enumerated in the count, for purposes other than for the use, sale, and distribution thereof, in the conduct of a lawful business in said drugs, and for purposes other than the use, sale, and distribution of said drugs, in the legitimate practice of the professions of the said defendants.

In respect to this count, also, it is urged that there is indefiniteness and uncertainty; that, as the criminality consists in the wrongful object or purpose, the purpose should be set forth specifically, so that the court may know that it was an improper purpose.

I am of the opinion that this is not necessary, since the count charges that the conspiracy was to obtain the drugs for purposes other than those specified in the act.

[4] The third ground of demurrer is applicable to the overt acts in both counts. The only ground which seems to require special consideration is the objection that there is a want of allegation of the place of commission of any of the overt acts. While the particular paragraphs which set forth the overt acts contain no allegation of place, I am of the opinion that upon reading the indictment as a whole it sufficiently fixes the locus of the overt acts. The concluding paragraph of each count alleges that the defendants, "at the times and places * * * aforesaid," conspired to commit an offense, "and did do the several acts mentioned in connection with their several names to effect the object of said conspiracy," etc. Any deficiency in fixing a locus to the several overt acts is thus cured, and the indictment as a whole must be interpreted as charging their commission within the jurisdiction of this court.

The demurrers are overruled.

UNITED STATES v. BAKER et al.

(District Court, D. Rhode Island. July 26, 1917.)

No. 152.

1. CONSPIRACY ⟸23—OFFENSES—ELEMENTS.
Under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [Comp. St. 1916, § 10201]) § 37, declaring that if two or more persons conspire to commit an offense against the United States, and one or more of such parties does any act to effect the object of the conspiracy, each shall be punished, the offense consists of a conspiracy and the commission of an overt act to effect its object.

2. CONSPIRACY ⟸43(5)—INDICTMENT—SUFFICIENCY.
An indictment charged that defendants in anticipation of involuntary bankruptcy conspired to commit an offense against the United States by unlawfully concealing from the trustee in bankruptcy, to be thereafter appointed, certain merchandise, that the conspiracy extended from January 1, 1912, to December 20, 1913, that on July 7, 1913, an involuntary petition against defendants was filed, and that, after adjudication as bankrupts and the qualification of a trustee, defendants concealed property to carry out the object of the conspiracy. *Held*, that the indictment was not insufficient as failing to show the commission of an overt act within the period of the conspiracy; the period not being cut down by the averment that the conspiracy was in anticipation of involuntary bankruptcy, and it being alleged that the concealment was made with intent to effect the object of the conspiracy.

3. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment, charging that defendants, in anticipation of involuntary bankruptcy conspired to commit an offense against the United States by concealing from the trustee to be thereafter appointed certain merchandise, is not bad because not showing that the anticipation of involuntary bankruptcy had any basis; it being immaterial whether the anticipated bankruptcy was to be brought about through voluntary or involuntary proceedings.

4. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment, charging a conspiracy in anticipation of involuntary bankruptcy to commit an offense against the United States by unlawfully concealing from the trustee to be thereafter appointed certain merchandise, property, money, rights, and credits belonging to the estate in bankruptcy, alleged the concealment of certain specific property. *Held* that, while resort to the allegation of overt acts to enlarge the scope of the conspiracy is not permissible, and though ordinarily in a prosecution for a conspiracy to conceal assets the prosecution is not confined to proof of the overt acts charged in the indictment, yet the indictment will be construed as charging a conspiracy to conceal the property described in the allegations of the overt acts, and as so construed is sufficient.

5. CONSPIRACY ⟸23—OFFENSES—NATURE OF.
Under Cr. Code, § 37, declaring that if two or more conspire to commit an offense against the United States, and one commits an overt act in furtherance thereof, all shall be punished, a general scheme or conspiracy may be complete though its details are not planned.

6. CONSPIRACY ⟸43(6)—INDICTMENT—RESORT TO.
Resort to the allegations of overt acts in an indictment charging a conspiracy to commit an offense against the United States is not permissible to enlarge the scope of the conspiracy.

7. INDICTMENT AND INFORMATION ⟸73(1)—INCONSISTENCY—SUFFICIENCY.
An indictment charged a conspiracy in anticipation of bankruptcy to commit an offense against the United States by concealing from the trus-

tee in bankruptcy to be appointed property belonging to the estate in bankruptcy, and subsequently described the property as all being the property of, and owned and possessed by, the bankrupts. *Held* that the indictment was not bad for inconsistency between the allegations of ownership of the property, for the allegations related one to the period after, and the other to the period before, bankruptcy.

8. CONSPIRACY ⊜43(5)—OFFENSE—OVERT ACT.
Under Cr. Code, § 37, denouncing the offense of conspiracy to commit an offense against the United States, only one overt act is necessary, and, where one overt act is sufficiently charged in the indictment, it is good against demurrer, regardless of deficiencies in other charges of overt acts.

9. CRIMINAL LAW ⊜113—CONSPIRACY—OVERT ACTS.
It is not necessary in a prosecution under Cr. Code, § 37, for a conspiracy to commit an offense against the United States that the overt act should have been done in the same jurisdiction in which the conspiracy was entered into.

10. INDICTMENT AND INFORMATION ⊜86(1)—AVERMENTS—SUFFICIENCY.
The rules of both civil and criminal pleading require for the sake of certainty allegations of the place of every traversable fact; hence an indictment charging a conspiracy to commit an offense against the United States should allege the place of the commission of the overt act.

11. INDICTMENT AND INFORMATION ⊜86(2)—PLACE OF OFFENSE—SUFFICIENCY.
An indictment, charging a conspiracy in anticipation of involuntary bankruptcy to commit an offense against the United States by concealing assets from the trustee to be appointed, alleged generally, before specifically charging overt acts, that defendants at the several times and places hereinafter mentioned unlawfully did do the several acts mentioned in connection with their names. Charges of the overt acts were followed by a general allegation that defendants at the time and place mentioned aforesaid did conspire and each did do the acts to effect the object of the conspiracy. Another paragraph of the indictment in allegations applicable to charges of overt acts alleged that they occurred at a named place in the district where the bankruptcy occurred and the prosecution was instituted. *Held* that, while it is not essential to the offense that the overt act be done in the same jurisdiction with the conspiracy, nevertheless, the indictment was good as alleging with certainty the place of the overt act which was within the district where the prosecution was instituted.

12. CONSPIRACY ⊜43(5)—INDICTMENT—SUFFICIENCY.
An indictment, alleging a conspiracy, in anticipation of involuntary bankruptcy, to commit an offense against the United States by concealing assets from the trustee to be appointed, is defective in its allegations as to overt acts, where such allegations merely alleged the concealment, and not that defendants, the bankrupts, concealed property from the trustee.

At Law. Robert Baker and Sam Baker were indicted for conspiracy to commit an offense against the United States. On demurrer to the indictment. Demurrers overruled.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Barney, Lee & McCanna, of Providence, R. I., for defendants.

BROWN, District Judge. The indictment charges a conspiracy in anticipation of involuntary bankruptcy, to commit an offense against the United States, i. e., unlawfully, etc., to conceal from a trustee in bankruptcy to be thereafter appointed, certain merchandise, etc., belonging to the estate in bankruptcy of said defendants; and also charges certain acts as done to effect the object of the conspiracy.

The period of the conspiracy is set forth as from January 1, 1912, to December 20, 1913.

[1, 2] The first contention on demurrer is that in both counts this period is cut down by the phrase "in anticipation of involuntary bankruptcy," when read in connection with the subsequent allegation that on July 7, 1913, an involuntary petition was filed.

It is also contended that this applies to allegations of acts done subsequent to July 7, 1913, to effect the object of the conspiracy.

The indictment contains, on page 9, allegations of concealment after the adjudication and after the qualification of a trustee, with the intent and purpose of effecting and carrying out the object of the conspiracy.

Even were it conceded that the period of the conspiracy should be thus cut down by construction, this would not be sufficient to support a demurrer; for the allegations of acts done within the limited period to effect the object of the conspiracy are sufficient. But the indictment must be construed as a whole. The offense, under section 37 of the Criminal Code, comprises, in addition to a conspiracy, an act done to effect the object of the conspiracy. The act is evidence that the conspiracy has passed beyond words and is on foot when the act is done. Hyde v. U. S., 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. See, also, 225 U. S. page 384, dissenting opinion, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

The indictment alleges specifically a continuous conspiracy at all times during the period from January 1, 1912, to December 20, 1913. The allegations of acts done after the filing of the petition and within this period are accompanied by specific allegations of intent and purpose to carry out the object of the conspiracy; i. e., of a continuation of the conspiracy. Effect must be given to this as well as to the expression "in anticipation of," etc. Both expressions may be given effect without limiting the period fixed by the indictment, by construing the indictment to charge a conspiracy which extended through that period and which was for one part of that period in anticipation of bankruptcy, and for another part during the actual existence of the bankruptcy, which at the beginning of the conspiracy was merely anticipated. The decisions in U. S. v. Britton, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698, and Joplin Mercantile Co. v. U. S., 236 U. S. 531, 535, 536, 35 Sup. Ct. 291, 59 L. Ed. 705, that the overt act cannot be resorted to to enlarge the conspiracy, are not in point, since the indictment alleges a period broad enough to cover the time after adjudication.

[3] It is further contended that the alleged anticipation of involuntary bankruptcy is not shown to have any basis. I am of the opinion that this is not necessary, and also that it is wholly immaterial whether the anticipated bankruptcy was to be brought about through voluntary or involuntary proceedings. Roukous v. United States, 195 Fed. 353, 357, 115 C. C. A. 255.

[4-6] Objection is also made that the description of the property to be concealed is insufficient. It is true that the description of the property in the statement of the conspiracy is very general: "Certain

merchandise, property, moneys, rights and credits belonging to the estate in bankruptcy" of said defendants. So general a mode of pleading a description of property is questionable, and ordinarily requires justification by an allegation that a more particular description is to the grand jury unknown.

I am of the opinion, however, that the objection is not fatal to this indictment, charging a violation of section 37 of the Criminal Code, which involves the elements of a conspiracy to commit an offense and an act to effect the object of the conspiracy. A general scheme or conspiracy may be complete though its details are not planned. Dahl v. U. S., 234 Fed. 618, 148 C. C. A. 384; Lew Moy v. U. S., 237 Fed. 50, 150 C. C. A. 252.

While resort to the allegations of overt acts to enlarge the scope of the conspiracy is not permissible, there is no question here of enlarging the scope of the conspiracy. The objection is that the language descriptive of the property is too general, and thus the scope of the conspiracy too large and indefinite; and that a more specific description should be given to confine the charge and make it more definite.

The allegations of the second element of the offense, overt acts of concealment of specific property, are pursuant to the general charge of conspiracy, and give the defendants more specific and detailed descriptions of the property.

There seems to be no sufficient reason why the allegations of overt acts, which are parts of the statutory offense, may not be resorted to to restrict the generality of the description of property. At least, I can see no practical prejudice that can arise to these defendants from any lack of definiteness in the description of the property which it is charged they conspire to conceal, unless the government should seek to offer in evidence at the trial acts of concealment of property other than that described in the allegations of overt acts. In that event, a question might arise whether the defendants were sufficiently apprised by the indictment that they were charged with a conspiracy to conceal that property.

Though ordinarily the government in a case of conspiracy to conceal assets is not confined to proof of the overt acts charged in the indictment, but may offer in proof of conspiracy other acts done which show a common plan, yet where the conspiracy charged is merely to conceal "certain merchandise, property, money, and credits," there is, as counsel for the defendants contends, difficulty in determining whether this applies to any particular piece of property. This difficulty, however, may be obviated by construing the first count of the present indictment to charge a conspiracy to conceal the property specifically described in the allegations of overt acts.

[7] On demurrer to the second count it is urged that the allegations of ownership of the property are inconsistent. The count charges properly a conspiracy in anticipation of bankruptcy to conceal from a trustee in bankruptcy to be appointed, property belonging to the estate in bankruptcy. The property is described, and following there is allegation, "all being the property of and owned and possessed by

said bankrupts." But this cannot be construed to detract from the previous allegation. The count relates both to a period before and a period after bankruptcy, and the allegations of prospective "belonging to the estate in bankruptcy" are not inconsistent with the other if each is applied to its proper period of time.

[8] The ninth cause of demurrer to the second count is:

"That it does not appear in or by said count that any act to effect the object of the supposed conspiracy therein charged against said defendants was done by any party to said supposed conspiracy."

This goes to the whole count, and not to any particular allegation of an overt act.

Only one overt act is essential to the statutory offense, and if one overt act is sufficiently charged this ground of demurrer to the whole count cannot be sustained, whatever may be the deficiencies in other charges of overt acts. United States v. Orr (D. C.) 233 Fed. 717.

[9-11] It is contended that the allegations of overt acts are uncertain for want of sufficient allegation of place. The specific charges of overt acts are preceded by a general allegation that, to effect the object of the conspiracy, "said defendants, at the several times and places in that behalf hereinafter mentioned, unlawfully did do the several acts following, mentioned in connection with their several names." But only in a few instances is place "hereinafter mentioned" in connection with specific overt acts.

However, the charges of overt acts are followed by the general allegation that:

The defendants, "at the time and place * * * aforesaid, did conspire, etc., and each did do acts to effect the object of the conspiracy."

In United States v. D'Arcy et al. (Ind. 135), opinion October 19, 1916, 243 Fed. 739, it was held in this court that any deficiency in fixing a locus to the several overt acts was thus cured.

It is contended, however, that this decision is inapplicable to the present indictment. I am of the opinion that without grammatical impropriety the final allegation of time and place may be read to apply both to the conspiracy and to acts to effect its object, and that the decision in U. S. v. D'Arcy is applicable.

While it is not essential to the offense that the overt act be done in the same jurisdiction with the conspiracy, yet the general rules of both civil and criminal pleading require for the sake of certainty allegations of the place of every traversable fact. Gould on Pleading, c. 3, §§ 102, 103.

But aside from the concluding paragraph of the indictment, there is in the paragraph numbered 26 a general allegation of concealment "at, to wit, Woonsocket in said district," which covers all "the merchandise and property hereinbefore mentioned," and is applicable to the whole count, and not applicable to the first paragraph of No. 26.

Overt acts 23 and 24 allege filing of false schedules in this court. In these there is no uncertainty as to place.

The allegations of overt acts are criticized in many details, but these criticisms need not be fully considered, since the question before us is only whether an offense is charged.

[12] It may be said, however, that many of the paragraphs, as for example 2 to 8, inclusive, contain allegations that certain property "was thereafterward concealed" from the trustee, which are wholly ineffective, since it is not alleged that the concealment was by the defendants; and this is not cured by the introductory allegation, since these are not "acts mentioned in connection with their several names." The effect is to reduce these to allegations merely of the purchase of cattle; they are entirely ineffective as allegations of acts of concealment of cattle or of money.

This applies to some extent also to paragraphs 10 to 18, inclusive, which are reduced merely to allegations of the withdrawal from bank of sums of money with intent to conceal. There are also in other paragraphs similar ineffective allegations that property was concealed.

Paragraphs 9, 19, 20, 23, 24, 25, and the second paragraph et seq. of No. 6, contain sufficient allegations of overt acts to meet the general objection on demurrer; and the allegations of withdrawals of sums from bank may be sufficient allegations of overt acts irrespective of the insufficiency of the allegations of actual concealment of these sums.

Most of the points raised upon demurrer might easily have been obviated by more careful observance of the conventional and well-established rules of pleading, which close up loopholes that generally are productive of delay and not infrequently prove fatal on demurrer. In the present case, however, I am of the opinion that none of the many objections made is fatal to either count on the present demurrers.

Demurrers overruled.

UNITED STATES v. BAKER et al.

(District Court, D. Rhode Island. July 26, 1917.)

No. 153.

CONSPIRACY ⊜43(5)—INDICTMENT AND INFORMATION—SUFFICIENCY—TIME—VIDELICET.

An indictment alleged that defendants conspired to make a false account of their assets and liabilities and to file it with the referee in bankruptcy after defendants had been adjudicated bankrupts on a creditors' petition, and that defendants did file on September 20, 1913, a debtor's schedule which they knew to be false. The period of the conspiracy laid in the indictment was "on, to wit, the first day of January, 1913, and on divers days and times between said first day of January, * * * and the 20th day of September, A. D. 1913." *Held*, that the indictment was insufficient, showing no overt act within the period of conspiracy; the positive averment as to the dates not being affected by the videlicet, to wit, the office of a videlicet or scilicet being to particularize that which was general before.

At Law. Robert Baker and Sam Baker were indicted for conspiracy to commit an offense against the United States. On demurrer to the indictment. Demurrer sustained.

Harvey A. Baker, U. S. Atty., of Providence, R. I.

Barney, Lee & McCanna, of Providence, R. I., for defendants.

BROWN, District Judge. This demurrer raises the question whether the indictment sufficiently charges a conspiracy to commit an offense against the United States.

The conspiracy as alleged is:

"To make a false account of the amount of their assets and liabilities, and to file the same with Nathan W. Littlefield, referee in bankruptcy in the district of Rhode Island, after said Robert Baker, * * * and Sam Baker, * * * doing business under the firm name of Baker Brothers, in Woonsocket in said district, had been adjudged bankrupt on a creditors' petition filed against them."

It is alleged as an overt act that the defendants on, to wit, September 20, 1913—

"unlawfully, fraudulently, knowingly and feloniously did file with Nathan W. Littlefield, referee in bankruptcy, etc., a debtor's schedule, so called, * * * which said account said Robert Baker * * * and Sam Baker * * * knew well to be false."

The period of the conspiracy laid in the indictment is:

"On, to wit, the first day of January, A. D. 1913, and on divers days and times between said first day of January, A. D. 1913, and the twentieth day of September, A. D. 1913."

September 19th, therefore, is the last day of the alleged period of the conspiracy.

A single overt act is alleged; the filing "on, to wit, the twentieth day of September, A. D. 1913, of a 'debtor's schedule,' so called, * * * which said account said Robert Baker * * * and Sam Baker * * * knew well to be false."

The filing of the schedule is a matter of record in the court, and by record appears to have been made on September 20, 1913; i. e., on the day following the termination of the period of the conspiracy as alleged. This date is positively alleged in the indictment irrespective of the fact that it is preceded by the words "on, to wit." The office of a "videlicet" or "scilicet" is to particularize that which before was general. Clark's Criminal Procedure, p. 173; Chitty on Pleading (11th Am. Ed.) *317, note k. When used in this and other indictments without a preceding general allegation it has no effect; and the allegation of a date is as definite as if the preceding "to wit" were entirely omitted.

There is no allegation that the schedule filed was false, or to show wherein it was false; but merely the words "knew well to be false." This has been held insufficient. Bartlett v. U. S., 106 Fed. 884, 885, 46 C. C. A. 19; Boren v. U. S., 144 Fed. 801, 803, 75 C. C. A. 531. Unless it was false the filing of the schedule was not an overt act.

I am of the opinion that the indictment fails to allege the commission of any overt act during the period of the conspiracy. As this is fatal, it is unnecessary to discuss the sufficiency of the charge of conspiracy, though this is probably insufficient on account of the failure to set forth the elements of the offense defined in section 29b(2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1916, § 9613]).

Demurrer sustained.

STATE OF WASHINGTON ex rel. CITY OF SEATTLE v. PUGET SOUND TRACTION, LIGHT & POWER CO.

(District Court, W. D. Washington, N. D. July 27, 1917.)

No. 132–E.

1. MANDAMUS ⊂=133—OPERATION OF STREET RAILWAYS.
Where a street railway company, maintaining railways in the streets of a city under franchises authorizing their maintenance and operation, willfully and unlawfully failed, neglected, and refused to operate cars, mandamus was a proper remedy.

2. REMOVAL OF CAUSES ⊂=4—NATURE OF PROCEEDING—"SUIT OF A CIVIL NATURE AT COMMON LAW OR IN EQUITY."
Rem. & Bal. Code Wash. § 1026, provides that when a temporary mandate has been issued, and any corporation upon whom the writ has been personally served has without just excuse refused and neglected to obey it, the court may impose a fine, and in case of persistence in such refusal the court may order imprisonment, and make any orders necessary and proper for the complete enforcement of the writ. An affidavit and petition for a writ of mandate filed by a city alleged a street car company's failure and neglect to operate cars, that under its franchises the city was entitled to a percentage of the gross earnings, that the loss sustained by the city was at the rate of $75,000 a year, and that the cessation of operation would cause irreparable damage to the industries and business of the public within the city. It prayed for an alternative writ of mandate, and that upon a refusal or failure of the company to operate cars the court, in addition to punishment for contempt, appoint a receiver. *Held* that, while the affidavit and petition contained matters which were unnecessary and constituted surplusage, the proceeding was not an equitable proceeding for the appointment of a receiver, or an application for a mandatory injunction or a receivership, but a mandamus proceeding, in which the pleader sought a receivership as punishment for noncompliance with the writ, and hence the proceeding was not removable to a federal court, under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1916, § 1010), authorizing the removal of "any suit of a civil nature at common law or in equity."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit of Civil Nature.]

In Equity. Application by the State of Washington on the relation of the City of Seattle, for a writ of mandate directed against the Puget Sound Traction, Light & Power Company. On motion to remand. Motion granted.

Hugh M. Caldwell, Corp. Counsel, and Walter F. Meier, Asst. Corp. Counsel, both of Seattle, Wash., for plaintiff.

James B. Howe, of Seattle, Wash., Clinton W. Howard, of Bellingham, Wash., and A. J. Falknor, of Seattle, Wash., for defendant.

NETERER, District Judge. This is a proceeding brought in the state court by the filing of an affidavit by the mayor, on behalf of the city, to obtain a writ of mandate directed against the Puget Sound Traction, Light & Power Company, a corporation. It alleges corporate capacity of the city and foreign corporate capacity of the defendant company; the passage of sundry and divers ordinances by

the city, authorizing the construction, maintenance, and operation of street railways upon divers streets of the city, on conditions in the ordinances set forth; the acceptance of the ordinances; the ownership of the ordinances by the defendant company since July, 1912; and the maintenance and operation of street railways pursuant to the ordinances, by the defendant company until the 17th day of July, 1917, since which date it charges willful and unlawful failure and neglect and refusal to operate such cars. It is further alleged that by virtue of the franchises the city is entitled to 2 per cent. of the gross earnings of the defendant company derived from the operation of the street railway lines; that in excess of 175,000 persons are each day carried over the lines, and that the loss sustained by the city is "at the rate of $75,000 per year"; that "the cessation of operation by said company of its cars over its railway lines has caused, and is now causing, and will continue to cause, unless relief is granted as herein prayed for, irreparable damage, injury, and inconvenience to the industries and business of the public generally within the city of Seattle, for which there is no adequate remedy"—and prays:

"That an alternative writ be issued herein, commanding the said Puget Sound Traction, Light & Power Company to forthwith, and within 24 hours after service of said writ upon it, commence and continue to operate over each and all of its lines within the city of Seattle, on the same schedule upon which it operated on and immediately prior to the 16th day of July, 1917, or to show cause at the expiration of said 24 hours from the service of said writ upon it why it has not done so. (2) That upon the refusal or failure of said company to so commence and continue to operate its cars over each and all of its said lines within the city of Seattle within 24 hours after the service of said writ of mandate upon it in the manner and upon the schedules upon which it was operating on and immediately prior to July 17, 1917, that in addition to punishment as and for contempt of court for failure to comply with the mandate of this court, that the court appoint a receiver. * * *"

Upon the filing of the affidavit, an "alternative writ of mandate and order to show cause" was issued by Judge Tallman, of the state court, commanding the defendant to "operate the said railway lines or show cause * * * why you have not done so, and why a receiver should not then and there be appointed to take charge of all of your cars and other facilities, * * * and to operate said lines. * * *" A petition for removal and bond were duly filed and approved, and the cause removed to this court. A motion to remand is filed by the city, on the ground that the court is without jurisdiction; that this is a mandamus proceeding, and not "a suit of a civil nature at common law or in equity"; and that from the whole record it is apparent that the action could not be properly removed to this court.

It is contended by the city that the proceeding is a special proceeding to compel the performance of a duty imposed upon the defendant company, and of which proceeding this court, being a court of limited jurisdiction, is not, by section 28 of the Judicial Code, the involved provisions of which were brought forward from the act of 1875, given jurisdiction, this not being "any suit of a civil nature at common law or in equity. * * *"

[1] That a mandamus proceeding in such a case is a proper remedy, I think, is conceded, and this is supported by the authorities set out in the margin.[1] I think it is also conceded that an original proceeding in mandamus cannot be removed to the federal court.[2]

[2] The contention, however, is made by the defendant that, though this be the proper remedy, the proceeding, while denominated "affidavit and petition for writ of mandate," is in fact an equitable proceeding for the appointment of a receiver, and that this court, therefore, has jurisdiction, and is competent to protect and enforce the obligations and rights of the several parties, and the motion to remand must therefore be denied.

I think it may be safely said that, while the "affidavit and petition" contain matters which are unnecessary and constitute surplusage, the fact of such surplus matter would not change the nature of the cause of action and enlarge the scope of the pleading, if the necessary essential elements are lacking upon which to predicate a receivership, independent of any remedial statutory agency which may be incident to the original proceeding. The statute of Washington (section 1026, Rem. & Bal. Code) provides:

"When a temporary mandate has been issued and directed to any * * * corporation * * * upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may * * * impose a fine not exceeding $1000. In case of persistence in a refusal * * * the court may order the party to be imprisoned * * * and may make any orders necessary and proper for the complete enforcement of the writ."

The duties and powers of the court by this section are clearly defined and limited. The issue is the refusal, without excuse, to comply with the order of the court. Upon the adjudication of that issue follows the penalty. The penalty is limited by the statute, which is a fine of not to exceed $1,000. That disposes of the issue. If, after this has been disposed of by the court, and the refusal continues, and the matter is presented to the court, a new and distinct issue is raised.

[1] Sections 1014, 1015, Rem. & Bal. Code of Washington; State ex rel. Bridgeton v. Bridgeton & Millville Traction Co., 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837; Pleasantville v. Atlantic City & Suburban Traction Co., 75 N. J. Law, 279, 68 Atl. 60; Bartlesville Water Co. v. Bartlesville (Okl.) 150 Pac. 118; Oklahoma Natural Gas Co. v. State of Oklahoma (Okl.) 150 Pac. 475; Seymour Water Company v. City of Seymour, 163 Ind. 120, 70 N. E. 514; State ex rel. City of Marion v. Marion L. & H. Co., 174 Ind. 622, 92 N. E. 731; State ex rel. Milwaukee v. Milwaukee Electric Ry. & Lighting Co., 144 Wis. 386, 129 N. W. 623, 140 Am. St. Rep. 1025; State ex rel. Lewis v. Hodge, 90 Wash. 487, 156 Pac. 404; Railroad Commission v. Saline River Ry. Co., 119 Ark. 239, 177 S. W. 896.

[2] Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743; Smith v. Bourbon County, 127 U. S. 105, 8 Sup. Ct. 1043, 32 L. Ed. 73; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; City of Columbus v. Xenia R. R. Co. (C. C.) 48 Fed. 626; State of Ind. ex rel. City of Muncie v. Lake Erie & W. Ry. Co. (C. C.) 85 Fed. 1; Cœur d'Alene Ry. & Nav. Co. v. Spalding, 93 Fed. 280, 35 C. C. A. 295; Mystic Milling Co. v. C. M. & St. P. Ry. Co. (C. C.) 132 Fed. 289; Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880; State v. Flannelly, 96 Kan. 833, 154 Pac. 235; Hager v. New South Brewing Co. (Ky.) 90 S. W. 608.

This new issue must then be tried by the court to determine what the fact is, and the court may fix a penalty upon the second issue presented, which may be imprisonment and may be such further order as the court may deem necessary. The prayer in the "affidavit and petition," as already noted, is that, in addition to punishment as and for contempt of court for failure to comply with the mandate of this court, "the court appoint a receiver," indicating in the mind of the pleader that the purpose was to bring the action as a mandamus proceeding, and the inclusion of the words "appointment of a receiver," in addition to the penalty provided, is an expressed desire of the pleader as to the interpretation to be placed upon the words of the text of the statute, "such other orders." This must be concluded, I think, from the absence of other necessary allegations in the petition to state facts upon which to found a receivership. The pleading does not contain the requisites of pleading, and lacks the jurisdictional process prescribed for the commencement of a civil action.

Kelly v. Grand Circle, Women of Woodcraft (C. C.) 129 Fed. 830, decided by Judge Hanford, I think, is "on all fours" with this case. In that case the relator, in addition to asking the restoration of certain rights of which she had been deprived, prayed compensation for damages in the sum of $11,000, and the court said:

"Under this statute [section 1026, supra] the right to recover damages is made dependent upon a right to have a * * * writ of mandamus. Hence a case commenced as a special proceeding cannot be converted into an ordinary civil action to recover damages by repleading, and severance of the demand for damages from the application for a writ of mandamus. The case is not ancillary to any other case of which this court has acquired jurisdiction, but is an original independent case, not cognizable in this court, because it is not a suit of a civil nature at common law or in equity."

It is said that Judge Hanford, in the case of State of Washington on the Relation of the City of Tacoma, Plaintiff, v. Tacoma Railway & Power Company, Defendant, and J. F. Fitch, Lorenzo Dow, Joe T. Mitchell, P. G. Hubble, and Peder Jensen, Interveners, 244 Fed. 989, did retain jurisdiction of a mandamus proceeding commenced in the state court and removed to the federal court. From an examination of the copy of the opinion produced in court, I find the action is readily distinguishable from the former case and the instant case. The court, in the Tacoma Case, said:

"The grounds of complaint are neglect and refusal to render the services of a common carrier in accordance with the general principles of law, and in the discharge of the obligation assumed by contract. In other words, the powers of the court of equity are invoked to compel the specific performance of a contract."

And it further said:

"As the real object is to secure an adjudication of the controversy which by law the defendant is entitled to have adjudicated in this court, and as the powers and process of this court are ample to protect and enforce the rights and obligations of all of the parties, the motion to remand must be denied."

In the Tacoma action the writ was sought—

"to compel the holder of the street railway franchise to operate the cars on one of its lines, so as to render adequate service, for the compensation of a

single fare of five cents for each passenger carried for a single continuous trip from any part of the city to the terminus of said lines."

The object was not the operation of the line, but the enforcement of a condition that passengers should be carried for a certain amount, and it seems to me, clearly, the facts, it must be presumed, all appearing in the record, the contrary not appearing, that the action was to determine the contractual rights of the parties, rather than to compel the operation of a public utility.

In the instant case the only issue presented is whether there is just excuse for not operating the railway. When that issue is settled, if it is found that there is just excuse, the matter ends; if there is not just excuse, the penalty is fixed by statute at not to exceed a fine of $1,000. No contractual relations or interests are sought to be adjudicated, and the only time when the matter of further punishment may be considered is when there is subsequent conduct, after the issue in the first instance has been disposed of; and that is left, likewise, with the discretion of the court, but with express power to imprison the party and make "such other orders" as may be deemed necessary.

It is strongly urged by the defendant that this matter should be considered as an application for a mandatory injunction, or a receivership, and as such it should be held by the court to be a civil action of an equitable nature, and within the jurisdiction of this court, and numerous authorities are cited[3] which, it is contended, support this position.

I cannot arrive at this conclusion from any viewpoint from which the subject can be approached. There is nothing upon the face of the pleading which would indicate such a thought in the mind of the complainant. The substance and effect of the entire record is mandamus.[4] There is an utter lack of allegations in the "affidavit and petition" upon which to predicate such relief, and the authorities which are cited do not, in my judgment, support the contention. I am thoroughly convinced that this is a mandamus proceeding and that this

[3] Defendant's authorities: Western Union Tel. Co. v. Postal Tel. Co., 217 Fed. 533, 539, 133 C. C. A. 385; Darragh v. Wetter Mfg. Co., 78 Fed. 7–14, 23 C. C. A. 609; Leighton v. Young (C. C. A. 8th Cir.) 52 Fed. 439, 442, 3 C. C. A. 176, 18 L. R. A. 266; Atchison, T. & S. F. Ry. Co. v. Love (C. C.) 174 Fed. 59; Love v. Atchison, T. & S. F. Ry. Co. (C. C. A. 8th Cir.) 185 Fed. 321, 322, 107 C. C. A. 403; Sheffield Furnace Co. v. Witherow, 149 U. S. 574, 575, 13 Sup. Ct. 936, 37 L. Ed. 853; State ex rel. Brown v. McQuade, 36 Wash. 579, 584, 79 Pac. 207; State v. Seattle Gas & Electric Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; State ex rel. White v. Point Roberts Reef Fish Co., 42 Wash. 409, 85 Pac. 22; Old River Rec. Co. v. Stubbs (Tex. Civ. App.) 133 S. W. 494; Seattle Electric Co. v. Snoqualmie Falls Power Co., 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032; In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; State of Wash. on rel. of City of Tacoma v. Tacoma Ry. & Power Co., 244 Fed. 989 (decision of Judge Hanford); In re Jarnecke Ditch (C. C.) 69 Fed. 161, 163; Wiemer v. Louisville Water Co. (C. C.) 130 Fed. 251, 256; State ex rel. Rosbach v. Pratt, 68 Wash. 157, 158, 122 Pac. 987; Toledo, A. A. & N. M. Ry. Co. v. Penn. Co., 54 Fed. 730, 19 L. R A. 387; C., B. & Q. Ry. Co. v. Burlington C. R. & N. Ry. Co. (C. C.) 34 Fed. 481, 482, 483.

[4] Old River Rec. Co. v. Stubbs (Tex. Civ. App.) 133 S. W. 494; Boardman v. Marshalltown Groc. Co., 105 Iowa, 445, 75 N. W. 343.

court has not jurisdiction, and, if any doubt did exist, it would be the court's duty to resolve it in favor of the state court which has undoubted jurisdiction. Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932; Harley v. Firemen's Fund Insurance Co., 245 Fed. 471, decided by this court October, 1913; Plant v. Harrison (C. C.) 101 Fed. 307; Kelly v. Virginia Bridge & Iron Co. (D. C.) 203 Fed. 566; Fitzgerald v. Mo. Pac. Ry. Co. (C. C.) 45 Fed. 812; Johnson v. Wells Fargo & Co. (C. C.) 91 Fed. 1; Groel v. U. S. Elec. Co. (C. C.) 132 Fed. 252.

The motion to remand is granted.

In re AMERICAN PAPER CO.

(District Court, D. New Jersey. August 8, 1917.)

BANKRUPTCY ⊜326—SET-OFFS AND COUNTERCLAIMS—"ANY DEBTOR OF THE BANKRUPT."

Bankr. Act July 1, 1898, c. 541, § 14c, 30 Stat. 550 (Comp. St. 1916, § 9598), provides that the confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge. Section 68a (Comp. St. 1916, § 9652) provides that, in all cases of mutual debts or mutual credits, the account shall be stated, and one debt set off against the other. Section 68b provides that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate. Section 17 (Comp. St. 1916, § 9601) provides that a discharge shall not release provable debts not duly scheduled in time for proving and allowance, with the name of the creditor, if known, unless the creditor had notice or actual knowledge. The H. Co. held notes of a paper company, and the paper company held notes of the H. Co., which it negotiated to third parties and secured by its own bonds. Both companies were adjudicated bankrupts, and the H. Co. offered a composition, which was confirmed, and the third parties holding the notes negotiated by the paper company received the composition payment. They then proved the balance of the debt against the paper company, and to protect its bonds it paid the balance. The H. Co. filed claims on the notes of the paper company, and it sought to set off such notes of the H. Co. *Held*, that these notes, having been once proved and having participated in the composition settlement, could not again be allowed against the H. Co., and were not available as a set-off; the contention that "any debtor of the bankrupt" referred to the H. Co., and not to the paper company, being without merit.

In Bankruptcy. In the matter of the American Paper Company. On review of an order of the referee disallowing a set-off, based upon claims in the hands of third persons discharged by a composition settlement. Petition dismissed.

Philip Carpenter, of New York City, for respondent.

McDermott & Enright, of Jersey City, N. J., for trustee.

DAVIS, District Judge. The American Paper Company, hereinafter called the Paper Company, bankrupt in the above-stated cause, was indebted to the George F. Hills Company, hereinafter called the Hills Company, in the sum of $16,713.74, evidenced by certain notes,

and the Hills Company was indebted to the Paper Company in the sum of $18,651.76, evidenced by certain notes, which the said Paper Company indorsed and negotiated to third parties and secured to a large extent the payment thereof by its bonds. July 10, 1914, the Paper Company was adjudicated a bankrupt. In the spring of 1915 a petition in bankruptcy was filed by the Hills Company in the Southern district of New York. A composition was offered by the company, and on June 25, 1915, the composition was confirmed, and 20 cents on the dollar was paid by the said Hills Company. The third parties to whom the Hills Company notes had been negotiated by the Paper Company proved the notes in question against the Hills Company and received the 20 cents thereon, leaving an unpaid balance of $14,923.81. They retained the notes, however, and proved them against the Paper Company on its indorsement, and filed the said claims on July 10, 1915. On the same day, which was the last day that said claims could be filed, the Hills Company filed, through its assignee, Charles R. McBride, claims against the Paper Company for the said $16,713.74. In order to protect the bonds of the Paper Company, the trustee in bankruptcy thereof purchased said notes from the third parties to whom they had been negotiated, paying therefor 80 per cent. of the face value thereof; 20 per cent. having been received by the holders from the Hills Company. The trustee sought to set off this amount, $14,923.81, against the claims of the Hills Company. The referee made an order disallowing the set-off, and the said order is before this court for review.

The disallowance was based upon sections 14c and 68b of the Bankruptcy Act of 1898. The referee held that the Hills Company had been discharged by the confirmation of the composition from its obligations upon the notes which it had given to the Paper Company, and, being so discharged, the claims are not provable again against the estate of the Hills Company, and so cannot be used as a set-off. The first section of the act referred to provides that:

"The confirmation of a composition shall discharge a bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

The second section provides that:

"A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate."

The trustee, on the other hand, bases his right to a set-off on section 68a of the act, which provides that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

He claims that section 68b is inapplicable, because section 17 of the act provides that—

"a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bank-

rupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy," etc.;

—that "any debtor of the bankrupt," mentioned in section 68b, refers in this case to the Hills Company, and not to the Paper Company; that the Paper Company had no claim against the Hills Company on the notes sought to be used as a set-off at the time of the bankruptcy of the Hills Company in the Southern district of New York, because these notes had not been proved against the Paper Company on account of its indorsement until after the confirmation had taken place. The question of whether or not the notes may be used as a set-off depends upon whether the liability of the Hills Company was absolutely discharged for all purposes and against everybody when they were proved and participated in the composition settlement of that company. If the liability was so discharged, the set-off should not be allowed, and section 68a does not apply, because there were no longer "mutual debts" or "mutual credits" between the Hills Company and the Paper Company; the debt of the Hills Company having been discharged and no longer provable against its estate in bankruptcy.

I am not referred to any case sustaining, in my opinion, the contention of the trustee, and I have not been able to find any case directly in point. He refers to the case of Morgan v. Wardell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33; but that case is not authority for his contention. It stands for the proposition that, upon the dissolution of the partnership between Dillon and Wardell, Dillon covenanting to assume the liabilities and save Wardell harmless therefrom, but not keeping his agreement, Wardell may set off in a plenary proceeding the amount which he had to pay on account of said liabilities of the partnership, in an action by Morgan, trustee of Dillon, to recover for merchandise purchased by Wardell from Dillon after the dissolution. That is not the problem presented by this case. The trustee is in error in his contention that "any debtor," of section 68b, does not refer to the Paper Company.

The liability of the Hills Company on the notes in question in the hands of third parties was absolutely discharged when those claims were proved and participated in the composition settlement. "A composition restores the estate to the bankrupt, frees him from all his debts provable and dischargeable in bankruptcy, and distributes among his creditors the amount the bankrupt is required thereby to pay for the ransom of his estate." Remington on Bankruptcy (2d Ed.) § 2346. The claims based upon those notes, having been once proved and having participated in the composition settlement, cannot again, in the hands of the indorsers thereof, be proved and create a new liability on the part of the Hills Company. Such a construction of section 14c would be contrary to the plain provisions thereof, and would make that paragraph of the section in certain cases, meaningless, and would also be inequitable.

If the contention of the trustee prevails, the result would be that the claims against the Hills Company would be twice allowed against it, and the claims which the Hills Company has against the Paper Com-

pany allowed but once. This, in principle, would be inequitable. The trustee, however, says, as a matter of fact, that it would work out equitably, because the Paper Company had to pay the third parties 80 per cent. of the face value of the notes in order to secure them and redeem its bonds, which is a much larger percentage than the Hills Company will have to pay if the set-off is allowed. This may be so, but the position in which the Paper Company finds itself is due to its own transactions in negotiating the notes of the Paper Company. Had it not secured them with its bonds, it would not be in its present predicament. As it turned out, the company acted unwisely in putting up its bonds. This, however, was a matter with which the Hills Company had nothing to do, and for which it is in no wise responsible. The trustee is asking that the Paper Company be relieved from the results of its improvident transactions by the application of an inequitable principle, and the violation of the plain provisions of a statute. All that the Paper Company can ask is to be subrogated to the rights of the holders of the notes in accordance with the provisions of section 57i of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1916, § 9641]). The holders exhausted their right of procedure against the Hills Company on those notes when they were proved and participated in the composition settlement.

It necessarily follows that the petition must be dismissed.

In re WEIDHORN.

(District Court, D. Massachusetts. March 8, 1917.)

No. 23319.

1. BANKRUPTCY ⊜224—REFEREE—OBJECTIONS.

Where a defendant in plenary suit in equity filed with the referee in bankruptcy seasonably objected to referee's jurisdiction, he did not, by subsequently filing an answer to the merits, assent to the referee's jurisdiction.

2. BANKRUPTCY ⊜224—REFEREE—JURISDICTION—"PROCEEDING."

Where an order of reference was made under General Order in Bankruptcy No. 12 (89 Fed. vii, 32 C. C. A. vii), providing that all proceedings except as required by the act or General Orders to be before the judge shall be had before the referee, such order of reference did not, the word "proceeding," as used in Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, covering questions between the alleged bankrupt and his creditors commencing with the petition for adjudication and ending with the discharge, and including matters of administration generally, authorize the referee to entertain a plenary suit unlimited as to amount by the trustee against a third party to recover property never in the custody of the bankruptcy court for the word "proceeding," as used in the General Order, should be given the same meaning as when used in the act, and furthermore the order of reference could hardly be construed as a delegation of all of the court's equitable powers.

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

In Bankruptcy. In the matter of the bankruptcy of J. Herbert Weidhorn. The trustee filed with the referee a bill of complaint against one Leo Weidhorn. On proceedings to review the referee's order. Order vacated.

Swift, Friedman & Atherton, of Boston, Mass., for trustee.
William M. Blatt, of Boston, Mass., for Leo Weidhorn.

MORTON, District Judge. This case presents an important question as to the jurisdiction of the referee. From the certificate it appears that, more than four months before the institution of bankruptcy proceedings, the bankrupt had conveyed property to his brother, Leo Weidhorn. There is no question but what, at the time of the bankruptcy, this property was in the exclusive possession of the brother under an actual claim of ownership. The trustee in bankruptcy filed with the referee what is called a "bill of complaint" against Leo; it is in form and substance a well-drawn bill in equity, alleging that the conveyances in question from the bankrupt to the respondent were invalid, because made in fraud of creditors, under the statute of Elizabeth and Bankr. Act, § 70a (Comp. St. 1916, § 9654). Upon the filing of this bill the referee directed that a subpœna issue under the equity rules of this court, and also issued a temporary injunction, as prayed for, restraining the transfer of the property pendente lite. The subpœna was in the usual form of those used in this court, except that it directed the defendant to appear before said court "sitting in bankruptcy," and notified the defendant to file his answer "in the referee's clerk's office." It was signed by one of the deputy clerks of this court, and bore the teste and seal of the court. The bill was filed only with the referee, and no order was made in the proceedings, except by him.

[1] The respondent seasonably objected to the jurisdiction of the referee, and afterwards filed an answer to the merits. By so doing, he did not assent to the referee's jurisdiction. Louisville Trust Co. v. Comingor, 184 U. S. 18, at page 26, 22 Sup. Ct. 293, 46 L. Ed. 413. The referee proceeded to hear and determine the merits of the controversy, and entered a final decree against the respondent, declaring the several mortgages or bills of sale in question to be void, and ordering the surrender of the goods in question to the trustee, and an account. Both the jurisdictional question and the merits of the case are certified for review.

The proceedings are in no sense summary, nor are they so regarded either by the referee or by the parties. The referee's decision is that a trustee in bankruptcy may proceed before a referee by plenary suit, unlimited as to amount, to recover property never in the possession of the bankruptcy court.

[2] The duties of the referee do not begin until the case has been referred to him; and his jurisdiction, therefore, includes only such parts of the bankruptcy jurisdiction of the District Court as are carried by the reference. The order of reference was made under General Order 12 (1), which provides as follows:

"And thereafter all proceedings except such as are required by the act or these General Orders to be before the judge shall be had before the Referee." 89 Fed. vii, 32 C. C. A. vii.

If the referee has jurisdiction of the present suit, it must be because it is covered by the words, "all proceedings" in this Order.

"Proceedings" has, in bankruptcy, a well-recognized technical meaning. It has been defined under section 24 as:

"Covering questions between the alleged bankrupt and his creditors, as such, commencing with the petition for adjudication, ending with the discharge, and including matters of administration generally, such as appointment of receivers and trustees, sales, exemptions, allowances and the like, to be disposed of summarily, all of which naturally occur in the settlement of the estate." Baker, J., In re Friend, 134 Fed. 778, 67 C. C. A. 500 (C. C. A. 7th Cir.).

It does not ordinarily include suits by the trustee against third persons. The word is frequently used in the General Orders, always, I think, in the same sense (e. g., in the preamble, and in Orders 1, 4, 5, 8, 21, 35 [89 Fed. iv, 32 C. C. A. iv]); when it is intended to refer to suits in equity or actions at law they are distinctly specified (General Order 37 [89 Fed. xiv, 32 C. C. A. xiv]). It seems to me that "proceedings," in the Order under discussion, is used in its established meaning as applied to bankruptcy matters, and that it does not include suits brought by the trustee against third persons in respect to property not in the custody of the bankruptcy court.

If the order of reference be construed as broadly as the plaintiff desires, it is questionable whether it would be valid. It would amount to a peculiar delegation of the general equity powers of the court, the exact limits of which, territorial or otherwise, it is not easy to understand. If it be regarded as covering all controversies to which the trustee in the case referred might be a party—which is the view of the referee, as I understand it—the effect is to create a new court having concurrent jurisdiction in equity with the state courts, and possibly with the District Court, as to cases in which a certain person, viz. the trustee in bankruptcy of the estate referred, may be a party.

In In re Steuer, 5 Am. Bankr. R. 209, 104 Fed. 976 (D. C. Mass.), where a plenary suit of this character was heard before the referee without objection, Judge Lowell, with "great doubt," held that the District Court had jurisdicion to make a decree in favor of the complainant; and he ordered that the decree issue as if made originally by the judge, and not simply as an affirmance of the decree of the referee. It seems that, if the objection had been seasonably taken and insisted upon, as it was in this case, a different result would have been reached. In In re Carlile, 29 Am. Bankr. R. 373, 199 Fed. 612 (D. C. N. C.), in In re Walsh Bros. (D. C. Ia.), 163 Fed. 352, and in In re Overholzer, 23 Am. Bankr. R. 10 (an able opinion by the referee), it was explicitly held that the referee did not have jurisdiction of a plenary suit of this character. The weight of opinion among the text-writers is in the same direction. Remington on Bankruptcy (2d Ed.) §§ 545 and 1695, collecting cases; Loveland on Bankruptcy (4th Ed.) § 37. Collier on Bankruptcy (10th Ed.) p. 595, says that the

question is doubtful, "and there are instances where such jurisdiction has been asserted and fully sustained by the District Court," but the cases cited do not support the statement. In In re O'Brien, 21 Am. Bankr. R. 11, Referee Olmstead, in this district, took jurisdiction of a plenary suit and appointed receivers, but it was done by agreement of the respondents. In In re Shults & Mark, 11 Am. Bankr. R. 690, the referee held in a long opinion that under a special rule in that district he had jurisdiction against objections thereto. It is the only express decision in the plaintiff's favor which has been brought to my attention.

It seems to me that, both upon the better reasoning and upon the great weight of authority, the referee has no jurisdiction of plenary suits of this character. They often involve very substantial amounts—in this case, for instance, from $7,000 to $12,000—and I think they should be filed, like other suits in equity, in the District Court, or in the proper state court.

There must be an order vacating the referee's decree and dismissing the bill, with costs as taxed in an equity suit in this court.

UNITED STATES v. RIVER SPINNING CO.

(District Court, D. Rhode Island. July 18, 1917.)

No. 1271.

1. ALIENS ⊂=56—IMMIGRATION—CONTRACT LABORERS.
Under Act Feb. 20, 1907, 34 Stat. 898, c. 1134, declaring that laborers induced or solicited to migrate to this country by offers or promises of employment, or in consequence of agreements, oral, written, or printed, express or implied, to perform labor in this country, shall not be admitted, and imposing a penalty upon one knowingly assisting, encouraging, or soliciting the immigration or importation, an actual migration into or entry into the territory of the United States is necessary to warrant a recovery of the penalty, and, where such laborers were rejected at the port of entry, no such penalty can be recovered.

2. ALIENS ⊂=40—IMMIGRATION—CONSTRUCTION OF STATUTE.
In construing Contract Labor Act Feb. 20, 1907, the strict construction adopted by the Circuit Court of Appeals for the circuit in which the District Court was located should be followed.

At Law. Action by the United States against the River Spinning Company to recover penalties for violation of the Contract Labor Law. On demurrer to the declaration. Demurrer sustained.

Harvey A. Baker, U. S. Dist. Atty., of Providence, R. I.
Edwards & Angell, of Providence, R. I., for defendant.

BROWN, District Judge. This is an action of debt for penalties for alleged violation of the contract labor provisions of Act Feb. 20, 1907, c. 1134, 34 Stats. 898.

[1] The principal ground of demurrer is that the declaration does not allege that the aliens actually migrated into or entered into the ter-

ritory of the United States. This raises an important question of substance, upon which there is some disagreement of the decisions. It is alleged that the aliens—

"did attempt and try to migrate into the United States but were at the point of entry into the United States, to wit, Newport, state of Vermont, rejected as alien contract laborers, by a board of special inquiry of the Immigration Service of the United States."

In United States v. Ju Toy, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646 (49 L. Ed. 1040), it was said:

"The petitioner, although physically within our boundaries, is to be regarded if if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate."

The declaration does not in terms allege an entry into the United States, and, if taken with the doubtful implication of a temporary presence of the aliens at Newport, Vt., at the time of rejection, would yet fail to allege an actual migration into the United States. According to several decisions the alien must have actually migrated into the United States in order to give a right of action for the penalty. In United States v. Craig (C. C. 1886) 28 Fed. 795, 799, 800, this question was carefully considered by District Judge Henry B. Brown, afterwards Justice of the Supreme Court. This decision was followed in United States v. Bornemann (D. C.) 41 Fed. 751; United States v. Gay (C. C.) 80 Fed. 254.

In Darnborough v. Joseph Benn & Sons, Inc., 187 Fed. 580, 582, 109 C. C. A. 270, 271, it was said in the opinion of the Circuit Court of Appeals for this circuit, construing the act:

"The defendant, therefore, is not charged in the declaration with any violation of section 4 for which a penalty can be recovered, unless, in addition to the charge that *an alien's immigration* has been assisted, encouraged, or solicited, there is also a charge either that *the immigration* was by reason of an offer, solicitation, promise, or agreement to or with him, or that *the immigration* was in order that he might perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him."

I have italicized the words "an alien's immigration" and "the immigration" to emphasize the fact that the words of the statute, "by knowingly assisting, encouraging or soliciting the migration or importation," were taken to refer to an actual and completed migration or importation. This, in my opinion, is the proper construction of the act. The penalty is incurred only when the migration or importation is a completed fact.

Had it been the intent to impose a penalty for assistance, encouragement, or solicitation of a person who did not in fact migrate, or for attempts to induce a person to do what was not in fact done, different phraseology would seem to have been necessary. To assist, encourage, or solicit a person, in order that he may form an intention to migrate, which intention is not carried out, is in substance a different thing from inducing, causing, or assisting to cause an actual importation or migration.

The case of United States v. N. Y. Cent. & H. R. R. R. Co. (D. C.) 232 Fed. 179, takes the contrary view. In that case there was no ac-

tual immigration or importation of any person. While it might be said that the aliens were solicited to immigrate, it could not with precision be said that "the importation or migration of any contract laborer" had been assisted, encouraged, or solicited, for there was no such importation or migration. The learned judge was of the opinion that, in construing the word "solicit," it must be given "its only meaning and that does not include or imply a successful solicitation."

But no one of the words "assist," "encourage," or "solicit," in itself implies success; nor does either word imply nonsuccess. The construction must be sought by reading the text as a whole.

In section 2 (Comp. St. 1916, § 4244), contract laborers are defined as persons—

"who have been induced or solicited to migrate * * * by offers or promise of employment, or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind," etc.

In United States v. Craig (C. C.) 28 Fed. 799, it is said:

"* * * We think that if, after having entered into the contract, the alien laborer should refuse to carry it out by migrating, the offense would not be complete, and the action could not be sustained."

This is according to the weight of authority and seems the more reasonable view of the penal provisions of section 5 of the act (Comp. St. 1916, § 4250).

The purpose of the act is exclusion. Section 2 defines the classes of aliens to be excluded by the immigration officers of the United States. When the immigrant appears before them his status as a contract laborer is determined as of that time by an inquiry into the cause of his coming. If, though solicited, he does not attempt to migrate, or if, attempting to migrate, he is stopped at the border as a person not entitled to enter the country, the purpose of the statute, exclusion, is not defeated. Upon the happening of a defined event, however, "the migration or importation of any contract laborer into the United States," the purpose of the statute, exclusion, is defeated; and if this is brought about or contributed to by a defendant he incurs a large penalty—the sum of $1,000, for each contract laborer.

That it was intended to impose so large a penalty for a mere solicitation which was unsuccessful and did not actually result in any attempt to migrate is a conclusion not warranted by the terms or purpose of the act. Nor is it conceivable that it was intended to give to an alien who had been solicited but had not acceded to the solicitation, and had made no attempt to enter the country, a right of action to recover a penalty of $1,000. This, however, would seem to follow from the construction of the statute adopted in United States v. N. Y. Cent. & H. R. R. R. Co. (D. C.) 232 Fed. 179. This results, as it seems to me, from a failure to give due effect to the exact language of the statute, and from the assumption that the mere solicitation of a person is the same as having assisted, encouraged, or solicited an actual event defined by the statute as "the migration or importation of any contract laborer into the United States."

As the statute refers to the event—i. e., the migration—as a thing assisted, encouraged, or solicited, it is not permissible to substitute for

this the solicitation, encouragement, or assistance of a person towards something which always remained in intention, and was not done. The difference is substantial.

Though some of the reasons stated in United States v. Craig (C. C.) 28 Fed. 795, are debatable, I am of the opinion that the construction of the act is right. It is well supported by good authority.

[2] Even were there a fair doubt of the meaning of the statute, the defendant would still be entitled to the benefit of the rule of strict construction which is applicable to this statute, according to the opinion of the Circuit Court of Appeals for this circuit in Darnborough v. Joseph Benn & Sons, 187 Fed. 580, 583, 109 C. C. A. 270.

As my opinion goes to the merits, it is unnecessary to dwell upon other points raised.

Demurrer sustained.

UNITED STATES v. AH HUNG.

(District Court, E. D. New York. June 27, 1917.)

1. POISONS ⇐2—STATUTES—VALIDITY.

Act Jan. 17, 1914, c. 9, § 2, 38 Stat. 275 (Comp. St. 1916, § 8801), which supplanted Act Feb. 9, 1909, c. 100, § 2, 35 Stat. 614, declares that importation of smoking opium shall be unlawful, that the importation, concealment, receipt, or sale of opium known to have been imported contrary to law shall expose the person dealing therewith to punishment, and that possession of opium shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain possession to the satisfaction of the jury. Section 3 of the same act declares that after July 1, 1913, all smoking opium found in the United States shall be presumed to have been imported after the law Act Feb. 9, 1909, went into effect. *Held* that, in view of the power of Congress over commerce foreign and interstate, such law is constitutional.

2. POISONS ⇐4—STATUTES—VALIDITY.

Defendant was charged with the willful and conscious concealment of smoking opium with knowledge that it had been imported contrary to law. Harrison Act Dec. 17, 1914, c. 1, § 8, 38 Stat. 789 (Comp. St. 1916, § 6287n), relating to the possession of opium and coco leaves and their derivatives, and to the dispensation of such drugs, declares that it shall be unlawful for any person not registered to have in his possession such drugs. *Held* that, though the latter section was construed to relate only to drugs specified in the registration provision, and though mere possession of an article injurious to health will not render a person liable under federal statute unless some constitutional basis for the statute gives the United States the right to regulate upon the subject, nevertheless accused, having possession of such opium though he obtained it from a source having no apparent connection with any drug importation, is liable under Act Jan. 17, 1914, §§ 2 and 3, unless he can rebut the presumption of unlawful importation.

3. CRIMINAL LAW ⇐95—JURISDICTION OF FEDERAL COURT.

The jurisdiction of the federal courts over a prosecution against one charged with the unlawful possession of smoking opium is not exclusive, and, where he appeared to have obtained it from a source having no apparent connection with direct importation, the United States district attorney may allow the offense to be dealt with under the state health statutes.

At Law. Ah Hung, alias Harry Wing, was charged with crime, and defendant made objections to the jurisdiction. Objection overruled, and defendant required to plead.

Melville J. France, U. S. Atty., of Brooklyn, N. Y.
Amy Wren, of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. Objection has been raised to the exercise of jurisdiction under the federal Constitution, and claim is made that the jurisdiction of the state statute is exclusive.

[1, 2] Chapter 100, Act Feb. 9, 1909, 35 Stat. p. 614 (Comp. St. 1916, §§ 8800–8801f), provides that all importation of opium shall be unlawful, but allows importation of other than smoking opium for medicinal purposes under regulations. It provides that importation, concealment, receipt, or sale of opium known to be imported contrary to law makes the opium contraband, and the person subject to punishment. It provides that possession shall be presumptive evidence sufficient to authorize conviction unless the possession is explained to the satisfaction of the jury.

Chapter 9, 38 Stat. p. 275, Act Jan. 17, 1914, adds certain sections, but does not change the foregoing. Section 3 as added provides that smoking opium found after July 1, 1913, shall be presumed to have been imported after April 1, 1909, and the burden of proof is on the accused to rebut the presumption. Section 4 has to do with possession on a vehicle or vessel bound for the United States, unless the opium is reported to the master. Section 8 makes the vessel liable if the opium is found on the vessel and not shown by the manifest.

The Act of December 17, 1914, 38 Stat. p. 785 (Harrison Law), provided, under section 8 (Comp. St. 1916, § 6287n), that it should be unlawful for any person not registered to have in his possession "such drugs." The various cases under this statute, which sought to make mere possession of opium an absolute offense, were decided because of the difficulties presented in cases brought under the laws which had previously been passed, but in the case of U. S. v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, the Supreme Court of the United States held that the words "such drugs" referred only to those specified under the registration section, and that the presumptive evidence of possession justified conviction only for such possession as would be legal under the registration or prescription sections.

The present case charged willful and conscious concealment of smoking opium by the defendant, with knowledge that the opium had been imported into the United States contrary to law. It is laid under section 2 of the Act of January 17, 1914, being chapter 9 of the Laws of 1914. The provisions of this section are exactly the same as when passed in 1909, but we have in addition the provisions of section 3 that the opium itself is presumed to have been imported illegally, and the burden of rebutting that presumption is on the defendant as well as the burden of explaining his possession so as to relieve himself of knowledge as to the importation. This leaves the defendant in the situation of being liable to an accusation that he was in the possession of

material presumed to be contraband and presumed to have been brought into the country unlawfully, unless he can show either a certificate or clear chain of title and history of the article, carrying it back of a possible contraband source. There seems to be no reason to hold that the law is unconstitutional. Brolan v. U. S., 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. 544.

The acts involved in this case are all subsequent to the passage and existence of the statute of which the defendant must have had knowledge and by which he is bound. The effect of the law is to put upon every person in the United States the burden of refusing to deal with what is upon its face contraband, unless he can show its innocent character. If, under those circumstances, he takes into his possession an article which is thus labeled contraband, he commits a violation of the statute which renders him liable to punishment unless thereafter he can save himself by obtaining the proof which he should have required before purchasing the article.

The basis of jurisdiction of the United States must be regulation of either interstate or foreign commerce. The charge of unlawful importation is therefore necessary to take the case out of the ordinary police regulation of a state. Mere possession of an article injurious to health would not render a person liable to a United States statute unless some constitutional basis for the statute gives the United States the right to regulate upon the subject.

The Brolan Case, supra, disposes of the objection that the only United States jurisdiction is based upon the so-called presumption. See, also, U. S. v. Yee Fing (D. C.) 222 Fed. 154.

As was said in the latter case, the defendant is dealing with something which he knows is under the ban of the law, in the use of which he will be committing a crime which can be punished under the United States law unless he can show clearly an innocent history of the article which he is using and as to which he is made to undergo no hardship, if he be held in accordance with the laws which were in force at all times during the transaction. It might take slight evidence to rebut the presumption and to leave the matter one which could be disposed of only under the state jurisdiction.

[3] The federal jurisdiction is not exclusive. As in the case of the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1916, §§ 8812–8819]), the existence of some real basis for the application of interstate commerce jurisdiction should be considered by those officers of the government on whom rest the responsibility for instituting prosecution.

The cases should not be taken from the states and the jurisdiction of the United States made exclusive where Congress has not so legislated as to indicate that the jurisdiction of the United States is exclusive of that of the state. N. Y. Cent. R. Co. v. Winfield, 37 Sup. Ct. 546, 244 U. S. 147, 61 L. Ed. 1045, and So. Pac. Co. v. Jensen, 37 Sup. Ct. 524, 244 U. S. 205, 61 L. Ed. 1086, decided in the Supreme Court of the United States in June, 1917.

The present case is evidently on the border line, in that the defendant has long been a resident of the United States, he obtained the opium

in question from a source that has no apparent connection with any direct importation, and his offense is of such a nature that it would be within the discretion of the United States attorney to allow it to be dealt with under the health and penal statutes of the state, regulating the welfare of the individual, rather than under interstate or foreign transportation of opium and its use as such. But jurisdiction over the case does exist, and if the man be brought into the United States court and does not rebut, to the satisfaction of a jury, the presumption under which he comes within the United States law, sentence should be imposed in accordance with the gravity of the offense.

The objection will be overruled, and the defendant required to plead.

FERRIER v. DE FRESE.

(District Court, N. D. Georgia, N. D. July 9, 1917.)

No. 51.

1. LIBEL AND SLANDER ⊂⊃43—PRIVILEGED COMMUNICATIONS—WHAT ARE.
Where the consulting engineer of a gas company, engaged to straighten out its affairs, in reply to a letter from the secretary of the Railroad Commission, recommended the president should be required to resign and a local man selected president, and stated that prepayment meters had been grossly mishandled, and indicated a system of systematic stealing from the company, the method of reading the meters being antiquated and permitting fake readings, such statement was privileged, and cannot be deemed libelous.

2. LIBEL AND SLANDER ⊂⊃10(5)—WHAT CONSTITUTES—CHARGES.
In such case, the statement cannot be deemed libelous, on the ground that it charged the president with dishonesty; the engineer's letter being susceptible only of the construction that he recommended another should be substituted as president.

At Law. Action by James Ferrier against S. E. De Frese. On demurrer to the declaration. Demurrer sustained, and leave given plaintiff to amend.

Maddox & Doyle, of Rome, Ga., for plaintiff.
W. H. Payne, of Chattanooga, Tenn., for defendant.

NEWMAN, District Judge. This is an action for libel, which is now here on a demurrer to the declaration. That which is claimed to be a libel was contained in a letter written by the defendant to the Railroad Commission of Georgia. It seems that Mr. Seaborn Wright, of Rome, Ga., made complaint to the Railroad Commission of Georgia about the quality of gas furnished the city of Rome by the gas company. Upon receipt of the letter from Mr. Wright, the secretary of the Railroad Commission wrote the plaintiff, who was the president of the gas company, calling his attention to the letter and the complaint. The letter from the secretary of the Railroad Commission was given by him to Mr. W. A. Sadd, and was given, it seems, finally to the defendant to answer. The defendant, at the time, was to some extent, at least, in

charge of the affairs of the gas company, having been placed there as consulting engineer, for the purpose of straightening out its affairs, and it is his answer which contains the libelous matter of which the plaintiff complains. The two things in the letter which are complained of mainly as being libelous against the plaintiff on the part of the defendant are:

[1, 2] First, these statements about the company matters:

"The prepayment meters had been grossly mishandled, and indicated a system of systematic stealage of the company's revenue. The method of reading meters is antiquated and permitted fake readings, which I am sure have been practiced."

The innuendo, as set out in the declaration, is that these statements in said letter—

"constitute a direct charge of dishonesty on the part of your petitioner, and that said statements in said letter and said charge are absolutely false, malicious, and without any foundation whatever."

This is demurred to, and I do not find anything whatever in the language contained in the defendant's letter to the Railroad Commission which could be in any way construed as reflecting upon the plaintiff's honesty. The whole purport of the letter shows very plainly, as well as this particular language, that it is the employés of the company who are referred to, and certainly in no wise can it be held to have reference to the plaintiff. This is the only clause in the letter which seems to refer in any way or even to hint at any dishonesty on the part of any one. In the letter the defendant criticizes severely the management of the gas company's affairs and recites that it would be necessary to remove Mr. Ferrier, the plaintiff, as president, in order for the company to be successful.

The other language, which probably covers the general charge against the plaintiff as a gas man, is this:

"My recommendations are that we at once request Mr. James Ferrier's resignation, and if this is not agreeable to him then hold a meeting of the stockholders, elect a new board of directors, consisting of a president, who should be a Rome, Georgia, man; secretary and treasurer, W. A. Sadd; general manager and assistant secretary, W. J. Austin; consulting engineer, S. E. De Frese; two representative citizens of Rome as directors."

It is this recommendation with reference to Mr. James Ferrier, requesting his resignation and substituting another man, who should be a Rome, Ga., man, that I understand is the main basis of the complaint. Other language is used; but it is this, it is claimed, that is a reflection upon his character and standing as a gasworks man, or as a man of ability, qualifications, and fitness in that line. Without conceding any of the language used in the letter to be libelous, I think what De Frese was doing when he wrote this letter to the Railroad Commission was a privileged communication under the law. It does not appear that he volunteered anything, but was answering the communication of the Railroad Commission, through its secretary. Mr. Wallace, the secretary of the Commission, among other things, writes:

"The Commission begs to request your preferred attention to the complaint, and we will be glad to have you furnish such response to us as your company might desire to make."

In some way, it is not claimed improperly, it came to be Mr. De Frese's part to answer this letter, and he answered it fully as to the condition in which he found the company when he went there as consulting engineer, and what it was trying to do to rehabilitate itself and give satisfaction to its patrons in Rome. It is claimed on the part of the defendant that the paragraph in the letter, the main part of this letter which is averred to be libelous, is taken from a report which had theretofore been made to the company by Mr. De Frese. He says in his letter to the Commission:

"After making this report to the owners of the property, the writer was authorized to proceed with the straightening out of the affairs of this company: thereupon Mr. H. G. Bedford, auditor and C. A., was employed, and I submit his remarks which are as follows: [He then gives Mr. Bedford's report.]"

On the whole, I do not think this letter of Mr. De Frese to the Railroad Commission was libelous in any proper sense, certainly does not attempt to charge Mr. Ferrier with any dishonesty, and at the most it could be held only to mean that Mr. Ferrier was found, after investigation, not to be the proper person to remain in charge of the company as its president, and a recommendation that he be superseded by some one else. I do not think such a report, rendered by a person who was employed as consulting engineer of a public utility corporation, could be considered libelous.

The plaintiff has asked, if the court should think the declaration as it stands insufficient, that he have leave to amend. To do this the plaintiff will have 30 days in which to state his case in such way as to overcome the objections which have been sustained to the declaration as it now stands.

THE COQUITLAM CITY.

(District Court, W. D. Washington, N. D. May 1, 1917.)

No. 3488.

1. ADMIRALTY ⇐86—REPORT OF COMMISSIONER—EXCEPTIONS.
   For good cause shown the court may consider exceptions to the report of a commissioner, although not filed within the time prescribed by the rules, since the findings and conclusions of the commissioner are advisory only.

2. SALVAGE ⇐27—AMOUNT OF COMPENSATION.
   A salvage award of $3,500 made for the services of a tug in towing a water-logged and unmanageable schooner, laden with a million feet of lumber, in from the sea to Seattle, and thereafter pumping her out twice, the schooner and cargo being worth from $15,000 to $18,000 and the tug about $5,000; $2,600 of the award to the tug, and $900 to officers and crew.

In Admiralty. Suit by C. J. Clark and others against the British schooner Coquitlam City; Frank Forsythe, claimant, and the Puget Sound Tugboat Company intervener. On exceptions to report of commissioner. Exceptions of claimant sustained, and exceptions of intervener denied.

James Kiefer, of Seattle, Wash., for libelants.
C. H. Hanford, of Seattle, Wash., for claimant.
Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for intervener.

NETERER, District Judge. [1] I think the court should consider the exceptions filed to the report of the commissioner. The objections to the consideration thereof for the reason that they were not filed within the time provided by admiralty rule No. 45, I think, should not obtain. Nor do I think that the court is bound by the findings and conclusions of the commissioner under the order of reference made, as such findings are merely advisory, and the court may disregard them entirely, where claimant had entered an appearance and contests the claim asserted. Luckenbach v. Delaware, L. & W. R. Co. (D. C.) 168 Fed. 560, I do not think is controlling here. It appears in this case that one of the proctors was unavoidably situated so that the exceptions could not be filed, and the other proctor was not in the case until the filing of the exceptions.

[2] I think the amount of salvage recommended by the commissioner in the sum of $5,000 should be revised to the sum of $3,500, $2,600 of this sum to go to the tug Pioneer, and $900 to be divided between the crew, in proportion to the monthly wage paid to them.

The exceptions of the Puget Sound Tugboat Company I think should be denied. It is not very material in this case whether the valuation placed upon the cargo and the vessel by the commissioner is $15,000 or $18,000. I think the allowance made for salvage would be ample on either valuation. The respondent vessel is a British vessel, and before loading for this trip was put on the dry dock and certain repairs made for the purpose of strengthening the vessel. It went to Bellingham and loaded over a million feet of lumber, and the agent and surveyor for the board of marine underwriters was employed for the purpose of examining and certifying as to its insurability, and insurance was declined, but was obtained upon the cargo.

On the morning of December 7, 1916, the vessel was left at a point five miles outside of Cape Flattery by the tug. Sail was set and the vessel proceeded in a southwest course, making about a point and a half leeway, going about 8 knots an hour. At that time the mate sounded the pumps and found 5 feet of water in her hold. The pumps were started, and later were again sounded, and found some 7 or 8 feet of water. It was then decided to wear ship and return to port for repairs. At this time the vessel was approximately 45 miles from Cape Flattery. During the maneuvering of wearing the ship, a strong southeast sea struck the rudder, carrying away her wheel and part of the steering gear. While the master and crew were rigging a spar and tackle, so that the rudder might again be used for steering, a northeast by east course was set for Cape Flattery and held until about 10:30 on the morning of December 8th, when the tug Pioneer approached. At this time there was about 12 feet of water in the hold of the ship and she was flying the international code signal "Y. P.," indicating a tug was wanted. The master of the tug and the master of the vessel were unable to agree upon a price for towing the vessel

to port at Victoria, and the master of the tug stated that he would only tow the vessel on a salvage basis, and finally this was the arrangement made. A high sea was running; the vessel was waterlogged, unmanageable, and constantly yawing into the swell of the sea. The tug proceeded with the vessel in tow, and arrived at Port Townsend at 5:30 o'clock on the morning of the 9th of December. The master came to Seattle on arriving at Port Townsend and arranged with the manager of the tug company to pump the water out of the vessel. After this was done the vessel was towed to the port of Seattle dock at Smith's Cove and pumped out twice thereafter. The tug has an iron hull, is 176 feet long, 21 feet beam, and 13 feet depth of hold, with a gross tonnage of 160; value, approximately $50,000. The tug Holyoke, belonging to the same company, approached after the Pioneer had started with the tow and offered assistance. After wireless communication with the tugboat company's office, the two tugs proceeded with the vessel.

There is nothing in the evidence that would indicate that the services of the Holyoke were necessary. The names of the crew of the Pioneer, and their monthly wage, is as follows:

H. F. Astrup.	Master.	Wage,	$210.00
R. Frederick, Jr.	First mate.	"	110.00
George Penny.	Second mate.	"	90.00
Fred Evans.	Deck hand.	"	45.00
Gust Pierson.	Deck hand.	"	45.00
C. J. Clark.	Chief engineer.	"	160.00
J. M. Jones.	First assistant engineer.	"	110.00
P. W. Primrose.	Fireman.	"	50.00
Ben Rust.	Fireman.	"	55.00
J. R. Blabes.	Fireman.	"	50.00
Earl Pratt.	Cook.	"	60.00
Stacy W. Norman.	Wireless operator.	"	55.00

The testimony shows that no heroic salvage service was performed. The services were highly beneficial and meritorious. The policy of the law is to deal liberally with salvors. I think the uniform holding of the federal courts, including the Circuit Court of Appeals of this circuit, while always recognizing the high order and merit of salvage service, would not justify the court in holding that a higher sum than allowed in this memoranda should be permitted, and this conclusion, I think, is fortified by the following cases: The Strathnevis (D. C.) 76 Fed. 855, 861; The Cottage City (D. C.) 136 Fed. 496, 499; The Santurce (D. C.) 136 Fed. 682, 689; The Knickerbocker (D. C.) 218 Fed. 524; The Roanoke (D. C.) 209 Fed. 114; Id., 214 Fed. 63–65, 130 C. C. A. 503; The Apache (C. C.) 124 Fed. 905, 914; The S. C. Schenk, 158 Fed. 54, 59, 85 C. C. A. 384; The Willis A. Holden, 174 Fed. 5, 10, 98 C. C. A. 43; The Kennebec, 231 Fed. 423, 425, 145 C. C. A. 417.

In re KEELER.

(District Court, N. D. New York. July 24, 1917.)

BANKRUPTCY ⊂=426(2)—DISCHARGE—DEBTS NOT AFFECTED—"WILLFUL INJURY."

The intentional conversion of money of another, deposited as security for the performance of a contract, is a "willful injury" to the property of such other, within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (Comp. St. 1916, § 9601), and a claim therefor is not released by a discharge in bankruptcy.

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

In Bankruptcy. In the matter of John B. Keeler, bankrupt. On application by Eunice E. Griffing, as guardian ad litem of Ward D. Breeze, a minor, for vacation of injunction. Motion granted.

Mangan & Mangan, of Binghamton, N. Y., for the motion.

Vere H. Multer, of Binghamton, N. Y., opposed.

RAY, District Judge. Within the four months preceding the filing of the petition in bankruptcy by the bankrupt, John B. Keeler, Eunice E. Griffing, as guardian ad litem of said Ward D. Breeze, a minor, obtained a judgment against said John B. Keeler in the City Court of the City of Binghamton, Broome county, N. Y., for the sum of $100 and interest and costs, on the allegation in the complaint in said action that the said $100 was placed in the hands of said John B. Keeler as security for the faithful performance by said Ward D. Breeze of an agreement with said Keeler that he would faithfully and honestly pay over to the said Keeler all sums of money belonging to said John B. Keeler which he might collect for said Keeler as a salesman, to sell insurance of the Massachusetts Bonding & Insurance Company; that the contract was terminated, and that the said Ward D. Breeze did honestly account for and pay over all such moneys, and faithfully perform his agreement, and that he then demanded the return of the said $100 placed in the hands of Keeler as security, and that said Keeler refused to return same, but, on the other hand, converted same to his own use; and that no part of said $100 was offered, tendered, returned, or paid to said Breeze, or paid his guardian ad litem, who demanded same.

It is unnecessary to set out the complaint in said action, as it is a clean-cut complaint for the willful conversion of said sum of $100. The defendant answered in said action, but the findings were against Keeler, and judgment was obtained by the guardian ad litem on the allegations of the complaint. Under the laws of the state of New York, a body execution may issue against said Keeler.

The bankrupt claims that this judgment is a claim dischargeable in bankruptcy, and one from which a discharge in bankruptcy would be a release. The guardian ad litem in said action, on the other hand, claims that, this being a judgment for willful conversion of the

money of the said Ward D. Breeze, who was a minor at the time, the debt or claim and judgment is not dischargeable in bankruptcy, and that a discharge in bankruptcy will not be a release therefrom, and that therefore the injunction granted by this court should not stand, but be vacated.

I think this contention is clearly correct, in view of the decision of the Supreme Court of the United States in McIntyre v. Kavanaugh, 242 U. S. 138, 141, 37 Sup. Ct. 38, 61 L. Ed. 205, affirming Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135. The Supreme Court in the case cited says (242 U. S. 141, 37 Sup. Ct. 40, 61 L. Ed. 205):

"To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptation of the words. Bouvier's Law Dictionary, 'Injury.' And this we understand is not controverted; but the argument is that an examination of our several Bankruptcy Acts and consideration of purpose and history of the 1903 amendment will show Congress never intended the words in question to include conversion. We can find no sufficient reason for such a narrow construction. And instead of subserving the fundamental purposes of the statute it would rather tend to bring about unfortunate, if not irrational, results. Why, for example, should a bankrupt who has stolen a watch escape payment of damages, but remain obligated for one maliciously broken? To exclude from discharge the liability arising from such transactions as those involved in Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, and here presented, not improbably was a special purpose of the amendment. In Tinker v. Colwell, 193 U. S. 473, 485, 487, 24 Sup. Ct. 505, 48 L. Ed. 754, we said of original section 17(2): 'In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.' And further: 'A willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.'"

Under the findings in the judgment referred to on the pleadings there was a clear conversion by Keeler of the money belonging to Breeze, and the conversion was knowingly and willfully committed. Breeze was forever deprived of his property and money by Keeler, deliberately and without semblance of authority. Keeler had no right to the money, and no right to use it and dispose of it. The City Court has so determined, and that judgment has not been reversed or set aside.

I am aware that there are decisions to the contrary in the lower federal courts, but this decision by the Supreme Court of the United States must be regarded as final and conclusive as to the proper construction and meaning of section 17 of the Bankruptcy Act. In McIntyre v. Kavanaugh, McIntyre & Co. had possession of Kavanaugh's stock as security for an indebtedness. McIntyre & Co., without notice to Kavanaugh, and without his authority, knowledge, or consent, sold and disposed of the certificates of stock turned over as security, and placed the avails in their own bank account. The court found that McIntyre & Co., in disposing of the stocks without notice to or demand upon the plaintiff, Kavanaugh, and without his authority, knowledge, or consent, and in depositing the proceeds and avails in

the bank account and to the credit of McIntyre & Co., committed willful and malicious injury to the property of the plaintiff. That was a case in bankruptcy, where McIntyre & Co. filed a petition in bankruptcy, and thereafter Kavanaugh proved his claim against the bankrupt estate.

In the instant case the money was placed in the hands of Keeler as security for the payment over of certain funds to be thereafter collected by Breeze, and if such funds were paid over then it was the duty of Keeler to return the deposit. Breeze did pay over all moneys collected by him, and owed Keeler nothing. He fully complied with his undertaking and agreement. Keeler had no right to the money, and no right to retain it, and when he refused on demand to return it, and used it for his own purposes, and converted it to his own use, under the decision of the Supreme Court he was guilty of willful and malicious injury to the property of Breeze. In the one case we have stock converted by the bankrupt, and in the other case we have money converted by the bankrupt. I discover no difference in principle between the two cases.

The injunction heretofore granted by this court, restraining the said Eunice E. Griffing from the further prosecution and enforcement of said judgment against Keeler, will therefore be vacated, and there will be an order accordingly.

UNITED STATES v. CHARLOTTE HARBOR & N. RY. CO.

(District Court, S. D. Florida. August 1, 1917.)

1. MASTER AND SERVANT ⇐17—HOURS OF SERVICE—PENALTIES—PLEAS.
In actions for the penalty for violating Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1916, §§ 8677–8680) by keeping train crews on duty more than 16 hours, the railroad company filed pleas admitting the overtime, but alleging that it was due to the derailment of cars, the necessity of clearing the track, and that the accidents occurred when it was impracticable to substitute another crew. It was also alleged that the conductor in one case willfully wasted time, and in the other case that the conductor and the engineer failed to notify the railroad officials that the crew would be on duty longer than 16 hours. Section 3 of the act excuses violations resulting from a casualty, unavoidable accident, or act of God, or where the delay was the result of a cause not known to the carrier or its officer or agent in charge of the employés at the time the employés left the terminal, and which could not have been foreseen. *Held*, that the pleas were insufficient to show that the violations fell within the exception.

2. MASTER AND SERVANT ⇐17—HOURS OF SERVICE—PENALTIES—PLEAS.
In such case, additional pleas alleging that the train left the terminal on schedule, allowing ample opportunity to make the trip within 16 hours, that cars became derailed and much time, etc., was necessarily consumed in putting them back on the track and repairing the damage, and that such cause of delay was not known to the officers in charge of the employés before leaving the terminal, and could not have been foreseen, are also insufficient, not showing that the accident was not the result of the carrier's negligence, for a casualty, to warrant a violation of the Hours of Service Act, cannot have been the result of the carrier's negligence.

At Law. Action by the United States against the Charlotte Harbor & Northern Railway Company. On demurrers to defendant's pleas. Demurrers sustained.

H. S. Phillips, U. S. Atty., of Tampa, Fla., for the United States.
K. I. McKay, of Tampa, Fla., for defendant.

CALL, District Judge. This cause comes on for a hearing upon demurrers filed by the government to pleas and additional pleas of defendant. The declaration sets up ten causes of action for violation of the Hours of Service Act, approved March 4, 1907; the first five for permitting certain employés to be on duty 17 hours and 20 minutes on February 14, 1915, and the other five for permitting employés to be on duty 16 hours and 35 minutes on February 19, 1915.

The defendant first pleads not guilty to each count, and then interposes certain special pleas. Its second plea to the first five counts admits the overtime, but alleges that it was due to an unavoidable accident, to wit, a derailment of a car, and the necessity of clearing the track to avoid a suspension of business; that it occurred at a time and place which rendered it impracticable to substitute another crew. The third plea to the first five counts alleges the promulgation of a rule requiring its officers to be notified wherever it became apparent the trip could not be completed within 16 hours; further it alleges the derailment and failure of the conductor and engineer to notify the officers, and the company was ignorant and did not participate in the violation, and had no opportunity to send a relief crew. As to the last five counts the defendant pleads the above-mentioned third plea, and in addition pleads that the conductor willfully wasted time and thus caused the crew to remain on duty the overtime.

To each of these pleas, except the first, the plaintiff interposed demurrers.

Subsequently by leave of court the defendant filed two additional pleas; the first to the first five counts, alleging the service as set out in the declaration, and that it was because of an unavoidable accident, to wit, because the train left the terminal at Boca Grande for a journey to Bruce on a schedule which allowed ample opportunity to make the trip within 16 hours, and one of the cars in the train became derailed and 2 hours and 25 minutes were necessarily consumed in putting it back on the track and repairing the damage to the track before the train could proceed, and that said cause of delay was not known to its officers in charge of the employés before leaving the terminal and could not have been foreseen. The additional plea to the last five counts is substantially the same, except that it alleges it took 5 hours and 10 minutes to put the car back on the track and repair the damage, before it could proceed.

The plaintiff demurred to these last two pleas.

[1] As to the special pleas first pleaded, it need only be said that neither of them show a "casualty or unavoidable accident or 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." And this is necessary in order to relieve the defendant from the penalty imposed for a violation of the statute. The statute fixes a duty upon the defendant not to permit its servants engaged in running trains to work more than 16 consecutive hours. If it does, then the penalty is incurred, unless it can excuse itself by alleging and proving one of the causes contained in section 3 of the act. The special pleas first pleaded do not do this, and the demurrers to them will therefore be sustained.

[2] The special pleas filed by leave of court were evidently framed with the intention of bringing the defendant within the provision of section 3, and, if they show an unavoidable accident, would show a complete defense. It is true these pleas allege it was an unavoidable accident, and undertake to show how it happened, in that a car of the train was derailed, and the delay thus occasioned was the cause of the crew being detained overtime. In the case of United States v. Missouri Pacific Ry. Co., reported in 213 Fed. 169, 130 C. C. A. 5, the answer alleged that "through no fault or negligence of the defendant company, its agents or servants," a derailment occurred. A demurrer to such an answer was overruled by the court, and such ruling affirmed in the Circuit Court of Appeals for the Eighth Circuit. On page 176 of 213 Fed., on page 12 of 130 C. C. A., Judge Sanborn notices particularly this allegation in the answer, and points out that the demurrer admitted it. In the case of United States v. Kansas City Southern Ry. Co., 202 Fed. 833, 121 C. C. A. 141, Judge Van Valkenburgh, speaking for the court, says:

"To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad."

It is true that the language was used while discussing the exemption in the proviso of causes of delay not known before leaving the terminal, and which could not have been foreseen; but it seems to me that it might well apply to a derailment, which ordinarily indicates neglect of the roadbed by the carrier. The pleas under discussion are silent as to the cause of derailment, and if such derailment could have been avoided by ordinary foresight the accident could not be said to be unavoidable, and unless it was unavoidable it is no defense to the action brought.

I am therefore of opinion that the demurrers to these pleas are well taken, and should be sustained. It will be so ordered.

BLOCK et al. v. ARROWSMITH MFG. CO.

(District Court, D. New Jersey. August 15, 1917.)

COURTS ⊂=350—FEDERAL COURTS—TAKING DEPOSITIONS—TIME.

Rev. St. § 863 (Comp. St. 1916, § 1472), declares that the testimony of witnesses may be taken in any civil cause pending in a District or Circuit Court by deposition, when the witness lives at a greater distance from the place of trial than 100 miles or is bound on a voyage to sea, etc. Section 862 (Comp. St. 1916, § 1470) declares that the mode of proof in causes of equity and admiralty shall be according to rules now or hereafter prescribed by the Supreme Court; while section 917 (Comp. St. 1916, § 1543) declares that the Supreme Court shall have power to prescribe from time to time, and in any manner not inconsistent with any law of the United States, the modes of framing and filing proceedings and pleadings, and of taking and obtaining evidence. Equity rule No. 47 (198 Fed. xxxi, 115 C. C. A. xxxi) declares that the court, upon application of either party, may permit the deposition of named witnesses to be used, and that the depositions of plaintiff, unless otherwise ordered, shall be taken within 60 days from the time the cause is at issue, and those of defendant within 30 days from the expiration of the time for the filing of plaintiff's depositions; while rule 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv) declares that after the time has elapsed for taking and filing depositions the case shall be placed on the trial calendar, and thereafter no further testimony by deposition shall be taken, except for some strong reasons shown by affidavits. *Held* that, after the time for taking and filing depositions under rule 47 had elapsed, and after the case had been placed on the trial calendar, plaintiff could not take depositions of witnesses living more than 100 miles from place of trial, on notice to defendant, without application to the court for an order to do so, based on some strong reason shown by affidavit, for the rules do not curtail the statutory rights, but merely prescribe the procedure.

In Equity. Suit by Alexander F. Block and another against the Arrowsmith Manufacturing Company. On motion to restrain plaintiffs from taking depositions without order of court after expiration of time for doing so under equity rules. Motion granted.

Russell M. Everett, of Newark, N. J., for plaintiffs.
Stephen J. Cox, of New York City, for defendant.

DAVIS, District Judge. The bill in the above-stated cause was filed April 12, 1916, and the answer was filed and the cause was at issue on July 20, 1916. The case appeared on the equity trial calendar of this court for the November term, 1916, and the January term, 1917. The equity list has not been called since. On January 24, 1917, solicitor for plaintiffs sent notice, as I understand it, by mail from St. Louis to the solicitor of defendant, whose office is in New York City, of the taking of depositions of 15 witnesses at St. Louis, Mo., on February 19, 1917. This notice was received January 27, 1917, and the number of witnesses was subsequently increased to 33. Motion was made to this court to enjoin the taking of said depositions and for other relief. An order enjoining the taking of said depositions until the motion could be heard and determined was made.

The notice was given, counsel for plaintiffs allege, under the authority of section 863, R. S. U. S., and the opinion in the case of Iowa

Washing Machine Co. v. Montgomery Ward & Co. (D. C.) 227 Fed. 1004, 1007. Section 863, inter alia, provides that:

"The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States," etc.

It was sought in the case of Iowa Washing Machine Co. v. Montgomery Ward & Co., supra, to introduce certain depositions taken without order of court and "apparently within the time required by equity rule 47 [198 Fed. xxxi, 115 C. C. A. xxxi]." Judge Mayer said:

"I am of opinion equity rule 47 was not intended to vary or be a limitation upon section 863, because, of course, that section, being a legislative enactment, cannot be changed, except by further legislative enactment."

Counsel claim, in substance, that under the authority of this section and this case, without application to the court for an order to do so, testimony of such witnesses as are mentioned in the section may be taken at any time, regardless of equity rules 47 and 56 (198 Fed. xxxiv, 115 C. C. A. xxxiv). Rules are necessary to orderly procedure in taking testimony by deposition or otherwise. Procedure without them would be indefinite, and courts in confusion. The Supreme Court has never attempted to take away the rights conferred upon litigants by that section of the statute. It has simply sought to prescribe conditions under which the rights which it gives may be exercised, and this power Congress has delegated to the Supreme Court. Section 862 of the Revised Statutes provides that:

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

Section 917 of the Revised Statutes provides, inter alia, that:

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, * * * the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence," etc.

In pursuance of this power conferred by Congress upon the Supreme Court, it promulgated our present equity rules on November 4, 1912. Rule 47 provides that:

"The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer, upon the notice and terms specified in the order. All depositions taken under a statute, or under any such order of the court, shall be taken and filed as follows, unless otherwise ordered by the court or judge for good cause shown: Those of the plaintiff within sixty days from the time the cause is at issue; those of the defendant within thirty days from the expiration of the time for the filing of the plaintiff's depositions; and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

Rule 56 provides that:

"After the time has elapsed for taking and filing depositions under these rules, the case shall be placed on the trial calendar. Thereafter no further

testimony by deposition shall be taken except for some strong reason shown by affidavit. In every such application the reason why the testimony of the witness cannot be had orally on the trial, and why his deposition has not been before taken, shall be set forth, together with the testimony which it is expected the witness will give."

The question before me is whether or not plaintiff, long after the time had elapsed for taking and filing depositions under rule 47, and after the case had been placed on the trial calendar for two terms, may take depositions by notice to defendant, or its counsel, without "some strong reason shown by affidavit" therefor, and without application to court for an order to do so. Depositions under such circumstances may not be taken. Before depositions under such circumstances may be taken, the litigant must, upon application to court, show by affidavits some strong reason why the testimony of the witnesses cannot be had orally on the trial, and why their depositions have not been taken before. This the plaintiffs have not done, and so far as the court is informed there is no reason why the depositions were not taken within the time required by the equity rules.

The plaintiffs will therefore be restrained from taking the depositions of said witnesses, except in accordance with the provisions of equity rule 56.

In re ALBURTIS SILK RIBBON MILLS.

(District Court, E. D. Pennsylvania. July 31, 1917.)

No. 5684.

PAYMENT ⇐26—APPLICATION OF PROCEEDS OF COLLATERAL SECURITY.

A bank held the bankrupt's note for $14,800, with which bonds in the same amount secured by a mortgage on real estate were deposited as collateral security, under an agreement that they were to be held as security for the payment of the note and any other indebtedness. The bank also held the bankrupt's note for $2,000. Shortly before bankruptcy, it sold the collateral bonds at public sale, and purchased them itself for $8,140, and in bankruptcy it sought to prove the balance of the debt of $14,800, in addition to the note of $2,000. The mortgaged property was sold, and from the proceeds the bank, as owner of the bonds, received the full amount of $14,800. *Held*, that there was no deficiency on the note for $14,800 provable in bankruptcy, as the note and the bonds represented the same debt, and the note was merged in the higher security, which had been paid.

In Bankruptcy. In the matter of the Alburtis Silk Ribbon Mills, bankrupt. On certificate of the referee. Order of the referee affirmed, and petition dismissed.

Calvin E. Arner, of Allentown, Pa., for petitioner.
Reuben J. Butz, of Allentown, Pa., for trustee.

THOMPSON, District Judge. On June 1, 1910, the Alburtis Silk Ribbon Mills executed a mortgage or deed of trust of its real estate to Thomas E. Ritter, as trustee, to secure its bonds, amounting to $16,000. Thomas E. Ritter was vice president of the Second National

Bank of Allentown, Pa. The Second National Bank loaned the corporation $16,000 upon a demand note, and received the entire issue of bonds as collateral security. Bonds to the amount of $1,200 were sold at par; the bank receiving the proceeds on account of the note, which was thus reduced to $14,800, and was accompanied with $14,800 in par value of the bonds as collateral security. The note contained a promise to pay on demand $14,800, and recited the deposit of the bonds as collateral security for the payment of the note and all other present or future indebtedness or liability of any kind to the holder. The holder is given authority to sell the whole or any part thereof, either at public or private sale. In case of deficiency, the maker agrees to pay to the holder the amount thereof forthwith after such sale. It is also agreed that, in case of sale of any of the collateral at public auction, the holder, if the highest bidder, may become the purchaser thereof in its own right.

On December 4, 1915, the bank sold the bonds, which it held as collateral, at public sale, and purchased the same for 55 per cent. of their face value, namely, $8,140. This amount, deducting the expenses of sale, $4.13, was credited by the bank on account of the $14,800 note, thus leaving a balance due thereon, as claimed by the bank, of $6,664.13. There was one other bidder at the sale of the collateral, but who he was and the extent to which the bidding was competitive does not appear. On December 23, 1915, Thomas E. Ritter, the trustee under the mortgage, who was then the president of the bank, sued out a writ of scire facias, and on January 11, 1916, judgment was entered by default for the sum of $17,586.66, which represented the real debt of $16,000, with interest, insurance premiums, trustee's compensation, and attorney's commission. A writ of levari facias was issued on the same day, and the sheriff made a levy thereunder and advertised the property for sale.

On January 12, 1916, a creditors' petition in bankruptcy was filed, and the corporation was adjudicated a bankrupt on February 2, 1916. The bank was at that time the holder of the note for $14,800 and another note of the bankrupt for $2,000, dated October 8, 1915, payable one month after its date. Interest had been paid on the demand note to November 1, 1915. The sheriff's sale was stayed on application to this court. The real estate was afterwards sold by the trustee in bankruptcy at public sale, discharged of the lien of the mortgage, for $21,000. Thomas E. Ritter became the purchaser. He purchased the property in the interest of the bank, and sold it to another at a profit of about $1,500, the benefit of which went to the bank. The bank, as holder of bonds to the amount of $14,800, received that sum, with interest out of the proceeds of the sale.

Being also still the holder of the note for $14,800 and the note for $2,000, it presented a claim before the referee in bankruptcy as follows: (1) For the balance of $6,664.13 due on the promissory note, dated November 1, 1913, for $14,800 on demand, with interest, executed by the Alburtis Silk Ribbon Mills, payable to Second National Bank, Allentown, Pa. (2) For the amount of the promissory note of $2,000,

dated October 8, 1915, payable one month after said date, executed by the said corporation and by them indorsed. Objection having been made to the first item of the claim, the referee made the following order:

"And now, December 27, 1916, it appearing after rehearing upon the claim of the Second National Bank as filed before the referee on the 10th day of March, 1916, for the sum of $8,664.13, and that said claim includes an item of $6,664.13, being the difference between the sum of $8,135.87 realized by the bank upon a sale to itself of the mortgage bonds of the bankrupt company, pledged to the bank as collateral for the two notes upon which the claim is founded, and the sum of $14,800, afterwards received by the bank for said bonds out of the proceeds of the sale in bankruptcy of the mortgaged premises, and the referee being of the opinion that the payment of $14,800 was in fact and in law a payment on account of the notes: Ordered that said claim be reduced by the amount of $6,664.13 in its principal sum, to wit, to $2,000, and that it stand at that figure for all purposes of said bankruptcy in common with other unsecured creditors, the parties, however, hereafter submitting a calculation accounting for both principal of bonds so as aforesaid received and interest thereon, on account of the claim, and when such calculation is submitted and approved, the amount of the claim will be fixed anew in the amount to be shown by the calculation."

When the $14,800 of the bonds of the bankrupt were delivered to the bank, they were secured by the mortgage of the bankrupt's real estate. The bonds thus secured were taken as collateral for the loan of $14,800, and afterwards, under the terms of the collateral clause of the note, became security for the note of $2,000. After the sale of the collateral, the bank claims to have become the holder of the bonds, not as collateral, but in its own right. The bank sold the bonds to itself, and credited the entire amount at which it bid them in upon the $14,800 note, so that, as far as the security is concerned, the transaction was in relation to the $14,800 note alone. The bank thereupon held obligations of the same debtor, the bankrupt, consisting of the notes and the bonds, the demand note and the bonds both being for the same debt, namely, $14,800, and the $2,000 note being now unsecured. The bank, having received the $14,800 debt in full out of the proceeds of the mortgaged premises, is now attempting to collect an alleged deficiency of $6,664.13, with interest, upon the note, which is merely another evidence of the same indebtedness as is evidenced by the bonds.

Having received the full amount of its debt upon the bond, it cannot recover the alleged deficiency upon the note, for, in the first place, there is no deficiency, as the debt has been paid in full, and the bank, being the holder of a higher degree of security for the same debt, the note merged in the bond. Jones v. Johnson, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760. It is apparent from the evidence that the bank, realizing that the Alburtis Silk Ribbon Mills was in a failing condition some months before the bankruptcy, undertook this method of procedure in order to protect itself upon the $2,000 note due November 8, 1915. It elected, however, not to treat the $2,000 note as being secured by the collateral, and comes in as a general creditor upon that note. It is within its right in presenting the $2,000 note as an unsecured claim, but, for the reasons stated, can recover upon that alone.

The order of the referee is affirmed, and petition dismissed.

GULDEN et al. v. HIJOS DE JOSE TAYA S. EN C.

(District Court, E. D. New York. July 30, 1917.)

1. SHIPPING ⟸141(2)—LIABILITY FOR DAMAGE TO CARGO—IMPROPER STOWAGE.
Under Harter Act Feb. 13, 1893, c. 105, § 2, 27 Stat. 445 (Comp. St. 1916, § 8030), a ship cannot relieve itself from liability for damage to cargo caused by improper stowage.

2. SHIPPING ⟸132(5)—LIABILITY FOR DAMAGE TO CARGO—BURDEN OF PROOF.
A carrier will not be held liable for damage to cargo within the exceptions of the bill of lading, unless the libelant affirmatively shows negligence which would preclude the setting up of such exceptions; but it is sufficient if negligence is shown which was likely to cause the damage, and no other cause is shown.

3. SHIPPING ⟸123—LIABILITY FOR DAMAGE TO CARGO—IMPROPER STOWAGE.
A ship *held* liable for damage to casks of olives from the breaking and leakage of the casks, on the ground that it was caused by improper stowage.

In Admiralty. Suit by Frank Gulden and others against Hijos de Jose Taya S. en C. Decree for libelants.

Francis Bertram Elgas, of New York City (George H. Gilman, of New York City, of counsel), for libelants.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine, of New York City, of counsel), for respondent.

CHATFIELD, District Judge. Libel has been filed to recover damages for part of a cargo of olives shipped on one of the respondent's vessels from Spain to New York. On unloading, four hogsheads and two barrels were found to be injured; that is, the staves crushed in, so that the brine had leaked out and the contents had decayed or spoiled. The cargo was transshipped from one vessel to another at Cadiz, Spain, and, while the respondent owned both vessels, the proof indicates that the damage occurred upon the steamer Asuarco, while on a voyage from Cadiz to New York.

There is testimony that the dunnage was not stowed properly under the ends of the barrels, so as to hold them bung up, and that many of them were found shifted or turned over upon their arrival. The respondent claims that such damage was within the exemption from liability contained in the bill of lading. The bill of lading stated that the goods were received in apparent good order and condition, but that the carrier would not be responsible for the contents of the packages or their value.

[1, 2] The Harter Act applied to this ship (The Chattahooche, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801), but will not relieve the vessel for bad stowage (The Palmas, 108 Fed. 87, 47 C. C. A. 220). Under a bill of lading like that in this case, the carrier, who has received the goods in apparent good order, will not be held responsible, unless the libelant shows affirmatively that the ship was guilty of negligence which would preclude setting up the exceptions of the bill of lading. The San Guglielmo (D. C.) 241 Fed. 969; The Konigin Luise,

185 Fed. 478, 107 C. C. A. 578; The Folmina, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748. In the present case the bill of lading included also a provision excepting the vessel from responsibility for leakage, breakage, or any other cause of damage, even through the fault of the stowage.

While but five packages were so damaged that their contents were destroyed, there is testimony that many of the casks had been improperly placed or had rolled over during the voyage through lack of care in the method of stowing and the distribution of the dunnage. In The Konigin Luise, supra, there was no proof of bad stowage, and the case turned upon the possibility of damage by pressure after extensive leaking, where no proof of good condition on delivery to the vessel was given, to overcome the testimony that the barrels were old and patched.

To always excuse the ship because the loss is fortunately small, and to hold that no carelessness is proven, unless some one has seen a deliberate violation of the ordinary rules of loading, is practically to relieve the ship in every instance and to make the exception in the bill of lading a perfect insurance against responsibility. It is much easier for the ship to show the actual conditions, and to throw upon the shipper the presumption that the goods were not delivered in good order, than for the consignee to find out what has occurred during the loading and on shipboard.

[3] In the case at bar the evidence shows such stowage that leakage was likely, and of itself might cause the conditions resulting in damage like that caused by the working of the vessel in The Konigin Luise, supra. But the bad stowage in this case would be the proximate cause. The vessel met rough weather, but this was to be expected, and presents only the question under the Harter Act as above discussed.

Libelant may have a decree.

In re SWAIN.

(District Court, D. Massachusetts. February 28, 1917.)

No. 22029.

1. BANKRUPTCY ⊜410—DISCHARGE—TIME OF FILING PETITION.

The bankrupt's attorney first offered for filing a petition for discharge after the expiration of the year but within the six months period referred to in the Bankruptcy Act July 1, 1898, c. 541, § 14, 30 Stat. 550 (Comp. St. 1916, § 9598). The clerk of the court informed the bankrupt's attorney that it was unnecessary for the petition to set forth the reasons relied on as excusing the failure to present the petition within the year, or do anything except file the usual petition for discharge after the year and within the six months, with the statement that the petitioner was unavoidably prevented from filing a petition within one year. The clerk also informed the bankrupt's attorney that it was unnecessary at that time to present to the court evidence showing that the delay in filing the petition was unavoidable, and that that question would be heard in connection with the petition for discharge. The clerk's statements were in accordance with the oral instructions of the late judge of the district. *Held* that, regardless of the propriety of the practice, the bankrupt

should not be penalized, and the petition for discharge will be treated as if presented to the court at the time it was first tendered to the clerk.

2. BANKRUPTCY ⊂=410—DISCHARGE—RIGHT TO.

Under Bankr. Act, § 14, declaring that any person may after the expiration of one month and within the next twelve months file a petition for a discharge, and if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time it may be filed within but not after the expiration of the six months, a discharge will not be denied because the bankrupt's counsel, through an honest mistake as to the law, supposed that the petition for discharge could not be filed until equity proceedings in the state court in which charges were made against the bankrupt that would have been sufficient if established to defeat the discharge had been terminated, and for that reason did not attempt to file the petition for discharge until after the conclusion of those proceedings and until after the expiration of more than one year after adjudication, for the statute is not limited to cases absolutely beyond the bankrupt's control.

In Bankruptcy. In the matter of the bankruptcy of Charles E. Swain. Objections to discharge. Discharge granted.

Philip B. Carter, of Melrose, Mass., for bankrupt.

Paul Dawes Turner, of Boston, Mass., for objecting creditor.

MORTON, District Judge. [1] As to the first objection, the bankrupt's attorney at first offered for filing a petition for discharge which recited with some particularity the reasons relied on as excusing the failure to present it within the year. He was thereupon informed by one of the clerks of this court that it was unnecessary for him to set forth said reasons, or to do anything except file the usual petition for discharge after the year and within the six months, with the statement that the petitioner was unavoidably prevented from filing the petition within one year. The petition originally tendered was not pressed, and the petition now before the court was filed. The clerk of this court also informed the bankrupt's attorney that it was unnecessary to present to the court at that time evidence to show that the delay in filing the petition was unavoidable, and that that question would be heard in connection with the petition for discharge. The clerk's statements were based on oral instructions given by the late Judge Lowell soon after the present act went into effect, and correctly stated the established practice of this court since that time.

It is doubtful whether the practice is sound (see In re Chase [D. C.] 186 Fed. 408); but it is clear that the petitioner was prevented from bringing the matter to the attention of the court within the permitted time by the clerk's statement to his attorney, and that what the petitioner did conformed to the current practice of the court. Under such circumstances, he ought not to suffer; and the petition for discharge should be treated as if presented to the court at the time when it was first tendered to the clerk.

[2] If the petition is properly before the court, no reason appears for not granting the discharge. So the real question is whether, upon the facts stated in the report of the referee, "the bankrupt was unavoidably prevented from filing" the petition within the six months'

grace period. Strictly construed, the words in question would exclude all excuses except those approaching actual impossibility, such as incapacitating illness, accident, or other causes entirely beyond the bankrupt's control. The words have never been so severely limited. They have, on the contrary, been given a liberal application and have been said to include delays in the postoffice, and faults on the part of clerks or employés in the office of the attorney making the application.

"It is not the purpose or policy of the law in such a matter as this to take advantage of errors, or mistakes, or misconstructions." Ray, J., in Re Daly (D. C.) 224 Fed. 263, 266.

The petitioner's counsel, through an honest mistake as to the law, supposed that the petition for discharge could not be filed until the equity proceedings in the state court (in which charges were made against the bankrupt, which would be sufficient, if established, to defeat the discharge) had been terminated. He therefore did not attempt to file the petition for discharge until the conclusion of those proceedings. It would, I think, be altogether too strict a construction of the statute to hold that on such facts the bankrupt did not have the right to petition for his discharge within the six months period.

An order will be entered nunc pro tunc (see Mitchell v. Overman, 103 U. S. 62, 64, 26 L. Ed. 369) as of the date of the filing of the petition for discharge, September 25, 1916, finding that the petitioner was unavoidably prevented from filing his petition within the prescribed time; and a further order granting the discharge.

In re AMSDELL-KIRSCHNER BREWING CO.

(District Court, N. D. New York. August 7, 1917.)

1. MORTGAGES ⟸535(1)—FORECLOSURE—RIGHTS OF PURCHASERS—LIENS.
   A corporation purchased mortgaged property, without assuming the mortgage or the mortgage debt. While it was the owner of the premises, but after it had ceased to use them, water rents, which under the law became a lien and charge on the property, accrued. The mortgage was foreclosed, and the judgment provided that the water rents should be paid from the proceeds of the sale; but, at the request of the holders of the mortgage, the water rents were not deducted from the proceeds, and the premises were sold to, and bid in by, the holders of the mortgage subject thereto. *Held* that, where they had not paid such water rents, or obtained any assignment thereof from the city, they had no claim against the corporation, or its estate in bankruptcy.

2. BANKRUPTCY ⟸336—AMENDMENT OF CLAIMS—TIME.
   An application to amend a claim after the expiration of one year, and after the disallowance of the original claim and the affirmance of such disallowance, will not be granted, where the liability of the bankrupt is not shown, and the trustee strenuously contests the claim.

In Bankruptcy. In the matter of the Amsdell-Kirschner Brewing Company, bankrupt. On application by Lona F. Crounse and another to file an amended claim after the expiration of one year, and after

review of an order of the referee disallowing and expunging their claim, and affirming the action of such referee. Application to amend denied.

Visscher, Whalen & Austin, of Albany, N. Y., for claimants.
Muhlfelder & Illch, of Albany, N. Y., for trustee.

RAY, District Judge. The facts in this case and those relating to this claim are quite fully set forth in In re Amsdell-Kirchner Brewing Co. (D. C.) 240 Fed. 492, and it is unnecessary to repeat them here. The claim filed was based upon a deficiency judgment against one Sniper, who signed the bond secured by the mortgage referred to in the case above cited. There was no deficiency judgment against the bankrupt, the Amsdell-Kirschner Brewing Company.

[1] It was claimed on the argument in that case that the deficiency judgment against Sniper arose in part by reason of the accrual of water rents on the premises while the property was in the possession of and used by the bankrupt, to whom the title of the premises had passed without assumption of the mortgage or mortgage debt. This court remarked:

"There is equity in this contention [that the bankrupt estate ought to pay the water rents]; but the trouble is a claim was not presented based on such facts, and no such claim was litigated, even indirectly, and there was no request to amend. If the now bankrupt corporation incurred indebtedness for water rents, and was liable therefor, I do not see why it is not still liable. If claimants should purchase such claim, it could present it in this court."

It now is made to appear on this application that while the owner of the premises, but, it is claimed, after the now bankrupt had ceased to use same, water rents accrued in favor of the city of Albany. Under the law these water rents became a lien and charge on the property. The claimants here became the owner of the mortgage, and foreclosed same, or perfected the foreclosure, and the premises were sold pursuant thereto, and bid in by these claimants. The judgment provided that the water rents referred to, being a lien on the premises, should be paid from the proceeds of the sale as a lien on the premises. The notice of sale and terms of sale so provided, but on application of these claimants, and at their request, the amount due the city of Albany for water rents was not deducted from the proceeds of sale, but the premises were sold to and bid in by these claimants, subject to said water rents, and by such purchase under such conditions these claimants, of course, assumed and became obligated to pay the water rents, inasmuch as they were a lien on the premises purchased by them.

There is no evidence before this court that these claimants have paid these water rents, and there is no evidence before this court that the city of Albany has ever assigned or transferred to these claimants its claim for such water rents. Affidavits are also filed to the effect that the now bankrupt corporation had in fact ceased to use the mortgaged premises prior to the accrual of the water rents referred to; in other words, that the now bankrupt corporation received no benefit fom the water furnished these premises and for which the lien

exists. By the terms and conditions of the bond and mortgage these water rents became a lien and charge on the premises.

Under the circumstances shown, it appears that these claimants have purchased these premises, in effect, assuming the payment of the water rents, and which are a burden on the premises, and which rents, of course, increase the amount the claimants will have to pay; but it does not appear that they have paid same, or that they have purchased the claim of the city of Albany for such water rents, and this court is unable to see any theory upon which it can hold that the claimants have a claim against the bankrupt or the bankrupt estate for such water rents.

[2] I think it would be a waste of time to allow the amendment to the claim, and expend time and money in taking proofs in regard thereto, as the trustee in bankruptcy contests the same most strenuously.

The application to amend the claim must therefore be denied. So ordered.

UNITED STATES v. FRENCH.

(District Court, S. D. Florida. July 30, 1917.)

No. 617.

1. POST OFFICE ⊂=33—LETTERS THREATENING PRESIDENT—FOR WHOM INTENDED.

Under the rule that words of a statute judicially defined before their use therein will be construed as used in the light of that decision, unless the context shows them to have been used in some other sense, to constitute the offense denounced by Act Feb. 14, 1917, c. 64, depositing for conveyance in the mail a letter containing "any threat" to take the life of or to inflict bodily harm on the President, it must be intended that the letter be communicated to the President, the person against whom the threat is made, and thereby influence his action, which intention is negatived in the case of a letter addressed to a third person, stating, if the German people "can pay $20,000 for W. (the President) wholesale fires, or soldier poisoning answer Yes"; and further stating, "I have an invention that will destroy an entire fleet, * * * burn cities and poison thousands."

2. WORDS AND PHRASES—"THREAT."

A "threat" is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent.

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

Walter T. French was indicted for an offense. On demurrer to indictment. Demurrer sustained.

Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla.

George C. Bedell, of Jacksonville, Fla., for defendant.

CALL, District Judge. On July 20, 1917, the grand jury indicted the defendant for a violation of the act of Congress to punish persons who make threats against the President of the United States, approved

February 14, 1917. The defendant demurs to the indictment. The first ground of demurrer is that:

"The facts stated in said indictment do not constitute any offense against any law in existence on April 30, 1917."

And the third:

"Neither of the certain letters set forth in said indictment contains any threat to take the life of, or to inflict bodily harm upon, the President of the United States; but the said letters are an invitation, ruse, or decoy to ascertain the sentiments of the person to whom they are addressed."

The fourth:

"The said letters were not addressed to the President of the United States, and there is not alleged any intent that they should ever reach the President of the United States."

The indictment sets out the letters, after alleging the addressing of the envelope to one Karl Zapf, at Jacksonville, Fla., and mailing same with the intention of having same delivered by the postal authorities, as follows:

"Dear Sir: if the german people can pay $20,000.00 for Wilson [the President of the United States] wholesale fires, or soldier poisoning answer yes by cutting or having 6 of the Spanish banuts off at roots, I mean the ones on front of lot close to corner of gate way. A pro-Jerman Anarcist."

And also the following:

"I have an invention that will destroy an entire fleet, *Navy* without a noise or shot, I can burn cities and poison thousands. I am not crazy or a faker but can produce the goods lets get together."

The question presented by the demurrer is: Does the mailing of the envelope containing these two writings violate the act approved February 14, 1917? That act is as follows:

That "any person who knowingly and willfully deposits or causes to be deposited for conveyance * * * 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," shall be punished, etc.

[1] If these letters, separately or taken together, contain a threat to take the life of the President, or to do him bodily harm, then the demurrer should be overruled; if they do not, then the demurrer should be sustained. The decision of that question depends upon what Congress means by the use of the words "any threat." It is a rule of construction of statutes that, if the words used have been judicially defined before the legislative body uses them, then they will be construed to have been used in the light of that definition, unless the context shows them to have been used in some other sense.

[2] A threat is defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent. A. & E. Enc. of Law, 141. No particular words are necessary to constitute a threat, but these words must be intended for the person threatened. If the communication is sent to one with

the intention of having it delivered to the person threatened, and it in fact reaches him, this would be sufficient. Id. 145.

The cases referred to in the text seem to support the principles announced. The communications set out in the indictment, when tested by the rules above mentioned, do not measure up to the requirements. It is clear, from the reading of those communications, that it never was the intention of the writer to have them communicated to the President. It is clear that the intention of the writer was either to test the loyalty of the addressee or gain money from him, on the supposition that he was strongly pro-German—leaving out the possibility that the writer was demented. However, his intention is of no moment in this investigation, unless it was that his writings should be communicated to the President, and thereby influence the action of the Executive. These communications, it seems to me, negative any such intention. The indictment setting out the writings in hæc verba, their construction becomes a question of law for the court to decide.

The demurrer to the indictment will therefore be sustained.

In re DE LEWANDOWSKI.

(District Court, D. Massachusetts. July 17, 1917.)

No. 22299.

BANKRUPTCY ⊜410—DISCHARGE—TIME.

Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (Comp. St. 1916, § 9598), declares that any person may, after the expiration of one month and within the next 12 months subsequent to adjudication, file an application for a discharge in the court of bankruptcy in which the proceedings are pending, and, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing his petition within such time, it may be filed within, but not after, the expiration of the next six months. Section 31a (Comp. St. 1916, § 9615) declares that whenever time is enumerated by days in this act, or in any proceedings in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last shall fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday. The bankrupt was adjudicated on June 4, 1915, and her application for discharge was not filed until December 5, 1916, though the preceding day was not a Sunday or legal holiday. *Held* that, in such case, the application for discharge came too late, being filed more than a year and six months after adjudication, for, in computing the time by months, the first day is to be excluded and the last day counted, so that the time expires on the corresponding day in the month in which the stated period occurs.

In Bankruptcy. In the matter of the bankruptcy of Maidelle De Lewandowski. On application for discharge. Application denied.

Ralph E. Tibbetts, of Boston, Mass., for bankrupt.

William C. Mellish, of Worcester, Mass., for objecting creditor.

MORTON, District Judge. This is an application for discharge. The bankrupt was adjudicated on June 4, 1915. The application for

discharge was filed December 5, 1916. The preceding day was not a Sunday or legal holiday. The discharge is opposed upon the ground, inter alia, that "it does not appear that the petition for discharge was brought within the time required by law."

The act provides that:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending: if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months. Section 14a, B. A.

"Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday." Section 31a, B. A.

It has been held that the rule of computation stated in section 31, supra, as to days should be applied when time is limited by months or years. Jones v. Stevens, 94 Me. 582, 48 Atl. 170; In re Warner (D. C.) 144 Fed. 987; In re Stevenson (D. C.) 94 Fed. 110. See, too, Collier, Bankruptcy, pp. 308, 574; Remington, Bankruptcy, § 2423. The corresponding provision in the law of 1867 (Act March 2, 1867, c. 176, § 48, 14 Stat. 540) was similar, and the construction placed upon it by the Supreme Court has been followed in decisions under the present act. Dutcher v. Wright, 94 U. S. 553, 558, 24 L. Ed. 130. See, too, Cooley v. Cook, 125 Mass. 406.

All these decisions held that, in computing time by months, the first day is to be excluded and the last day counted, so that the time expires on the corresponding day in the month in which the stated period terminates; e. g., four months from January 1st expired May 1st, and a year from January 1, 1915, expired on January 1, 1916. When the expiring day falls on a Sunday or holiday, the next day is included.

The applicant for discharge contends that an additional day of grace is allowed; in other words, that neither the day at the beginning nor the day at the end of the period is counted. In re Holmes (D. C. Vt.) 165 Fed. 225, so decided. No other decision so interpreting limitations of time has been called to my attention. In both the cases cited as authority by it, the last day fell on a Sunday or holiday, and on that account the additional day was allowed. They seem to me authorities against the proposition here contended for by the bankrupt.

The application for discharge was not filed in time, and must be denied.

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

(District Court, D. Montana. July 12, 1917.)

No. 574.

1. REMOVAL OF CAUSES ⟸26—RIGHT OF REMOVAL—"NONRESIDENT"—"NONCITIZEN."

Citizens of Montana jointly sued in the state court a foreign corporation and a citizen of Italy living within the state. Under the statute declaring that suits falling within the original jurisdiction of the District Court may be removed by the defendant or defendants, being nonresidents of the state, defendants removed the cause. *Held*, that the word "nonresident" is synonymous with "noncitizen," and, though the alien lived within the state of Montana, he was entitled to remove the action.

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

2. VENUE ⟸26—ALIENS—ACTIONS.

If an alien desires to commence an action or bring a suit against a citizen of the United States, he must resort to the domicile of the defendant to sue; the alien not being assumed to reside in the United States, though citizens may sue in either the state of which the plaintiff or the defendant was a resident.

At Law. Action by Altie Best and another against the Great Northern Railway Company, a corporation, and another, begun in the state court, and removed to the federal court. On motion to remand. Motion denied.

Walsh, Nolan & Scallon, of Helena, Mont., for plaintiffs.

Veazey & Veazey and W. L. Clift, all of Great Falls, Mont., for defendants.

BOURQUIN, District Judge. Defendants, one a foreign corporation, the other a citizen of Italy resident in this state, and who in a court thereof has petitioned for naturalization, sued jointly in tort in the state court, removed the suit hither, and plaintiffs, citizens of this state, move to remand. The suit is of original jurisdiction in this court, and the statute provides that such cases, brought in a state court, may be removed hither "by the defendant or defendants being nonresidents of that state."

[1] Plaintiffs contend that there is no right of removal, for that the defendant alien is not a nonresident of this state; defendant corporation, that, the case being of original jurisdiction herein, the alien's residence is merely of venue, a privilege capable of waiver, and that it can remove the suit in any event. The statute is the measure of the right of removal; but, having in mind that citizenship, and not residence, is the basis of jurisdiction, that the object of removal is to enable one, sued in a state of which he is not a citizen, to submit the controversy to a tribunal presumably free from local influences and more impartial than a court of the state of plaintiff's residence, in the sense of citizenship, and having in mind the practice and consequences, it is believed that, though "nonresidents" is not an accurate (but sometime) synonym for "noncitizens," or for "citizens of other states or foreign states,"

it is so intended in the removal statute, perhaps because of more common use, more euphonic, or of greater brevity. The practice always was and now is that, in suits between citizens of different states, citizenship alone, and not residence, is material, whether original jurisdiction or on removal is involved. (A suit can neither be brought in nor removed to this court, though one or both parties are resident in this state, but neither a citizen thereof, nor alien, save by consent.)

The cases make a distinction in the matter of alien defendants on removal, which is believed unwarranted. Most such cases are noted in Simpkins' Equity, 808. They seem to overlook the basis of jurisdiction and also the reasons for removal, that aliens' residence is immaterial either to jurisdiction or venue, and that the doctrine of said cases leads to absurd consequences, even to perversion of the statute. For instance, if "nonresidents" be not construed "noncitizens," a citizen of Montana resident in Idaho, sued by a citizen of Idaho in a Montana state court, could remove the suit into this court. Conversely, a citizen of Idaho resident in Montana, so sued by a citizen of Montana, could not remove the suit into this court.

[2] Furthermore, "an alien * * * is assumed not to reside in the United States, and must resort to the domicile of the defendant" to sue. Railway Co. v. Gonzales, 151 U. S. 507, 14 Sup. Ct. 401, 38 L. Ed. 248; In re Keasbey, etc., Co., 160 U. S. 230, 16 Sup. Ct. 273, 40 L. Ed. 402. That is, while citizens of states may sue in the state of the citizenship of either plaintiff or defendant, aliens, though living in a state, can sue only in the state of defendant's citizenship, and for the same reason a citizen may sue an alien wherever process can be served on him, though the alien lives, is resident, in another state than that of plaintiff or the court. So an alien, resident, in the sense of living, in Montana, cannot bring suit in this court against a citizen of Idaho, though a citizen of Montana, residing in Idaho, can, all because citizenship, not residence, controls.

Remand denied.

In re COLE JEWELRY CO.

Intervention of RICHARDSON.

(District Court, N. D. Georgia. March 15, 1917. On Motion for Rehearing, April 3, 1917.)

No. 5642.

BANKRUPTCY ⊂345—CLAIMS—PRIORITIES—RENT.

Where a bankrupt's landlord had a distress warrant issued and levied, and a person representing four or five of the largest creditors of the bankrupt, but not all of the creditors, went into control of the business, the landlord was entitled to a lien or right of priority against goods levied on and not sold, and accounts which could be identified as covering articles levied on, but had no such right as against the general fund, because of the commingling of assets in the store.

In Bankruptcy. In the matter of the Cole Jewelry Company, bankrupt. On intervention by Mrs. Josephine Inman Richardson. Claim allowed in part, and denied in part.

Rosser, Slaton, Phillips & Hopkins, of Atlanta, Ga., for trustee in bankruptcy.

Robert C. & Philip H. Alston, of Atlanta, Ga., for claimant.

NEWMAN, District Judge. I have gone through this case pretty carefully, and I am satisfied that the action of the referee was right, except probably as to the amount of the claim. A careful investigation of the balance due Mrs. Richardson for rent—that is, rent that was due at the time the distress warrant was issued—shows the amount to have been $201 principal, and interest, which, as I have calculated, makes the gross amount, principal and interest to date, $270.19. Mrs. Richardson is undoubtedly entitled to her lien for this amount on the articles set out in Exhibit A, attached to the referee's certificate, and the balance due on the accounts set out in Exhibit B, also attached to the referee's certificate. These two amounts together are sufficient on their face to more than pay Mrs. Richardson's claim. Whether that much can be realized, or not, it is impossible to say.

I do not see how any other claim of a lien for her can be upheld, unless it can be determined that Slocum Ball went into control of the business and in charge of the stock as the representative of the creditors generally. Undoubtedly he represented four or five of the creditors, and a majority in amount of all the creditors; but the evidence fails to show that he was there as the representative of the creditors generally. If he had been, the result here would be entirely different. The creditors who put Ball there, and who are responsible, in a way, for what he did in connection with the matters in issue here, perhaps ought to be required to share Mrs. Richardson's loss, if, in this bankruptcy proceeding, there was any way to get at them separately; but I do not see how that can be done here in any proper or just manner.

The attempt to create a trust here, as proposed by counsel for Mrs. Richardson, or the rights arising from commingling the assets in the store, cannot, as I see it, be sustained. The only clear right that I can see to priority is on the articles and accounts I have referred to, and even this assumes the levy to have been valid, about which there is some doubt at least. I think it is right, under the facts and circumstances surrounding this matter, to allow the lien to the extent I have indicated.

The action of the referee, except as to the amount, is approved, and he should find, as we make it here, that Mrs. Richardson is entitled to a lien of $270.19 on the articles and the accounts to which I have referred, giving her, of course, the same rights as to the accounts that the trustee would have.

On Motion for Rehearing.

Since this motion for a rehearing on Mrs. Richardson's intervention was filed, I have gone over the evidence in this case again very carefully, and I am satisfied that, under all the evidence here as to the facts in connection with this claim, the levy of the distress warrant, the receipt given by Mr. Slocum Ball, and his relation to the store and to the whole transaction, I made no mistake in determining this case

on March 15, 1917. Indeed, I am fully satisfied with the correctness of that decision.

Slocum Ball was the representative, at the most, of only five creditors, although they were large creditors, and there were a number of other creditors; and I do not see how Mrs. Richardson can have any rights as against the general fund arising from the sale of the stock of goods, unless Ball represented the creditors generally. The articles found and identified in the store, and the accounts owing for goods sold, which were identified as having been a part of the goods levied on, is the extent, in my opinion, to which her rights go. I do not think there was any recognition particularly of a trust, on the part of the court, as to articles sold which had been levied on; but her right to those accounts was recognized because the articles sold and covered by those accounts had been identified as part of the property on which the sheriff made his levy. If the levy be sustained, as it has been both by the referee and by the court, her right as to those accounts is as clear to my mind as her right to the particular articles of jewelry which had not been sold, and which were part of the goods levied on.

Therefore, being satisfied that the decision heretofore made is correct, the motion for a rehearing must be, and the same is hereby, denied.

In re HAWKINS.

(District Court, N. D. Georgia, N. W. D. July 5, 1917.)

Nos. 855, 856.

1. BANKRUPTCY ⟸165(1)—PREFERENCE—WHAT CONSTITUTES.
   Stockholders in a failing corporation, who had indorsed the corporation's paper, executed security deeds on their individual property to secure corporate creditors, with the understanding that the time of payment should be extended and further credit given the corporation. The transaction occurred a little more than a month before the bankruptcy of the corporation and of the stockholders individually. *Held* that, as the mortgages would enable the creditors obtaining such liens to secure the larger portion, if not all, of their debt to the exclusion of other creditors of the same class, such mortgages were preferences.
2. FRAUDULENT CONVEYANCES ⟸27—MORTGAGE BY STOCKHOLDER—VALIDITY.
   In such case the mortgages were subject to attack as a fraud on the creditors of the stockholders, who were insolvent, for they could not assume debts of the corporation to the exclusion of their own creditors.

In Bankruptcy. In the matter of the bankruptcy of Miss M. E. Hawkins and Miss Lucile Hawkins. Petition by the trustee for leave to sell real estate free from all liens, and attacking the debts and liens of certain creditors, with petition to review order of referee in favor of trustee. Order of referee upheld.

In September, 1916, Miss M. E. Hawkins and Miss Lucile Hawkins were officers and managers of the Hawkins-King Millinery Company, owning $10,000 of the capital stock of said corporation. They also owned a house and lot in Atlanta, Ga., and about January, 1916, they borrowed $1,500 from one Rosa W. Young, giving a loan deed on said house and lot to secure same, and used

this in buying out other stockholders and financing the corporation. On October 24, 1916, the Hawkins-King Millinery Company went into bankruptcy, and on the same date the Misses Hawkins filed their individual voluntary petitions. On September 11, 1916, the Misses Hawkins each indorsed the corporation's paper to the Exchange National Bank of Rome, Ga., for $2,400. On September 14, 1916, a warranty deed was given by them on their property in Atlanta, subject to the deed given to Rosa W. Young, for $867.84, to secure the debt of the corporation to the Tinsley Millinery Company for that amount, and on September 15, 1916, a third security deed to said property in Atlanta, subject to the first two deeds, was given by them to secure a debt of the corporation to the Vatter-Lynn Millinery Company, also with the understanding that time of payment would be extended and further credit given the corporation. A bond to reconvey was given by Rosa W. Young to the bankrupts, but in making the two last deeds this bond was not assigned.

It appears from the record that the extension of time of payment and additional credit were of value to the corporation and to the Misses Hawkins; that at the time of making these security deeds the Misses Hawkins believed they were solvent; that, together with their interest in the corporation and the equity in the real estate, valued at $4,000, they believed they were solvent; that they were not in business on their own account, and owed practically no one individually at the time of their bankruptcy. At the time of the making of the second and third deeds there was no ordinary way for others of telling what their financial condition was, and all the evidence is to the effect that the lien claimants did not know or have reason to believe that the Misses Hawkins were insolvent. They did not know that they owed the bank. The trustee, representing the claim of the Exchange National Bank of Rome, filed a petition asking to sell the Atlanta real estate free from all liens, and attacks the validity of the debts and liens of the Tinsley Millinery Company, and the Vatter-Lynn Millinery Company.

Lipscomb & Willingham, of Rome, Ga., for trustee.
Walter S. Dillon, of Atlanta, Ga., for interveners.

NEWMAN, District Judge (after stating the facts as above). [1] I have gone carefully into the question in this case, have examined the briefs of counsel, have re-examined the report and opinion of the referee, and am entirely satisfied that the referee's decision is right. The giving of these mortgages was undoubtedly a preference, it seems to me.

[2] I am inclined to think that the second point made by the trustee is also sound; that is, that the individual bankrupts, the ladies here, could not create a lien on their property, to assume the debt of another, while they were insolvent, and thereby cut out all of their creditors. This would be a fraud upon their individual creditors, which the law would not tolerate. All this was done a little more than a month before the bankruptcy of both the Hawkins-King Millinery Company and the Misses Hawkins individually. There seems to be no doubt at all of the mortgages creating a preference under the bankruptcy act, that the effect of the giving of the mortgages was to enable the mortgagees to secure a larger portion of, if not their entire, debt, to the exclusion of other creditors of the same class.

The action of the referee will stand approved, and it is directed that the property be sold, as ordered by the referee, at the most convenient time under present conditions, subject to the mortgage of Mrs. Rose W. Young, for the sum of $1,500, which is not contested by any one.

In re BOURKE.

(District Court, D. Kansas, First Division. April 26, 1917.)

ALIENS ⊂=68—NATURALIZATION—TIME FOR PROCEEDING.

Act June 29, 1906, c. 3592, 34 Stat. 596, requiring application for admission to full citizenship to be made within seven years after the declaration of intention, applies to one who filed his declaration of intention before the act took effect.

Petition by Timothy Samuel Bourke for admission to citizenship. On final hearing. Petition dismissed.

POLLOCK, District Judge. The facts are petitioner filed his declaration of intention to become a citizen of this country in due form of law July 19, 1904. Based on this declaration of intention, he filed his petition in this court for a judgment of naturalization on the 14th day of December, 1916, more than seven years after the act of Congress of June 29, 1906, in regard to naturalization took effect. The question presented in this case is this: Will the declaration so filed support the petition, and warrant the entry of a judgment of naturalization as prayed therein, or was the right of petitioner to proceed by petition to procure a judgment of naturalization from this court cut off and barred by the seven-year period of limitation prescribed in the act of 1906?

On investigation, I find from the reported decisions the question so presented has been ruled by the Circuit Court of Appeals for the Second Circuit in Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67, by the Circuit Court of Appeals for the First Circuit in Harmon v. United States, 223 Fed. 425, 139 C. C. A. 19, and by the District Court for the Eastern District of Arkansas in Re Wehrli (D. C.) 157 Fed. 938, against the validity of the petition, and in the case of In re Anderson (D. C.) 214 Fed. 662, from the District Court for the Western District of Texas, and the case of Eichhorst v. Lindsey (D. C.) 209 Fed. 708, from the District Court for the Western District of Pennsylvania, holding in favor of its validity. It is also further observed in the Harmon Case, supra, a petition for writ of certiorari was presented to and denied by the Supreme Court, 241 U. S. 676, 36 Sup. Ct. 725, 60 L. Ed. 1232. Hence it may be safely said the weight of authority is against the sufficiency of the petition to authorize the judgment of naturalization prayed by petitioner.

The gist of the argument made in support of the legal sufficiency of the petition is that the act of Congress of June 29, 1906, by its very terms is inapplicable to and does not in any manner control or limit the time in which one, who had heretofore, under existing laws, filed his declaration of intention to become a citizen, may proceed, at any time after the filing of such declaration, to complete his right or privilege of obtaining a judgment of naturalization and admission to full citizenship. On the contrary, it is the contention of the government in this matter the seven-year period of limitation prescribed in that act applies to all future legal proceedings instituted and carried on for

the purpose of transforming an alien into a full-fledged citizen of our country. While it must be confessed the act does not in express terms prescribe a period of time in which any alien, who theretofore has declared his intention to become a citizen of this country, shall institute his proceeding to obtain a judgment of naturalization, hence the question presented is not altogether free from doubt, yet, if it be held the period of limitation prescribed by said act has no application in such case, it follows, while one who files his declaration of intention after said act took effect must proceed further by instituting his action within the statutory period therein named, or be forever barred, but one who, many years before the taking effect of said act, filed his declaration of intention, may, from the simple fact alone of having filed such declaration, delay for any period he may desire the filing of his petition for judgment of full citizenship.

I am convinced the Congress could have hardly so intended. Therefore, in harmony with the great weight of authority on the question presented, and from the very reason of the matter, I hold the petition must be dismissed, because insufficient in law.

It is so ordered.

UNITED STATES v. BOSTON & M. R. R.

(District Court, D. Massachusetts. September 21, 1916.)

No. 694.

RAILROADS ⊂=229—OPERATION—PENALTIES—HAULING DEFECTIVE CAR—"NEAREST AVAILABLE POINT FOR REPAIRS."

Within Safety Appliance Act, permitting without penalty a defective car to be hauled "to the nearest available point" where it can be repaired, availability depends on other considerations than mere distance; and whether, for a defective car containing freight destined to points west, E., 38 miles west of G., the point where the defect was discovered, rather than F., 17 miles east, E. and F. being the nearest repair points, was the "nearest available" point, was a matter of business judgment, on which, involving, as it does, many elements, the decision of those in charge of the business, if made in good faith, is entitled to serious consideration.

At Law. Action by the United States against the Boston & Maine Railroad. Judgment for defendant.

Geo. W. Anderson, U. S. Atty., of Boston, Mass., for the United States.

Charles S. Pierce, of Boston, Mass., for appellee.

MORTON, District Judge. This is a suit for penalties under the Safety Appliance Act. Judgment has been rendered for the plaintiff by agreement on the first and third counts of the declaration. The questions here presented arise under the second count, which in substance alleges that the defendant hauled over its railroad, from Gardner, Mass., to East Deerfield, Mass., a box car which was out of repair by reason of a coupler being missing from the A end of said car. The case is submitted on an agreed statement of facts, being those con-

tained in the report of the inspectors of the Interstate Commerce Commission, from which the following appear:

The car in question was billed from Smith Mills, Me., to Lake Junction, N. Y. It was in a train which left Boston during the night of August 23, 1916; it became defective and was left behind at Gardner, with one drawbar pulled out, between 1 and 2 o'clock the next morning. Subsequently it was turned around and was attached by its good coupler behind the caboose on the end of a freight train going west from Gardner at 7:40 a. m. on August 24th. On this train it was taken to East Deerfield, where it was repaired. This is the movement on which the complaint is based. The car contained about 45 pieces of freight, including one cask of gasoline. Gardner is not a repair point for such defects as this car developed. The nearest such point was Fitchburg, which is 17 miles east from Gardner; East Deerfield is 38 miles west. The freight in the car was destined to points west.

The contention of the plaintiff is that the car ought to have been taken to Fitchburg, because the distance was shorter. Obviously some movement of the car in its defective condition was necessary; it was beyond repair with the facilities at Gardner. The defect occurred during the night; the car was loaded with freight, on some of which speedy delivery may have been important. There were unloading facilities at Gardner, but it does not appear that there was any car there into which the freight could have been transferred from the defective car. What was done involved hauling the car about 20 miles further than the distance to Fitchburg; but it "gained on the voyage," and does not appear to have substantially increased the risk of injury to employés.

The statute permits a defective car to be hauled, not simply to the nearest point where it can be repaired, but "to the nearest available point." The word "available" cannot be ignored. It has been judicially defined (in connection with the word "assets") as follows:

"The word 'available' must have been inserted for some limiting or qualifying purpose. It must have been intended as including certain assets and excluding others, else there was no reason for its use. The ordinary meaning of 'available' is 'usable, capable of being used to advantage.' Hamilton v. Menominee Falls Quarry Co., 106 Wis. 352, 359, 81 N. W. 876, 878.

Availability obviously depends, under the statute, on other considerations beside that of mere distance. Whether Fitchburg was, under all the circumstances, the "nearest available" point for the repair of this car, was a matter of business judgment. Upon such a question, involving as it does many elements, the decision of those in charge of the business, if made in good faith, is entitled to serious consideration. It is not shown to have been wrong in this instance.

Judgment for the defendant on second count.

In re COOPER.

(District Court, D. Massachusetts. February 28, 1917.)

No. 23714.

BANKRUPTCY ⊂=347—PREFERRED CLAIMS—CLAIMS OF ASSIGNEE.

A claim for the necessary expense for an appraisal of the property of a bankrupt, which prior to bankruptcy was transferred to a common-law assignee, is entitled to be preferred, though presented by the appraiser directly against the bankrupt estate; for such appraisal was for the benefit, not only of the assignee, but of the bankrupt estate, establishing the amount and value of the property.

In Bankruptcy. In the matter of the bankruptcy of Nathan Cooper. Proceeding to review order of referee denying claim of common-law assignee. Order reversed, and claim allowed.

Leon R. Eyges, of Boston, Mass., for common-law assignee.
George I. Cohen, of Boston, Mass., for trustee.

MORTON, District Judge. The common-law assignee sold all the chattel property and reduced the entire estate to money. An adequate appraisal of the property which originally came into his hands seems to have been desirable, both for his protection and for the information of the trustee, if bankruptcy proceedings should be instituted. The charge for it appears reasonable, and there is no suggestion that the amount is excessive, or that the work was not well done. It seems to me that in this case an appraisal was reasonably necessary, in connection with the proper preservation and care of the property received by the assignee, and that the assignee, if he had paid the expense of it, should have been allowed therefor in his account with the trustee. If so, under Randolph v. Scruggs, 190 U. S. 533, 539, 23 Sup. Ct. 710, 47 L. Ed. 1165, the claim is entitled to be preferred, although presented by the appraiser directly against the bankrupt estate.

The order of the referee is reversed, and the claim is allowed.

THE BUENA VENTURA.

(District Court, S. D. New York. February 28, 1916.)

1. SEAMEN ⊂=11—WHO ARE SEAMEN—WIRELESS TELEGRAPH OPERATOR.

Libelant was a wireless telegraph operator who went on board respondent vessel pursuant to a contract between her owners and the Marconi Wireless Telegraph Company, by which he was required to sign the ship's articles, was classed as an officer, and messed with them. It was further provided that, should the vessel render salvage services through the use of the wireless apparatus, the Marconi Company was to have a share of the money earned. Libelant signed the articles at a stated wage of 25 cents per month, which was not collected. He was in fact hired and paid by the Marconi Company, which supplied him and the apparatus for a stated sum per month. Libelant also operated the launch when in port through a private arrangement with the captain and for which he was paid. He became sick and was discharged and taken to a hospital. *Held*, that he was a member of the crew, and, as a seamen who fell ill in the

service of the ship, was entitled to maintenance and cure at the expense of the vessel.

2. SEAMEN ⟸11—"CREW"—WHO CONSTITUTE CREW OF SHIP.
By the "crew" of a vessel, those persons are naturally and primarily meant who are on board her aiding in her navigation without reference to the nature of the arrangement under which they are on board.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crew.]

3. SEAMEN ⟸11—WHO ARE SEAMEN.
A man who serves a ship in her navigation as the result of a contractual engagement of any kind is a member of the crew and entitled to the privileges of a seaman.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Seamen.]

In Admiralty. Suit by George Gerson against the steamship Buena Ventura. Decree for libelant.

Silas B. Axtell, of New York City, for libelant.
Russell T. Mount, of New York City, for claimant.

HOUGH, District Judge. The pleadings present a somewhat novel application of the doctrine that vessel and owners are liable in case a seaman falls sick in the service of the ship to the extent of his maintenance and cure and wages, at least so long as the voyage is continued. The Osceola, 189 U. S. at 175, 23 Sup. Ct. 483, 47 L. Ed. 760. The last phrase of this sentence has no application to the matter in hand, because Gerson was discharged sick at an intermediate port and was cured before the voyage ended.

[1] Libelant was a "wireless operator" who came on board the Buena Ventura in pursuance of a contract between her owners and the Marconi Wireless Telegraph Company of America. By this agreement Gerson was required to sign the ship's articles, he was classed as an officer, and messed with them; assistance, if any, of the wireless apparatus operated by him was to bring to the Marconi Company "a fair and reasonable proportion of salvage moneys" that might be awarded to the shipowners; and, finally, a part of his duty was to instruct an officer of the ship in the art of sending messages by wireless apparatus.

Libelant did sign the articles, but purely as a formality; his stated rate of wage is 25 cents per month, which as a matter of fact was never collected; he received board and lodging from the ship, and a regular stipend from the Marconi Company.

It is quite true in one sense that the Marconi Company hired out their apparatus and a man to go with it at $100 a month.

It appears that Gerson did not find his duties as wireless operator so engrossing but that he could do other things, and by an arrangement between himself and the captain he operated the launch while in port, receiving therefor $15 a month. No such bargain is mentioned in the articles, and it does not affirmatively appear that the shipowners knew anything about it.

Gerson fell ill of iritis, an inflammation of the iris. It appears that he once told the master that on another vessel he had received some acid in one of his eyes from which he had suffered annoyance. There is no evidence to show that the iritis was connected with this earlier difficulty. There is no medical testimony, but I think it a matter of common knowledge that iritis is a difficulty frequently, if not usually, resulting from long-continued exposure to brilliant sunlight.

In my judgment Gerson fell ill "in the service of the ship," and is therefore entitled to maintenance and cure if he is to be regarded as a seaman or a member of the crew.

[2] The word "crew" is explicitly considered in United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740. What Justice Story there said has not been improved upon, though the language of Dodge, J., in The Bound Brook (D. C.) 146 Fed. at 164, may be quoted as a fair summary:

"When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board."

The word "seaman" undoubtedly once meant a person who could "hand, reef and steer," a mariner in the true sense of the word. But as the necessities of ships increased, so the word "seaman" enlarged its meaning. Even in Bean v. Stupart, 1 Doug. 11, it was held that a warranty to carry "30 seamen besides passengers" meant that the 30 seamen included a cook, a surgeon, and other employés, and did not mean merely able seamen. And a cook was explicitly held to be a seamen in this court by Betts, J., in Allen v. Hallet, Abb. Adm. 573, Fed. Cas. No. 223. By the same course of reasoning an employé on a barge may be regarded as a seaman. The Walsh Bros. (D. C.) 36 Fed. 607. Also, a cooper. United States v. Thompson, 1 Sumn. 168, Fed. Cas. No. 16,492. See, also, The Mary Elizabeth (C. C.) 24 Fed. 397. This court has even decided that a bartender may rank as a seaman, in The J. S. Warden (D. C.) 175 Fed. 314.

But the reason of the matter is shown best by Judge Benedict's decision in The North America, 5 Ben. 486, Fed. Cas. No. 10,314, wherein he held that a fireman was a seaman.

The reason for such generous interpretation of so simple a word as "seaman" is that every one is entitled to the privilege of a seaman who, like seamen, at all times contribute to and labor about the operation and welfare of the ship when she is upon a voyage. When mariners in the old sense of the term were the only persons who enabled the ship to go in safety, then they were the only seamen; when firemen contributed quite as much as the deck hands to that end, they became seamen in the eye of the law. And in my judgment a wireless operator is to-day a far more important person in the safe operation of a voyaging vessel than is any one imaginable fireman, cook, or the like.

If therefore the shipowner had directly hired this libelant as a wireless operator and put him on the articles not at the nominal sum of 25 cents a month, but at the wage he actually received from the

Marconi Company, there would be no doubt of his right to the privilege of a seaman; to be regarded as a member of the crew, and to be entitled to maintenance and cure as such.

Claimant's argument is that the right in question is a contractual right and has always grown out of and can only be justified by the seaman's contract of employment.

I think this is true, but I fail to discover in any reported case, or in the reason of the matter, any justification for the idea that the measure of right depends, not on the fact of service, but on the quantum of wage paid therefor.

It is urged that a vessel can clear from no port of the United States without having the entire ship's company set forth in the articles. This also is true, but does not, I think, advance the matter, for if Gerson belonged to the ship's company he belonged to the crew.

The fact is that Gerson served the ship; he was subject to discipline under the orders of the captain, and his business was to assist in a very important manner in navigating the vessel. It is this relation, and not the 25 cents a month, paid or unpaid, which made him a member of the crew entitled to the privileges of a seaman.

[3] It is preferred to put decision on this broad ground; i. e., that a man who serves the ship as the result of a contractual engagement of any kind, and serves her in her navigation, is a member of the crew and entitled to the privileges of a seaman.

In this case, however, it is plain that the arrangements made between the shipowners and the Marconi Company may well have conferred upon Gerson a status and a relation to the ship quite sufficient to justify his present demand without laying down the comprehensive principle hereinabove stated.

When this agreement is studied, it is seen that the shipowners really hired Gerson and the apparatus; they did not covenant to pay Gerson directly, but they agreed to pay, and in addition to this payment they specifically agreed that the libelant should rate as an officer, that he should sign the ship's articles, etc. In other words, the agreement shows that the parties thereto considered him a member of the crew whose business it was (inter alia) to assist in salvages. To be entirely logical, claimant would have to argue that, in the event of the Buena Ventura's making a salvage and getting an opportunity to salve by reason of the wireless apparatus, the Marconi Company should share in the salvage moneys, but that the wireless operator should have no share at all. It seems to me that such a proposition would be monstrous; yet, if Gerson is no more than the employé of the Marconi Company, such must be the result under this agreement.

The libelant may take a decree for $297.71, with costs.

THE MANCHIONEAL.

(Circuit Court of Appeals, Second Circuit. June 11, 1917.)

No. 238.

1. COLLISION ⟸83—STEAM VESSELS MEETING—EXCESSIVE SPEED IN FOG.
A steamship and a pilot boat meeting nearly end on in a fog so dense that they did not see each other until within 500 feet both *held* in fault for a collision for excessive speed after they heard each other's fog signals in violation of article 16 of the Inland Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 99 [Comp. St. 1916, § 7889]), and the pilot boat also for failing to keep a proper lookout.

2. COLLISION ⟸108—FAULT—ERROR IN EXTREMIS.
To excuse a false maneuver by a vessel in danger of collision as an error in extremis, it must have been produced solely by the fault of the other vessel.

3. COLLISION ⟸82(2)—EXCESSIVE SPEED IN FOG—RULE OF MODERATE SPEED.
Speed in a fog is always excessive in a vessel that cannot reverse her engines and come to a standstill before she collides with a vessel that she ought to have seen, having regard to fog density.

4. SHIPPING ⟸79—LIABILITIES OF VESSEL—LOSS OF WIRELESS APPARATUS FURNISHED UNDER CONTRACT.
A vessel owes the duty of reasonable care for the preservation of a wireless apparatus owned by a telegraph company but placed on the vessel under a contract with the owner for its service, and, if it is lost through the affirmatively proved fault of the vessel or her owner, both are liable therefor.

5. PILOTS ⟸16—LIABILITY FOR IMPROPER NAVIGATION OF VESSEL.
A pilot is responsible only for his personal negligence in the navigation of the vessel, and that must be affirmatively shown.

6. PILOTS ⟸2½—PILOTS' ASSOCIATIONS—LIABILITY FOR NEGLIGENCE OF MEMBERS.
A pilots' benevolent association whose members, instead of taking their fees as earned, pool them in the association, which after paying expenses distributes the fund among those on the active list according to the number of days they have worked, is not liable for the negligence of one of its members while in the service of a vessel.

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

Suits in admiralty for collision by the United New York Sandy Hook Pilots' Association and the United New Jersey Sandy Hook Pilots' Association, owners of the pilot boat New Jersey, and by the Marconi Wireless Telegraph Company of America, against the steamship Manchioneal, the Actieselskabet Dampskibs Manchioneal, claimant, with Charles Beebe, the United New Jersey Sandy Hook Pilots' Benevolent Association, and John F. Hopkins, as president, etc., impleaded. Decree against the Manchioneal alone, and her claimant appeals. Modified and affirmed.

Appeals from a decree in admiralty entered in the District Court for the Southern District of New York, holding the steamship Manchioneal solely at fault for a collision with the steam pilot boat New Jersey (resulting in the sinking of that vessel), and refusing to hold either Beebe, the pilot then on the Manchioneal or the "United New Jersey Sandy Hook Pilots' Benevolent Association," of which Beebe was a member, responsible in whole or in part

for the resulting damages. The Benevolent Association is unincorporated, and it and Beebe were brought in by petition under the fifty-ninth rule.

The New Jersey was a propeller about 150 feet long and 475 tons gross, built for the pilots, and used only in their business. She was owned by the two libelants, both corporations, and created for the purpose of holding title to the vessels used by the Sandy Hook pilots of this port.

Beebe is a New Jersey pilot, and all such pilots may, and as a matter of fact do, belong to the unincorporated New Jersey Benevolent Association above named.

The trustees of this association own all the stock of the incorporated libelant "United New Jersey Sandy Hook Pilots' Association," and this company owned three-tenths of steamship New Jersey; the other seven-tenths being the property of the libelant "United New York Sandy Hook Pilots' Association," all of whose capital stock is owned by an unincorporated New York "Benevolent Association," which is the counterpart of the New Jersey entity.

Pilots are licensed in both states by legislative authority and are subject to discipline by commissions appointed by the state executive. They are not obliged to join either "benevolent association," and can ply their trade independently if they can find means so to do. Such procedure, however, is impracticable, and the pilotage business of this port has since a date prior to this collision been done by pilots serving in turn according to an agreement among themselves, all of them belonging to one of the unincorporated "benevolent associations" aforesaid and turning their earnings into one of two common funds (i. e., those of New York and New Jersey) out of which the expenses of their pilot boats are paid, and from one of which each pilot (according to the state giving him license) receives a stipulated income based on the number of days per month he has worked; if the gross earnings of all are sufficient to pay the same in full; if not, all suffer ratably.

Membership in the Benevolent Association carries with it sick benefits or insurance, a retirement or old-age pension, and an interest in the property of the association payable to a member's personal representatives on death, or to himself if he resigns during his lifetime from what is practically a very rigid trade guild. The membership agreement in these "benevolent associations" forbids any alienation or hypothecation of interest; the rights and privileges obtained by admission are purely personal.

The petition under Rule 59 alleges personal negligence on the part of Beebe as pilot in charge of the Manchioneal, and is an effort to hold the Benevolent Association responsible for Beebe's fault.

The New Jersey carried a radio plant belonging to the Marconi Wireless Telegraph Company. It went down with the boat, and to recover its value the Marconi Company filed an independent libel, subsequently consolidated with the action of the New Jersey's owners. By the written contract between shipowners and Marconi Company the apparatus was to remain absolutely the property of the latter; but the owners (in the language of the contract) requested that it be put on board "to furnish service" to and for their steamer and its business at a stipulated price per month, paid by the owner. This contract also contained the usual clause, "Operators to sign ship's articles." Whether this was done is not proved; but we assume that the New Jersey had a license only, and that the formality of signing articles was not observed.

Uncontradicted facts surrounding collision are that it occurred about 8 a. m., of a calm summer day at a point somewhat to the westward of and near to the whistling buoy, which is two statute miles beyond the outer buoys of Ambrose Channel, and in line with the southerly side of said channel. The tide was flood, but of no great strength; the wind and sea were negligible. The weather was foggy, but as to how much it interfered with vision there is no agreement.

The Manchioneal, a fruit steamer about 265 feet long, nearly light, was bound to sea by Ambrose Channel. The New Jersey was coming into or toward harbor, and passed the whistling buoy aforesaid to the southward; i. e., having it on her starboard side. When the Manchioneal was still in Ambrose Channel, and the New Jersey passing the whistling buoy, they were on opposite parallel courses, but were not then visible to each other; and

whether they were then "end on" or otherwise is matter of dispute. The Manchioneal struck the New Jersey on the latter's starboard side at substantially right angles. The pilot boat was of wood, and the prow of the steel freighter cut in deeply; the New Jersey foundered in four or five minutes, yet the force of impact was not very great.

The Manchioneal put her helm hard aport, and went ahead full speed for at least a few turns, before collision. The New Jersey was traveling under a slightly starboard helm before she saw the Manchioneal, and before collision put it hard astarboard, and hooked up. Both vessels had been blowing fog whistles with regularity, and each heard the other before seeing her; but how often whistles were heard before sight is not agreed on.

The Manchioneal had master and pilot on the bridge, a quartermaster at the wheel, and the first officer as lookout on the forecastle head. The New Jersey had no one on her forecastle, and was navigated by her mate, who was personally at the wheel. Standing by him in the house was a pilot who said he was acting as lookout because the "boys" (i. e., the hired crew of the pilot boat) were at breakfast. The forecastle head of the New Jersey was a turtleback, and its sloping deck is given as the reason for not maintaining a lookout there; it was never done. It is also said that when "the turtleback gets wet it gets slippery." The capstan head, however, rose above this curving deck, and any work with that appliance would require the presence of workmen on the turtleback. The sea being calm and no rain falling, there was nothing to make the turtleback slippery on the morning in question except (perhaps) the fog vapor.

Both vessels were capable of about twelve knots, and at "half speed" the New Jersey would make about eight. She was a "heavy boat" and held her way well; but the actual speeds of the two vessels after the Manchioneal got near the end of Ambrose Channel and the New Jersey had the whistling buoy abeam is a matter of dispute and uncertainty.

Haight, Sandford & Smith, of New York City (John W. Griffin, of New York City, of counsel), for the Manchioneal.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark and Charles C. Burlingham, both of New York City, of counsel), for the New Jersey and Marconi Wireless Telegraph Co.

Lindsay, Kalish & Palmer, of New York City (J. Culbert Palmer, of New York City, of counsel), for Beebe and United New Jersey Sandy Hook Pilots' Benev. Ass'n.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The usual navigation rules apply to this matter, inasmuch as steamer and pilot boat had not in effect agreed to navigate with reference to the latter's peculiar occupation. It is not a case of special circumstances, as in The Monterey, 161 Fed. 95, 88 C. C. A. 259.

[1] Each vessel heard the other's fog whistles forward of the beam, when neither had ascertained the other's position, and each was therefore bound to "stop her engines and then navigate with caution until danger of collision (was) over." And cautious navigation meant that such speed should be maintained as would enable each vessel to stop within the distance that the other could be seen.

The fog density is not certain, yet the uncertainty has a bearing upon the case. There were but two men on the New Jersey whose business it was to pay attention to the navigation of that vessel; i. e., the mate at the wheel and the pilot at his side, who was acting as lookout. Both substantially begin their story of collision with the whistling buoy

abeam; yet one says he saw it at a distance of not over 150 feet on the starboard side, while the other also saw it with the same bearing at a distance of a quarter of a mile; and both maintain that the Manchioneal came into sight three points on their starboard bow, and from 1,200 to 1,500 feet away. Their story of collision is that the steamer maintained her course until she was about two points forward of their beam, and then turned at high speed and ran down the New Jersey with a right angled blow, before she could escape, even with the assistance of a hard astarboard wheel and a hook-up bell.

This story of collision is physically impossible. The Manchioneal was of no peculiar construction, and, to turn the eight points necessary to produce the collision asserted by these witnesses, an ordinary vessel of her size would advance considerably more than 1,000 feet in the process of swinging eight points under a hard over wheel. Knight's Modern Seamanship, p. 195.

Since by admitted compass bearings the two vessels were on opposite parallel courses, it follows that if the New Jersey passed the whistling buoy within 150 feet or less she could not, at any time, have had the Manchioneal three points on her starboard bow; for the latter was admittedly steering the Ambrose Channel course near the southern line of buoys. On the other hand, if the whistling buoy was seen a quarter of a mile on the pilot boat's beam, there is no excuse for not having seen the infinitely larger Manchioneal much more than 1,500 feet away —and the question of fog practically disappears from the case. From this dilemma the New Jersey cannot escape.

The point is settled by the testimony from the Manchioneal, which is full to the effect that, although whistles were heard from a vessel that turned out to be the New Jersey, that craft was not seen and could not be seen until she was no more than two lengths (or a little over 500 feet) away, and she then bore a quarter of a point on the starboard bow. This corresponds with the New Jersey's admitted compass course, continued from a point about 150 feet from the whistling buoy; produces a meeting end on or nearly so (i. e., within a quarter of a point), and article 18 applied—if there was then room and time to follow the rule.

We consider it established that the vessels did not see each other until they were about 500 feet apart, and within a minute or perhaps less of collision; but, if it be admitted that the New Jersey saw the Manchioneal at 1,500 feet, it was incumbent upon her (if she intended to pass starboard to starboard) to give a passing signal, and wait for assent to such departure from the rules. The Gladiator, 203 Fed. 690, 121 C. C. A. 648. Therefore libelants' case is not advanced by adopting so much of their own evidence.

[2] But if, as we find and hold, the vessels did not see each other until they were about 500 feet apart, we consider them both at fault for having permitted such a situation to arise. Down to that time it may be admitted that each master thought himself proceeding at moderate speed in a fog; but, when they were in sight of each other, the Manchioneal hard aported, the New Jersey hard astarboarded, and both rang for full speed ahead; and now each avers that, if this action was error, it was error in extremis. But that phrase always implies that

the false maneuver must be produced solely by the fault of the other vessel (The Elizabeth Jones, 112 U. S. 514, 5 Sup. Ct. 468, 28 L. Ed. 812); and when each of the colliding craft does in the very jaws of collision, what each tries to excuse by pleading in extremis, both are necessarily in fault for unnecessarily getting into a position which produced false maneuvers in both.

[3] Exactly what were the speeds of the colliding vessels cannot be ascertained; but they were such that each master took the desperate course of trying to pass the other's bow. The fact that such endeavors were made is proof that neither thought collision could be avoided by reversing, in which conclusion we agree.

This is not a compliance with the rule, so often announced, that speed is always excessive in a vessel that cannot reverse her engines and come to a standstill before she collides with a vessel that she ought to have seen, having regard to fog density. The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Etruria, 147 Fed. 216, 77 C. C. A. 442.

This finding renders it unnecessary to dwell upon the fault of bad lookout charged against the New Jersey. The point is mentioned only to state our opinion that by the overwhelming weight of authority it is settled that the proper place for a lookout is, under ordinary circumstances—on the bow. The Vedamore, 137 Fed. 844, 70 C. C. A. 342; St. John v. Paine, 10 How. at 585, 13 L. Ed. 537. See, also, The Arthur M. Palmer (D. C.) 115 Fed. 417; The George W. Roby, 111 Fed. 601, 49 C. C. A. 481; The Michigan, 63 Fed. 280, 11 C. C. A. 187; The George M. Dallas, Fed. Cas. No. 5338. Nor can it be accepted, as an excuse for not maintaining a lookout in what is usually the best place, that a vessel is so constructed as to render that position uncomfortable. There is not the slightest evidence that the New Jersey's turtleback was more than that.

[4] Our finding that both vessels were in fault requires some consideration of the claim of Marconi Company. The relation of the wireless apparatus to the vessel upon which it is installed is perhaps not easy to define in terms of historic law, because the relation itself is so recent. Although the Marconi operator was a member of the crew, and for many purposes a seaman,[1] the apparatus was not his, and cannot be regarded as the "personal effects" of a sailor. Neither was the wireless plant "cargo," "freight," or "baggage," as those words have long been understood. Yet it was received on board pursuant to a contract which imposed upon the ship and her owners the duty of reasonable care. The shipowner is not an insurer, but if, at termination of contract or employment, he is unable to return the apparatus through any fault of his own, both he and his ship are liable for affirmatively proved negligence. The Marconi Company is therefore entitled to recover in solido against the Manchioneal, with the usual right of recoupment against the New Jersey's recovery.

[5] There remains the petition against Beebe and the Benevolent

[1] See The Buena Ventura, District Court, S. D. N. Y., Feb. 28, 1916, 243 Fed. 797, holding a wireless operator to be a seaman in respect of claims for maintenance and cure.

Association. So far as Beebe is concerned, we have discarded his evidence in arriving at our conclusions upon the facts of this cause. The negligence of which he is specifically accused is in giving the orders to hard aport and full speed ahead. According to his story, both of these commands were given by the captain against his protest. Inasmuch as the master of the Manchioneal approved of the orders, it makes no difference who gave them. The master had not relinquished command of his ship by the employment of a pilot, and, if (as clearly appears here) he approved of what the pilot did, it is equivalent to giving the order himself, unless (as is not here asserted) the pilot induced him to agree to a wrong course upon pretense of superior local knowledge.

It is asserted in argument (though not pleaded) that the pilot must be responsible for any excessive or incautious speed or other improper navigation on the part of the Manchioneal. But a pilot is responsible only for his personal negligence, and that must be affirmatively shown. We have held that the steamship was going at such speed that she could not avoid collision within her range of visibility; but her master was entirely satisfied with the speed which we consider a cause contributing to collision. That the res called the Manchioneal was erroneously navigated is enough for the purposes of the main suit, but Beebe cannot be held without clearer proof than is here presented of his personal responsibility for the error.

Our reasons for discarding Beebe's testimony upon the main issue are that, having testified to the captain's erroneous order and his protest thereto, he remained during a protracted examination ignorant of everything that occurred thereafter. He said that, having seen the New Jersey between a quarter and a half a mile away, he did not know what she did, and did not know whether she changed her heading. He was then asked:

"Why didn't you? A. I couldn't see her. Q. Couldn't you see her? A. No, not until we ran into the vessel. * * * Q. Do you know whether the New Jersey moved forward or back? A. No, sir."

And again he declined to remember whether the Manchioneal on porting blew one whistle or ever reversed her engines, although the testimony was full and substantially uncontradicted that both of these things had been done almost at the instant of collision. The position of this witness was, of course, difficult; he was charged with the navigation of a vessel that destroyed what in part was his own property. But his attitude on the witness stand was inconsistent with both intelligence and integrity; one or the other was absent. The least that can be said is that no finding can safely be made or supported on Beebe's evidence.

[6] As to the New Jersey Benevolent Association, if Beebe is not held, his association cannot be; yet we perceive no substantial difference between the facts here shown and those in Guy v. Donald, 203 U. S. 399, 27 Sup. Ct. 63, 51 L. Ed. 245. That case was decided on the ground that all that the members of the Pilot Association there complained against did was, "instead of taking their (pilot) fees as they earned them, the fees were mingled in the first place, and then, after paying expenses, distributed to those on the active list according to

the number of days" they had worked. The New Jersey Association does nothing more, and on the authority of the case cited the decree below was right.

On the reason of the matter the test of responsibility is: Who was employed to do the work that was negligently done? No shipowner believes that he employs the Benevolent Association; he takes a pilot because the law imposes one, and it imposes a man, not an association. The legal fee is the private property of the officiating pilot, and, if he chooses to pool his earnings with his guild-fellows, he has not changed his legal relation to his employer, nor increased the number of such employer's employés.

The decree below is modified so as to award half damages to the owners of the New Jersey and full damages (with right of recoupment) to the Marconi Company. In other respects it is affirmed. The appellants will receive the costs of this court; costs below will be divided. No other costs of this court are awarded; the decree below as to the costs there awarded to Beebe and the Benevolent Association will not be disturbed.

THE STUDENT.*

(Circuit Court of Appeals, Fourth Circuit. May 25, 1917.)

No. 1500.

SHIPPING ⊂=84(3)—LIABILITY OF VESSEL—INJURY TO EMPLOYÉ OF STEVEDORE.

Libelant's intestate, who was an employé of an independent contracting stevedore engaged in loading a ship, was fatally injured by the falling of a sling of copper plates being hoisted on board by means of a fall and tackle rigged to a boom furnished and put up by the ship. The falling of the sling was caused by the working loose of a pin in the shackle holding one of the guy wires from the boom. The evidence was conflicting, but warranted a finding that the pin came out because it was defective in that the threads on the screw end were worn and rusty. This defect could not be seen by the stevedores after the tackle was in place, but could have been when it was put together. There was also evidence that means were quite commonly used which would have prevented the accident, and that the contractor requested that such means be supplied and was refused. *Held*, that a decree holding the ship negligent and liable for the injury was sustained by the evidence.

Dayton, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by Mattie Kreszewski, administratrix of Karmier Kreszewski, deceased, against the British steamship Student and the Terminal Shipping Company. Decree against the Student, and Richard Watson, master and claimant, and the Charente Steamship Company, Limited, owner, appeal. Affirmed.

See, also, 238 Fed. 936.

George Forbes and John Phelps, both of Baltimore, Md., for appellants.

Walter L. Clark and George T. Mister, both of Baltimore, Md. (Harry B. Wolf, of Baltimore, Md., on the brief), for appellees.

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

* Rehearing denied July 20, 1917.

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

KNAPP, Circuit Judge. The case in brief is this: On June 2, 1916, in the port of Baltimore, the Terminal Shipping Company, an independent contractor, was engaged in loading the steamship Student with a cargo of copper plates. The plates were piled in slings, which were hoisted aboard by means of a fall and tackle and two of the ship's booms, one over the side of the vessel and one over the hatch, the two falls connected therewith being attached together. Each boom was held in place by two guys, the boom over the side of the ship having one guy leading forward and the other aft, both guys being shackled to the head of the boom and made fast, after running through two blocks to eyebolts in the ship's rail. The lower block was secured to the eyebolt in the rail by a semicircular shackle through which a pin was inserted. The shackles and blocks and all the tackle used in hoisting the cargo belonged to and were furnished by, the ship, and the ship's crew had rigged them up and fastened the various parts together before they were turned over to the contractor. The shackle in question was rigged for use by putting the pin first through the unthreaded head of the shackle, then through the eyebolt, and then screwing it into the threaded head of the shackle.

About noon of the day named, and while the process of loading was going on, the shackle which held the aft guy suddenly gave way, in consequence of the pin coming out, with the result that the boom swung inboard, and a sling of copper was precipitated on the deck, striking the coaming of the hatch. The sling collapsed and some of the plates fell down upon Kreszewski, an employé of the shipping company, who was at work in the hold, inflicting injuries from which he died about a month later.

A few days after the accident he filed a libel against the vessel and the Terminal Shipping Company, to which answers were made by both respondents. In September following, upon suggestion of the death of Kreszewski, the suit was continued by his administratrix, and a second suit brought by libel in personam by the state of Maryland to the use of Mattie Kreszewski et al. The cases were consolidated and tried together. The trial court dismissed the libel as against the Terminal Company, held the ship solely liable for the accident, and awarded damages in the sum of $5,000.

The case turns on a question of fact which lies within narrow compass. That the accident was caused by the pin coming out of the shackle seems to be conceded on all sides. Why or how it came out is the point in controversy. The amended libel charges that the pin was defective and unsuitable, in that the screw-head which entered the threaded end of the shackle was so worn and rusty as to be liable to work out under normal use. On the other hand, the ship stoutly maintains that the pin was in good and serviceable condition, that it had been screwed in tightly by the boatswain with the aid of a marlin spike, and that it must have been tampered with by some one after the gear was turned over to the contractor. The claim that it

had been tampered with may be dismissed at once as a mere theory unsupported by any proof. The actual condition of the pin is the decisive issue.

Speaking generally, it appears that all the appliances furnished by the ship were of superior quality and strength. The testimony shows that they had been found sufficient to handle loads several times heavier than the sling of copper plates which were being put aboard when the accident happened. The testimony is also to the effect that a shackle pin in proper condition would not work loose in the two and a half days that the tackle had been in use and under the moderate strain to which it was subjected. Although this is hardly a case to which the doctrine of res ipsa loquitur applies, yet the fact that the pin did become loose gives support to the contention that it was not such a pin as the ship was bound to furnish (Reid v. Fargo, 241 U. S. 544, 549, 36 Sup. Ct. 712, 60 L. Ed. 1156); and this contention is aided, in our judgment, by the appearance of the pin itself, which was produced in court on the argument and submitted to our inspection. Whilst the body of the pin, which passed through the eye-bolt, shows little evidence of wear or yielding to strain, the screw-head is evidently somewhat worn, the threads look dulled and lacking in sharpness, as from long use or imperfect construction, and there is some indication that it was more or less rusty when put in the shackle. In short, it seems a screw-head which might rather easily work out of place.

Nothing would be gained by a detailed review of the testimony respecting the sufficiency of this pin for the purpose required. The witnesses, expert and nonexpert alike, sharply disagree, and conflicting opinions would perhaps be formed by those who might now subject it to examination. Taking everything into account, we are inclined to the conclusion, which was reached by the learned District Judge, that the pin in question was shown to be defective and unfit by a slight preponderance of proof; and if this conclusion be accepted, the liability of the ship follows under familiar principles of law. The case is exceedingly close, and we can only express our best judgment after careful study of the record and personal observation of the shackle which caused the accident. On the whole we think the pin unsuitable, because of its worn and defective condition, and therefore not such a pin as the ship was under obligation to provide.

In support of this view, one or two observations may be added. It is admitted by the appellants that the condition of this pin could not be discovered by any examination which it was the duty of the contractor to make before accepting the tackle and putting it to use. To all appearance it was of good quality and in every way sufficient. The contractor had the right to assume that it was free from any defect that was not observable. If it was in fact unsafe by reason of imperfection or unfitness which could not be seen after it was inserted in the shackle, the responsibility therefor rested upon the ship and not upon the contractor, because the ship was bound to furnish tackle free from defects of that character.

Moreover, there were two ways at least in which the consequences of this particular defect might have been avoided. The first of these

was what is called a "preventer," which the contractor says the ship refused to supply, though request was made before the work commenced. On behalf of the ship it is earnestly denied that any such request was made until after the accident. This question of veracity was decided by the court below in favor of the appellees, and we are not persuaded that a different conclusion should be reached; and the evidence of record indicates that no serious results would have followed the giving way of the shackle if a suitable preventer had been provided. Another means of insuring safety would be to protect the pin from coming out by using a wire to hold it in place, or the pin might be so made as to extend beyond the threaded end of the shackle far enough to permit the insertion of a cotter pin, which would keep it in position. In a word, there appear to be appliances, well known and frequently used, that would presumably avoid the risk of a defect which was unobservable to the contractor, but which might readily have been seen by the ship's crew in putting the tackle together. In this case such precautions were doubtless deemed by the master to be quite unnecessary, because of the unusual size and strength of its tackle; but unfortunately it turned out that there was a concealed defect, such as we are constrained to hold, and a serious accident resulted which probably would not have occurred if proper measures had been taken to guard against it. The Anglo-Patagonian, 235 Fed. 92, 148 C. C. A. 586.

Affirmed.

DAYTON, District Judge. I dissent. To sustain this decree for $5,000 against this Steamship Company upon the evidence contained in this record, in my judgment, leads this court, in effect, to establish the doctrine that an employer must be an insurer against accident, not only to his own employé, but to the employé of his independent contractor, unless the accident results solely from the negligence of the injured employé himself. Such a decision of the case, in my judgment, annuls the well-settled rules that (a) the fact of accident carries with it no presumption of negligence on the part of the employer; that (b) the burden of proof is upon the injured employé, charging negligence, to show it by affirmative proof of substantial facts; that (c) it is not sufficient for the injured employé to show that the employer *may* have been guilty of negligence, he must show by evidence the fact that he *was*; that (d) conjecture is an unsound and unjust basis for recovery in negligence cases, and where it is uncertain which one of several things may have brought about the injury, for some of which the employer is liable and for some of which he is not, neither court nor jury are permitted to guess between these causes and find the negligence of the employer was the real cause; that (e) if an employer furnishes an independent contractor the means and appliances, and such contractor accepts them as sufficient, and undertakes, solely and alone, to direct and prescribe their use, the employer is not liable for accident occurring to the employé of the contractor incurred in their use; that (f) while an employer owes the duty to use ordinary care in supplying sound and sufficient appliances, he is not required (1) to make use of the safest known appliances and

instruments, nor (2) to discard one which is not of the safest possible kind which can be secured and supply something in place which may be safer, nor, (3) without regard to their cost and his ability to pay for them, to provide the newest and best kind of implements which may be in use in his line of business, nor (4) to provide machinery or appliances of any particular description; but he discharges his duty to his employé when he provides those which are in common and general use in his business, which are considered safe by other employers generally, who are engaged in the same business, and which may be safely operated by the exercise of ordinary or reasonable care. He cannot be made liable by reason of the fact that other appliances which are safer than his are also in common use, but he discharges his duty if the appliances which he furnishes are reasonably safe for the purposes intended, such, in short, as a prudent man would select and use, having in view his own protection. The fact that other appropriate means might have been used to do the work does not make it negligence on the part of an employer to use an implement also appropriate and ordinarily sufficient, although an accident results from its use. Nor are the rules requiring inspection based on any other principle or requirement than the use of ordinary care. Hidden defects in appliances are not required to be detected, nor is an employer required to tear his machinery apart to ascertain whether such defects do or do not exist. The fact that a clamp to which the guy-rope of a derrick was attached broke does not imply that the master with reasonable diligence might have discovered the supposed defect as held by the Court of Appeals of New York in Welsh v. Cornell, 168 N. Y. 508, 61 N. E. 891.

The principles set forth in the first four (a, b, c, and d) above paragraphs seem to me to be settled beyond question by these authorities:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * Second, that in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he *was*. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." Patton v. T. & P. Ry. Co., 179 U. S. at page 663, 21 Sup. Ct. at page 277, 45 L. Ed. 361.

"When the evidence is equally consistent with either view—the existence or non-existence of negligence—it is not competent for the judge to leave the matter to the jury, the party who affirms the negligence has failed to establish it. This is a rule which never ought to be lost sight of. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established." Bailey on Personal Injuries, § 1672 et seq., cited and approved in Railway Co. v. Cromer's Adm'r, 99 Va. 763, 40 S. E. 54.

"To fix a liability upon the master for injuries sustained by a servant while engaged in his employment, the negligence of the master, as the proxi-

mate cause of the injury, must be proved by affirmative evidence, which must show more than a probability of a negligent act." C. & O. Ry. Co. v. Sparrow, 98 Va. 630, at bottom of page 640, 37 S. E. 302, at page 306.

"Conjecture is an unsound and unjust basis for a verdict. Substantial evidence of the facts which constitute the cause of action, in this case of the alleged defect in the lift pin lever and automatic coupler, is indispensable to the maintenance of a verdict sustaining the cause." Midland R. Co. v. Fulgham, 104 C. C. A. (8th Ct.) 151, at page 155, 181 Fed. 91, at page 95. Citing M. K. & T. Ry. Co. v. Foreman, 98 C. C. A. 281, 174 Fed. 377; Kern v. Snider, 76 C. C. A. 201, 203, 145 Fed. 327, 329; Spencer v. R. Co., 105 Wis. 311, 313, 81 N. W. 407; Thomas v. R. R. Co., 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; Hyer v. Janesville, 101 Wis. 371, 376, 77 N. W. 729.

"When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred—some fact or facts by which it can be determined by the jury—and not be left entirely to conjecture, guess, or random judgment, upon mere supposition, without a single known fact." Sorenson v. Pulp Co., 56 Wis. 338, 14 N. W. 446, cited and approved in R. R. Co. v. Sparrow, 98 Va. 640, 37 S. E. 302, and R. R. Co. v. Cromer, 99 Va. 763, 40 S. E. 54.

"The presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. * * * The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed. * * * The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences." Manning v. Ins. Co., 100 U. S. at page 698, 25 L. Ed. 761; U. S. v. Ross, 92 U. S. at page 284, 23 L. Ed. 707.

As establishing the fifth (e) principle, set forth above, touching the nonliability of the principal to his independent contractor's employés, and which principle alone, in my judgment, should be determinative of and reverse this decree, I cite from Bailey on Master & Servant: Pierce v. O'Keefe, 11 Wis. 181; De Forrest v. Wright, 2 Mich. 368; Ohio South. R. Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Hughes v. Railroad Co., 39 Ohio St. 476; McCarthy v. Second Parish, 71 Me. 318, 36 Am. Rep. 320; Aston v. Nolan, 63 Cal. 269; Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. St. Rep. 696; Waltemeyer v. Railway Co., 71 Iowa, 626, 33 N. W. 140; Sweeney v. Railroad, 128 Mass. 5; New Orleans & N. E. R. Co., 61 Miss. 581; Deford v. State, 30 Md. 179; Speed v. Railway Co., 71 Mo. 303. Also the 90 cases cited in the note to section 621 of 1 Thompson on Negligence (last Ed. 1901), the note to St. Louis, I. M. & S. R. Co. v. Yonly, 9 L. R. A. 604, and the very elaborate opinion of Judge Richardson in Bibb's Adm'r v. Norfolk & W. R. Co., 87 Va. 711, 14 S. E. 163.

To cite authorities supporting the principles enunciated in the sixth (f) above paragraph I deem unnecessary—they are so many. They can be found in large numbers in notes to sections 3986, 3991, 3993, 3995, and 4031 of 4 Thompson on Negligence, and to the same section numbers in White's Supplements 1 and 2 to this work. In the very outset of a consideration of this case it seems to me the pleadings disclose a progressive and continuing "fishing" excursion, on the part of

libelants, in order to find some ground on which to base the charge of negligence, for which a parallel would be hard to find. It would be ludicrous if it did not relate to so pathetic a subject. The accident occurred on June 2, 1916. Five days after, on June 7th, while the unfortunate victim of it was still, at least, in a semiunconscious state, the original libel was filed in his name against the steamship alone, in which the negligence is alleged to have been "*either* because of the breaking of the pin, or because the same came out, because not properly secured at the time it was rigged up by the ship's crew." It further alleged that "all the tackle connected with the hoisting of the cargo belonged to and was furnished by the ship, and the ship's crew had rigged the same up *and made fast* the various parts thereof before the stevedore started to work." And five days after that, on June 12th, an amended libel was filed for the purpose of making the stevedore corporation a party for its failure to perform its duty of inspection, owed libelant, of the various tackle, and especially of the shackle and pin, "which inspection your libelant alleged would have disclosed the defects set out herein, and that therefore their neglect in this particular *directly* contributed to the aforesaid accident."

The sound rule of pleading, universally accepted, is that:

"The facts, as stated, must not be insensible or repugnant, nor ambiguous or doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but positive and according to their legal effect and operation." Saunders on Pl. & Ev. (5th Am. Ed.) vol. 1, p. 919.

According to this original libel, the tackle, including the shackle and pin, were *made fast* by the ship's crew; but the pin either broke, or else *was not made fast*, by reason of one or other of which the ship is charged to be liable. By the libel and amended one taken together, we are informed that the libelant was the immediate employé of the Stevedore Company; that such company failed in its nonassignable duty to him of inspecting the condition of the tackle, and especially the shackle and pin, which inspection would have disclosed either that the pin was defective or had not been made fast, and therefore *it* was the party directly responsible to him for his injury. Pure "guessing" as to what caused the accident and which one of two independent parties could be held liable to libelant therefor! On this same 12th of June, when this amended libel was filed, the ship's evidence was taken in open court, so done because the ship was anxious to sail. Seven witnesses were examined. The shackle and pin were produced and identified. The ship's storekeeper testified that on the day the ship came into port he inspected the tackle and oiled this shackle and pin; that he oiled them after they had been fastened to the rail; that they were all right and the pin was screwed in tight. The boatswain testified that he erected the tackle on the ship; that he screwed the pin in the shackle with a marlin spike "so it was real tight"; that it was sound and in good condition; that he "would swear that it would never come out." The second mate testified to the superior character of the ship's tackle and to the soundness of the shackle and pin. Sliney, first officer, testified that all the gears turned over to the Stevedore Company were of the highest standard, that they were overhauled and inspected under

his personal supervision while at sea, and that a personal inspection thereof was made by him as it was erected, and a certificate of such inspection, signed by himself and the captain, was sent to the office of the company, a cautionary requirement, on the part of the company, wholly unusual. He testified to the soundness of the pin and shackle and its careful inspection before use. To the same effect on these points was the testimony of Watson, the captain.

This evidence completely and finally disposed of the two alternative charges of negligence against the ship relied on in the original and amended libels, that "either because of the breaking of the pin, or because the same came out, because not properly secured at the time it was rigged up by the ship's crew." The bolt spoke for itself. It was not broken nor even bent. The testimony of the ship's boatswain that he screwed the pin into the shackle with a marlin spike so tight he would have sworn it would never come out was not attempted to be disputed. That this was the proper way to secure it was not denied. That the shackle and pin were sufficient in strength and general effectiveness for the work was not only not denied, but corroborated by both the Stevedore Company's foreman and boss rigger. Brink, the foreman, when asked the question, "One of the best equipped ships in gear and tackle that you had seen in some time, wasn't it?" answered, "Yes; the gear was perfect, the tackles were good, and their derricks were able." After examining the shackle and pin, he was asked, "With your experience, wouldn't you say that was an ample and satisfactory shackle and pin for the use it was performing?" and answered, "I think that ought to answer the purpose."

Kacher, the rigger, testified as follows:

"Q. You have seen this pin and shackle; tell me whether or not you time and time again discharge ships with shackles no better than that and often not as good? A. Yes; even some of them not as good, even some of them not as strong. Some of them, as I said, only five-eighths. The Court: And even with threads much more worn? The Witness: Yes; even just as bad. Q. And even more than that? A. Yes; you cannot say that is a real bad shackle or a real good shackle, that is just in between. Q. As a matter of fact, you would not condemn this as a bad shackle, would you? A. No, sir; not on a guy; even a shackle like that you could have it on a hoisting fall. Q. It is strong enough even for that? A. If it pulls plumb. The Court: But, as I understand you, with a shackle of that kind it ought to be secured by wire. The Witness: It would be a preventer against the pin working out. Q. Of course, you do not expect the ship to furnish you with brand new tackle and pins and bolts each time you discharge cargo? A. No, sir. They have them up there sometimes five or six or ten years. They stay there until they wear half way through. But that is not the case there. Mr. Mister: And they stay there until they break sometimes, don't they? The Witness: Sometimes they do and sometimes not. Sometimes they order them out. But this is the first case I have ever seen since I have been around the wharf since 1884 where it carried away in that manner. Often they will work out aloft, but I have never seen an instance of this kind. Q. You have never known of a pin in a shackle used as a guy on a derrick of this size to work out? A. I have seen some of them work out by the working of the guys, but never to do any damage like this here. The Court: They were noticed before they came out, is that it? The Witness: Even if they came out, the boom was amidships, or it did not do any damage. Q. At the time this was being worked, it was exclusively in the charge of the Terminal Stevedoring Company, was it? A. Yes. Q. You are their boss rigger, are you not? A. Yes."

But getting back to the pleadings: On July 7, 1916, the ship's master filed answer to the original libel denying all negligence, and charging, in effect, that libelant having alleged that the ship's crew *made fast* the various parts of hoisting apparatus, it became the duty of the Stevedore Company, an independent contractor solely in charge of operation, to see, by inspection, that the same remained so during such operation. It would seem that this was an all-sufficient defense, so far as the ship's liability was concerned, under the many authorities hereinbefore cited, leaving the stevedore's liability an open question. This latter company, on July 28, 1916, filed its answer substantially denying the charges of negligence contained in the libel and amended libel, asserting the injury to have been caused by one of the ordinary risks assumed by libelant, and, further, which was very pertinent and important in bearing on the case, that it had complied with the requirements of the Maryland "Workmen's Compensation Act" (Laws 1914, p. 1429), which provided an exclusive remedy for injuries to or death of its employés by accident while in its employ, at such labor as libelant was doing at the time he was hurt, by reason whereof it was absolved from any demand or liability in any action brought against it by libelant for his injury sustained. The situation was very acute. It could not be denied from the evidence taken that the Stevedore Company was an independent contractor; that the relation of master and servant did not exist between libelant and the ship; that the accident was an incident of the operation which had been going on for two and a half days, during which time at least 200 tons of sand ballast had been unloaded, and 250 tons of copper had been loaded, with the Stevedore Company in full charge and control; that this company was rushed with work on this and other ships, and in consequence had made no inspection at all of the tackle, gears, and derricks, although ordinary care required such inspection at least every day before starting work (so testified by the old and experienced shipmaster, Folkenberg); yet this Stevedore Company was relieved by law, and no hope remained for recovery unless something could be discovered to hang a negligence charge on against the ship. It would seem that this law providing indemnity for the injury to libelant and barring his action against his immediate employer would bar also his action against his employer's principal, the ship. In my judgment, it would and does and should be so held by us.

Be that as it may, the situation for recovery by libelant in any phase of the situation was critical. On July 26, 1916, the court, by order, had set the case down for general hearing, and, on a motion to dismiss, for September 28th following. Meanwhile the libelant had died. When the hearing day arrived, a libel and complaint in personam was filed against the ship corporation and persons interested in ownership in behalf of decedent's widow and children. The two libels were, by consent order, consolidated, and, against protest, second amended libel in the original cause was permitted to be filed. In both of these new pleadings the original statements are reformed, carefully omitting the original allegation that the apparatus had been "made fast" by the ship's crew, and alleging that the injuries were sustained

"either because the pin had not been properly secured in the shackle, or because the threads on the pin and shackle were *badly* worn and allowed the pin to work out." And, further, that "those in charge of the ship" were negligent in "refusing to put up additional guys or preventers and in failing to inspect the rigging during the time it was used." Thus the whole alleged negligent cause of injury was shifted, illustrating how vicious it is to allow "conjecture" and "guess" to be the basis of an action of this kind where substantive fact, by the law, is required.

Immediate hearing was had on this 28th of September, the day these new pleadings were filed; answers prepared later were as of that day filed nunc pro tunc.

After examining the attendant physician, the libelants introduced the inevitable expert. His name was Mills. He was somewhat of an expert too! From his evidence it was disclosed that he had been for 20 years a seaman as an apprentice and officer (he does not state what officer, when or for how long) in the merchant marine, then went to stevedoring aboard ship, and finally "graduated" into a night watchman for a department house, not having done any rigging or stevedoring work for the last seven years. He seriously objected to being called "Doctor," declaring he had been "pretty much every thing else in my lifetime but a doctor or a lawyer." In short, clearly, a "jack of all trades," not yet landed in the "professional ones." He was ready and prompt to express his opinion that the screw threads of both pin and shackle were badly worn and to attribute the accident to this direct cause. When we remember that expert testimony is to be regarded ordinarily as the most unreliable kind permitted by law, it is hard to give much credence to this testimony when it is contradicted (a) by the undisputed evidence of the storekeeper, the boatswain, mate, and captain that it was carefully inspected and oiled before put to use; of (b) the boatswain that it was screwed in tight with a marlin spike; and (c) that it held for two and a half days under severe use, when at least 450 tons of sand ballast and copper was handled. It certainly is not entitled to any more credence than that of the expert subsequently introduced by the ship in the person of Arthur Skijold Folkenberg. This man was the master of the Danish ship General Konsul Pallisen, present because his ship was in port at Baltimore, expecting to sail the next day. He did not know the captain of this ship Student, and had never seen the ship itself. He had followed the sea since he was 15 years old, a period of 23 years, had been in the employ of the same company continuously for 15 years, held a master's certificate, for the last 9 years working up to this grade through all the lower ones, and had the handling of rigging, such as that in controversy, for 11 years. I quote from his testimony:

"Q. Will you look at this shackle and pin marked Respondent's Exhibits 1 and 2, and tell me, in the first place, with reference to the shackle, whether or not there are any threads in that eye which are stripped? A. No, there are not. Q. So far as the threads are concerned, what is its condition? A. In good condition. The Court: Are the threads worn at all? The Witness: No, sir. Q. With reference to the shackle itself, what is its condition? A. The shackle has been used; it is not a new shackle, but it could be used safely

when it is screwed tight with a marlin spike. Q. In the shackle you have in your hand one arm is bent, is it not? A. Yes. The Court: Take the pin and see if a marlin spike would be of any use to you. (Witness screws pin in shackle as far as it will go.) The Witness: Now it wants a marlin spike at this moment to get it tight. But of course when you screw it in from the other side, which you cannot do, now that it is bent, it will press that in line there, the bent arm, by pressing against the breast of the pin, and you can tighten it up to there so that there will be a heavy friction before it could loosen. Q. I understand you to say that when the shackle is not bent and the pin is properly inserted that in order to tighten it, with reference to the eyes of the shackle, that a marlin spike is necessary? A. Yes. Q. Will you look at the threads on the pin and tell me whether or not they are stripped? A. Yes; it seems to me from the thread that this has been used. Q. Has that use to which it has been subjected in any way interfered with its proper usefulness as a pin in this particular shackle? In other words, is it so worn as to interfere with its being effectively used in this shackle? A. No. Q. Would you regard that or not as a satisfactory pin for the use to which it was put? A. I would. Q. Would you regard the shackle as a satisfactory shackle? A. I would. Q. Is there any question but what that shackle and that pin were altogether satisfactory for the use to which they were put? A. It is entirely satisfactory for the place where it was used. Q. When you screw the pin into the head of the shackle tight with your hand, is there any lateral movement whatsoever? A. None. Q. When you unscrew it a part of the way there is a movement, isn't there? A. Yes. Q. Look at the shackle filed by the libelant (new shackle) and see if it is not true that it shakes in the same way when it is partly removed? A. It does. Q. Does it shake just as the other shackle did? A. Yes; it is shaking just the same. Every shackle will do it, of course. Q. No matter whether the shackle is new or old? A. Yes. Mr. Wolf: You cannot tighten that up as you did the other one, can you? The Witness: No; that is simply because this one has not been used. As soon as it has been used one time you can do the same with this shackle (indicating new shackle). If we had to put a shackle in for every time it is used, I think the ship would have to be loaded with shackles. Q. Is there any reason why, as a master of steamship, you would condemn this shackle for the purpose for which it was used on board the steamship Student? A. No, sir. The Court: When it was to be used on that kind of strain, the direction of strain, would you screw the end of it and wire it, or something of that sort? The Witness: I think it is unnecessary, sir, for that work. If it was necessary to secure it with a piece of string or a piece of wire, I would condemn the shackle for that purpose."

This testimony of this witness bears weight with me for several reasons:

First. Because, after a very careful examination, at the time the case was argued and submitted to us, but before I had read it, my judgment as to the condition and sufficiency of this shackle and pin exactly tallied with it.

Second. Because it is corroborated not only by the ship's witnesses, but by witness Brink, the Stevedore Company's foreman, who admits the threads inside the eye of the shackle were not worn; that while the threads of the pin were worn a little, from his experience he thought the shackle and pin "ought to answer the purpose." Also by the evidence of Kacher, the Stevedore Company's boss rigger and inspector, as set forth in the excerpt from his testimony hereinbefore set forth.

Third. Because it was in accord with the judgment of the learned trial judge that the pin was only a little worn. He says in his opinion: "I do not know that it was so worn that it would have worked out more

than one time in a hundred. Perhaps it would not. * * * I might hesitate to say that the use of a pin worn no more than the one in question was worn was by itself negligence." The learned trial judge had carefully examined the pin and shackle, and was in doubt as to whether once in a use of a hundred times it would have pulled out; thought it probably would not. To hold an employer negligent because he does not provide against such a contingency as that is surely equivalent to making him an *insurer*. To what, in practical effect, must such a ruling lead? A pin, it is true, may be an inexpensive thing, but the rule of law must be a general one, and applicable to all appliances used in industries. Thousands upon thousands of machines are in daily use that "are a little worn"; might once in a hundred times "but probably not," break and injure an operative. Must they be discarded and new ones bought, in many cases at a cost of many dollars, so soon as they get into this condition of "a little worn"? An appliance, implement, or machine when once used becomes "a little worn"; who is to say how little or how much? If, in cases like this, the evidence of men like Mills, the expert, and Karl Schultz, the winch driver (himself more than likely, at least in part, responsible for this deplorable accident, as indicated hereafter), is to preponderate over such evidence as that of experienced men like Brink, Kacher, Folkenberg, Watson, and other of the ship's officers, and establish the fact that the slightly worn condition of the threads of this pin were sufficient to establish negligence and make the ship responsible for an award of $5,000, how many industries must go out of business?

Another question arises in this connection: Did this pin pull out instantly, or did it gradually work loose and then come out? If it came out instantly, after two and a half days' hard strain upon it, it must have done so because of some unusual and severe wrench of it not experienced by it in the two and a half days' prior use of it. If it worked itself loose and came out gradually, it did so solely during the time it was in the charge and control of the Stevedore Company and when, in plain view, fastened to the ship's rail, its loosened condition would be plainly apparent. Common knowledge tells us that bolts and pins like this will, no matter how little worn from use, work loose and become unscrewed. How strong and applicable the commonsense statement of Folkenberg that, in view of this fact, his opinion is that "it is the duty of the stevedores or whoever works with the gear to inspect it at least every day before they start with it." Mills, the expert, has an original idea about it. He *supposes* that for some reason "the shackle sprung open may be three-eighths or a half an inch and came off of that bolt and then sprung back again." In other words, some extraordinary wrench or strain, that could not be anticipated, sprung the shackle loose, which, under all the rules of law, reduced the case to one of pure accident, unless such wrench or strain was due to negligence in operation, for which the Stevedore Company and not the ship could be held responsible. However, this was conjecture and guesswork pure and simple. The learned trial judge, in effect, recognizing that the coming out of the pin in itself could not sustain the charge of negligence, and that the screw threads of the pin, instead of being *badly* worn, as charged by libelants, were so *little*

worn as to make it improbable that they would fail to hold once in a hundred times' use, resorts to the other last-hour alleged ground of negligence—the failure of the ship to furnish preventer guys. I am entirely reconciled to the conclusion reached by the trial judge upon the disputed question as to whether such preventer guys were demanded by the Stevedore Company and refused by the ship, holding that such demand was so made and refused, but to the conclusion drawn by him therefrom I distinctly dissent, for two reasons:

First. Because no rule of ordinary care required such preventers to be either furnished or used. If anything has been proven beyond question—yes, admitted—it is that this whole hoisting outfit furnished by the ship was in all respects superior. Double blocks were used when single ones were considered sufficient; the guy provided was rove in four parts, when general custom only required two, or, at the utmost, three; and the rope used was new, large, and in good condition. This preventer simply meant to provide an additional guy, and its requirement was like requiring a man to put on two suits of clothes instead of one, as stated by one of the witnesses. A man clothed in a heavy suit of clothes, putting on another, would find it both unnecessary and in the way, and so the old and experienced Danish master, Folkenberg, says, when he is sure the guy is right, he never puts up a preventer "because it will only be in the way." But more important still is the statement made by Kacher, the Stevedore Company's boss rigger and inspector. When hurriedly leaving the ship—for he had a lot of work to do—he told young Bradley, the stevedore's foreman, to get preventer guys put on the head of the boom. Asked the question, "Why did you tell him that? Was there anything about the gear to indicate that preventer guys were necessary?" he answered: "No, sir; but it is customary *now and then.* We always do it for safety ourselves. *We are about the only people that uphold the preventer guy system.*" Young Bradley, the foreman, he said was the son of the stevedore, by which I presume he meant the chief officer or manager of the Stevedore Company. It was a hobby of this company, it would seem, contrary to the practice of all the other stevedores, to put up these preventer guys. The law says:

"It is not demanded that the master shall use the newest and best appliances. It is sufficient if he furnishes machinery and appliances reasonably safe, or safe according to the usages and habits and ordinary risks of the business; the standard is the conduct of the average prudent man." 8 Thompson, Neg. (White's Supplement) § 3993, and numerous cases cited. Also case note to Mamie Chrismer v. Bell Tel. Co., in 6 L. R. A. (N. S.) 492, where authorities are collated.

Again, practical experience demonstrates that, in the use of appliances of this kind, unnecessary and superfluous parts are not only "in the way," but sometimes the direct cause of injury. Does any one doubt that if the preventer had been rigged up, and this accident had been the direct result of its rope somehow becoming twisted or tangled with the other rigging or tackle, that libelants would be here earnestly contending that it was negligence to use or suffer its use; that such use was contrary to general custom, and only calculated to complicate, hinder, and endanger operations?

But, second, this Stevedore Company, as independent contractor, owed to its employés a nonassignable duty to furnish them with reasonably safe appliances with which to work. It could not shirk this responsibility—it was an unshirkable, nonassignable obligation. It could not plead ignorance for not performing such duty or for relying upon the judgment of another. If the use of a preventer was necessary, it knew that fact far better than the ship or any one else. Therefore this nonassignable duty, on its part, to this libelant and other employés, required absolutely one of two things to be done by it —peremptorily to refuse to undertake the work until the ship rigged up such preventer or to rig it up itself. No contractor, seeing and knowing the defective and dangerous character of appliances, can willfully subject his employés to injury and death, and excuse himself upon the plea that he was not furnished sound and safe ones. This Stevedore Company says it asked for this preventer, the ship deemed it unnecessary, the company manifestly concluded it was not, accepted the appliances without, went on and unloaded 200 tons of sand ballast without it, then rigged up the preventer, and now denies responsibility upon the ground that it did not properly rig it up, wherefore it proved wholly ineffective.

Third. If I am right in the foregoing position that it was the duty of the expert Stevedore Company to its immediate employés to supply at the place of accident this preventer, and that it actually did do so, who on earth but it could be responsible for not supplying a sound one and for not rigging it properly? It might charge the ship, under certain circumstances, for the extra expense; but this would not justify them to shift the duty onto the ship for the accident to its immediate employé on the ground that it willfully supplied for his safety an insufficient, improperly rigged, and worthless appliance.

But, finally, at the suggestion of the expert night watchman, Mills, it is suggested that some kind of a wire or string somehow should have been used in connection with the pin to render it safe. The same old cry in all these cases—*something* better might have been used; *something* unusual added! The answer is the law as stated, and the very decisive and common-sense fact stated in effect by Folkenberg, that pins of this character are manufactured with a view to be sufficient in themselves, and, if so worn and defective as to require such extraneous additions as wires and strings, should be discarded and not used.

Very naturally, during this extended course of changes in base, conjecture, and guesswork on the part of proctors for libelants, to discover some negligent cause on the part of the ship for the accident, the proctor for the ship, on his part, advanced some conjectures and guesses to account for it, for which the ship could in no way be responsible. Among these were, first, that in the course of the operation and use of the apparatus some fellow servant of the original libelant may have unscrewed the pin, attempted to put it back, and did not do so effectively with a marlin spike as was required to be done. In support of this is the undisputed fact that originally it was screwed in by the boatswain with its head *inward* so that if it came

out it would naturally fall inside of the ship's rail on its deck, while in fact it did fall *outside* the rail of the ship on the deck of the lighter boat. The learned trial judge states the theory of the ship's proctor in this regard, based on this fact, is a plausible one, "perhaps even a probable one, but he is not prepared *to be absolutely certain* as to whether that pin might not have struck the rail or something else first, and have bounced in any direction." Could it be less plausible or probable, or could he be less *absolutely certain,* about the slight wear of the pin threads causing it to come out? Where comes the proof by substantive evidence, the burden to produce which was by law upon the libelants, that either theory did or could account for the accident?

Second. It was an undisputed fact that the copper plates to be lowered were secured by chains leaving the ends not protected in any way, instead of loading them in tubs or shovels, as zinc plate was taken in, and which was the safer and better way. From this it is argued that the plates spread over greater space as they dropped in the hold, and this was the proximate cause of the victim being struck. It may be so. To me it seems as reasonable as any other conjecture advanced, except the next one to be adverted to; but who can tell from the evidence where a bucket or shovel would have slid to in that hold and whether it would have struck the poor victim or not?

Third. The second mate, Palmer, the first officer, Sliney, and the captain, Watson, all testify that during operation they severally complained that the winches were not properly operated; that they were so worked that one winch in effect was allowed to heave against the other, whereby overstress and strain was caused, and the tackle was not permitted to come in on an angle of 45 or 60 degrees, but at one of more than 60 degrees, which no tackle could stand. The second mate says he repeatedly complained of this to watchmen; the first officer testifies he spoke to the stevedore about it; the captain testifies that after 4 o'clock in the afternoon of the day before the accident he complained to the winchman, the hatchman, and everybody assembled around, saying to Bradley, the young foreman: "You fellows will be killing somebody yet." In this he is fully corroborated by the engineer, Garden, who was present and suggested shutting off some of the steam. The latter also testifies to having heard the stevedore's deckman complain to the after winchman, controlling the outboard lines, that he was not looking after his signals. All three of the first-named officers express the opinion that this improper working of the winches was the cause of the accident. All this testimony is very unsatisfactorily denied by the winchman resting under the charge and by young Bradley, the foreman. It is corroborated by the fact that this Stevedore Company at the time was rushed with work and this operation was being hurriedly done. The strong conviction comes to me that this was in truth and fact the proximate cause of the accident. Be that as it may, it is sufficient to sustain my position to point out that there have been suggested seven theories in this case to account for it:

First. That the pin broke, a theory finally abandoned.

Second. That the pin was not properly screwed in—one absolutely not proven, but contradicted by positive testimony, unimpeached and uncontradicted.

Third. That the threads of the pin were *badly* worn—a theory shown to be so little substantiated by evidence and personal examination as to cause the trial court to express doubt as to whether it would come out once in a hundred times of use.

Fourth. That the extra and unusually used preventer guy, if it had been properly rigged up by libelant's immediate employer, the Stevedore Company, *might* have prevented the accident.

Fifth. That, if the copper plates had been properly loaded in tubs or shovels instead of by use of chains, leaving the ends unsecured, the plates would not have spread, and struck the victim.

Sixth. That in operation, for some cause, some one removed the pin, and failed to properly and effectively screw it back and secure it.

Seventh. That, in operation, the winches were negligently worked against each other, whereby extraordinary stress and strain was produced, the shackle was worked from the pin, and the guy rope was broken.

Could anything be more completely applicable in the premises than the words of Mr. Justice Brewer, which I have quoted, that "where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury (or court) to guess between these half dozen causes, and find that the negligence of the employer was the cause"?

But, finally, the learned trial judge, I think, very properly and wisely, in his opinion, warned counsel of the existence of the Workman's Compensation Law existing in his state, and of the risk they run in imperiling their client's rights in bringing suits for which it provides an exclusive remedy.

If these humane laws were enacted, as they have been in many of the states, for any particular reasons, above all others it has been, first, to provide compensation for those unforeseen and unaccountable accidents constantly arising, whereby the helpless victims and their families would be deprived of their means of subsistence; and, second, to establish, at the joint expense of the state, employers, and workmen themselves, an equal and uniform rate of compensation for all injuries, duly classified, received by such workmen, which could and would be promptly and inexpensively ascertained and paid to them, whereby would be abolished a practice that had, in maritime, mining, and manufacturing districts, become a scandal and reproach to the legal profession—a practice that has led some members of the bar to hunt up victims of accident, seek employment to prosecute their cases, and thereby secure large fees in case of their successful issue. This practice, significantly called "ambulance-chasing," has largely contributed to the congested dockets of the courts, state and federal, requiring the services of additional judges from time to time and greatly enhanced expense of court administration. It has been demonstrated

by the studies made of existing conditions causing the enactment of these laws that, over and above the costs of court administration paid by government, on an average the employer has to pay, as a result of litigation, near three times the actual sum received by the unfortunate subject of the accident. The latter usually pays in cost, expenses, and attorney's fees one half of his judgment, and the employer an equivalent half over and above the judgment, in payment of court costs and attorney's fees in making his defense. Under such circumstances, the courts, it seems to me, should be earnest in sustaining and enforcing these laws for the protection of society, employers, and workmen alike. This case was one where the original libelant was entitled to the benefits of the Maryland act, and I would dismiss these libels because clearly not maintainable under the rules of law, but with the hope that the unfortunate widow and children may not even yet be deprived of the beneficent provisions of this Compensation Act.

McCULLOUGH et al. v. SMITH.*

(Circuit Court of Appeals, Eighth Circuit. June 20, 1917.)

No. 4784.

1. TERRITORIES ⟸18—INDIAN TERRITORY—ADOPTION OF ARKANSAS STATUTES.
   By Act May 2, 1890, c. 182, § 31, 26 Stat. 94, extending certain of the statutes contained in Mansf. Ark. Dig. over the Indian Territory, Congress adopted the construction placed upon such statutes by previous decisions of the Supreme Court of Arkansas, but not by subsequent decisions, nor the decisions of that court construing and applying the common law.
2. MORTGAGES ⟸188—CONSTRUCTION AND EFFECT—LAW OF INDIAN TERRITORY.
   The legal effect of a mortgage executed in 1906 on land in Indian Territory is to be determined by the common law, there being no provision on the subject in the Arkansas statutes extended by Congress over the territory; and under the common law the mortgage is not a complete alienation of the title, but, except as against the mortgagee, the mortgagor, while in possession and where there has been no foreclosure, remains the real owner of the land.
3. INDIANS ⟸16(4)—VALIDITY OF LEASE—EFFECT OF INVALID PROVISION—DIVISIBILITY.
   Act June 7, 1897, c. 3, 30 Stat. 72, authorized allottees of land within the limits of the Quapaw Agency, Indian Territory, to lease their land "for a term not exceeding * * * ten years for mining or business purposes." An allottee subject to such act executed an oil and mining lease for ten years, with a further provision that, should oil or other mineral of value be found in paying quantities, the privilege of operating should continue so long as such substances could be produced in paying quantities, "on such terms and conditions as parties hereto have agreed upon after the expiration of this lease." *Held*, that the lease was divisible, and that the invalidity of the provision for an extension did not affect its validity for the ten-year term which was within the statute.
4. CONTRACTS ⟸137(1)—SEVERABLE CONTRACTS—EFFECT OF INVALID PROVISION.
   When a part of a divisible grant or contract is ultra vires or illegal, but not malum in se, and the remainder is lawful, the latter may be sustained

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

* Rehearing denied September 10, 1917.

and enforced, unless it appears from a consideration of the whole grant or contract that it would not have been made without the part which is ultra vires or illegal.

5. MINES AND MINERALS ⟸58—MINING LEASE—VALIDITY.

In a suit by the holders of a mining lease to quiet title as against adverse claimants, it appeared that the lease was for the term of ten years, "for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal, and copper. * * *" It also gave the lessee the right to use the surface for railroad tracks, pipe lines, or buildings. The bill alleged that the lessee and his assigns had been in possession since the execution of the lease, and had drilled test holes and sunk a shaft thereon, and improved the same for mining purposes. *Held*, that such lease was not subject to the rules governing strictly oil and gas leases, and that it was not invalid on its face by a clause providing that the lessee should pay five cents per acre yearly in case of delay in beginning operations, "in lieu of said work, so long as they or their assigns desire to operate or hold the same," but that the question whether such clause was unfair or inequitable was one to be determined on final hearing.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit in equity by W. P. McCullough and another against W. M. Smith. From a decree dismissing the bill on motion, complainants appeal. Reversed.

Paul A. Ewert, of Joplin, Mo. (A. C. Towne, of Miami, Okl., on the brief), for appellants.

A. Scott Thompson, of Miami, Okl. (Hiram W. Currey, of Joplin, Mo., on the brief), for appellee.

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

SMITH, Circuit Judge. According to the allegations of the bill, the plaintiffs W. P. McCullough and T. F. Phillips, residents and citizens of Oklahoma, and D. E. Beth, a citizen and resident of Kansas, brought this suit in equity against W. M. Smith, a citizen and resident of Kansas. The bill substantially alleges that on March 2, 1895, c. 188, Congress enacted 28 Stat. 876, 907, as follows:

"That the allotments of land made to the Quapaw Indians, in the Indian Territory, in pursuance of an act of the Quapaw National Council, approved March twenty-third, eighteen hundred and ninety-three, be and the same are hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council subject to revision, correction, and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: Provided, that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents." See Goodrum v. Buffalo, 162 Fed. 817, 89 C. C. A. 525.

There was patented to Leander J. Fish some 200 and possibly 240 acres of land. On June 21, 1906, c. 3504, the Fifty-Ninth Congress (34 Stat. 325, 344) enacted the following:

"That Leander J. Fish, an allottee of two hundred acres of land in section thirty-two, township twenty-nine, range twenty-three east, and of forty acres

in section fourteen, township twenty-nine, range twenty-four east, in the Quapaw Reservation, under the provisions of the act of March second, eighteen hundred and ninety-five (twenty-eighth Statutes, page nine hundred and seven), and the act of March third, nineteen hundred and one (thirty-first Statutes, page ten hundred and fifty-eight), be, and he is hereby, authorized to alienate such portion of said land as he may see fit, not exceeding one hundred and twenty acres, under such rules and regulations as the Secretary of the Interior may prescribe, and any conveyance of such land made by said Fish shall be executed subject to the approval of the Secretary of the Interior."

Thereafter, on July 14, 1906, Fish executed a mortgage deed to E. V. Kellett upon the east half of the northwest quarter, and the southwest quarter of the northeast quarter, section 32, township 29, range 23, being 120 acres, to secure a note for $1,000 due in three years, with 9 per cent. interest. This mortgage deed was received by the Secretary of the Interior, and approved July 20, 1906, although for aught that appears he had never prescribed any rules or regulations as contemplated in the last-quoted act of Congress. Thereafter Kellett assigned the said mortgage deed to the Alliance Trust Company of Dundee, Scotland. On June 20, 1908, the Alliance Trust Company acknowledged full payment and satisfaction of said mortgage, and released the same, and reconveyed the premises to Leander J. Fish, his heirs and assigns. On June 7, 1897, c. 3, Congress passed an act (30 Stat. 62, 72):

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years, for farming or grazing purposes, or ten years for mining or business purposes."

On April 29, 1912, Leander J. Fish executed a lease of the same 120 acres previously mortgaged to Kellett to Dallas Hopper for the term of ten years,

"for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal and copper and all and every other kind or kinds of valuable minerals, ore, fossil, or vegetable substance whatever; * * * if oil, mineral or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals or other substances of value can be produced in paying quantities on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease. * * * The party of the second part hereby agrees to begin operations on the above-described premises within ninty days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5¢ per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate or hold the same."

Immediately after the execution of said lease said Dallas Hopper entered into possession of said premises under its terms, and thereafter sold and conveyed all his rights under said lease to the plaintiffs, and ever since the date of said lease said Hopper and his assignees, the plaintiffs, have remained in possession of the leased premises under said lease, and have prospected and developed said lands, and have sunk numerous test or drill holes upon said land, and have sunk a shaft thereon, and have improved and developed the same for mining purposes. The plaintiffs claim a leasehold interest in said premises under

said mining lease, and defendant claims an estate and interest adverse to the plaintiffs; that the claim of defendant is without any right whatever, and the said defendant has no estate, title, or interest whatever in said premises or any part thereof. The bill prays that the plaintiffs' title to their claimed leasehold interest be quieted; that it be decreed the defendant has no right whatever in said land, and that he be debarred from asserting any claim adverse to the plaintiffs', and that defendant's claim under his mining lease be decreed void, and for general equitable relief. The defendant filed a motion to dismiss the bill because of want of equity, and this motion was sustained, and the plaintiffs appeal.

It was not claimed in the motion to dismiss that the court lacked jurisdiction. For the first time it is urged in this court that the case should have been dismissed for that reason. It is probable that the jurisdiction could not be sustained upon the ground of diversity of citizenship, as it is alleged that the plaintff, D. E. Beth, is a citizen and resident of the state of Kansas, and that the defendant, W. M. Smith, is a citizen and resident of the same state. But it will hereafter appear that this case "arises under the * * * laws of the United States," within the meaning of Judicial Code, § 24, sub. 1 (Act March 3, 1911, c. 231, 36 Stat. 1091, as amended U. S. Comp. St. 1916, § 991), and the objection to the jurisdiction cannot be sustained.

Plaintiffs contend that the conveyance to Kellett was such an exhaustion of the power of alienation under the act of the 59th Congress (34 Stat. 344) that all control over alienation of the lands in question under the act of the 53d Congress (28 Stat. 907), and under the act of the 55th Congress (30 Stat. 72), had ceased to exist when the lease was given by Fish, and that it was given not under the power conferred by the 59th Congress (34 Stat. 344), but absolved from any and all restrictions whatever. This involves a construction of the act of Congress of May 2, 1890, c. 182, 26 Stat. 81, 94, § 31, and the 14th section of the act of June 28, 1898, c. 517, 30 Stat. 495, 500.

[1] In 1884 there was adopted, by the general Assembly of Arkansas, Mansfield's Digest of the statutes of that state down to the close of the General Assembly of 1883. By section 31 of the statute of May 2, 1890 (26 Stat. 81, 94), Congress extended certain of these general laws over Indian Territory. It is noticeable that of the 156 chapters of Mansfield's Digest, less than one-third in number are covered by this act. It doubtless adopted the interpretation and construction put upon the statutes thus put in force in the Indian Territory by the Supreme Court of Arkansas prior to the adoption of the act of Congress, but not those decisions subsequent thereto.

In McClellan v. Pyeatt, 50 Fed. 686, 1 C. C. A. 613, this court held that although 26 Stat. 81, 94, put in force in Indian Territory the practice act of the state of Arkansas, and although ever since 1840 the Supreme Court of Arkansas had held that a motion for a new trial in the trial court to correct all of its alleged errors not apparent upon the face of the record was essential to review, this had no application in this court in appellate proceedings from the United States court of Indian Territory.

In Eddy v. Lafayette, 49 Fed. 798, 1 C. C. A. 432, this court held that where a statute of Arkansas had been construed by the Supreme Court of that state so as to change the burden of proof as to negligence from plaintiff to defendant in an action against a railroad company for killing stock, that as the statute was not extended to Indian Territory by the act of 26 Stat. 81, 94, the rule in the courts of Indian Territory had not been changed.

In Sanger v. Flow, 48 Fed. 152, 1 C. C. A. 56, and in Leak Glove Manufacturing Co. v. Needles, 69 Fed. 68, 16 C. C. A. 132, this court held that Congress was presumed to have put in force the laws of Arkansas enumerated in Indian Territory, with the interpretation and construction put upon said laws prior to the act of Congress by the Supreme Court of Arkansas.

In Noyes v. Neel, 100 Fed. 555, 40 C. C. A. 539, this court held that a construction by the Supreme Court of Arkansas put upon one of the statutes extended to Indian Territory after such extension was merely persuasive, and did not preclude the courts of Indian Territory from expressing their independent opinion on the question of its interpretation and construction.

Enough has been said to show that Congress did not adopt for Indian Territory the interpretation and construction of Arkansas as to the common law. It simply extended the statutes enumerated to Indian Territory with the interpretation and construction placed upon them by the Supreme Court of the state of Arkansas before the date of the act of Congress.

[2] The 14th section of the act of June 28, 1898, c. 517 (30 Stat. 495, 500), provides:

"For the purposes of this section all of the laws of said state of Arkansas herein referred to, so far as applicable, are hereby put in force in said territory."

Without stopping to analyze what laws of Arkansas are within "the purposes of this section," as used in the statute of June 28, 1898 (30 Stat. 495, 500), it is sufficient to say that the decisions of the Supreme Court of Arkansas are not themselves laws within the meaning of this section. Swift v. Tyson, 16 Peters, 1, 17, 10 L. Ed. 865.

As the Kellett mortgage was given July 14, 1906, before the actual admission of Oklahoma to the Union, the effect of that instrument must be determined by the common law, modified, if at all, by the laws of Arkansas made applicable by the act of Congress indicated to the Indian Territory and the interpretation and construction of such laws by the Supreme Court of Arkansas prior to May 2, 1890. Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367.

Among the laws of Arkansas put in force by the act of May 2, 1890, was chapter 110 of Mansfield's Digest. Section 4743 of this chapter provides that a mortgage shall be a lien on the mortgaged property from the time of the filing of the mortgage. Section 4745 provides that upon payment of a mortgage the mortgagee or his assignee shall, upon request of the person making payment, acknowledge satisfaction upon the margin of the record of the mortgage. Section 4746 provides that if he fails to so acknowledge satisfaction

as provided in the previous section within 60 days after being requested to do so, he will be liable in damages. Section 4747 provides that such acknowledgment of satisfaction shall have the effect to release the mortgage and revest in the mortgagor or his legal representative all title to the mortgaged property. Section 4748 provides that if mortgaged property be redeemed by a payment to the officer, such officer shall execute and acknowledge a certificate thereof, and the same shall be recorded and have the same effect as the satisfaction on the margin of the record provided in section 4747. Section 4759 provides that the property shall not at the first offering be sold for less than two-thirds of the appraised price, and the second offering shall be made 12 months after the first, and that real property may be redeemed within one year from the date of sale.

There is not a word in the chapter or in Mansfield's Digest, so far as we have been able to ascertain, as to whether the whole estate, legal and equitable, vests under a mortgage in the mortgagee. Everything in Arkansas which passes upon how far the mortgagor alienates and how far the mortgagee acquires title is simply the construction of the common law by the Supreme Court of that state. Whittington v. Flint, 43 Ark. 504, 51 Am. Rep. 572; Fitzgerald v. Beebe, 7 Ark. 310; Kannady v. McCarron, 18 Ark. 166; Gilchrist v. Patterson, 18 Ark. 575; Terry v. Rosell, 32 Ark. 478; Reynolds v. Canal Co., 30 Ark. 520.

In none of these cases does the Supreme Court of Arkansas refer to or cite as the basis of the opinion any of the statutes extended over Indian Territory by act of Congress. They are simply decisions of the Supreme Court of Arkansas as to what it deemed the common law to be, and such constructions were never adopted by Congress for Indian Territory. We say this because it is true, and not because it is essential to the determination of this case; for the Supreme Court of Arkansas has decided numerous cases showing that a legal and equitable interest remains in the mortgagor in addition to those specified in Mansfield's Digest. In one of those cases (Terry v. Rosell, 32 Ark. 478, 488) Vaughan had mortgaged certain real estate to Terry, and the court said:

"The question now presents itself, how the rights of the parties are affected by these conveyances? As between Vaughan and Terry, the legal estate is considered to be in Terry, as between him and Vaughan, and those claiming under Vaughan; but as to all others Vaughan must be considered as seised of the legal estate, and might well convey to another subject to the mortgage. Waterman's Eden., p. 93."

In Turner v. Watkins, 31 Ark. 429, it was held that, when a mortgage or trust deed has a defeasance clause, the legal title is with the grantee, and the equity of redemption is in the grantor, subject to sale on execution.

In Burr v. Robinson, 25 Ark. 277, it is held that the mortgagor of real property has the ownership or fee, and his wife is entitled to dower therein, and the mortgagee of real property, even after forfeiture, has no interest in the property subject to execution, and the last proposition was sustained in Trapnall's Adm'x v. The State Bank, 18 Ark. 53, and the cases cited therein.

In Van Ness v. Hyatt, 13 Pet. 294, 297, 10 L. Ed. 168, it is said:

"In the United States, different views have been taken on this question in the courts of the several states. It is said in 4 Kent's Com. 153–4, that courts of law have, by a gradual and almost insensible progress, adopted the views of a court of equity on the subject of mortgages, which are founded in justice, and accord with the true intent and inherent nature of the transaction; that, except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner."

We hold that the question of the effect of the Kellett mortgage is to be determined by the common law of England and America as developed from time to time unaided by statute, and that everywhere, except as between the mortgagor and the mortgagee, the mortgagor, while in possession and before foreclosure, is regarded as the real owner; and we also hold that, even if the decisions of Arkansas were controlling, the Kellett mortgage was not a complete alienation of the land; that the confirmation by the Secretary of the Interior of a partial alienation would not cause him to lose authority over the complete alienation. Of course, if this mortgage had gone to foreclosure, it would have ultimately resulted in a complete alienation, and in this contingent way the Secretary of the Interior approved a complete alienation if it took place; but it did not take place, and Fish had no more authority to execute a lease by reason of the execution and approval of this mortgage than he would have had if it had never been executed.

[3] We turn now to the question of the validity of the lease now owned by the plaintiff, but originally executed to Dallas Hopper.

The defendant contends that it is invalid for two reasons: First, the lease provides that if oil, mineral, or any other substances of value are found in paying quantities in any well drilled or shaft sunk the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities, on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease; that the act of 55th Congress (30 Stat. 72) only authorized leases for mining purposes for a term not exceeding ten years, whereas the clause above quoted made the lease in effect in perpetuity. Second, that the lease contained the following provision:

"The party of the second part hereby agrees to begin operations on the above-described premises within ninety days after the date of this lease; in case such operations do not begin within said stated time, said second party agrees to pay to said first party 5¢ per acre yearly for each and every acre contained in this lease, in lieu of said work, so long as they or their assigns desire to operate and hold the same,"

—the specific contention under this head being that the lease lacks mutuality and is in effect a unilateral contract. Defendant cites in support of this contention Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942; Huggins et al. v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, and Reese v. Zinn (C. C.) 103 Fed. 97.

These questions will be passed upon in their order.

By the act of June 7, 1897 (30 Stat. 62, 72), the Indian in this case was authorized to lease this land "for a term not exceeding

* * * ten years for mining or business purposes." The Hopper lease granted the land for purposes of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal, and copper, and all and every other kind or kinds of valuable minerals, ore, fossils, and vegetable substance whatever, for ten years, with the additional provision that if oil, mineral, or any other substances of value are found in paying quantities in any well drilled or shaft sunk, the privilege of operating shall continue so long as oil, minerals, or other substances of value can be produced in paying quantities, on such terms and conditions as parties hereto have herein agreed upon after expiration of this lease.

The first question is whether this last provision made the lease in effect in perpetuity, and whether it made the lease void from the beginning or valid for ten years and void thereafter.

Turning first and primarily to the federal authorities upon the subject, in United States v. Bradley, 10 Pet. 343, 9 L. Ed. 448, a suit was brought by the United States on a joint and several bond, and it was claimed the bond contained conditions not authorized by statute. The court said, at page 360:

"That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on illegality, but not malum in se, is a doctrine well founded in the common law, and has been recognized from a very early period."

After a review of a number of authorities, English and American, it continued, 10 Pet. on page 363 (9 L. Ed. 448):

"Upon the whole, upon this point we are of opinion that there is no solid distinction in cases of this sort between bonds and other deeds containing conditions, covenants, or grants not malum in se, but illegal at the common law, and those containing conditions, covenants, or grants illegal by the express prohibition of statutes. In each case the bonds or other deeds are void as to such conditions, covenants, or grants which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is when the statute has not confined its prohibitions to the illegal conditions, covenants, or grants, but has expressly, or by necessary implication, avoided the whole instrument to all intents and purposes."

In Gelpcke v. City of Dubuque, 1 Wall. 175, 222, 17 L. Ed. 520, the Supreme Court said:

"The counsel of the plaintiffs in error have submitted no argument in regard to the two first causes assigned for the demurrer. We have not therefore considered the questions which they present. They relate to certain provisions of the contract which are claimed to be invalid. Conceding this to be so, they are clearly separable and severable from the other parts which are relied upon. The rule in such cases, where there is no imputation of malum in se, is that the bad parts do not affect the good. The valid may be enforced."

In United States v. Hodson, 10 Wall. 395, 408, 19 L. Ed. 937, it is said:

"It is a settled principle of law that where a bond contains conditions some of which are legal and others illegal, and they are severable and separable, the latter may be disregarded and the former enforced."

In Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, 22 L. Ed. 315, where the Oregon Steam Navigation Company sold a steamer to

one Winsor with a stipulation that she should not be run on the waters of the state of California for the period of ten years from the 1st day of May, 1867, and this was a reasonable stipulation in restraint of trade for seven years but not for ten, the court held that the contract was separable, and that an action would lie for liquidated damages for the violation of the contract within the seven years.

In Bernhisel v. Firman, 22 Wall. 170, 22 L. Ed. 766, where notes had been given in renewal of old notes, computing the interest at the rate fixed in the old notes, which was in excess of the customary rate, and it had been held that such higher rate was valid until the maturity of the notes, and thereafter the customary or statutory rate governed, it was held that in suits upon the renewal notes independently of the bankrupt act and of any statute making such security void in toto as usurious, they were valid securities for the amount which would be due on a calculation properly made. They were bad only for the excess above proper interest.

In McCullough v. Virginia, 172 U. S. 102, 19 Sup. Ct. 134, 43 L. Ed. 382, the Supreme Court, after citing numerous state authorities and the authorities from that court heretofore cited, said:

"We see no reason to change the views heretofore and often expressed by this court, and reiterate, as said in Vashon v. Greenhow, 135 U. S. 668, 10 Sup. Ct. 972, 34 L. Ed. 304, 'This question, therefore, must be considered as foreclosed, and no longer open for consideration.'"

Turning now to the decisions of this court in Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, the city of Arkansas City, in the state of Kansas, had granted to the Interstate Gas Company the franchise to construct and operate waterworks in the city exclusive in character, and stipulated for the payment of specific sums as hydrant rentals. The provision granting the exclusive franchise was void, but this court held that the city was liable for the water rentals under the contract.

In Lincoln Savings Bank & Safe Deposit Co. v. Allen, 82 Fed. 148, 27 C. C. A. 87, this court held that where the plaintiff in error had a claim for $2,700 against one Sears secured by collateral, and it contracted that upon payment to it of $1,500 and the transfer to it absolutely of two of the collateral notes it would release all claims against Sears and surrender the balance of the collateral notes, that while the agreement to release Sears was illegal the contract to surrender the remaining collateral notes was valid and could be enforced. See Kauffman v. Raeder, 108 Fed. 171, 179, 47 C. C. A. 278, 54 L. R. A. 247.

In McPhee & McGinnity Co. v. Union Pacific R. Co., et al., 158 Fed. 5, 87 C. C. A. 619, the city of Denver by ordinance had granted to the Union Pacific Railway Company, its successors and assigns, a license to construct a railroad track on Blake street, in the city of Denver. The city council had no power to grant anything but a revocable license, and it was insisted that every license must be personal and unassignable, and as the license in question ran not only to the railroad company, but to its successors and assigns, it was unauthorized and void. This court held that the city council had power to grant this

license to the Union Pacific Railroad Company, and if without authority it conferred it upon its successors and assigns the result would be that the latter portion of the grant would fail and the former stand.

In Jenson v. Toltec Ranch Co., 178 Fed. 86, 98 C. C. A. 60, it is held that it is no defense to an action upon a contract executed by the promisee that a divisible part of its consideration was without the powers of the promisor corporation if the other part was valuable, legal, and within them; for the promisee may waive the part without the powers of the promisor and recover upon the consideration within its powers.

Passing now from the decisions of the Supreme and of this court to decisions of other federal courts, in Western Union Telegraph Co. v. Kansas Pac. Ry. Co. (D. C.) 4 Fed. 284, the principle that a provision in a contract which is illegal does not invalidate the entire contract is announced.

In Re T. H. Bunch Co. (D. C.) 180 Fed. 519, the opinion of Trieber, District Judge, quite clearly makes the distinction heretofore pointed out.

In McBride v. Farrington, 149 Fed. 114, 115, 79 C. C. A. 56, 57, the court said:

"The leases in question are for the mining of coal, iron, petroleum, oil, gas, asphaltum, and other minerals. If void as to the other minerals, they are apparently valid as to the coal. For what length of time they purported to run is not shown by the record. If for an indefinite time the terms of the act would no doubt restrict them to ten years. It is difficult to see how such leases, which apparently conveyed some rights for a restricted period, can be held to be so utterly valueless as to constitute an entire failure of consideration."

And in the dissenting opinion it is said:

"It is well settled that when a conveyance or contract contains conditions, some of which are legal and others illegal, and they are severable and separable as respects consideration and performance, the latter may be disregarded and the former enforced."

The following federal cases sustain the same doctrine: Van Ness v. Hyatt, 5 Cranch, C. C. 127, 28 Fed. Cas. 1044; Warner v. Howell 3 Wash. C. C. 12, 29 Fed. Cas. 257; United States v. Humason (C. C.) 8 Fed. 71, 79; United States v. Jones (C. C.) 77 Fed. 717, 721; Mathews Slate Co. v. New Empire Slate Co. (C. C.) 122 Fed. 972; In re Johnson (D. C.) 224 Fed. 180, 186; Northern Pac. R. Co. v. United States, 15 Ct. Cls. 428.

Passing now from the federal cases, a very strong case on the subject, reviewing many cases both English and American, is Osgood v. Central Vermont Railroad Co., 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930, 933, and see Shaw v. Carpenter, 54 Vt. 155, 41 Am. Rep. 837.

The following cases quite fully sustain the proposition that the clause in the lease in question was void but did not affect the balance of the lease: Hart v. Hart, 22 Barb. (N. Y.) 606; Robertson v. Hayes, 83 Ala. 290, 3 South. 674; Erie Railway Co. v. Union Locomotive &

Exp. Co., 35 N. J. Law, 240; Glaze v. Duson, 40 La. Ann. 692, 4 South. 861; Porter v. Fisher, 4 Cal. Unrep. Cas. 324, 34 Pac. 70; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372; Hedges v. Frink (Cal.) 163 Pac. 884; Corcoran v. Lehigh & Franklin Coal Co., 138 Ill. 390, 28 N. E. 759; Stewart v. Pierce, 116 Iowa, 733, 89 N. W. 234; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817; Rosenblatt v. Townsley, 73 Mo. 536; Morris v. Way, 16 Ohio, 469; Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803.

Other cases in point could be cited, but we have called attention to enough to fully demonstrate, as we think, that the clause in the lease in question was invalid, but it did not serve to invalidate the lease as a whole.

[4] The rule is that when a part of a divisible grant or contract is ultra vires or illegal, but not malum in se, and the remainder is lawful, the latter may be sustained and enforced unless it appears from a consideration of the whole grant or contract that it would not have been made without the part which is ultra vires or illegal. Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 280, 22 C. C. A. 171, 34 L. R. A. 518; McPhee & McGinnity Co. v. Union Pac. Ry. Co., 158 Fed. 5, 19, 87 C. C. A. 619.

This lease is divisible, and it does not appear that it would not have been made without the clause assailed.

[5] We turn now to the second clause in the lease which it is claimed invalidated it. This question does not seem to have been presented to the court below at all. It was never presented in this court in the original printed brief. It was first suggested in the oral argument at the bar. Were it suggested in this case to reverse the judgment of the court below we should not consider it at all, but it is suggested as a ground upon which the action of the court below should be sustained, and we have concluded that it was best to consider it briefly.

The lease in question expressly recites that it is in consideration of one dollar in hand paid by the lessee to the lessor and other considerations. It has been held not only that one dollar is a valuable consideration, but that neither party to such a contract can show that the same was not paid. Stannard v. Aurora E. & C. Ry. Co., 220 Ill. 469, 77 N. E. 254; Lindley v. Raydure (D. C.) 239 Fed. 928, 938.

In Lovett v. Eastern Oil Co., 68 W. Va. 667, 70 S. E. 707, Ann. Cas. 1912B, 360, 363, the lease was not only for oil and gas, but "for the purpose of prospecting, mining, drilling, boring, or digging for oil, gas, asphaltum, lead, zinc, coal, and copper, and all and every other kinds of valuable minerals, ore, fossils, or vegetable substances whatever." The particular clause here in question provides that it shall run "so long as they [the party of the first part] and their assigns desire to operate or hold the same." This, we think, means within the period of the lease, which we have held was for ten years. Under the holding just made with reference to the other clause, if it extended beyond ten years it would, in that respect, be void, but the balance of the lease would stand.

We have seen that the petition expressly alleges that the lessee and his assigns, including these plaintiffs, have remained in continuous possession of the said premises; that, under and pursuant to the terms of said lease, they have prospected and developed said land and sunk numerous test or drill holes upon said land, and have sunk a shaft thereon, and improved and developed the same for mining purposes. It must be borne in mind that the lease was for the purpose of mining lead, zinc, coal, and copper as well as for the purpose of boring for oil and gas. The rules, therefore, as to oil and gas, which are fugacious (Priddy v. Thompson, 204 Fed. 955, 123 C. C. A. 277, Kemmerer v. Midland Oil & Drilling Co., 229 Fed. 872, 144 C. C. A. 154), do not wholly control the construction of the contract.

The lease gave not only the right to mine for lead, zinc, coal, and copper, but it gave the right—

"to use as much of the surface of said land and so much of the building stone found thereon as may be properly needed to successfully conduct said prospecting and mining operations, also the right of way over and across said land whereon to construct and operate such line or lines of railroad as may be necessary to carry on and prosecute the objects of this indenture; also the right to erect buildings, refineries, machinery, pipe lines upon said premises for successfully carrying on the business of boring, prospecting, mining, and prosecuting the object of this indenture, with the right to remove or sell and remove all of said buildings, refineries, machinery and pipe lines, at any time or at the expiration of this lease."

The rule, therefore, that the lessee who has the right to oil and gas acquires only an incorporeal hereditament is not applicable to this lease as applied to other subjects of the lease. Allegheny Oil Co. v. Snyder, 106 Fed. 764, 45 C. C. A. 604; Lindley v. Raydure (D. C.) 239 Fed. 928.

The question whether the clause now under consideration is unfair or inequitable must be determined upon the final hearing upon the issues between the parties. Suffice it to say, it does not appear that there is anything in the clause in question to invalidate the lease. Guffey v. Smith, 237 U. S. 101, 116, 117, 35 Sup. Ct. 526, 59 L. Ed. 856; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 72 C. C. A. 213.

The cases cited by appellee upon this question are not in point. In Superior Oil & Gas Co. v. Mehlin, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942, the defendant made not a lease but a contract to make a lease to plaintiff of certain lands for oil and gas. The action was to reform and secure specific performance of the lease. The contract sued on was wholly executory. In this case the bill shows the lease in suit was in part executed, and is not a suit for specific performance, but is in the nature of an action to quiet title. The holding in that case was that specific performance will not lie unless the agreement is certain, fair, and just in all its parts, and such an action may, where showing that the contract is unfair, unjust, and against good conscience, well justify the court in refusing such decree, although the contract, had it been executed, might offer no sufficient ground for cancellation. It was further held that an executory contract which under its terms leaves it optional with one party whether or not he will

proceed with the contemplated enterprise makes the same likewise optional with the other, and specific performance will not be decreed. It is manifest that case does not sustain the contention of the appellee.

In Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, it is held that where an oil and gas lease provides for the compensation of the lessor solely by a share of the product, and provides for the sinking of a well within a specified time under a penalty as distinguished from liquidated damages, and the lessee makes no attempt to comply with the terms of his contract, and manifests no intention to comply therewith, the lease becomes forfeitable at the expiration of the specified time. In this case the defendant had filed no answer, and did not allege that the lease had been forfeited. This case under the present state of the pleadings has no application.

The same is true of Reese v. Zinn (C. C.) 103 Fed. 97. It was an action to forfeit a lease upon the ground of abandonment, and did hold that the lease lacked mutuality because it authorized the lessee to terminate the contract at will.

The decree of the District Court is reversed, and the cause is ordered remanded, to the end that the court may overrule the motion to dismiss the petition and permit the defendant, if so advised, to answer and proceed to trial.

WILLIAMSON v. COLLINS et al.

(Circuit Court of Appeals, Sixth Circuit. July 5, 1917. On Request for Further Opinion, August 6, 1917.)

Nos. 3020–3022, 3038–3042.

1. RECEIVERS ⟸170—ACTIONS—DEFENSES.

Where one seeking to intervene in a suit in which a receiver was appointed for a corporation, and to contest the validity of bonds of the corporation, was concededly a creditor against whose claim there was no defense, the court was justified in directing the receiver to facilitate rather than hinder the rendition of a judgment in its favor, so as to give it the standing of an unsatisfied judgment creditor.

2. EQUITY ⟸35—ANCILLARY JURISDICTION—BONDS—DETERMINATION OF VALIDITY.

A minority stockholder in a corporation also holding its bonds filed a bill on behalf of all stockholders to annul a deed of assignment which the controlling stockholder had procured to be executed to himself, and for a determination of the status of the bonds which such controlling stockholder and others were contending to be invalid, and a receiver was appointed. A judgment creditor intervened and filed a petition contesting the bond issue. Plaintiff then filed a supplemental bill asserting the validity of the bonds, and praying for a determination, and the answering bondholders also sought a determination of the validity of the bonds as incidental to the setting aside of the assignment. *Held*, that the court, having properly obtained jurisdiction and control of the corporation and its properties, had power to determine the rights of the bondholders as against the corporation and its property and as between themselves, especially in view of the negotiable character of the bonds, and the serious damage that would result to the company if, while invalid in the hands of the original holders, they should be transferred to holders in due course.

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

3. CORPORATIONS ⟸480½—BONDS—RIGHTS OF BONA FIDE HOLDERS.
Under the rule in Ohio, holders in due course of bonds of a corporation secured by a mortgage were entitled to have the lien of the mortgage preserved for their benefit, though the bonds were not good as between the original parties, and were entitled to an equality with other creditors as against assets not covered by the mortgage.

4. ATTORNEY AND CLIENT ⟸103—ACTS OF ATTORNEY AS BINDING CLIENT.
Where the attorney charged with the organization of a corporation had the stock actually paid for in cash, and had bonds issued to the stockholders in an amount equal to their stock as a bonus, the stockholders, all of whom had full knowledge of the purpose and the means taken to effectuate it, were bound by his acts, though the purpose would better have been accomplished by paying for the bonds and having the stock issued as a bonus.

5. CORPORATIONS ⟸476(3)—BONDS—RIGHTS OF HOLDERS.
Stockholders in a corporation to whom bonds were issued in an amount equal to the amount of their stock as a bonus had no standing as creditors of the corporation in any true sense of the word or in competition with other creditors.

6. CANCELLATION OF INSTRUMENTS ⟸4—GROUNDS—INVALIDITY OF INSTRUMENT.
Where bonds were issued to stockholders in a corporation as a bonus, the corporation was entitled to the aid of a court of equity so that it might not be deprived of its defense of want of consideration through the negotiation of the bonds to holders in due course.

7. CORPORATIONS ⟸482½—BONDS—RIGHTS OF BONDHOLDERS.
Where, with the consent of all stockholders, and for the legitimate purpose of giving the minority stockholders some protection against the possible wrongdoing and mismanagement of the majority, bonds were issued to each stockholder as a bonus, the contract of the parties should be given the utmost effect permissible under the law; and, while the bondholders could not compete with creditors or subject the capital of the company to their claims, they were entitled to dividends payable out of surplus, and to a redemption of the principal out of the surplus at maturity, and to have the agreed sinking fund created so far as it could be done out of the surplus, and in subordination to the rights of bona fide purchasers of the bonds and on liquidation of the company they were entitled to have the remaining capital, after creditors had been satisfied, devoted to the redemption of the bonds.

8. CORPORATIONS ⟸476(3)—BONDS—RIGHTS OF BONDHOLDERS.
Such bondholders were not, however, entitled to have the mortgage securing the bonds sustained as a lien in their favor, as such lien would jeopardize the fund as to which the creditors had priority.

9. CORPORATIONS ⟸479—BONDS—BONA FIDE PURCHASERS.
Where bonds were issued as a bonus to the stockholders in a corporation, a stockholder who, because of the bond issue, increased her stock subscription, was not a bona fide holder of the bonds.

10. CORPORATIONS ⟸479—BONDS—BONA FIDE PURCHASERS.
One who was paid in stock for his services in promoting the company, and who received bonds not as a part of his agreed compensation, but merely because the other stockholders were receiving them, as a bonus, was not a bona fide holder.

11. CORPORATIONS ⟸417—COMPROMISE AND SETTLEMENT—PERSONS CONCLUDED.
Where bonds were issued to the stockholders in a corporation as a bonus, and a party receiving stock in payment for his services in promoting the company was compelled to sue the controlling stockholder for possession of his stock and bonds, and compromised by giving up a part of the bonds, the settlement did not estop the company and the other stockholders to deny his rights as a bona fide purchaser of the bonds, especially

as the only issue was the right of compensation and ownership of the stock and bonds and not their validity as against the company or its creditors.

12. INTEREST ⟸38(2)—RATE OF INTEREST ON JUDGMENTS.
Under Gen. Code Ohio, § 8304, providing that upon all judgments, decrees, or orders rendered on any bond or other instrument in writing, containing stipulations for the payment of interest, interest shall be computed until payment at the rate specified in such instrument, where stockholders, to whom bonds were issued as a bonus, transferred them to holders in due course, a personal judgment against them in favor of the company for the amount of the bonds would bear interest at the rate specified in the bond.

13. CORPORATIONS ⟸479—BONDS—INVALIDITY—LIABILITY OF HOLDERS.
Where persons to whom corporate bonds were issued as a bonus, with full knowledge of all the facts constituting the company's defense as to them, transferred the bonds to bona fide holders, their liability to the company was not limited to the amount received by them on the sale of the bonds, but extended to the face of the bonds and the matured coupons.

14. CORPORATIONS ⟸522—BONDS—INVALIDITY—LIABILITY OF HOLDERS.
Enforcement of the judgment against such bondholders should be conditioned upon their failure to furnish good security for the repayment to the company of such sums as it might pay on the bonds, and where the original holders of such bonds, though not having the rights of creditors, had rights analogous to that of the first preferred stockholders entitled to cumulative dividends payable out of surplus, and to a redemption of the principal out of surplus, provision should likewise be made for delivering the bonds to the original holders when paid or redeemed, or on payment of the judgment.

15. CORPORATIONS ⟸479—BONDS—RIGHTS AND REMEDIES OF HOLDERS.
Where stockholders in a corporation to whom bonds were issued as a bonus sold the stock and bonds together for an agreed price, representing that the bonds were valid and that the stock was a bonus, and the company subsequently recovered judgment against them for the amount of the bonds, they were not entitled to reimbursement from their vendees, though their vendees in addition to having bonds valid in their hands also gained an unexpected exemption from possible stock liability.

16. CORPORATIONS ⟸550(10)—ASSIGNMENTS FOR CREDITORS—RIGHTS OF ASSIGNEE.
The controlling stockholder in a corporation who took a deed of assignment from the company, which was subsequently set aside, was entitled to reimbursement upon payment of its debts incurred by him where the company received the full benefit.

17. APPEAL AND ERROR ⟸984(5)—REVIEW—DISCRETION—ALLOWANCE OF COSTS.
In a suit by minority stockholders in a corporation to set aside a deed of assignment taken by the controlling stockholder from the company, and to have a determination of the validity of bonds issued by the company, the trial judge's discretion in allowing fees to plaintiff's solicitor against the company instead of the controlling stockholder was not reviewable.

On Request for Further Opinion.

18. CORPORATIONS ⟸480—MORTGAGES—RIGHTS OF BONDHOLDERS.
Where, with the consent of all stockholders, and for the legitimate purpose of giving the minority stockholders some protection against the possible wrongdoing and mismanagement of the majority, mortgage bonds were issued to each stockholder as a bonus, the bonds, though subordinated to the rights of creditors, had priority, not only over the original common stock, but over a subsequent issue of preferred and common stock.

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 Frances H. Williamson against Justus Collins and others. From the decree the plaintiff and the defendants Nannie H. Wright, D. Gregory Wright, M. L. Sternberger, Jr., Daniel J. Herbert, the Commercial Bank of Jackson, S. E. Sternberger, and Elizabeth M. Dickinson appeal. Reversed and remanded.

Murray Seasongood, of Cincinnati, Ohio, for appellant Williamson.

Lawrence Maxwell and Murray Seasongood, both of Cincinnati, Ohio, for appellants Wright.

Edward P. Moulinier, of Cincinnati, Ohio, for appellants Herbert and others.

David Lorbach, Harry L. Gordon, Walter M. Schoenle, and Rufus B. Smith, all of Cincinnati, Ohio, for appellees.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. On a former appeal this court affirmed the order of the District Court avoiding a deed of assignment, which Justus Collins, the president of the Superior Portland Cement Company (hereinafter called the Cement Company), had caused it to make to himself. 229 Fed. 59, 143 C. C. A. 653. His purpose had been to free the company in this way from a bond issue of $525,000. As the successive phases of the company's organization and career were reviewed on the earlier appeal and as the former record, with some supplementary testimony, is the basis of the decree now sought to be reversed, a summary review of the facts, more fully set forth in the former opinion, will suffice.

The Cement Company was organized in 1906 with a capital stock of $10,000, promptly increased in accordance with the original plans to $525,000. The land on which its plant is situated was purchased from Mrs. Nannie H. Kelley (who subsequently became Mrs. Wright), appellant in No. 3021, for $100,000. Of this sum, $10,000 was to be and was given to Mr. D. Gregory Wright, appellant in No. 3022, the promoter of the company, who turned it into the treasury for working capital. Originally Mrs. Wright had subscribed for $25,000 of the capital stock, but, when the bond issue and its pro rata distribution among the stockholders were proposed, she increased her subscription to $50,000. M. L. Sternberger, since deceased, became interested in the project and finally invested $75,000. From the beginning, however, he stated that he was willing to subscribe only on the condition that the investment of the minority stockholders be represented by such a bond issue. Appellee Collins subscribed for 2,669 shares, and with the holdings of his relatives, he has had the controlling interest in the company continuously since its organization. Eugene Zimmerman, since deceased, acquired 325 shares; Frances Williamson, appellant in No. 3020, a sister of Nannie H. Wright, 100 shares; D. Gregory Wright received for his services in promoting the company 250 shares. All of the parties expected to and did receive bonds in an amount equal to the stock subscribed by them pursuant to their agreement, except that D. Gregory Wright eventually received only $20,000 bonds with his $25,000 stock. Sternberger's attorney, Joseph McGhee, acted for the company. On his advice that it was necessary to show a consideration

for the bonds, the parties acquiesced in his plan that the apparent consideration to be paid Mrs. Kelley be $525,000 in bonds in addition to the $100,000 in cash. They knew, however, that this was a purely fictitious consideration.

The bonds were secured by a trust deed in the nature of a mortgage to the Provident Savings Bank & Trust Company; they were to mature July 1, 1936; and bore interest at the rate of 5 per cent. per annum, payable semiannually, evidenced by interest coupons. The trust deed provided for the payment to the trustee of five cents per barrel as a sinking fund, for the payment or redemption of the bonds, on every barrel of Portland cement manufactured by the Cement Company. But no payments have ever been made toward such a fund.

In October, 1907, in order to raise needed funds, the company issued 500 shares of preferred stock and offered them at par, together with a bonus of 250 shares of common stock, pro rata to the stockholders other than D. Gregory Wright. As some stockholders, including Mrs. Wright and Mrs. Williamson, declined the offer, Collins took $19,400 of the issue, and Sternberger and his friends $31,600. Mrs. Wright and Mrs. Williamson refused to put more into a project controlled by Collins, especially in view of his action in withholding from D. Gregory Wright his stock and bonds and compelling him to sue therefor.

On account of the heavy bond issue, the company was unable to obtain necessary credit. Collins and others were compelled to indorse its paper. To avoid this, and to better the company's condition, Collins and his friends stood ready to surrender and cancel their bonds if the entire issue were canceled; the Wrights and Mrs. Williamson refused to give up their position of mortgage secured creditors having priority over the preferred stock issue. Thereupon Collins, in the hope of freeing the company in some manner from this lien, and with the consent of three-fourths of the stockholders, had the deed of assignment executed to himself.

The original bill filed by Mrs. Williamson as a minority stockholder, on behalf of all stockholders as well as on behalf of the company, sought an annulment of this deed and a determination of the status of all the bonds. After the affirmance of the earlier decree, the Sturtevant Mill Company, which theretofore, as a simple contract creditor, had sought to file an intervening petition, obtained a judgment against the Cement Company and an immediate return nulla bona. As the receiver, after investigating the merits of the claim, acquiesced therein, it then filed an intervening petition to contest the entire bond issue. The plaintiff, reciting that she acted "by direction of the court," filed a supplemental bill asserting the validity of the bonds held by her and others, alleging defendants' contention that their own bonds were invalid, and praying for a determination of the conflict as well as general relief. By answer, a number of defendants claimed to be bona fide purchasers of the bonds without notice of the facts on which the claim of their invalidity was based. Intervening petitions were presented by other creditors. By final decree, the trust deed and the bonds secured thereby were held without consideration, void, and invalid both as against creditors of the Cement Company, and as against the

Cement Company itself, except as to certain innocent purchasers from the original holders; judgments for the face value of the bonds and all past-due interest coupons thereon were rendered against the original holders who had sold their bonds to these innocent purchasers; all other bonds and coupons were directed to be delivered up for cancellation within a specified time under penalty of judgment against the holders for the face of the bonds and the coupons not surrendered. Creditors of the Cement Company, including on an equality those who had given credit to Collins as assignee conducting the business of the company and innocent bondholders, in respect of the matured coupons, were directed to be paid. Plaintiff's attorney was awarded $2,500 payable out of the funds in the hands of the receiver.

[1, 2] 1. All parties in interest, stockholders, bondholders, trustee, and creditors, were before the court, both on the original and supplemental bill and on the intervening petition. As the intervening petitioner was concededly a creditor against whose claim there was no defense, the court was justified in directing the receiver to facilitate rather than to hinder rendition of a judgment in its favor so as to give it the standing of an unsatisfied judgment creditor. But it is unnecessary to determine whether, on the intervening petition alone, the court should have limited its action to satisfying the creditors' claims without determining the rights of the bondholders inter sese or as against the company itself when freed of debts. For under the original and supplemental bill and the answers thereto all parties sought a determination of these matters as incidental to the setting aside of the assignment. The court had properly obtained jurisdiction and control of the Cement Company and of all of its properties; it was clearly within the power of a court of equity, under the circumstances, to fix the rights of the parties, both as against the company and its property, and, in relation thereto, as between themselves. Especially is this true in view of the negotiable character of the bonds, and the serious damage that would result to the company if, while invalid in the hands of the original holders, they should become valid by transfer to holders in due course. Thompson v. Emmett Irrig. Co., 227 Fed. 560, 142 C. C. A. 192.

[3] 2. Holders in due course of these bonds concededly have enforceable claims against the company. Cromwell v. County of Sac, 96 U. S. 51, 24 L. Ed. 681. As to assets not covered by the mortgage, they were properly placed by the decree on an equality with other creditors in so far as their coupons had matured.

In Ohio, the innocent holders of a corporate bond issue, payable to bearer and intended for general circulation, may enforce the lien of the mortgage security free from defenses which would be good as between the original parties; the mortgage lien follows as an incident of the negotiable character of the bonds. Railway Co. v. Lynde, 55 Ohio St. 23, 52, 44 N. E. 596.

These holders have not appealed from the decree, but as neither the language of the decree nor of the opinion accompanying it indicates clearly the measure of protection intended to be given to them, and as a modification of the decree in other respects will be essential, the new

decree will specifically preserve the lien of the mortgage in favor of these bona fide bondholders, both as against the company and as against its creditors, present and future.

3. In the course of the former opinion of this court it was said:

"That the outstanding bonds were a menace to the life of the corporation, that they were issued as an inducement to procure stock subscriptions and as a bonus without the payment of any consideration for them, is too manifest to admit of controversy; but what the rights of the holders as between themselves, and as between themselves and company, may be, and as to what method is to be pursued to determine such rights, and cancellation and return of them to the company, if it shall ultimately be decided that such shall be done, are matters which we are not now called upon to decide."

These matters, which were then expressly left open, must now be determined.

[4] Whether or not the attorney failed to carry out the intention of the parties in having the stock not merely issued as full paid, but actually and specifically paid for in cash, is beside the question. He was charged with the organization of the company; the parties, all of whom had full knowledge both of the purpose and of the means taken to effectuate it, are bound by his and their own acts.

It may well be that a payment for the bonds and the issuance of the stock as bonus would better have accomplished Sternberger's original proposition of giving the minority stockholders the protection of a full-paid investment. But the evidence clearly demonstrates that the bonds were the bonus; they were issued only after the stock calls had been paid; no consideration was given for them to the company itself; the pretended consideration in treating them as part payment for the land was concededly a pure fiction, to the knowledge of all parties.

[5, 6] As creditors, therefore, in any true sense of the word, these bondholders have no standing; as against them, the corporation could plead no consideration; in competition with its actual creditors, present or future, they have no rights; and the corporation for its protection, to enable it to pay its debts and to transact its business, is entitled to the aid of a court of equity so that it may not be deprived of its defense through the negotiation of these evidences of an obligation unenforceable by the original parties, though valid when acquired by a holder in due course.

[7] But while the original bondholders are not creditors in the full sense, nevertheless as the transaction in question was entered into with the consent of all the stockholders for the legitimate purpose of giving minority holders some protection against the possible wrongdoing and mismanagement of the majority, the contract of the parties should be given the utmost effect that may be permissible under the law. While they cannot compete with creditors, and therefore while the company is a going concern cannot subject the creditors' fund, the capital of the company, to their claims, yet, subject to this limitation, their contractual rights can and should be enforced. In practical effect, they are in a position analogous to that of first preferred stockholders (see In re Fechheimer Fishel Co., 212 Fed. 358, 129 C. C. A. 33), entitled to cumulative dividends payable out of surplus, and to a redemption of the principal out of surplus on and after July 1, 1936, but in both cases

without impairment of fixed capital. Furthermore, they are entitled to a performance of the contractual obligation to create a sinking fund by the payment of five cents on each barrel of cement manufactured, subject, however, again to the limitation that such payment be made only out of surplus without impairment of fixed capital, and that it be subordinate to the rights of the bona fide purchasers to the sinking fund as provided in the trust deed. And in the event that the company should be liquidated before the payment in full of the bonds and the interest thereon, then on such liquidation, after all of the creditors shall have been satisfied, the remaining capital should first be devoted to the bond redemption.

In substance, all of the company's funds which could be legally devoted to the payment of dividends, and, on liquidation, to distribution among stockholders, are to be first applied to these bondholders' claims. To this extent the agreement entered into by all the stockholders on behalf of the company can be legally carried out. And inasmuch as there is nothing inherently illegal in the contract or its purpose, the company's defense to its full enforcement presents no obstacle to the grant of this relief. See Cratty v. Peoria Library Association, 219 Ill. 516, 76 N. E. 707, cited in 46 L. R. A. (N. S.) 639, note; McKee v. Title Insurance & Trust Co., 159 Cal. 207, 113 Pac. 140; 1 Cook, Corporations, § 3. In Germania Trust Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118, and in Rolapp v. Railroad, 37 Utah, 540, 110 Pac. 364, rights of creditors were involved. In Gunnison Gas & Water Co. v. Whitaker (C. C.) 91 Fed. 191, the bonds were made absolutely void by the state Constitution. Moreover, they were not delivered as existing obligations, but were wrongfully retained by the agent to whom they had been delivered for the purpose of effecting a sale. Inasmuch as the corporation involved was a public service company, and not, as in the instant case, a private corporation, the rights of the public were deemed by the court to be jeopardized by the transaction. In Morrow v. Iron & Steel Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. Rep. 658, the subscribers to the stock other than plaintiff abandoned the original plans before the bonds were delivered. Under these circumstances, the court properly refused to direct the issuance of bonus bonds to plaintiff. It is unnecessary for us to express an opinion on the further action of the court in refusing plaintiff the alternative remedy of a cancellation of his notes given in payment of his stock and bonus bonds subscription, as no such question is involved in the instant case.

These bonds, with the rights thereunder, hereinabove set forth, are somewhat analogous to income bonds, which are not uncommon in this country (Texas Ry. v. Marlow, 123 U. S. 687, 8 Sup. Ct. 311, 31 L. Ed. 303; 2 Machen, Corporations, §§ 2100–2110); to the English irredeemable debentures (Palmer, Company Law [10th Ed.] p. 313; 3 Palmer, Company Precedents, p. 56; but see Lindley, Companies [6th Ed.] p. 303); and especially to the bonds payable only out of profits, dealt with in Famatina Development Corporation v. Bury, 1910, A. C. 439. While in Synnott v. Tombstone Consolidated Mining Co., 208 Fed. 251, 125 C. C. A. 451, bonds payable both as to principal and interest, only out of profits, were held not provable in bankruptcy in

competition with creditors, their validity was not questioned. See, too, Philadelphia & Reading R. R. v. Stichter, 11 W. N. C. 325, 4 Amer. & Eng. R. R. Cases, 118 (Pa. Sup. Ct.); but see Taylor v. Philadelphia & Reading R. R. (C. C.) 7 Fed. 386.

[8] The mortgage, however, cannot be sustained as a lien in favor of the original bondholders. As in Miller, Exec., v. Ratterman, 47 Ohio St. 141, 159, 24 N. E. 496, it is difficult to say what office such a mortgage for their benefit could have. As the property covered thereby constituted an essential part of the company's capital, such a lien thereon would jeopardize the fund as to which all creditors have priority. The decree, therefore, properly preserved the lien of the mortgage only in favor of the holders of the bonds acquired in due course.

[9, 10] 4. Neither Mr. nor Mrs. Wright is a holder in due course. It is a fiction to assert that the land was sold for $40,000 or $50,000 cash, together with $50,000 par worth of both stock and bonds. Not only was the price of $100,000 fixed, but it was actually paid out in cash to the vendor. Her stock subscription, while doubtless made because of the sale, was entirely independent thereof. It may well be, too, that she increased her subscription because of the bond issue; but she went into the company as a stockholder and as a bondholder in exactly the same way as, and is therefore entitled to no better rights than, the other stockholder. D. G. Wright's promotion fee was fixed at $25,000 worth of the stock; this he eventually received full paid; but the bonds were no part of his agreed compensation. He was justly entitled to them only because the other stockholders received this bonus; he got them, however, as a bonus, not in payment for services.

[11] 5. Wright was compelled to sue Collins, who had possession of his stock and bonds, in order to get them, and at that he compromised by giving up $5,000 of the bonds to the company. This suit, however, was against Collins, not against the company; the settlement was with him; the company and the other stockholders were neither bound nor estopped thereby as Collins might be. But even at that, the only issue was the right of possession and ownership of the stock and bonds, not their validity as against either the company's creditors or the company itself. That action and the proceedings thereunder in no manner sustain Wright's contention. He is not a bona fide purchaser of the bonds.

[12] 6. The decree holds the original bondholders whose bonds have come into the hands of holders in due course liable to the company for the face of the bonds and the matured coupons. This personal judgment, having no express provision as to interest, will bear interest at the rate specified in the bond in accordance with section 8304 of the Ohio General Code.

[13] As the vendors, unlike the trustees of Rector College in Wilson v. Lazier, 11 Gratt. 477, acquired and disposed of the bonds, not in ignorance but in full knowledge of all the facts that constitute the company's defense as to them, their liability is not to be limited to the amount received by them on the sale of the bonds, even if this could be definitely determined when, as here, bonds and stock were sold together for less than their joint par value. But, like Rector in the case

of Wilson v. Lazier (see, too, Pettit v. Jennings, 2 Robinson, 676, and 27 L. R. A. 519, note), their liability in equity is to indemnify the company fully against loss due to their acts.

[14] If the bonds were now due and the company paid them, the judgment would be proper. But they may not mature until 1936; at that time it cannot be known whether the company will actually pay them or the interest thereon, and thus what, if any, loss, will result. Nevertheless, as the company's liability is absolutely owing, though not matured, the amounts of the judgments fixed in the decree are proper. Enforcement thereof should, however, be conditioned upon the failure to furnish good security from time to time for the repayment to the company of such sums as it may pay on the interest and principal of such bonds.

Provision should likewise be made that on such repayment the original bond or coupon so redeemed or, on payment of the judgment, a new bond of like effect, shall be delivered to the purchaser so repaying, to be held with the same rights thereunder as are accorded the other bonds in the hands of the original holders.

[15] 7. The claim of the vendors of these bonds to reimbursement, in whole or in part, from their innocent vendees, was properly denied. The bonds were represented to be valid; the stock was assumed to have been a bonus. But the sale was of the two together for an agreed price; that the vendee has acquired actually full-paid stock as well as a bond valid in his hands against the company gives the vendor no claim to counter indemnity because of his own liability to the company. While the vendee thereby gains an unexpected exemption from possible stock liability, that gain is not at the vendor's cost. Moreover, the vendor, under the decree to be entered, will be restored to his original rights in respect to the bonds, with priority over all stock issues, if and when he indemnifies the company against its liability on the bonds so sold by him.

8. There is no occasion at this time to consider whether the common stock given with the $50,000 preferred issue is within the principle of Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, and Peters v. Union Mfg. Co., 56 Ohio St. 181, 46 N. E. 894, free from liability to creditors and to the company, or whether under Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, the liability thereon remains. For the company is not insolvent, now that most of the bonds are held not to be company debts, and it is not seeking any such relief against the holders of this issue of common stock.

[16] 9. Furthermore, in view of the solvency of the company, it is immaterial whether the debts incurred by Collins as assignee be allowed directly against the company or against Collins with a right of reimbursement to him. Clearly he had a right of reimbursement, inasmuch as the company received the full benefit of the consideration given for these claims. See Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165.

[17] 10. The allowance of fees to plaintiff's solicitor is not contested; but it is urged that these should be charged against Collins and not against the company. Inasmuch, however, as the suit involved not only the validity of the assignment, but also the determination of

the status of the bonds, the discretion exercised by the district judge in this matter is not properly reviewable.

11. All bonds and coupons not belonging to holders in due course should be stamped in such manner as to give notice of the limitations thereon under the decree to be entered by the District Court on the remanding of this cause.

The decree will be reversed and the cause remanded for further proceedings in accordance with the views herein expressed. Costs will be taxed against the Cement Company.

On Request for Further Opinion.

PER CURIAM. [18] Counsel for certain parties ask the court for an expression of opinion whether the $50,000 of preferred stock mentioned in the opinion heretofore filed, pursuant to the decision rendered June 30, 1917, "is to come ahead of or after the interest represented by those holding bonds for which nothing was paid."

The former opinion was intended to express, and is believed to express, the view that the entire bond issue has priority, not only over the original common stock, but over the subsequent issue of both preferred and common stock. This would seem clearly to follow from the statement, as to the bondholders, in that opinion, that "in practical effect they are in a position analogous to that of first preferred stockholders," and from the closing sentence of paragraph 7:

"Moreover, the vendor, under the decree to be entered, will be restored to his original rights in respect to the bonds, with priority over all stock issues, if and when he indemnifies the company against its liability on the bonds so sold by him."

McCABE et al. v. GUARANTY TRUST CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. May 31, 1917.)

No. 201.

1. COURTS ⊜324—FEDERAL COURTS—OBJECTION TO JURISDICTION—ANCILLARY PROCEEDINGS.
Whether an action was properly removed from a state to a federal court on the ground of diversity of citizenship cannot be determined in an ancillary suit to restrain further proceedings in the state court, as a court's jurisdiction of the principal suit cannot be questioned in an ancillary proceeding or suit.

2. COURTS ⊜264(1)—FEDERAL COURTS—JURISDICTION—ANCILLARY SUITS.
Neither the citizenship of the parties nor any other factor that would ordinarily determine jurisdiction has any bearing on the right of the court to entertain jurisdiction of a suit ancillary to a pending suit.

3. REMOVAL OF CAUSES ⊜97—ENJOINING PROCEEDINGS IN STATE COURT.
The statute forbidding federal courts to enjoin proceedings in state courts, except as authorized by laws relating to bankruptcy proceedings, has no application to cases where it is necessary for a United States court to protect its own jurisdiction by injunction; and if a cause is properly removed from the state to a federal court, the federal court may, when necessary, enjoin the party against whom the cause has been removed from any further steps in the state court.

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

4. REMOVAL OF CAUSES ⊂97—ENJOINING PROCEEDINGS IN STATE COURT.
The defendants in an action in a state court filed a petition for removal to the federal court, and filed a certified copy of the record in the federal court, and on the same day filed a bill for an injunction enjoining the plaintiff in the original action from proceeding in the state court. The plaintiff in the original action filed an answer denying the right to remove, and admitted that, if the state court decided that the cause was not removable, it intended to proceed in that court. Subsequently, and before the decree in the ancillary suit, the state court granted the motion to remove. *Held* that, as plaintiff's intention to proceed in the state court was conditioned solely upon the contingency that such court should deny the motion to remove, the injunction was properly denied without prejudice, as in equity the decree is to be shaped as the rights of the parties exist at the time of the decree.

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

Suit by W. Gordon McCabe, Jr., and another, against the Guaranty Trust Company of New York, as substituted trustee of Stephen H. P. Pell and others, individually, and as partners doing business as S. H. P. Pell & Co. From a decree dismissing the bill without prejudice, plaintiffs appeal. Affirmed.

The plaintiffs are citizens of the state of South Carolina, where they are engaged as partners in the cotton business. The plaintiff McCabe is the owner of a seat in the New York Cotton Exchange, which is a membership corporation organized and existing under the laws of the state of New York, and his membership therein is of considerable pecuniary value. The Guaranty Trust Company is a corporation organized and existing under the laws of the state of New York, and has its principal place of business in the Southern district of New York.

On June 14, 1916, the Guaranty Trust Company began an action in the Supreme Court of the State of New York in New York county against the plaintiffs, asking for judgment in the sum of $133,328.34, with interest. On the same day a warrant of attachment was issued against the defendants in the action and was levied by the sheriff upon certain of their property, including the seat in the New York Cotton Exchange. The summons was never personally served upon defendants in the state action, but an order was made directing service of summons by publication.

The defendants in that action on August 21, 1916, appeared specially and filed a petition in the usual form for the removal of the action into the District Court of the United States for the Southern District of New York, alleging that the controversy in said action exceeded the sum of $3,000 and was wholly between citizens of different states. The usual bond was filed with the petition. On September 11, 1916, the defendants filed in the United States District Court for the Southern District of New York a duly certified copy of the entire record in the action.

Thereafter, and on the same day, September 11, 1916, they filed their bill of complaint herein, in which they prayed an injunction perpetually enjoining the Guaranty Trust Company from in any way proceeding in the action at law in the Supreme Court of New York in which it is plaintiff and the plaintiffs herein are defendants, which action it alleged had been duly removed into the United States District Court for the Southern District of New York. On September 12, 1916, Mr. Justice Mullan of the Supreme Court of New York granted the motion for the removal of the action to the District Court for the Southern District of New York.

On October 2, 1916, the District Judge filed an opinion in the action at law, in which he said that "the real question here arises on the remand," but "I see no ground for remand, and the motion to remand is denied." He also declined in the ancillary suit to issue the preliminary injunction, on the

ground that, as the New York court had granted the motion to remove, this swept "away the whole ground on which the bill in equity rests." On October 6, 1916, a final decree was entered, dismissing the bill of complaint without prejudice. From that decree the plaintiffs appeal.

Miller & Auchincloss, of New York City (David Hunter Miller and Frank L. Warrin, Jr., both of New York City, of counsel), for appellants.

Myers & Goldsmith, of New York City (Emanuel J. Myers and Gordon S. P. Kleeberg, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is ancillary in its nature, and is brought by two citizens of the state of South Carolina against a New York corporation residing in the Southern District of New York, and an injunction is asked to restrain the defendant from proceeding in an action which was commenced by it in the Supreme Court of New York county, and which is alleged to have been removed by the plaintiffs herein, being the defendants in the action removed. The District Judge has refused to remand the original action, and holds it to have been properly removed; and he has refused the injunction for reasons which will be referred to hereinafter.

The defendant in this suit in its answer denies that this court has the power or jurisdiction to entertain and take jurisdiction of the original action, and denies that that action is legally removed or can be removed. It also avers "that this court is without power and jurisdiction to entertain and take jurisdiction of this action as ancillary to the aforesaid action, because this court could not take jurisdiction of and proceed with or take any steps in the original action in the state court if removed to this court, and would be required to remand such action or to dismiss the same from its further consideration."

[1] The question whether the action was properly removed from the state court was raised in the District Court on a motion to remand, and that court decided that the case was legally removed, and overruled the motion to remand. Whether the refusal to remand was error is not before this court in the present suit. The way to correct that error, if error was committed, is not by means of an averment in an answer filed in an ancillary suit. The Guaranty Trust Company denies that the original action was properly removed. In other words, it denies the jurisdiction of the District Court over a suit which is removed solely on the ground of diverse citizenship, where the assignees do not all live in the same district. The question whether jurisdiction exists under such circumstances is a most important one, upon which, unfortunately, the judges in the Southern district hold contradictory views. In the original suit now under discussion the District Judge thought he had jurisdiction, and, as we have seen, refused to remand. In Doherty v. Smith (D. C.) 233 Fed. 132 (1915), Judge Learned Hand felt constrained to hold the reverse, not feeling himself sufficiently assured whether Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, was intended to be overruled by the

cases of In Matter of Tobin, 214 U. S. 506, 29 Sup. Ct. 702, 53 L. Ed. 1061 (1906), and of In the Matter of Athanasi Nicola, 218 U. S. 668, 31 Sup. Ct. 228, 54 L. Ed. 1203. While appreciating all this fully, we are prevented from expressing our views upon the subject at this time; for the law is that the jurisdiction of the court as regards the principal suit cannot be questioned in an ancillary proceeding or suit. Johnson v. Christian, 125 U. S. 642, 8 Sup. Ct. 989, 1135, 31 L. Ed. 820 (1888); New Orleans v. Fisher, 180 U. S. 185, 21 Sup. Ct. 347, 45 L. Ed. 485 (1901).

[2] Again, the jurisdiction of the court over this ancillary suit is denied on the ground that the right which the Guaranty Trust Company asserts is the right of an assignee, and that, as two of the assignors live in the Southern district of New York and one in the Eastern district, the suit cannot be maintained, as the assignors are not residents of the same district and consent is not given to be sued in a district in which all the assignors do not reside. Root v. Woolworth, 150 U. S. 401, 413, 14 Sup. Ct. 136, 37 L. Ed. 1123 (1893); Pacific Railroad v. Missouri Pacific Railway, 111 U. S. 505, 522, 4 Sup. Ct. 583, 28 L. Ed. 498 (1884); Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145. This court is, however, not only compelled to decline to consider at this time the question of jurisdiction as respects the original suit, but is also precluded from questioning the right of the complainants to file the ancillary suit against defendants who do not all reside in the same district. We can only consider the question of jurisdiction of the ancillary suit so far as to ascertain whether the ancillary character of the suit is made to appear by the allegations of the bill. The rule is that neither the citizenship of the parties nor any other factor that would ordinarily determine jurisdiction has any bearing on the right of the court to entertain jurisdiction of an ancillary suit. There seems to be one exception to the rule as above stated, but the circumstances of this case do not bring it within the exception. See Street on Federal Equity Practice, §§ 1229 and 1230.

[3] This brings us to inquire whether the injunction which the plaintiffs in the ancillary suit are seeking was properly refused. The United States courts are forbidden by act of Congress to enjoin proceedings in state courts, except as authorized by laws relating to proceedings in bankruptcy; but the prohibition referred to has no application to cases where it is necessary by injunction for a United States court to protect its own jurisdiction. So that, if a cause is properly removed from a state to a federal court, the latter may, when it is necessary to do so, issue an injunction to restrain further proceedings in the state court, if such court should persist in proceeding. This it does by restraining the party against whom a cause has been legally removed from any further steps in the state court. Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462 (1905); Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, 154, 34 Sup. Ct. 278, 58 L. Ed. 544 (1914). In the instant case the bill states:

"On information and belief, that the defendant herein the plaintiff in said action, notwithstanding the removal thereof to the District Court of the

United States for the Southern District of New York, purposes and intends to proceed in said action in the Supreme Court of New York, and in said court to take further steps in said action and to enter judgment there," etc.

[4] The answer was filed while the Supreme Court had under consideration the motion to remove the cause, and it denied the right of removal and admitted that, if the Supreme Court decided that the cause was not removable, it intended to proceed in the state court, according to the law of that state and procedure of its courts, but denied each and every other allegation as to its intentions. Before the decree in the District Court, Mr. Justice Mullan, of the Supreme Court of New York, granted the motion to remove the cause. The state of facts existing at the time the decree is entered, and not the facts existing at the time the bill is filed, determine the rights of the parties. It is true that the right to judgment in an action at law depends upon the facts as they exist when the action is commenced; but in equity a different rule governs, and is, as already stated, that the decree in equity is to be shaped as the rights of the parties exist at the time of the decree. This principle was recognized by the Supreme Court of the United States in Randel v. Brown, 2 How. 406, 423, 11 L. Ed. 318 (1844). The courts of New York have recognized it in like manner. Gay v. Gay, 10 Paige Ch. (N. Y.) 369 (1843); Peck v. Goodberlett, 109 N. Y. 180, 189, 16 N. E. 350 (1888); Sherman v. Foster, 158 N. Y. 587, 593, 53 N. E. 504 (1899).

It appearing at the time of the decree that the intention to proceed in the New York court was conditioned solely upon the fact that the New York court should decide to refuse to grant the motion to remove, and as that court did not so decide, but granted the motion to remove the cause, we think the District Court was right in refusing the injunction and in dismissing the bill without prejudice. If any attempt to proceed in the state court contrary to the statements contained in the answer should hereafter be made, the plaintiffs herein are at liberty to renew their application.

Decree affirmed.

GREAT LAKES TOWING CO. v. AMERICAN SHIPBUILDING CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2963.

1. ADMIRALTY ⟸118—APPEAL—REVIEW.
   Findings of fact and law made by a commissioner in admiralty, concurred in by the District Judge, will be accepted as correct by the appellate court unless clearly wrong.

2. TOWAGE ⟸11(7)—INJURY TO TOW—NEGLIGENCE OF TUGS.
   A newly launched steamer without machinery or rudder and standing very high in the water was taken by two tugs from the builder's dock on a river to the harbor a mile distant to be turned around and brought back. When near the harbor, the wind increased to 25 or 30 miles an hour, striking the steamer broadside, and after entering the harbor she was blown against a breakwater and injured and was again injured by striking a pier

when re-entering the river. *Held* that, the steamer being helpless and wholly under control of the tugs, the happening of the injuries under all the circumstances existing raised a presumption of negligence and cast upon them the burden of proving its absence; that the evidence did not sustain such burden, but showed that the tugs were negligent in proceeding down the river at such speed that the movement could not be stopped in time to prevent the collision; and also that one of the tugs at the stern of the steamer failed to co-operate with the other to turn the steamer to head into the wind.

3. TOWAGE ⊜15(2)—INJURY TO TOW—INEVITABLE ACCIDENT.
The burden of showing inevitable accident in such case as the cause of the injuries to the steamer rested on respondent.

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

Suit in admiralty by the American Shipbuilding Company against the Great Lakes Towing Company. Decree for libelant, and respondent appeals. Affirmed.

H. D. Goulder and T. H. Garry, both of Cleveland, Ohio, for appellant.

H. A. Kelley, of Cleveland, Ohio, for appellee.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. The case grows out of this situation, generally stated: The ship Percival Roberts had recently been launched at the shipbuilding company's dock at Lorain, Ohio; the dock being located upon Black river (the lower part of which forms the inner harbor of Lorain), and about a mile from Lake Erie. The outer harbor is formed by two breakwaters, the west breakwater extending due north and south, the easterly one lying in a generally northwesterly and southeasterly direction, the opening between the pier heads of the two breakwaters being on a line with the generally northwesterly course of the lower part of the river. The ship was not equipped with engines, boilers, machinery, or anchors; she was practically only a hull; she lay headed down the river. It was necessary to head her up the river in order to install the engines and boilers. The towing company was accordingly employed to tow the ship down the river, bow foremost, wind the ship about in the outer harbor, and tow her back to the dock, headed up. In the course of this maneuver, the ship was driven by a southwesterly wind against the east breakwater, and the starboard side of the ship damaged. In re-entering the river the ship was allowed to collide with the northwest corner of the east (river) pier, sustaining damage to her port side. To recover the damages the shipbuilding company filed libel in personam against the towing company, charging the latter's sole fault. The towing company denied fault on its part, and alleged at least contributory fault on the part of the shipbuilding company. The case was referred to a master commissioner to take proofs and report, with his findings of fact and conclusions of law. The master found the towing company

solely at fault. The district judge confirmed the master's report, and decreed accordingly. The appeal is from that decree.

The Roberts was 600 feet long and had a depth of 32 feet. At the time of the maneuver in question she drew but about one foot forward and about five feet aft. She was without officers and crew, and was herself completely helpless. The tugs had sole control of her navigation; the six or seven of libelant's men on board the ship (none of whom were sailors) being there only to handle lines, or otherwise act under the tugs' direction. The tow left the dock at about 8 a. m. There was then but a slight wind. The tug Pierce was pulling on a short line from the steamer's bow; the tug Excelsior, with a line at her bow, was at the steamer's stern, acting as the steering tug. When the tow was still in the river, and the steamer's bow about 190 feet inside the piers, a strong southwesterly wind was encountered. No effort was made to stop the tow or slow down. Her speed already reached was about five miles an hour, and was immediately increased to seven miles. The Excelsior continued under the steamer's port quarter, to help hold her up in the wind until the steamer's stern had cleared the piers, whereupon the Excelsior's engines were stopped. The wind, which struck the steamer practically broadside, carried her toward the east breakwater, taking the Pierce with her. Meanwhile, the Excelsior did nothing at all until the steamer was about 900 feet from the piers and within 200 feet or 300 feet of the breakwater, when her master made his line fast to his tug's stern tow-post, then heading up and pulling. The steamer continued to drift until it struck, the Excelsior's line having meanwhile parted. After about half an hour the Roberts was pulled from the breakwater by the two tugs, the Excelsior using at the last a wire cable furnished by the steamer, the manilla line having again broken. The Roberts was worked to a position athwart the piers, a few hundred feet outside (bows to the west), with the idea of pivoting her on the end of the pier. While the Pierce pulled on the bow, the Excelsior put her stem against the steamer's port side, in an effort by pushing to cushion her around the corner of the pier, but failed, because, as claimed, of the slipping of the tug's stem on the steamer's side, due to lack of line. The collision with the pier followed.

[1] The master, upon a careful review of the testimony—all of which was taken before him—found the tugs negligent in going down the river at such speed that the tow could not be stopped in less than 700 feet (as claimed), and in making no effort to stop when the Roberts was still 190 to 200 feet inside the piers; that the tug Excelsior was negligent in stopping her engines and doing nothing from the time the Roberts' stern cleared the end of the pier and until, as before stated, the steamer was within 200 to 300 feet of the breakwater; and that the collision with the pier head was due to mismanagement of the tugs in making the maneuver and in not advising the Roberts of the alleged plan to pivot her into the river on the end of the pier, and where lines would be needed in making the maneuver successful. The then district judge (the present Mr. Justice Clarke), upon a careful examination of

the briefs and record, expressed himself as "entirely satisfied with the findings of the master with respect both to the facts and to the law." These concurring conclusions of master and judge must be accepted as correct unless clearly wrong.[1]

[2] The tugs were in complete and sole control of the steamer's navigation, and, while they were not insurers of the steamer's safety (The Margaret, 94 U. S. 494, 24 L. Ed. 146), they were bound to exercise such care as would be commensurate with the situation. The towing company was in the habit of performing service of this nature, in this same port, and for the same shipbuilding company; it was familiar with the surroundings; it alone finally determined whether the movement could prudently be then had, although, in fact, the libelant's manager also thought the morning a good one for the purpose. These facts, as well as the helpless condition of the steamer and the season of the year, determined the care required of the tugs; and the happening of the accident under the circumstances existing raises a presumption of negligence, casting upon the tugs the burden of proving its absence.[2]

The most prominent defense asserted is that the weather conditions existing when the tow left the dock were such as to justify the movement; that the wind encountered just before leaving the river, and when (it was alleged) it was too late to discontinue the maneuver, was a sudden storm of unusual violence, amounting to a squall or gale; and that this wind was the proximate cause of the stranding and an efficient cause of the collision with the pier, constituting inevitable accident within the meaning of the law, and working thus a complete defense.

[3] The burden of showing inevitable accident rests upon the respondent.[3] We think this burden has not been sustained. According to the weight of the evidence, the wind encountered was one of about 25 to 30 miles per hour, and was not a gale. The master thought it a fair presumption that it was "a fresh wind of perhaps 28 miles per hour." Moreover, it blew from the same direction from which the testimony tended to show a very light wind had been blowing for some little time before. True, the strong wind encountered just before the river was left had come up quite suddenly, and was such as to make it imprudent to expose to it the immense broadside of the powerless,

[1] Cleveland v. Chisholm (C. C. A. 6) 90 Fed. 431, 434, 33 C. C. A. 157; United Steamship Co. v. Haskins (C. C. A. 9) 181 Fed. 962, 964, 104 C. C. A. 426; Monongahela, etc., Co. v. Hurst (C. C. A. 6) 200 Fed. 711, 119 C. C. A. 127; Erie & Mich. Nav. Co. v. Dunseith (C. C. A. 6) 239 Fed. 814, 816, — C. C. A. —; Wabash Ry. Co. v. Compton (C. C. A. 6) 172 Fed. 17, 21, 96 C. C. A. 603.

[2] The W. G. Mason (C. C. A. 2) 142 Fed. 913, 915, 74 C. C. A. 83; Hawgood Transit Co. v. Meaford Transportation Co. (C. C. A. 6) 232 Fed. 564, 565, 146 C. C. A. 522; Gt. Lakes Towing Co. v. Shenango Steamship Co. (C. C. A. 6) 238 Fed. 480, 485, — C. C. A. —, and cases there cited.

[3] The Olympia (C. C. A. 6) 61 Fed. 120, 122, 9 C. C. A. 393; Bradley v. Sullivan (C. C. A. 6) 209 Fed. 833, 834, 126 C. C. A. 557; Hawgood Transit Co. v. Meaford Transportation Co., supra, 232 Fed. at page 565, 146 C. C. A. 522; Australia Transit Co. v. Lehigh Transportation Co. (C. C. A. 6) 235 Fed. 53, 55, 148 C. C. A. 547.

rudderless, and empty hull, standing, as it did, high out of the water; and we do not doubt that the tugs' navigators would not have left the dock had they anticipated such a blow. The movement required fine weather, although perhaps the maneuver could safely have been executed in the face of the light wind which the testimony tended to show existed on the lake when the tow left the dock, although not very noticeable at the latter point. But while a wind of the nature and velocity encountered was unusual at that season of the year, it was by no means unprecedented. On the contrary, it is the undisputed evidence of an officer of the Weather Bureau that such blows occur on an average three or four times during each month of December; and we think the towing company was bound to anticipate this as a not improbable occurrence, and to use due care in the premises. Assuming, without being entirely convinced, that when the high wind was encountered the maneuver could not be discontinued, and without determining whether respondent was negligent in undertaking the maneuver without further knowledge of actual conditions on the lake, in view of the more than mere possible intervention of such a wind at that time of the year, and of the exposed and helpless condition of the steamer, we agree with the essential conclusion of the court below that the tugs were negligent in proceeding down the river with such speed that the movement could not be stopped in time to prevent stranding.

Moreover, it is clear that the Excelsior was guilty of positive fault, which we think directly contributed to the stranding. Prudent navigation required that the Roberts be headed, if possible, into the wind, and apparently the Pierce was exerting efforts to that end. The Excelsior should have assisted in that movement, by way of shoving or pulling the steamer's stern about. No attempt in this direction was made by her; instead, she did nothing except, when the Roberts was already drifting toward the breakwater, to aid in a futile attempt to hold her broadside against the wind. The master of the Pierce testified that, if the Excelsior had had a line out, she "could have shoved the stern down; it would have released the pressure on the bow, so that the 'Pierce' would not have had any trouble to keep her up." This impresses us as entirely reasonable.

We think it clear that the breaking of the line furnished by the Roberts did not contribute to the stranding, for we agree with the conclusion below that by the time the Excelsior commenced her pull on the steamer's stern the stranding was bound to occur, whether the line held or not. The two tugs could not have held the steamer as against the broadside wind.

It is also urged that the subsequent collision with the pier was due to the Roberts' failure to furnish a line to the tug. There is no evidence of request therefor, excepting that the Excelsior, when she found that her stem could not be held without a line against the Roberts' side, blew (several times) several short blasts—apparently to attract the steamer's attention—and called out for a line. But there is no evidence that any one on the Roberts understood or heard the call. Indeed, the tug's master says "there was nobody around where the tug was, anyhow, to take a line," and that he "just called into the air."

We agree with the conclusion below that the collision with the pier head was due to mismanagement of the tugs, in the respects already referred to as found by the master.

We have not discussed all the considerations and arguments presented by respondent. We have, however, carefully considered them all, and are of opinion that the District Court did not err in finding respondent solely at fault for both the stranding and the subsequent collision, and that its decree should be affirmed.

MORROW, County Auditor, et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 30, 1917.)

No. 4774.

1. CONSTITUTIONAL LAW ⟸93(1)—VESTED RIGHTS—AGREEMENTS WITH INDIANS.

The government may in its dealings with Indians create property rights which, once vested, even it cannot alter, and such property rights may result from agreements either in the form of a treaty or of a statute; the important considerations being that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.

2. CONSTITUTIONAL LAW ⟸93(1)—TAXATION ⟸181—INDIAN LANDS—VESTED RIGHTS.

Act Feb. 8, 1887, c. 119, § 5, 24 Stat. 389 (Comp. St. 1916, § 4201), provided for allotments of lands to Indians and for the issuance of patents providing that the government would hold the land for 25 years in trust for the Indian and his heirs and at the expiration of such period convey it by patent discharged of the trust and free of all charge or incumbrance. Act Jan. 14, 1889, c. 24, 25 Stat. 642, provided for the appointment of a commission to obtain from the Chippewa Indians in Minnesota a relinquishment of all their lands except parts of two reservations and for allotments of lands in such reservations to individual Indians in conformity with the act of 1887. Act June 21, 1906, c. 3504, 34 Stat. 353, provides that all restrictions as to sale, incumbrance, or taxation of allotments within the White Earth Reservation held by adult mixed-blood Indians are thereby removed, that the trust deeds executed therefor are thereby declared to pass title in fee simple, and that such mixed bloods upon application shall be entitled to a patent in fee simple. *Held* that, where the Indians consented to relinquish their lands and accept allotments in such reservations under the Act of 1889, there was a valid contract between the government and the Indians, and an Indian receiving a trust patent had vested rights which could not be altered against his will, and hence where he was claiming no rights under the act of 1906, but was insisting upon holding his land under the trust patent, his land could not be taxed by the state.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by the United States against W. J. Morrow, as County Auditor of Becker County, Minnesota, and others. From a decree in favor of the government, defendants appeal. Affirmed.

Egbert S. Oakley, of St. Paul, Minn. (Lyndon A. Smith, of St. Paul, Minn., and Henry N. Jenson, of Detroit, Minn., on the brief), for appellants.

S. W. Williams, of Washington, D. C., for the United States.

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

STONE, Circuit Judge. Suit by the United States as trustee of lands for a mixed-blood Chippewa Indian against certain officials of Becker county, Minn., to restrain collection of tax levied upon land in the White Earth Reservation allotted and trust patented under the Nelson Act.

The case is submitted upon a stipulation of facts, the essential portions of which are that:

"The allottee of the tract of lands therein described is, and at the time of the commencement of this action was, an adult mixed-blood Chippewa Indian residing upon the White Earth Reservation, and that he has never incumbered or alienated, or attempted to incumber or alienate, said lands; that said lands are situated upon the White Earth Reservation and were allotted to said Kah-be-mah-be and were thereafter patented to him * * * pursuant to the statutes of the United States."

The sole point for decision is, in general terms, whether or not the land of an adult mixed-blood Chippewa Indian allotted, patented, and held under the provisions of the Nelson Act (January 14, 1889, 25 Stat. 642) is, since the enactment of the so-called Clapp Amendment (June 21, 1906, c. 3504, 34 Stat. 353), subject to state and local taxation, where the allottee has never attempted to avail himself of any power he might have under that amendment to alienate or incumber, but on the contrary is insisting upon holding it according to the provisions of a trust patent issued under the authority of the Nelson Act.

The patent issued on this land December 30, 1902, was what is called a "trust patent." The law required that it declare, and that its legal effect be, that the land be held "in trust for the sole use and benefit of" the Indian to whom such allotment shall have been made, or his heirs for 25 years with no power in the allottee to convey or to contract "touching the same" during that period; and that at the end of such period the United States "convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever." 24 Stat. 388, § 5.

Appellants properly concede that there was no right of taxation while the land was held solely under such trust patent. They contend that the Clapp Amendment enacted four years subsequent to the issue and during the life of this trust patent had the effect of terminating it and of vesting a complete fee title in the allottee irrespective of his consent to such a change. An answering contention of the government is that Congress had no power to alter this "trust patent" status without the consent of such patentee, because such trust patent, issued under the Nelson Act, conveyed a property right to this patentee which had

become vested. The property right intended being the separate beneficial use of the land free from taxation and involuntary alienation for 25 years from date of trust patent, with fee title thereafter.

[1] There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. Williams v. Johnson, 239 U. S. 414, 420, 36 Sup. Ct. 150, 60 L. Ed. 358; Sizemore v. Brady, 235 U. S. 441, 449, 35 Sup. Ct. 135, 59 L. Ed. 308; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Chase v. U. S., 222 Fed. 593, 596, 138 C. C. A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian.

[2] That exemption of land from taxation is a property right is established. Choate v. Trapp, supra. That this Indian had taken possession of and was enjoying this land under such an exemption at the time the Clapp Amendment was passed is undisputed. Therefore, if this exemption came to him as a legal right, it had fully vested. It came as such legal right if it rested on the solid basis of a binding agreement. If there was such an agreement here, it is to be found in the terms of the Nelson Act, read in the light of attendant circumstances. These circumstances are revealed in the communication of the Interior Department recounting the negotiations between the Commissioners and these Indians (Doc. 247, published in volume 32, House Exec. Doc. 51st Cong. 1st. Sess).

At the passage of that act, the Chippewa Indians were scattered over several reservations in the state of Minnesota. Much of their land was held as tribal by different bands or communities while some was held in severalty. The Indians were in dire need from crop failures. Their condition generally was very unsatisfactory. Their reservations included some supposedly valuable mineral land and much very valuable timber land; the worth of the latter, as stated by the commissioners, having been estimated at from $25,000,000 to $50,000,000. Their title to these lands was unquestioned by the government and sprang from several successive treaties, the last being that of March 19, 1867 (16 Stat. 719). Under such circumstances this act was passed, as its title attests, for their "relief and civilization."

The broad objects of the act were: The concentration of these Indians upon two reservations (White Earth and Red Lake); allotments thereon in severalty; acquirement by the government of title to the surplus beyond these allotments for sale to establish a fund; the net income from this fund to be utilized for 50 years for the support, civilization, and education of these Indians; the final distribution of the fund among them.

With unquestioning recognition of the Indian title to all of these lands, both tribal and allotted, the first sentence of this act provided for the appointment by the President of a commission "to negotiate with all the different bands or tribes of Chippewa Indians in the state of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the state of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the commissioners for said purpose"; such cession and relinquishment to be "for the purpose and upon the terms hereinafter stated." The act provided that, where an allotment of land in severalty had theretofore been made on any reservation, the allottee "shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given." As to tribal lands the act required the cession to be "assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations," with a like assent by two-thirds of the male adults of all Chippewas in Minnesota as to the Red Lake Reservation. It further provided that such "agreements" should be approved by the President before becoming effective. Section 3 provided for the removal of the Indians and the allotments of lands as soon as "the cession and relinquishment has been obtained, approved, and ratified." Section 4 required the survey and classification for sale of the "lands so ceded to the United States" "as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid." So much for the terms of the act.

The commissioners provided for in the act secured the written consent of the required number of Indians only after almost six months of patient negotiations. The cession was later ratified by the President and thereupon became effective, the Indians removed to the two reservations, relinquished the balance of their lands, and received allotments in severalty.

Thus the terms of this act, as well as its attendant circumstances, leave no doubt that this act required, before it should become effective, an agreement to its terms by the Indians and the cession by them of very valuable tracts of lands to which their title was unimpeached. The Indians fully performed their part of the agreement, and it was in exact performance upon its side that the government allotted to this Indian his land and was holding it for him at the time the Clapp Amendment was enacted. Such a proposal, acceptance, passage of consideration, and performance between private parties would constitute a valid contract. The character of the transaction is not changed because one of the parties to it is the government.

Appellants seem to regard this allotment as made solely under the General Allotment Act (Feb. 8, 1887, 24 Stat. 388), and clothed only with such rights as might attach to any allotment made under that act alone. This is based on the provision in section 3 of the Nelson

Act, which is that the allotment thereunder should be "in conformity with" the General Allotment Act. The Nelson Act, except for its reference to the General Act, is silent as to the character of interest or title to be acquired by the Indians through the allotments. Obviously that would be one, if not the most important, of the considerations in the minds of the Indians. Clearly this, although but a part, would be a vital part of the agreement to them. To execute that part of the plan, the method laid down in the recently enacted General Allotment Act was deemed suitable. Therefore it was, by reference instead of repetition, incorporated into the Nelson Act as a part of that agreement. The General Act, § 5, set this forth in detail. It provided that the title should be held by the President in trust for 25 years free from "all charge or incumbrance," which meant, in effect, freedom from taxation.

If the Nelson Act had set out in detail the terms upon which the allotments were to be made, it could not be successfully contended that those terms were not a part of the agreement, or that any title or rights resulting therefrom when once vested would not be free from alteration. Can this be less true because the allotment method is incorporated by reference? This incorporation of the method outlined in the General Allotment Act by reference made that method part of the agreement with precisely the same effect as though its terms had first found expression by being set out in full as a section of the Nelson Act. The General Allotment Act was not made applicable to these allotments in any other sense. They were not under the authority of the General Allotment Act at all, but "in conformity with" it under the authority of the Nelson Act.

If there were any doubt as to the status of this matter, the understanding of the Indians as to the agreement would control. Kansas Indians, 5 Wall. 737, 18 L. Ed. 667; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. Several hundred copies of both the Nelson and of the General Allotment Acts were distributed among the Indians and were discussed by them and the commissioners as constituting parts of one agreement. As to these very matters of title and taxation, the Indians were very inquisitive and solicitous. The commissioners gave them the direct assurance that their alloted lands would not be taxed for 25 years "because the President holds this land in trust for you," and it was so understood by them.

A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and local taxation.

The court has not overlooked the decisions in Dickson v. Luck Land Co. (January 8, 1917) 242 U. S. 371, 37 Sup. Ct. 167, 61 L. Ed. 371, and United States v. Waller (April 9, 1917) 243 U. S. 452, 37 Sup. Ct. 430, 61 L. Ed. 843. In the Dickson Case the only question was whether, in a suit between rival grantees of land allotted and patented to a mixed-blood Chippewa Indian in the White Earth Res-

ervation, and by him conveyed, the issue of the patent (not a trust patent) was conclusive as to the adulthood of the Indian at the time of its issue. There the Indian had fully availed himself of the terms of the Clapp Amendment, had secured a patent thereunder, and had alienated his land. The suit in this court is based upon refusal of this Indian to change his status by acceptance and exercise of the powers offered in the Clapp Amendment. In the Waller Case the question was whether the government could properly bring a suit to set aside conveyances of land by mixed-blood Chippewa Indian allottees on the ground that the conveyances had been fraudulently obtained. The court held the government was not a proper party because the wardship of the government had been, in respect to their lands, removed from such Indians by the Clapp Amendment. The court says:

"The act thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands."

The instant case is not one depending upon governmental wardship over a dependent and inferior people, but is based upon the legal relation of trusteeship, and springs from the obligation contained in the terms of the trust to preserve the land, so that at the end of the trust period it can be passed to the beneficiary "free of all charge or incumbrance."

The judgment is affirmed.

THE BERN.
THE ST. GABRIEL.

(Circuit Court of Appeals, Second Circuit. April 20, 1917.)

No. 160.

COLLISION ⇐147—FOG—TOW LYING AT END OF PIER—FAULT OF TUG.

It is the duty of a tug, having charge of a flotilla of barges, lying off the end of a pier in a bay, on hearing the fog signals of an approaching vessel, to give warning in some manner of the presence of her tow, and her failure to do so renders her liable for a collision with one of her barges.

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

Suit in admiralty by the Pennsylvania Railroad Company, owner of tug P. R. R. No. 14, against the steam tug Bern, the Philadelphia & Reading Railway Company, claimant, and the barge St. Gabriel, Kate Dougherty, claimant. Decree for libelant, against the Bern, and her claimant appeals. Affirmed.

Armstrong, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark, of New York City, of counsel), for appellee Pennsylvania R. Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The libel in this suit was filed to recover contribution from the steam tug Bern for damages which the libelant was compelled to pay by reason of a collision between the libelant's tug, P. R. R. No. 14, and the barge St. Gabriel, in charge of the Bern, at the Packer Dock, Jersey City, on the morning of March 14, 1913. In the District Court the Bern and No. 14 have been held jointly responsible for the damage sustained by the St. Gabriel and the libelant has been allowed to recover from the Bern one-half the amount paid the owner of the St. Gabriel in the suit of Kate Dougherty against tug P. R. R. No. 14. The amount paid under the final decree in the former suit was $3,038.39. The decree in that suit was entered on January 20, 1914, and on January 5, 1915, this libel for contribution was filed. The Bern was not impleaded in the original suit.

The trial of the present suit consisted in offering the record in the former suit and calling of one witness by the Reading Company, a deck hand from the Bern, who testified that he heard no whistles from No. 14. On the morning of the collision the Reading Company's tugs Wyomissing and Bern had tied up a tow at the Packer Dock for the purpose of distributing the several boats in the North and East Rivers. The two tugs left for this purpose. Later a dense fog set in, and the Bern, which had found her way back, was tied up at the dock, and her master had gone to telephone for instructions, leaving a deck hand in the pilot house in charge. The facts may be stated as follows:

The tug P. R. R. No. 14 had left Pier 4, North River, Manhattan, bound for Jersey City. The master of No. 14 was at the wheel, and a lookout was stationed on the bow. The tug proceeded sounding fog signals at intervals and keeping a lookout. When about midstream the fog became more dense; No. 14's engines were stopped, and she proceeded, alternately stopping and starting her engines. While so proceeding, the lookout made out a low-lying object in the water close under the tug's bow. The tug's engines were reversed full speed, but she came into collision with what afterwards proved to be the barge St. Gabriel at an angle of about 45 degrees. The St. Gabriel was damaged considerably and later sank.

In this thick fog the St. Gabriel and 17 or 18 other boats were hung up off the end of the dock. The tow was made up in 4 or 5 tiers of 4 boats in a tier, and extended down stream across the pier ends for 400 or 500 feet. The St. Gabriel was the starboard hawser boat, with 3 boats between her and the pier end, and was about 120 to 125 feet out in the river. The tug Bern was lying just inside the slip at the head tier of the tow, with her stern lapped about 10 feet on a Lehigh Valley boat, which was lying on the end of the pier. The deck hand, who was in the pilot house and in charge of the tug, admitted hearing several fog signals. He seems to have had no conception that it was incumbent upon him to give any warning of the presence of this obstructing flotilla. He admitted that the Bern was equipped with a fog bell, but he does not seem to have been aware that he was under any duty to use it in the fog conditions which prevailed.

There can be no doubt as to the obligation which rested on the Bern to protect this tow. This court in the Jersey Central, 221 Fed. 625, 137 C. C. A. 349 (1915), stated the law as follows:

"It is now established in this circuit that when such a situation exists—at least when there is more than a single vessel at the pier head—and fog signals indicate the approach of another vessel, there should be sounded some warning of the presence of the obstructing vessels; not navigating or anchored signals, but some other sound, to take the place of sight, whether it be given by beating a pan, or blowing a mouth horn, or using a watchman's rattle or a megaphone. When the tug which had the tow in charge has been at hand, she has been held in fault for not giving such warning. When she is absent, reasonable care and prudence should be exercised by the master of a boat thus left tied up, when conditions indicate that danger threatens."

See, also, The Express, 212 Fed. 672, 129 C. C. A. 208 (1914).

In the instant case the Bern, which had the tow in charge and was bound to sound some warning of the presence of the obstructing tow, did nothing. Under these circumstances, the District Judge properly held the tug in fault, and that the libelant was entitled to contribution.

Decree affirmed.

BURROUGHS ADDING MACH. CO. v. FELT & TARRANT MFG. CO.

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

No. 2255.

1. PATENTS ⊜167(1)—CONSTRUCTION OF CLAIMS—LIMITATION BY DRAWINGS AND SPECIFICATION.
   The claims of a patent are to be construed in the light of the real invention as shown and described in the drawings and specifications.

2. PATENTS ⊜167(1)—CONSTRUCTION OF CLAIMS—LIMITATION BY DRAWINGS AND SPECIFICATION.
   While courts will always endeavor to distinguish the several claims of a patent, one from another and give a broadly stated claim a broader construction than one more narrowly stated, this rule is subject to the fundamental and controlling rule that a patentee's broadest claim can be no broader than his actual invention as disclosed in his drawings and specification.

3. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—ADDING MACHINES.
   The Felt patents, No. 762,520, No. 762,521, No. 767,107, and No. 960,528, all for improved mechanism for adding machines, construed, and *held* valid, but not infringed.

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

Suit in equity by the Felt & Tarrant Manufacturing Company against the Burroughs Adding Machine Company. Decree for complainant, and defendant appeals. Reversed.

Infringement suit on four patents issued to Dorr E. Felt on calculating machines. The patents are numbered 762,520, 762,521, 767,107, and 960,528, dated, respectively, June 14, 1904, June 14, 1904, August 29, 1904, and June 7, 1910. A reargument was directed by the court, and argument had June 9, 10, and 15, 1916. A rehearing was granted and argued March 10, 1916.

Edward Rector and Robert H. Parkinson, both of Chicago, Ill., for appellant.

Henry Love Clarke, of Chicago, Ill., for appellee.

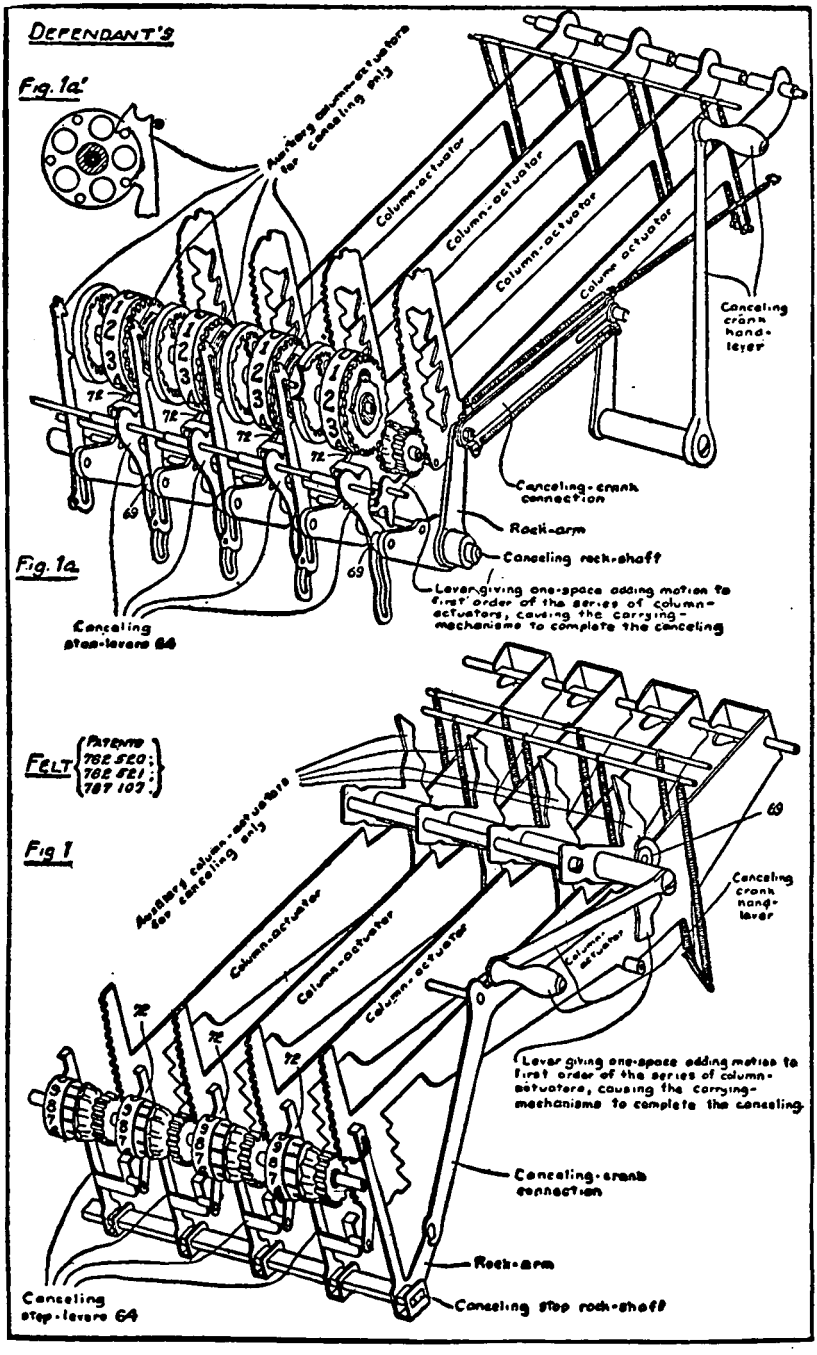
Before MACK and ALSCHULER, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge. These patents are for improvements on adding machines, for which Felt had taken out earlier patents expiring before this suit was begun. The chief question is whether the mechanism employed by defendant, different from that illustrated by the patents in suit, is an infringement. The improvements covered by the patents are many of them meritorious and valuable, and give the machine much greater flexibility and rapidity of action than the earlier forms. As to most of the improvements the Burroughs Company has sufficiently departed from the patented form to escape infringement, but as to one of them, particularly, there is question.

The principle of action of an adding or calculating machine is not difficult to understand, but there is much complication in the actual machine. Aside from the recording of results on paper, and restoring the machine from one operation so that another may be begun, known as "clearing the machine" or canceling the former operation, an adding machine depends on three points. These are: (1) The use of the numeral-wheel and column-actuator; (2) the carrying mechanism, by which the turning of the units wheel beyond a full revolution carries one to the next wheel, and so on through a hundred, a thousand, ten thousand, etc.; and (3) the employment of stop mechanism to prevent the wheels from overrunning, and thus turning up a greater number than the one struck.

The Numeral-Wheel Mechanism. On the periphery of the numeral-wheel the digits 1 to 9 and the cipher are printed, and there are nine keys, marked 1 to 9. When a key is depressed the wheel will turn up to view the number which the key bears. Thus if the 6 key is touched the number 6 will come up, and if then the 2 in the same bank or column is touched the number 8 will appear, each key having the ability to turn the wheel that many tenths of a revolution corresponding to its own value. Depressing the 3 key turns the wheel three-tenths around, the 8 four-fifths, etc. If the 9 is struck and then the 1 the wheel will complete one revolution, and turn up the cipher. All this is accomplished by the relation of the key bars to the column-actuator and the numeral wheel, as shown by the accompanying cut, being plaintiff's Comparative Drawing No. 22, which needs only the number keys to give a clear idea of the latest form of calculating machine. With a bank of keys over each column-actuator the picture would be complete; but it may readily be understood that if the keys are so placed that they can depress the column-actuator, number 1 key being nearest the wheel and number 9 farthest away, the same depression of the latter may be made to depress the actuator 9 times as far as the former, since 9 is near the fulcrum of the actuator and 1 is farthest away.

COMPARATIVE DRAWING No. 22



Carrying Mechanism. When a column of figures is added with paper and pencil the tens, hundreds, etc., are carried from the units, tens, etc., columns. The same thing must be done mechanically in an adding machine by turning the tens wheel one-tenth of a revolution every time the units wheel makes a full revolution, two-tenths when it makes two revolutions, etc. In this way the values of all the operated keys are added in one common sum or total upon the series of numeral-wheels. When the units wheel completes a revolution the tens wheel moves forward one step, two steps when it completes two revolutions, and there is the same result in respect to the tens and hundreds, hundreds and thousands, etc., for as many banks of keys as the machine has. This carrying operation is brought about in the Felt construction by a ratchet and pawl construction, and in defendant's by a planetary gear. This is the point at which the main question of infringement comes up, the defendant claiming that it makes use of different means and operation.

The following figures will serve to illustrate plaintiff's carrying devices. Figure 5 is taken from the Felt patent 366,945, and 5a from appellant's brief.

Fig. 5

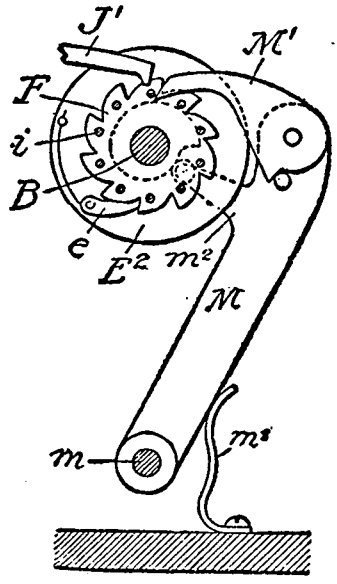
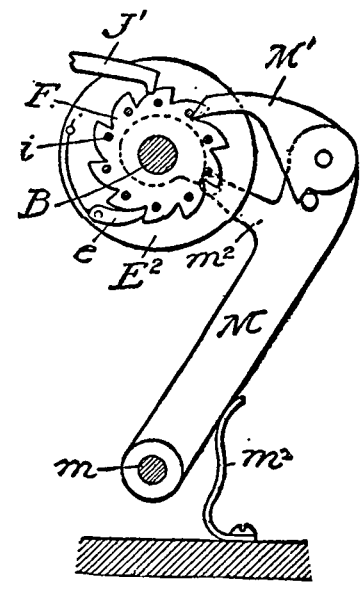


Fig. 5a



The snail cam shown in different positions in both figures is attached to the hub of all the numeral-wheels except that of the highest order. When a lower order wheel completes a full revolution its cam, turning counter-clockwise, pushes out the pawl *M'*, registering with the next higher wheel, by means of its shoulder m^2, into the position shown by Figure 5a, and when the tail of the cam clears the rear end of the

shoulder the spring operates on the pawl and rotates the higher order wheel one step, so that the figure 1 will show on the higher wheel and the cipher or some figure between that and 9 on the lower. Thus the carry is made, no matter what keys of the lower order wheel may be operated.

To illustrate this carrying operation suppose the 9 key in the units column is struck 12 times so that the sum will be 108. On the first stroke the units wheel turns nine-tenths of a revolution, and the tens wheel does not move because its pawl *M'* has not yet been actuated by the units wheel cam and the tens wheel pawl spring. But when the 9 is struck again the units wheel revolves another nine-tenths, and turns up an 8, and the carry has been made so as to move the tens wheel one step, and show 18 on the top of the two wheels. When the third stroke is made the units wheel will show 7 and another carry occurring the tens wheel will show 2. So with each successive stroke the units wheel goes nearly around, and the tens wheel advances one step until the eleventh, where it remains stationary because the units wheel was then starting as at the beginning with the cipher uppermost; but when the twelfth stroke is made the units wheel cam and the tens pawl move the tens wheel one step, and the tens wheel (having now completed one revolution) has by its cam and the hundreds wheel pawl operated on the hundreds wheel to move it one step, so that the final result of all the strokes on the 9 key is 1 on the hundreds wheel, a cipher on the tens and an 8 on the units, or 108.

A novel improvement on this carrying device, covered by claim 29 of the first patent in suit, No. 762,520, presents the chief question in the case, and will be explained after adverting to the third point, the stop mechanism.

The Stop Mechanism. The third requisite of an adding or calculating machine is to provide automatic catches or stops to prevent overrun of a wheel. Without such stops the rapid striking of a key might rotate the wheel so far as to produce an unauthorized carry. Thus if 99 was simultaneously struck in the units and tens columns both wheels might overrun so as to make a carry in both the tens and hundreds wheels, and show a total of 110 instead of 99. The most important of these stops operate on the column-actuators, and will be referred to later.

Improvement in Carrying: Claims 29 and 30. Referring to the cuts 5 and 5a it may be seen that there would be a loss of carry if, when the carry is being made, both the lower and higher order wheels are moving. As described by plaintiff's counsel:

"The thousands wheel might at one and the same time be receiving both an impulse from a key of its own and an impulse from the carrying mechanism of the hundreds wheel; and if there were not some special means for preserving both impulses the lesser or carrying impulse might be swallowed up in the greater or key-driven impulse that such thousands wheel was receiving."

The patentee refers to this feature as follows:

"In order to prevent the loss or swallowing of the carrying movements in the other and generally larger movements of the numeral-wheels received from

the impulse of the keys, which would occur if the carrying took place simultaneously with the key movements, I have devised means whereby the operation of the carrying mechanism of the different denominations is caused to take place between the key-strokes in the same denominations and after such strokes have been completed and the numeral-wheels have moved in accordance therewith."

In securing this Mr. Felt also obtained another important result highly useful and entirely new, called the duplex key action or fluidity of key movement. This was the capacity of the machine for striking a number of keys in different denominations at the same time, without striking them absolutely together. That is, the key-action may be independent, or irregular and overlapping, thus giving the machine an elastic or fluid action. It is possessed by both plaintiff's and defendant's machines alike, and has been called by plaintiff's witnesses and counsel, "fluidity of keyboard action." How this new result is obtained by both parties will now be described; the vital question being whether defendant, in using different means and a different operation, has really taken an equivalent.

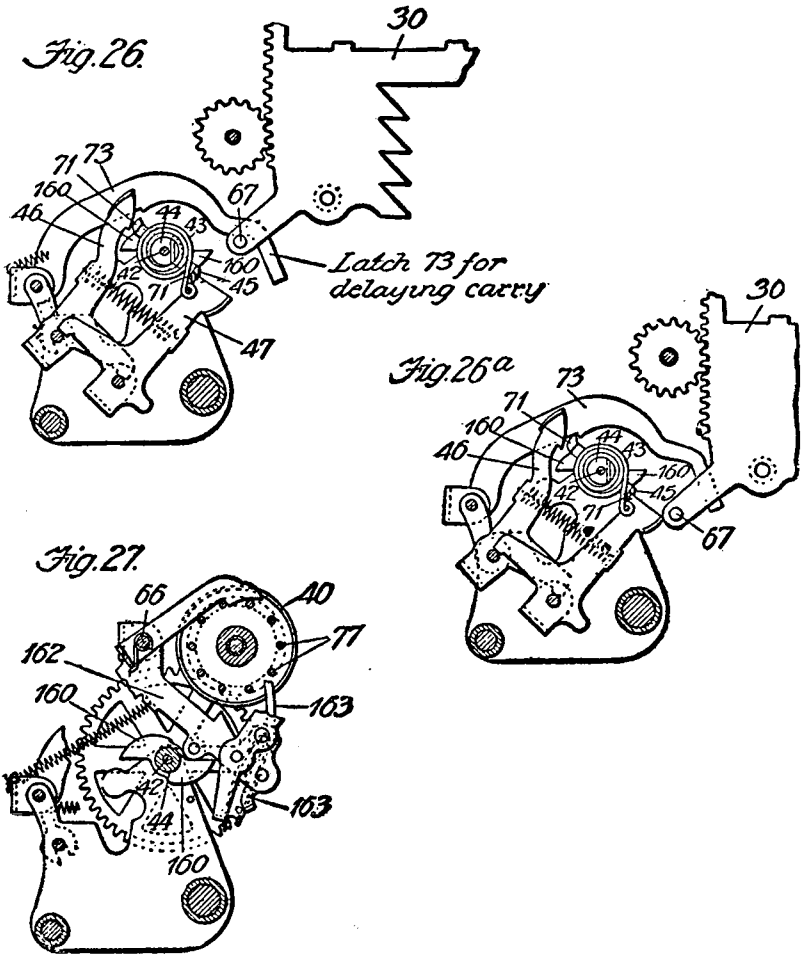
In order to show how Felt attained these objects modified figures of the patent, as shown in defendant's brief, are here reproduced. The mechanism is described by Mr. Felt with sufficient clearness:

"The sleeve *44* is also provided at opposite sides, as shown at Fig. 26, with two projections *71*, each adapted to engage the under edge of a latch *73*, pivoted on the cross-rod *48a*. The latch is extended over and rests on the column-actuator of the denomination to which the carrying is to be done, and preferably on the pin *67* on the actuator, and a spring *99*, already mentioned, draws the latch over onto the actuator. Normally the latch is out of engagement with the projections *71;* but when any key of the column to which the carrying is done is struck the actuator of that column moves down, so that the latch drops into position, where it must engage the first or nearest one of the projections *71* as soon as the sleeve begins to turn. The sleeve is thus arrested before it gets fairly started or has performed any function, and continues to be held by the latch until the column-actuator has fully completed its upstroke after being depressed by a key. When the actuator thus returns to its normal position and as it arrives at the same, it lifts the latch through the contact of the pin *67* with the end of the latch, so that the engagement with the sleeve is terminated, leaving the sleeve free to turn under the power of the carrying-spring *43* and through the mechanism already described to operate its numeral-wheel through a one-tenth revolution."

The inventor, having conceived his idea of improving his old machine by having the higher order actuators suspend the carry from the lower order wheels, and allow it to occur only after the driving stroke of the next higher actuator had been made, drew a number of specific and one broad claim in order to secure the legal benefit of his invention. Each of these claims contains five elements, the first four being substantially the same, and being old, but the fifth represents the new conception. Claims 29 and 30 follow:

"29. The combination of a series of denominational numeral-wheels, a series of column-actuators operating said wheels, a series of keys for each actuator, and a carrying mechanism for each wheel, and means whereby the several carrying mechanisms may be temporarily controlled by the next higher actuators.

PLAINTIFF'S CARRYING MECHANISM



"30. The combination of a series of denominational numeral-wheels, a series of column-actuators operating said wheels, a series of keys for each actuator, and a carrying mechanism for each wheel, and means whereby the actuator of a higher denomination may delay the carrying from a lower denomination until it has completed any movement imparted to it by the keys."

Claim 30 specifically represents the actual invention described in the specification, and claim 29 may be properly construed to cover all variations and equivalents of the five elements going to make up the real invention.

The mechanism of the delaying latch of the Felt machine has been already described, in connection with the patent drawings. The "inventive concept," or underlying and fundamental principle of the invention, was thus previously described in the specifications. After referring to his own prior art machines, Mr. Felt proceeds:

"A third objection to this class of calculators has been that they are liable to add incorrectly if the operator strikes two or more keys of different denominations simultaneously, because under such circumstances the carrying is often lost in the movement imparted directed to the register-wheels by the keys, and by reason of this fact it has not heretofore been possible to operate the machines by striking a plurality of keys simultaneously. Obviously a machine in which correct results can be obtained by striking two or more keys in different denominational series at a time will enable the operator to increase the speed of his calculations very materially, and by my present invention I not only obviate all danger of miscalculations from this cause, but produce a machine well adapted to permit the habitual striking simultaneously of a plurality of keys."

"In order to prevent the loss or swallowing of the carrying movements in the other and generally larger movements of the numeral-wheels received from the impulses of the keys, which would occur if the carrying took place simultaneously with the key movements, I have devised means whereby the operation of the carrying mechanism of the different denominations is caused to take place between the key-strokes in the same denominations and after such strokes have been completed and the numeral-wheels have moved in accordance therewith. This feature of the invention will now be set forth."

And the patentee then proceeded to describe the mechanics of the invention in the words quoted on an earlier page.

[1] Since defendant does not use the delaying latch the question is thus presented as to the effect of describing the inventive concept or idea, claiming it as thus described, as in counts 28 and 30, and then attempting to broaden it by a more general count, as in claim 29. This situation has often come before the courts, and the governing rule well expressed by this court, and by Judge Colt, speaking for the Court of Appeals for the First Circuit. In Mossberg v. Nutter, 135 Fed. 95, 99, 68 C. C. A. 257, 261, Judge Colt said:

"In approaching a patent, we are to look primarily at the thing which the inventor conceived and described in his patent, and the claims are to be interpreted with this particular thing ever before our eyes. In confining our attention too exclusively to a critical examination of the claims, we are apt to look at them as separate and independent entities, and to lose sight of the important consideration that the real invention is to be found in the specification and drawings, and that the language of the claims is to be construed in the light of what is there shown and described."

In this court, in State Bank of Chicago v. Hillman, 180 Fed. 732, 104 C. C. A. 98, Judge Grosscup said:

"The question of law presented, then, is this: Can the patentee rightfully include in his claims something that does not emerge from the description? Can a patentee describe something to the world in his letters patent that means just that thing or its equivalents and nothing else, and, having claimed that, claim in addition something not thus described and not its equivalents? We think not. The description is required to set forth the invention in such full, clear, concise, and exact terms as to enable any person, skilled in the art to which it appertains, or with which it is most nearly connected, to make and

use the same; and the claim is to enable the public to know the bounds and scope of the invention 'thus disclosed'; but 'any claim which is broader than the described invention is void, even where that invention is valuable, and could have supported a valuable claim.' Walker on Patents (4th Ed.) § 177, citing Edison v. American Mutoscope Co., 114 Fed. 934, 52 C. C. A. 546."

"There is nothing in Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, or the Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, brought to our attention since the argument, nor in any of the rules of law cited ('that the claims of every patent should be construed, if possible, to cover and protect the actual invention made by the patentee, and should not be restricted to the particular form of device disclosed in his patent, if other forms may embody it.' or that 'the patentee's claim is the "measure of his invention,"' or that 'where the claims of a patent are clear and unambiguous, there is no room for construction') that contravenes what has just been said; for what is said in both of these cases, and in all of these rules, is based on the fact that the inventive concept is disclosed in the description, whatever may have been the mechanical form that such concept subsequently took. Certainly it was not intended by these cases or these rules that an inventive concept, that is separate and apart from the one embodied in the description, should become a part of the patent simply by being included in the claims."

The Hillman Case was approved by this court in Stevens v. Mitchell, 220 Fed. 455, 136 C. C. A. 283, and the Supreme Court announced the same doctrine in Snow v. Lake Shore & M. S. R. Co., 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004. To the same effect are Celluloid Co. v. Arlington Co., 52 Fed. 740, 3 C. C. A. 269; Whitaker Cement Co. v. Huntington Dry Pulverizer Co., 95 Fed. 471, 37 C. C. A. 151, and Jewell Filter Co. v. Jackson, 140 Fed. 340, 72 C. C. A. 304.

Thus the gist or spirit of the invention was to cause the carry to occur only between actuator strokes, and to be held up and delayed until the next higher actuator has come to rest after an impulse of its own. This is the "law of the machine" and the prime object of the invention; but the operation is entirely foreign to defendant's device, in which the carry is not delayed, but occurs as well during a higher actuator movement as at any other stage.

Plaintiff's position is that claim 29 covers any and all means by which the carrying mechanism is temporarily controlled in any degree by the next higher actuator; and that unless this meaning be given to claim 29, the latter cannot be distinguished from claim 30. In support of this plaintiff's counsel appeal to the well-understood theory of claim differentiation described by Judge Baker in Lamson Consolidated Store Service Co. v. Hillman, 123 Fed. 416, 59 C. C. A. 510, to the effect that separate claims are not to be construed as identical unless fairly unavoidable. "To construe claim 8 as being the same as either claim 10 or claim 11 would be to declare claim 8 void as a duplication. Such a course should not be pursued unless it cannot fairly be avoided." Baker, C. J., in Kennicott Co. v. Holt Ice & Cold Storage Co., 230 Fed. 157, 144 C. C. A. 455.

[2] The rule is of course well established that the courts will always endeavor to distinguish the several claims of a patent, one from another, and that where a patent contains two similar claims the difference in the wording of the two claims will be given effect if possible, and the more broadly stated claim will be construed more broadly than the narrowly stated claim, if it can be done within the limits of the

patentee's invention as described in his specification and illustrated in his drawings.

But this rule of construction of patent claims is entirely subordinate to the fundamental and controlling rule that a patentee's broadest claim can be no broader than his actual invention, no matter how it may be expressed or what other claims his patent may contain. When a patentee has fully and clearly described his actual invention in the specification and drawings of his patent, and has fully covered that invention by the broadest claim to monopoly which the law will allow him, he cannot then, by merely including in his patent a more broadly or more vaguely stated claim, cover and monopolize something more than and different from his real invention. Now, while it is a very common thing for the courts to construe a claim of a patent by reference to some other claim of the same patent, and to apply the rule of construction to which plaintiff refers, it is equally common for the courts to wholly disregard and ignore such rule of construction whenever it comes into conflict with the fundamental and controlling rule that a patentee's claim can be no broader than his actual invention, and they have not hesitated to hold a claim invalid where it could not be restricted by construction to the patentee's actual invention as disclosed in the specification and drawings of his patent.

That is what this court did in the Hillman Case, and what was done by the Circuit Court of Appeals of the Eighth Circuit in the Jewell Filter Case.

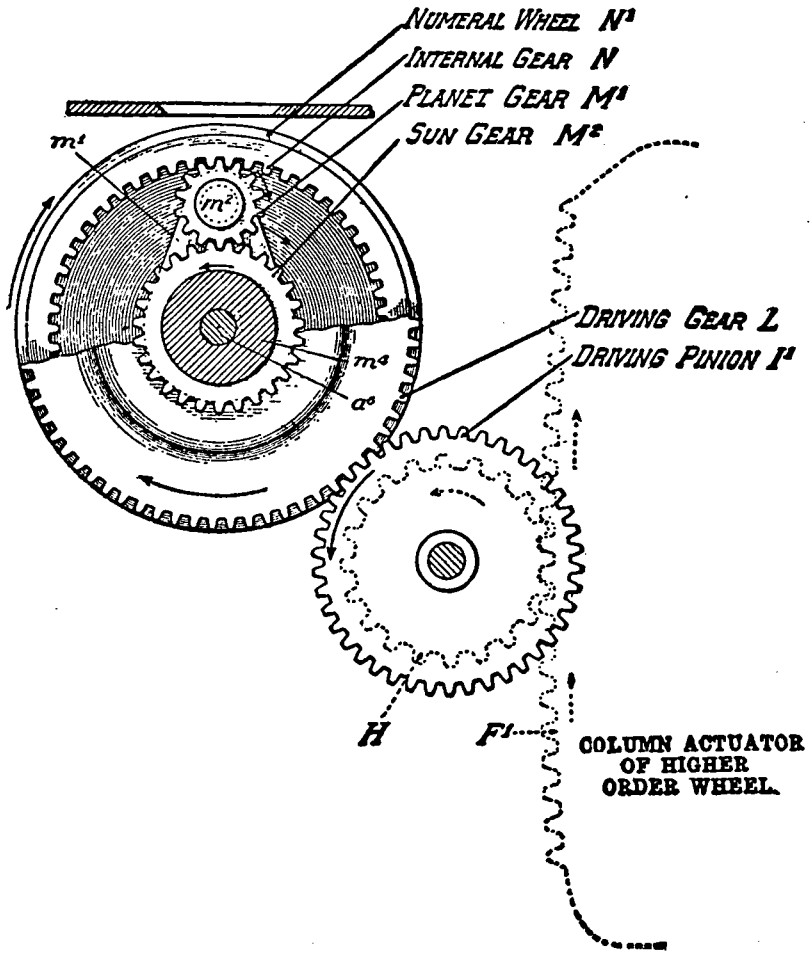
It is also to be noted, however, that there are differences between claims 29 and 30, sufficient to so distinguish them, and to hold that both are valid. Claim 29 counts on control of the "carrying mechanism" by the "next higher actuator," while claim 30 counts on delay of the "carrying" by the "actuator of a higher denomination." It will not do, in this difficult and intricate matter, to make the absolute statement that the fifth element of both claims is identical.

[3] *Defendant's Mechanism.* It has been stated in the opinion that defendant's mechanism, which it is now necessary to describe, does not include means for a delayed carry, or any equivalent mechanism. The object of both constructions is to enable one complete revolution of a lower order numeral-wheel, say the units, to transmit to the next higher or tens wheel a one-step carry, or one-tenth revolution. Each numeral-wheel (except the first and last) has a dual function. Each is a lower order wheel to its next higher neighbor, and a higher order wheel to its next lower. Each must transmit the carrying impulse to the next and receive it from the lower one, and in so doing neither must interfere with the other.

In order to do these things rapidly and correctly all the mechanism must be connected like a watch in the most exact and perfect way, and within a very small space. Between the units and tens wheels (also the tens and hundreds, etc.) there is placed a set of small cogwheels or pinions which wind up a spring in order to make the one-step carry. There is also a cam, an escapement, lever, catch, etc. So when the units wheel turns from 1 to 9 it winds up the spring ready

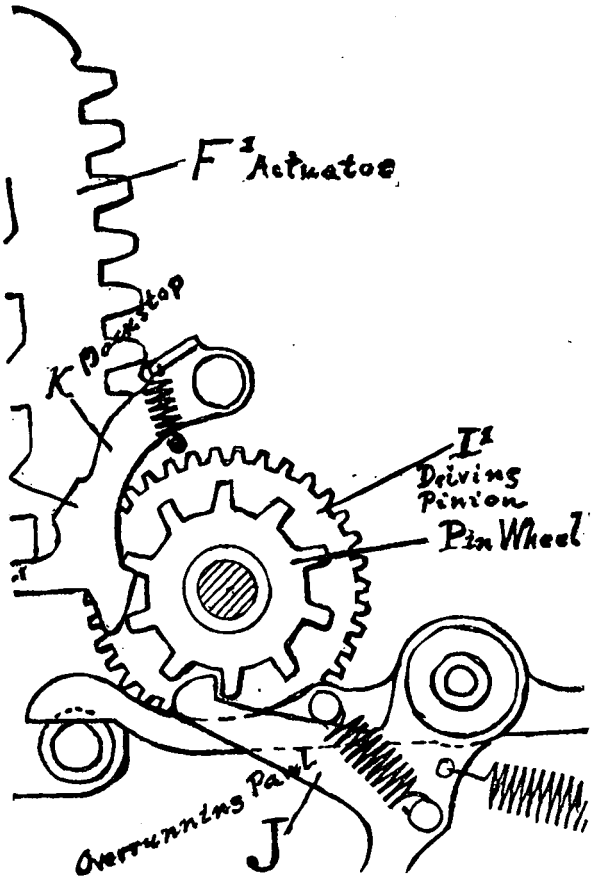
to be tripped when the wheel reaches the cipher position and to turn the tens wheel one step. Some device, also, must be arranged to prevent the one step carry being smothered or swallowed up by the larger movement of the next lower wheel, as described by Mr. Felt in the language quoted. Felt does this by a ratchet and pawl construction and the delaying latch *73* controlled by the next higher actuator, and defendant by the transmission mechanism referred to and the planetary or differential gearing shown in the accompanying cuts.

HIGHER ORDER WHEEL AND ACTUATOR—DEFENDANT'S CARRYING MECHANISM.



DEFENDANT'S DEVICE.

HIGHER ORDER ACTUATOR, BACKSTOP, DRIVING PINION, PINWHEEL AND OVERRUNNING PAWL.



The foregoing drawings represent a planetary gear and some additional devices such as the higher order actuator, driving pinion, pinwheel, backstop and pawl to prevent overrunning, all attached to a higher order numeral-wheel, the actuator shown being the "next higher" one referred to in claim 29. The sun gear is normally stationary, is not turned by the movement of the actuator, but only by the carrying spring attached to the transmission devices, and wound up by the movement of the lower order wheel not shown.

It may be difficult to describe the characteristic motion of a planet gearing, but it is just like the differential of an automobile. Its fundamental principle is that a cogwheel turned by two other cogwheels moving simultaneously will take on the sum of both movements. The

planetary movement has long been well known, and is an accelerated motion due to force transmitted from two points into one. That is, when the driving pinion alone moves the planet gear turns. When the sun gear alone moves the planet gear also turns. When both driving and sun gears move together the planet gear takes on a more rapid motion as the result of both, and the planet gear is the last step in the train which makes the carry by turning the higher wheel one step.

Now as the lower order wheel through the transmission and spring turns the sun gear, and the higher order actuator turns the driving pinion which in turn drives the higher order numeral-wheel, it is obvious that the difficulty described by Mr. Felt as the loss of carry by the swallowing up of one movement by the other cannot occur, because the planet gear will transmit to the higher wheel the motion it receives from the sun gear just as well when the numeral-wheel is turning from a key impulse given by the actuator as it will when the actuator is at rest. When the actuator is making its rising or driving stroke it will be seen that the planet gear is being carried idly around the sun wheel by the internal gear N. If at this time a carry comes over from the lower wheel, by the spring turning the sun gear contra-clockwise, this motion of the sun gear will be transmitted through the planet wheel by the internal gear N to the numeral-wheel N^1, and move it one step in the opposite or clockwise direction.

Carry-Control by Next Higher Actuator. Claim 29 counts on "means whereby the several carrying mechanisms may be temporarily controlled by the next higher actuators." So a further question that may be thought material is whether defendant's carrying device is within this claim. And since claim 29 is clearly valid because it was new to control the carrying operation by the next higher actuator, it will conduce to a better understanding of the case to inquire whether or to what extent defendant uses the temporary control of claim 29, and if so whether defendant's carrying device is an equivalent of plaintiff's.

The notion of control of carry in the Burroughs' device is based upon a fundamental principle applying to all differential gearing, which is that a pinion or cogwheel placed between two other cogwheels cannot turn either one unless the other is either held stationary or driven in the proper direction. Thus the driving pinion I^1 in the first cut must be held stationary or be moving forward at the instant that the planet wheel is turning the numeral-wheel N^1 by the influence of the sun gear M^2. The second cut shows how this driving pinion is normally held from backward motion by the backstop pawl K when the column-actuator F^1 is making its downward movement, also how the backstop will ride over the pinwheel when moved clockwise by the upward or driving stroke of the actuator. Those who understand automobile operation will know why the driving pinion cannot be allowed to turn backward while the planet gear is being operated by the sun gear. When a car is coasting down hill, in gear, but with the spark turned off, the movement of the hind wheels is propelling the engine through the differential and main shaft. During this operation, if one of the hind wheels should leave the ground while rounding a curve

the engine would stop, because it is absolutely necessary that both wheels shall be on the road, or the differential pinion, corresponding to the planet gear, will idle about the large gear wheels connected with the rear axle shafts in the differential, and exercise no driving power on the main transmission shaft. The same thing happens if one wheel of the car is lifted from the ground and turned by hand. This will operate the engine if sufficient force be used, but if both wheels are off the engine will not turn over. This illustrates the point that the driving gear must either be stationary or held from backward movement while a carry is being made.

Bearing this in mind, the cut may be explained by saying that the actuator shown is the "next higher" one in mesh with a gear wheel not shown, and which is supposed to be rising and making its driving stroke at the exact instant when a carry is coming over from the lower order wheel. In the cut, however, the parts are shown in their normal, inactive position. The pinwheel and driving gear are held from backward movement by the backstop *K* pressed against the pinwheel by its spring, and from forward movement by the actuator itself. The driving gear and pinwheel are rigidly connected.

Suppose now the actuator is depressed by its own key-movement. The latch *J* will be pulled by its spring downward away from its registry with the pinwheel, and thus allow forward movement of the pinwheel and driving gear, but which are still held from backward movement by the backstop *K*. So if a carry is coming over during the descending or idle stroke of the actuator, it will be properly made, because the driving gear is "on the ground," held immobile by its backstop. But when the actuator begins its upward or driving stroke the backstop, by the turning forward of the pinwheel, is made to slide over the cogs or pins and thus prevented from holding back the driving gear. Of course such gear cannot be held back and go forward under the lead of the actuator at one and the same time. It is at this instant of a rising actuator that the latter is said to temporarily control a carry if one then happens to be coming over.

By referring to the diagram the operation of a driving or rising stroke may be clearing understood. The actuator forces the backstop out of commission and itself steadies and holds firm the pinwheel and attached driving pinion by pushing them forward. It is like the pilot assuming the wheel on an incoming steamship; he takes control from the helmsman and assumes it himself. So it is plain that it is accurate to say that when both *K* and *J* are out of commission during the driving stroke the only thing which can steady the driving gear is the actuator, and if at this instant a carry is made the actuator, by pushing the driving gear forward, prevents it from going backward, and so in a sense "temporarily controls the carrying mechanism." But this is manifestly quite a different control from that positive prevention of a stroke which occurs when plaintiff's latch *73* is made to absolutely tie up the carrying mechanism until the rising actuator stroke is completed.

We have not lost sight of defendant's argument that the Burroughs' higher order actuators do not prevent loss of carry, but in that con-

nection we are satisfied, even if the argument is sound, that these actuators do "temporarily control" the carry in the sense that they prevent the driving pinion from going backward by the operation of driving it forward.

The case is thus brought squarely within the rule of the Hillman Case that when an inventor has described and claimed his real invention he cannot add to it by adding a broader claim. Felt's fundamental idea was the delayed carry temporarily governed by the next higher actuator descending and putting in operation the delaying latch *73*. This he described most clearly, and fully covered in claims 22 to 28 and 30. He could not by another claim cover a distinct inventive idea, not described or even intimated in his specifications as his conception, namely, the concept used by defendant, of the nondelayed, simultaneous carry, even though both operations are individualized to the next higher actuator. The inventive notion of a nondelayed simultaneous carry is contained in the prior art patents of Cook, No. 503,946 and Webster, 484,887, but as individualized to the next higher actuator it is not actually used by either one. Felt was the first to bring into actual use this individualized control, with a highly beneficial result in securing the duplex key-action and fluidity of key movement above referred to. But this individualization of the control was expressly confined by him to control through delaying mechanism, as an improvement on his own older machine, in which simultaneous striking of the keys, either in unison or overlapping, was impossible without loss of carry. That was his invention: there is nothing even to suggest that the actual invention was broader than the invention as described by him in his patent, unless it be the language of claim 29. And this claim, fairly construed, both independently and as compared with the language of the other claims, does not support the broader construction. While the inventor must have all due credit, if, as we hold, his real invention is not used by the defendant, there can be no infringement.

Stop Device Claims, 1-10 and 16-21, No. 762,520. At the reargument it was thought that aside from claim 29 of the first patent in suit there was no infringement, on the theory that both parties were equally entitled to improve upon the old Felt machine, and that each had done so in its own way. As these stop mechanisms are quite complicated it will be enough to compare the most limited of the respective claims of the Felt and Horton patents.

Felt claim 3:

"The combination with the keys and the column-actuator operated by the keys and provided with coarse spaced teeth, projections or shoulders, of two hinged levers arranged alongside of the actuator, one adapted to be depressed by the odd keys and the other by the even keys, and two pivoted stop devices adapted to be swung each by one of the levers, and thereby to be forced into engagement with said shoulders, the acting portions of said devices being located in different planes so that one may engage later than the other."

Horton claim 10:

"In a machine of the character described the combination of an adding wheel; an actuator lever therefor having two confronting series of shoulders, those of one series staggered with relation to those of the other; a swinging

stop adapted to engage said shoulders; a bar connected to said stop and having two series of cams, those of one series alternating with those of the other and oppositely inclined relative thereto; a series of depressible keys to act upon the lever different distances from its pivot and having studs to act upon the cams of said bar, the odd keys acting upon one series of said cams to swing the stop one way, and the even keys acting upon the other series of cams to swing the stop the other way; and a spring applied to the stop to centralize it."

Comparing the two devices one has five stop shoulders and two stops, and the other nine stop shoulders and one stop. One has two hinged levers or catches and the other a hinged bar. Defendant's device is the more simple and easy to understand. The only invention shown in either device is in decreasing the number of shoulders and increasing their size, and in this respect defendant employs different means and operation. Each party is entitled to its own form. The devices differ in principle, operation, mechanical construction and arrangement of parts, and there is no infringement.

Other Stop Devices, Claims 11–15, 38, 39, 53, No. 762,520. The devices referred to are the two pivoted stop devices referred to under the preceding division for stopping the downward movement of the actuator, a rod across the machine for stopping its upward movement, and a spring latch timed to prevent overrun of the numeral-wheels after the rod had arrested the upstrokes. The arrangement of stops is simply a matter of mechanical skill, and there could be no invention except in the precise form employed. The prior art abounds in all kinds of stop devices, and there is a mere change of form from the first Felt patent, now expired. Defendant does not use just the same combination, and does not infringe. Claims relating to other stops are 40, 41, 63, 70, 71 and 73, but they all stand on similar grounds, being simply specific arrangements requiring mechanical skill only. The claims are narrowly valid but not infringed.

Canceling or Zero Claims, Patents No. 767,107, and 960,528. These claims relate to the process of "clearing the machine" by swinging a lever forward and back, known as canceling or zeroizing, by which all the numeral-wheels are lined up with the cipher of each uppermost. The two devices are shown in the first diagram on an earlier page, being Comparative Drawing No. 22. All the column-actuators move in plaintiff's machine, but only the units actuator in defendant's, and the mechanism is different, as well as mode of operation in other respects. Canceling mechanism is old, and is found in Felt's prior art machines. No infringement of these patents is shown.

Claims 7, 8, and 16, No. 762,521. These claims cover the carrying springs described in the discussion on claim 29, in combination with their numeral-wheels, which are being constantly revolved against the tension of the spring, and restrained by it. This patent was not mentioned on the oral reargument. It is simply an ingenious triplex coiled spring, required by the necessity of storing carrying power. Defendant does not use it or anything like it.

Claim 19, No 762,521. This claim relates to plaintiff's numeral-wheel with a celluloid face. Defendant's wheel is quite different. The celluloid face element is not insisted on by plaintiff.

The decree appealed from is reversed, with direction to enter a decree sustaining all claims in suit but finding them not infringed, with costs.

Reversed.

ROBERT et al. v. KREMENTZ.

(Circuit Court of Appeals, Third Circuit. July 6, 1917.)

No. 2243.

1. PATENTS ⇐328—REISSUE—VALIDITY—MATCH BOX.
   The Dodge reissue patent, No. 12,290 (original No. 749,539), for a match box designed to hold a book or comb of matches, having an open face with a hinged cover and a holding piece at one end for folding the package, with an opening therein through which the matches may be ignited on the friction material of the package, while applied for and granted for broadening the claims of the original patent, is valid, as within the invention described in the specification, the essence of which is in the means for engaging and holding the exposed match comb; also *held* infringed.

2. PATENTS ⇐136—REISSUES—INADVERTENCE OR MISTAKE.
   The failure of a patentee to apply for claims sufficiently broad to cover his invention, in the absence of any fraudulent intention, is an inadvertence or mistake, which will authorize a reissue.

3. PATENTS ⇐142—REISSUE—ACQUIESCENCE IN REJECTION OF ORIGINAL CLAIMS.
   The acquiescence by a patentee in the rejection of claims, which are for but a part of his invention, does not estop him from obtaining by a reissue claims for another and different part.

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by Samuel Robert, trading as the A. R. T. Manufacturing Company, and Harold A. Dodge, against George Krementz trading as Krementz & Co. Decree for defendant, and complainants appeal. Reversed.

For opinion below, see 232 Fed. 876.

James H. Griffin, of New York City, for appellants.

Seward Davis, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The bill charged infringement of claims 5 and 10 of Reissued Letters Patent No. 12,290 to H. A. Dodge for a match box. The District Court, while of opinion that infringement must be found if the claims are valid, dismissed the bill on the ground that claims 5 and 10 of the reissue are substantially the same as rejected claims 1 and 2 of the application for the original patent (Serial No. 162,236—Letters Patent No. 749,539); and that in acquiescing in their rejection from the original, the patentee is precluded from asserting them in the reissue.

As viewed by the District Court, the case does not present the

broad question of "power to enlarge inadequate claims by a reissue, but the more limited one of overcoming by a reissue the error of acquiescing in the decision of the Commissioner of Patents that the patentee was entitled only to a narrower claim." We are inclined to the opinion that the case presents both questions. The reissue was sought admittedly for the purpose of obtaining enlarged claims and was granted with claims enlarged concededly for the purpose of awarding a patent commensurate with the invention, as stated by the Examiners-in-Chief when reversing on appeal the decision of the Examiner disallowing the claims. In order, therefore, to determine the validity of the broad claims of the Reissued Letters Patent sued upon, we must first determine whether they are for the invention of the original patent. Powder Co. v. Powder Works, 98 U. S. 126; Topliff v. Topliff, infra. If they are, we may then determine the questions upon which the case turned in the District Court, whether the rejected claims were similarly for the invention of the patent and were the same in scope as the reissue claims, and whether in acquiescing in their rejection the patentee lost his right to a patent for his invention. We must therefore inquire into the character of the invention and into the scope of the claims rejected, accepted and reissued, with reference to the invention.

[1] The invention of the patent is a match box, designed especially to hold "book matches" or the familiar comb of paper safety matches, and, because of its simplicity and cheapness, well adapted to advertising purposes. Within its limited field the invention is a pioneer, as it appears to be the first box designed and used to hold book matches, notwithstanding matches of that type had been extensively made and used for many years before the date of the patent. Its novelty cannot be questioned; its extensive use and popularity (being made by the million) argue its patentability. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 858; Neill v. Kinney, 239 Fed. 309, — C. C. A. —.

The specification of the original discloses a structure designed to hold matches of the comb type, and no other. It is preferably tapered so as to conform to the wedge shape of a match comb, and is constructed to engage the clip or base of the comb in a way to hold the comb in the box and leave exposed its strands of matches and frictional surface. The engaging means or "holding piece," as diagrammatically shown in the original, is a continuation of the metal back of the box turned over the front a short distance. Upon this specification the patentee applied for the following claims:

"1. A match box comprising a back, having turned-up lips to afford side and end portions for the body of the box, and having, integral with the end portion, *a turned-over holding piece adapted to partly overlie a package of matches, and which holding-piece is provided with an opening through which the matches may be ignited on the friction material of the package,* said box being provided with a suitable lid.

"2. A match box provided with a hinged lid at one end and being formed deeper at the end where the lid is hinged than at its opposite end, so as to be adapted to hold a package of paper matches, and the said box having at its end opposite the hinge of the lid, *a holding-piece,* as d, *adapted to partly overlie a package of matches* contained by the box."

These claims were cancelled on references (principally Mortimer, No. 185,123—1876) showing match boxes designed not to carry match combs but to carry loose individual matches. These boxes had a holding-piece in the sense of a front high enough to hold the matches from toppling out, and not in the sense of fastening or engaging the matches in the box. To meet these references the Patent Office canceled the original claims of the application and substituted for them claims of the patent, as follows:

"1. A match box comprising a back having turned-up lips to afford side and end portions for the body of the box, and having, integral with the end portion, a turned-over holding piece adapted to partly overlie a package of matches, said holding-piece *having its central portion* open to provide an aperture through which the matches may be ignited on the friction material of the package, and said box being provided with a suitable hinged lid.

"2. A match box provided with a hinged lid at one end and being formed deeper at the end where the lid is hinged than at its opposite end, so as to be adapted to hold a package of paper matches, and the said box having, at its end opposite the hinge of the lid, a holding-piece, as *d*, adapted to partly overlie a package of matches contained by the box, said holding-piece *having its central portion cut away* to provide an opening through which the matches may be ignited on the friction material of the package."

In this cancellation and substitution the patentee acquiesced.

The only difference we discern between the two sets of claims is in the location of the opening in the holding-piece through which matches may be ignited on the friction material of the comb; the original claims make no reference to its location, while the substituted claims prescribe a central location.

The patentee soon realized that his claims did not cover his invention, so within less than two months from the grant of the patent he filed an application for reissue based upon the specification of the original patent, with amendments that did little more than emphasize the fact that the essence of the patent lay in the means for engaging and retaining the exposed match comb. Claims 1 and 2 of the application for reissue were the same as allowed claims 1 and 2 of the original, showing a holding-piece with a central opening. Claims 3 to 10 were new and broad. Claims 5 and 10 (the claims here in issue) did not deal with and therefore were not limited to a holding-piece with an opening, but concerned a match-retaining and engaging flange at one end of the box, permissibly extending from the sides, leaving the matches and frictional material exposed as before. They were:

"5. A match box having a solid back, a turned-up end member rigid therewith, two side members also rigid with said back, substantially the entire front of said box being open, a match retaining and engaging flange arranged near one end of the box to hold a package of matches exposed to view through the open front, and a cover pivoted to the box and arranged to cover the open front."

"10. A match box provided with a back, and end member and two side members rigid and integral with said back, substantially the entire front of said box being open, a cover hinged near one end of the box, and means near the end of the box opposite the cover-hinge for engaging and retaining a comb of matches, whereby the entire comb of matches is exposed when the cover is opened and individual matches may be detached without disturbing the comb."

After various amendments and much official correspondence, claims 3 to 10 were rejected by the Examiner on the ground that certain of them were anticipated by prior patents, and certain others (interpreted in the light of the specification) were the same in substance as the claims presented in the original application and rejected; and that there was no "inadvertence, accident or mistake" in securing the limited original claims of the patent upon which an application for a reissue of broader claims could be predicated. An appeal was taken, in which the Examiners-in-Chief reversed the entire decision of the Examiner upon reasoning that was exactly the opposite of his, and established the claims now contained in the Reissued Letters Patent. They stated that the Examiner, in finding there was no inadvertence in securing the original claims of the patent, was clearly in error, and held that none of the appealed claims is the same in scope as original claim 2 (and inferentially original claim 1). In so holding the Examiners-in-Chief said:

"They are all broader in some respects or narrower in others. * * * It is very apparent from a study of all the references cited that while many of the features of the appellant's device are shown to be old, no one of them nor all of them taken together is sufficient to anticipate the appellant's' device. It is as far as this record shows, the first device in which a package or comb of matches can be conveniently held and used, *and this is due to the features of the retaining and engaging means arranged near one end of the box and the front of the box being open substantially its entire length.* Each of the claims now appealed contains these features."

It should be kept in mind that an arrangement for holding a comb of matches in a box with its front open substantially its entire length to permit access to the comb, disengagement of matches and ignition on its friction piece is the essence of the invention. The claims of the reissue were allowed by the Examiners-in-Chief on the ground that they were within this conception of the invention as disclosed by the original specification.

The law of reissue when within the invention is well settled. This court has said (Nu Bone Corset Co. v. Spirella Co., 183 Fed. 984, 985, 106 C. C. A. 324, 325):

"If a patentee discloses in his specification an invention not sufficiently covered by the claims of his patent, he may, *if the limited character of the claim is the result of inadvertence*, accident, or *mistake*, surrender his patent and apply for a reissue, with a claim or claims sufficiently definite and exact *to cover the whole of his invention.*"

This statement of the law is in harmony with the cases generally upon the subject of broadening claims by patent reissues. The leading case probably is Topliff v. Topliff, 145 U. S. 156, 164, 12 Sup. Ct. 825, 831 (36 L. Ed. 658) in which the Supreme Court stated:

"It may be regarded as the settled rule of this court that the power to reissue may be exercised when the patent is inoperative by reason of the fact that the specification as originally drawn was defective or insufficient, *or the claims were narrower than the actual invention of the patentee*, provided the error has arisen from inadvertence or mistake, and the patentee is guilty of no fraud or deception; but that such reissues are subject to the following qualifications:

"First. That it shall be for the same invention as the original patent, as such invention appears from the specification and claims of such original.

"Second. That due diligence must be exercised in discovering the mistake in the original patent, and that, if it be sought for the purpose of enlarging the claim, the lapse of two years will ordinarily, though not always, be treated as evidence of an abandonment of the new matter to the public. * * * To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee. * * * The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation."

Testing the validity of reissue claims 5 and 10 by these rules of law, we find ourselves in full accord with the ruling of the Examiners-in-Chief. These claims, though broader than the original and rejected claims, are nevertheless for the invention shown in the original specification. They would have been quite as much in place in the original as in the reissue. The patentee thus met the first requisite for a valid reissue. Topliff v. Topliff, supra. Being entitled to a patent for his invention and having failed to obtain it by original, has the patentee done anything which prevented him obtaining it by reissue?

[2] There is no evidence that in making claims of the limited character of the original, the patentee was actuated by fraud or deception. Topliff v. Topliff, supra. There is evidence that on discovering his mistake of asking for claims narrower than his invention, he was abundantly diligent in attempting to rectify it by an application for reissue. Topliff v. Topliff, supra. There is no suggestion that rights of others had intervened between the grant of the patent and the application for reissue. Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783. Thus far the patentee conformed to the rules. Was the patentee's failure to apply for claims sufficiently broad to cover his invention an inadvertence or mistake within the meaning of the Reissue Statute? Upon this point it was said in Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 853, 48 C. C. A. 72, 79:

"A review of the earlier decisions of the Supreme Court would seem to show that by 'defective or insufficient specifications' was meant any failure either to describe or claim the complete invention upon which the application for the patent was founded, and that 'inadvertence or mistake' was used in antithesis to fraudulent intent, and that the right to reissue depends upon any failure to make specifications and claims legally adequate to their purpose, if due to any cause except an intention to deceive."

In Toledo Computing Scale Co. v. Moneyweight Scale Co. (C. C.) 178 Fed. 557, 559, the court said:

"Mistake or inadvertence making a patent inoperative or invalid may be that of the patentee or his solicitor, either in preparing the specification or claims. If the solicitor fails to understand and properly describe or claim the real invention, by making claims so broad as to be anticipated, or so narrow as to be inoperative, this is such mistake as to authorize a reissue, if authorized on other grounds. Topliff v. Topliff."

It has been generally held that inability of solicitors of a patentee to put claims into a form that covers the real invention constitutes a case of inadvertence authorizing a reissue, and in such case the

abandonment of such claims on their rejection by the Patent Office is not an abandonment of the invention and does not preclude a reissue and the substitution of claims which properly cover it. Toledo Computing Scale Co. v. Moneyweight Scale Co. (C. C.) 178 Fed. 557.

This kind of mistake or inadvertence the patentee claims was made in his case. In this we agree with him and with the Examiners-in-Chief. We are therefore of opinion that the patentee was entitled to a reissue, and that claims 5 and 10 of the reissue are valid—unless the patentee is estopped from asserting them because of his acquiescence in the rejection of claims for the same invention and of similar scope when applying for his original patent.

[3] Having determined that claims 5 and 10 of the reissue are for the invention of the patent, we must inquire whether rejected claims 1 and 2 were also for the same invention, in order to decide the question of estoppel.

The rule is well established that an inventor who acquiesces in the rejection by the Patent Office of his claim in one form and accepts a patent *for the same thing* but with the claim changed so as to correspond with the views of that office, is estopped to claim the benefit of the rejected claim. Morgan Envelope Co. v. Albany Paper Co., 152 U. S. 425, 429, 14 Sup. Ct. 627, 38 L. Ed. 500; Leggett v. Avery, 101 U. S. 256, 25 L. Ed. 865; Crawford v. Heysinger, 123 U. S. 589, 606, 8 Sup. Ct. 399, 31 L. Ed. 269; Union Metallic Cartridge Co. v. United States Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475, 28 L. Ed. 828; Phœnix Caster Co. v. Spiegel, 133 U. S. 360, 368, 10 Sup. Ct. 409, 33 L. Ed. 663. But he is not estopped by his acquiescence in the rejection of the claim asked for to make a claim by reissue for something he had not asked for and which had not been refused by the Patent Office.

Were rejected claims 1 and 2 for the same thing as reissue claims 5 and 10?

Claims 1 and 2 as applied for in the original, dealt with a holding-piece of the match box and were rejected upon references because they did not designate the location of an opening in the holding-piece. Substituted claims 1 and 2 differed from rejected claims 1 and 2 by prescribing the location of the opening. None of these claims embraced or emphasized the capital feature of the invention, which is a means to engage and firmly hold the match comb in a fashion which permits disengagement of single matches and ignition upon its friction surface. The specification of the original, however, was sufficiently broad to include this means; yet the claims of the original, either rejected or substituted, were not sufficiently broad to cover it. Therefore what the patentee acquiesced in was the rejection of two claims dealing with a particular construction of a holding-piece and opening. What he got were two claims dealing with the same holding-piece construction, but prescribing the location of the opening. He thus asked for and obtained claims for but a part of his invention. It is now maintained that in accepting claims for only a part, he abandoned the balance. This we question. What the patentee did (keeping always in mind the essence of his invention) was to disclose his real invention and fail to claim it. Having never claimed his

real invention, he never abandoned it. All he abandoned by acquiescing in the rejection of claims 1 and 2 of the original was the indefinite location of the ignition opening in a structure having a holding-piece. In his application for reissue he did not ask for new claims covering this structure, but prayed for new claims covering the engaging means of his invention not covered either by rejected or substituted claims 1 and 2 of the original. These were allowed. We are of opinion that rejected claims 1 and 2 were for but a part of the patentee's invention, and that reissue claims 5 and 10 are for another and different part, and that in consequence the patentee is not estopped from asserting them as valid claims in a reissue.

Having sustained the validity of claims 5 and 10 of the Reissued Letters Patent, we find them infringed. The motion to dismiss is without merit.

The decree below is reversed.

CHICAGO & A. RY. CO. et al. v. PRESSED STEEL CAR CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917. Rehearing Denied May 24, 1917.)

No. 2339.

1. JUDGMENT ⊂=570(5)—JUDGMENT AS BAR—MATTERS CONCLUDED.
   A decree of dismissal in a suit to restrain an action at law for want of equity, on the ground that complainant has an adequate remedy at law, aside from cases involving title to or possession of land, is not a bar to any defense in the action at law.
2. APPEAL AND ERROR ⊂=1008(2)—REVIEW—CASES TRIED TO COURT.
   In an action at law involving the question of infringement of a patent, where there is no evidence of the prior art, and no extrinsic evidence is necessary to explain the respective structures, which, with their manner of operation, are plainly shown and described in patents covering the same, the question of infringement is one of law, and where the case is tried without a jury a general finding by the court is reviewable by the appellate court on writ of error.
3. PATENTS ⊂=129—LICENSES—EFFECT AS ESTOPPEL.
   In a suit upon a patent license contract, the prior art is not admissible, either to show the invalidity of the patent or to limit the prima facie scope of the claims, further than to make clear any ambiguities therein.
4. PATENTS ⊂=328—INFRINGEMENT—CAR DOOR MECHANISM.
   The Lindstrom & Streib patent, No. 791,348, for car door mechanism for closing and supporting the hinged doors of dump cars, claim 13, which is for car door mechanism having a lifting shaft arranged to support the door "directly" when the door is raised, *held* infringed by the device of the Christianson patent, No. 828,458, which is the mechanical equivalent of that of Lindstrom & Streib, and operates in the same way, except that, when the door is closed, it does not rest upon the shaft, but is held by a latch supported by the shaft.
5. PATENTS ⊂=211(3)—LICENSES—EFFECT AS ESTOPPEL.
   A patent conveys nothing but a negative right of exclusion, and the effect of a license thereunder as an estoppel does not depend on user by the licensee of the device licensed.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action at law by the Pressed Steel Car Company against the Chicago & Alton Railway Company and the Chicago & Alton Railroad Company. Trial to court, and judgment for plaintiff, and defendants bring error. Affirmed.

The case is thus stated by counsel for the railway companies, with slight changes:

"Plaintiffs in error (defendants in the District Court, and hereinafter called defendants) were sued by defendant in error (hereinafter called plaintiff) for $20,000 in royalties claimed to be due under a contract between defendants and plaintiff covering the construction and use of steel cars of the type known as general service cars with drop bottom doors for dumping, by which defendants had agreed to pay to plaintiff the sum of $10 'for each car hereafter built or caused to be built during the period of this contract by the railroad companies (except certain cars not here in controversy) containing any of the designs or devices covered by patents now owned or controlled by said car company.' Judgment was entered below in favor of plaintiff and against defendants for $20,000, with interest amounting to $6,308.31, a total of $26,308.31, and defendants bring the cause here by writ of error.

"The evidence shows that the defendants purchased from the Standard Steel Car Company 2,000 cars of the 'general service' type, the door-fastening appliance of which cars was constructed under the Christianson patent, No. 828,458, owned by the Standard Company. The whole controversy between the plaintiff and the defendants centers upon the question as to whether the means for holding these doors closed is identical with the means provided for in the Lindstrom & Streib patent No. 791,348, owned and controlled by the plaintiff.

"There are other questions referred to in the evidence and raised below by counsel, but the gist of the case is the simple proposition stated in the last foregoing paragraph. The Lindstrom & Streib patent shows, describes, and claims as means for closing and supporting the hinged doors of dump cars a rotatable and bodily movable or creeping shaft arranged to roll laterally toward and under the doors and to support the doors directly, when raised, a lifting chain being connected at one end to the shaft and at the other end to the door, so that when the shaft is rotated to wind the chain the pull of the chain first raises the door and then pulls the shaft under the edge of the door whereby 'to support the door directly when the door is raised,' as recited in claim 13 of said patent.

"The defendants' car door mechanism comprises a rotatable shaft mounted in fixed bearings and having no bodily or lateral movement, to which one end of a lifting chain is connected, the other end of the chain being connected to a sliding bolt or latch mounted in ways on the door, so that when the shaft is rotated to wind the chain the pull of the chain first raises the door and then pulls the latch out over the shaft, whereby the door is supported indirectly upon the shaft through the medium of the latch. If these constructions are alike, and both covered by the Lindstrom & Streib patent, the plaintiff is entitled to its royalties. If they are different, the defendants are entitled to reversal of the judgment below.

"(1) Plaintiff contends that the defendants cannot present a defense to this suit, for the reason that all matters in controversy have been adjudicated by the judgment of this court [without opinion], affirming the order of the District Court in the case of Chicago & Alton Railroad Company v. Pressed Steel Car Company No. 2095 (referred to herein as the equity suit), the record in which is a physical exhibit in this case. (2) Plaintiff contends that the Lindstrom & Streib patent covers the mechanism used by the defendants in the cars in question. (3) Plaintiff contends that defendants cannot use the prior art to show the scope of the Lindstrom & Streib patent, notwithstanding plaintiff insisted on referring to the prior art to show the improvement thereover made by Lindstrom & Streib, and also insisted that it is entitled to invoke the doctrine of mechanical equivalents and to explain the scope of its claims in the light of the prior art. (4) Plaintiff contends that the general finding of fact in the decree leaves nothing for the court to review.

"(1) Defendants insist that the decree dismissing the equity suit for want

of equity did not in any manner adjudicate the claims in controversy in this lawsuit. (2) Defendants claim that the devices and mechanisms used on the cars in question do not employ the invention covered by the Lindstrom & Streib patent. (3) Defendants claim that, without reference to the prior art, it is clear that defendants' cars do not invade plaintiff's patent; but defendants contend that the testimony offered by the defendants with respect to the state of the art prior to the Lindstrom & Streib invention was competent and admissible to show what the patentees meant to claim and the government to allow, also to clear the ambiguity raised by plaintiff's claim that 'direct' means 'indirect,' and also to meet plaintiff's contention as to equivalents. (4) Defendants further claim that the general finding of fact contained in the judgment may be reviewed on this writ of error, because the questions presented are matters of law and not of fact."

The District Court held that the equity decree was not an adjudication of the suit, and that plaintiff was entitled to judgment. The equity record was struck out, as well as all evidence referring to the prior art. It further appears that on May 30, 1905, there was issued to the plaintiff, upon an application of Lindstrom & Streib, the patent above referred to, No. 791,348, for car door mechanism. Being the owner of this grant plaintiff made with defendants the contract in suit, dated November 1, 1905, in which it was agreed that defendants were licensed to use freight cars containing "the designs and devices covered by patents now owned and controlled * * *" by plaintiff, for a royalty of $10 per car. During the period covered by the contract defendants bought and used 2,000 cars equipped with the car door mechanism of the Christianson patent of August 14, 1906, No. 828,458, and refused to pay royalty on these cars upon the theory that they had not used the subject-matter of Lindstrom & Streib, and hence were not liable on their contract.

Charles C. Linthicum and John D. Black, both of Chicago, Ill., for plaintiffs in error.

Lewis H. Freedman and Alfred W. Kiddle, both of New York City, and Andrew R. Sheriff, of Chicago, Ill., for defendant in error.

Before MACK and EVANS, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The questions presented are substantially as stated above, and may be thus restated: Is the equity decree, dismissing the bill for want of equity and because defendants therein (plaintiffs here) had an adequate remedy at law, an estoppel in this case, sufficient to support the judgment sought to be reviewed? Does the general finding of fact in the judgment prevent a review on this writ of error? Was proof of the prior art admissible either (1) because the Lindstrom & Streib patent refers to the prior art; or (2) because the words "arranged to support the door directly" in claim 13 are ambiguous; or (3) because there has been no user or enjoyment under the patent in suit, as claimed in the brief or amicus curiæ? Did defendants use the mechanism of the patent in suit, and should the judgment therefore be affirmed?

[1] 1. Is the equity decree an estoppel? The bill in equity was filed to restrain this suit at law because the contract was alleged fraudulent, that there was no contract, that it is unconscionable, and to avoid multiplicity of suits. The court held there was no fraud or imposition, and that the contract would not be set aside as improvident, or because there was apprehension of embarrassment or loss thereunder, and that as to the question of validity there was a full, adequate, and complete remedy at law by an action for royalty, such as this

one is. The suit was accordingly dismissed for want of equity. It is evident that the matters in dispute here were neither litigated in the equity suit, nor could have been. It is a general rule that a decree of dismissal in a suit to restrain an action at law is not an adjudication in the latter, because the very foundation of the equity decree is that the remedy at law is adequate and ample. Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89; Id., 217 Ill. 61, 75 N. E. 427; Lundy v. Mason, 174 Ill. 505, 51 N. E. 614. Equity had no jurisdiction, and the bill was therefore dismissed. This was an affirmance of the right to bring this suit, rather than a judgment disposing of it. Richards v. L. S. & M. S. R. Co., 124 Ill. 516, 16 N. E. 909. So the only question is whether defendant at law, by bringing suit in equity to restrain the former on the ground that he has an equitable defense not available at law, admits that he has no legal defense, and therefore tacitly confesses judgment in the suit at law. Such authority as has been found seems to show that a decree of dismissal in the equity suit, to the effect that complainant has an adequate remedy at law, is not a bar to any defense at law, which was not decided in equity, and could not have been there decided because the remedy at law was deemed adequate. Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89; Id., 217 Ill. 61, 75 N. E. 427; Lundy v. Mason, 174 Ill. 505, 51 N. E. 614; Richards v. L. S. & M. S. R. Co., 124 Ill. 516, 16 N. E. 909. An examination of many cases of bills dismissed for adequate remedy at law discloses no trace of any practice requiring defendant in a bill to restrain a suit at law either to admit that he had no defense at law or to confess judgment at law, except a former practice in cases involving land titles. If a bill to restrain an ejectment suit on the ground of an equitable defense not available at law is filed, it has been held that complainant (defendant at law) must confess judgment in the ejectment suit, because otherwise, even if he failed, and the equity court sustained the legal title in defendant, the latter could not get possession without prosecuting his ejectment. Daniell's Chancery, 1624; Turner v. American Baptist Missionary Union, 5 McL. 344, 24 Fed. Cas. No. 14,251; Mathews v. Douglass, 1 Cooke (Tenn.) 136, Fed. Cas. No. 9,276; Trousdale v. Maxwell, 6 Lea (Tenn.) 161; Henry v. Tupper, 27 Vt. 518. One of the many cases where a bill was dismissed for adequate remedy at law, and the suit sought to be restrained was tried on its merits, is Grand Chute v. Winegar, 15 Wall. 355, 21 L. Ed. 170 (at law), and 15 Wall. 373, 21 L. Ed. 174 (in equity), an action on municipal bonds. Patterson v. Turner, 62 Ga. 674, and Ham v. Schuyler, 2 John. Ch. (N. Y.) 140, are directly in favor of defendants. The question is no longer of much importance since the act of 1915, allowing equitable defenses in actions at law. Section 274b, Judicial Code, U. S. Comp. Stats. § 1251b, 38 Stat. 956. The rule of practice referred to has not been applied to cases other than those involving land title or possession. Plaintiffs in error, therefore, did not admit liability in this suit by bringing the equity action, and the decree therein is not an estoppel in this proceeding.

[2] 2. Does the general finding prevent a review of the judgment? The case having been tried by the court pursuant to a written waiver

of jury trial, and the finding being a general one, no disputed question of fact is now subject to review. St. Louis v. Western Union Tel. Co., 166 U. S. 388, 17 Sup. Ct. 608, 41 L. Ed. 1044. If, therefore the question whether defendants used the Lindstrom & Streib invention on the 2,000 cars was one of fact the judgment must be affirmed. Infringement is sometimes a question of fact, of law, or mixed law and fact, depending entirely upon the condition of the proofs. In most cases the question is one of fact, and if the case is tried by jury it is error for the court to direct a peremptory verdict. Coupe v. Royer, 155 U. S. 565, 578, 15 Sup. Ct. 199, 39 L. Ed. 263, 268. But where no evidence of prior art, or extrinsic evidence to explain the respective structures, is necessary the question is one of law, and the trial judge is authorized to direct a verdict. Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437. We think this case is controlled by the latter decision. All evidence of the prior art was struck out, and the structures of the Lindstrom & Streib and Christianson patents are so plainly described and illustrated in the descriptions and drawings that no other proof is necessary to afford clear apprehension of their construction and mode of operation. The question of similarity of the two structures is therefore one of law, not foreclosed by the general finding.

[3] 3. Was the prior art admissible, and did defendants use the licensed structure? In this circuit it is settled law that in a suit upon a patent license contract the prior art is not admissible, either to limit the prima facie scope of the claims or to show their invalidity. This statement of the law is based upon the principle of estoppel by contract; estoppel by deed or writing, not by conduct. Siemens-Halske Elec. Co. v. Duncan Elec. Co., 142 Fed. 157, 73 C. C. A. 375. The rule in this circuit was first stated in 1886 by Judge Blodgett, in Pope Mfg. Co. v. Owsley (C. C.) 27 Fed. 100, and the latest case in this court is Indiana Mfg. Co. v. J. I. Case Threshing Machine Co., 154 Fed. 365, 83 C. C. A. 343, although others recognize the rule, such as Macey Co. v. Globe-Wernicke Co., 180 Fed. 401, 103 C. C. A. 547. There is an exception to the rule where the claim relied on is ambiguous on its face, explained by Judge Baker in the Siemens-Halske Case:

"In our judgment the reason of the case leads to the conclusion that, between contracting parties extraneous evidence is inadmissible if there is no ambiguity or uncertainty in the language of the description and claims, and that, if there is uncertainty, outside evidence is admissible only to make clear what the applicant meant to claim and the government to allow, and not for the purpose of showing even in the slightest degree that the applicant had no right to claim and that the government was improvident in allowing what was in fact claimed and allowed."

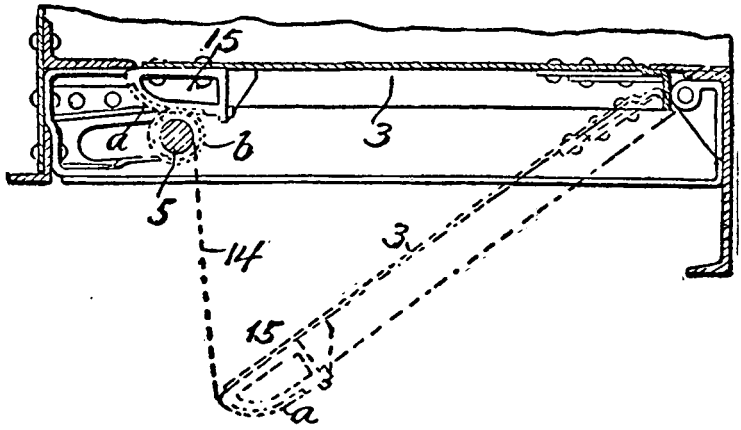
[4] Both parties insist that there is no ambiguity, but each construes the claims differently. Claim 13, chiefly relied on, reads:

"Car door mechanism having a lifting shaft arranged to support the door directly when the door is raised, and a flexible connection between the shaft and door."

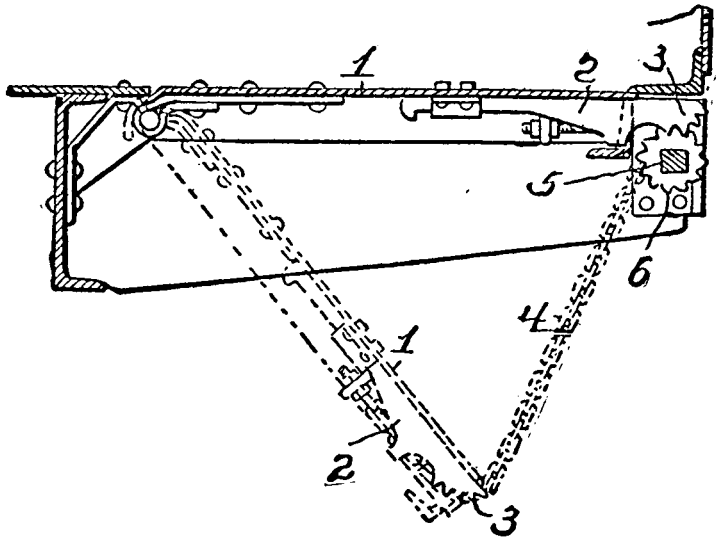
It is insisted by defendants that the use of the word "directly" clearly means that the door support must be immediately beneath it, while

in the Christianson patent the shaft directly supports a latch attached to the door, thus indirectly supporting the door. Defendants further claim that plaintiff has introduced uncertainty by asserting that claim 13 means just the same as if the word were omitted, or "indirectly" substituted. So it is claimed that the prior art is admissible to clear up an ambiguity having no real existence, dwelling only in the imagination of defendants' counsel. For better understanding the designs of the two patents, Lindstrom & Streib and Christianson, are here introduced.

LINDSTROM & STREIB.



CHRISTIANSON.



It will be seen that in one the shaft *5* slides or creeps back and forth as the door lowers and raises, and when the door is closed is beneath the shoe *15*, which is rigidly attached to the under edge of the door. In the other the shaft is immovable, and supports the sliding or creeping latch *2*. In one the shaft moves back and forth and in the other the latch, so if it were not for the word "directly" in claim 13 there would be no difficulty whatever in concluding that the two devices are absolute mechanical equivalents.

The prior art which was offered, and later struck from the record, is claimed to show the following:

"1. Door supported by the winding or lifting chains, as represented in Lipschutz, No. 750,670.

"2. Doors supported by the lifting shaft through intermediate means connecting the shaft and the doors, as represented in Simonton, 616,811, Simonton, 666,160, and Bellows, 693,218.

"3. Doors supported by bolts or latches operated by means other than the winding shaft, as represented in Simons, 534,584, Campbell et al., 598,136, Hager, 674,357, Hanson, 720,245, and Swanson, 727,487.

"4. Doors supported by bolts or latches operated by the winding shaft or chain as represented in Bellows, 644,890, and in the defendant's construction built under Christianson, 828,458.

"5. Doors supported directly by the shaft, as represented in Becker, 763,841, in Caswell, 806,394, and in the Lindstrom & Streib patent in suit."

These prior patents, it is said, show why the word "directly" was used in claim 13, to distinguish between the fourth and fifth types, and limit the claim to those constructions in which the shaft supports the door without the use of any medium, such as the latch. Therefore, it is insisted, the claim is clear, and excludes defendants' construction; but, if by any possibility the word introduces uncertainty, the prior art clears it up, and shows that defendants did not use the Lindstrom & Streib conception.

The technical force of this argument is evident, but we think, since the validity of the claim is necessarily conceded, absolutely unlimited in its prima facie scope by the prior art, the two constructions must be regarded as equivalent in all respects. One slides the support and the other the thing supported, obviously a mere mechanical interchange; as defendants' counsel said (in another connection), the two are twin brothers. The purpose of Lindstrom & Streib was to securely support a car bottom door by means of the shaft used to open and close the door. This means and operation are admittedly novel and useful, without any anticipation whatever. The estoppel supplies all these elements. In this situation it is plain that defendants use like means and operation and get the same result.

[5] An interesting brief, very carefully prepared, was by leave of court filed by George Adams Ellis as amicus curiæ. Stated very briefly, his argument is that because defendants have never entered into possession or made use of the Lindstrom & Streib patent, or of the designs and devices covered thereby, there is no estoppel. The argument depends on the assumption that licenses of real estate and patent rights, and the principles of estoppel in real estate and patent cases, are

entirely similar, the estoppel in each depending on actual use of the thing licensed. Since we think that real estate and patent transfers stand on different grounds, a synopsis of the argument would hardly be justified here.

As already stated, estoppel by patent license is by deed, and does not depend on user of the device licensed. It is most clearly shown, in plaintiff's brief in reply to Mr. Ellis, that a patent conveys nothing but a negative right of exclusion. It is the right to exclude others, but not the natural right to make, use, and sell, which the patentee obtains from his general ownership of the materials employed, not from the government. So the licensee does not obtain this right to make, use, and sell from the license, but only immunity from suit by the licensor. Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Hartman v. John D. Park & Sons (C. C.) 145 Fed. 358, 364. A license passes nothing, but only makes something lawful which would have been unlawful without it. Even a patent assignment creates merely an immunity, and the right to exclude others. Hence a licensee under a patent does not enter into or use any property transferred, so that real estate and patent licenses are in this respect properly distinguished.

The fact, therefore, that defendants never intentionally used the Lindstrom & Streib devices, and made no use of that licensed invention other than by the purchase and use of the cars in suit, is, we think, of no materiality in the case.

The judgment is affirmed.

GENNERT et al. v. BURKE & JAMES, Inc.

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

No. 213.

PATENTS ⇐328—INVENTION—FLASH-LIGHT APPARATUS.

The Mills patent, No. 676,545, for a flash-light apparatus, *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 Gustav C. Gennert and others against Burke & James, Incorporated. Decree for defendant, and complainants appeal. Affirmed.

See, also (D. C.) 231 Fed. 998.

The defendant is a corporation organized and existing under the laws of the state of Illinois. The suit is brought to restrain the alleged infringement of letters patent No. 676,545 and for an accounting and damages. The court below held the patent was not valid and dismissed the bill. The patent issued on June 18, 1901, to Charles Mills, a subject of Great Britain residing in New York City, and all the right, title, and interests in the said letters patent, and in the invention therein described became vested by assignment in the plaintiff prior to the filing of his complaint.

C. P. Goepel, of New York City, for appellants.

Clifford E. Dunn, of New York City, and Rudolph William Lotz, of Chicago, Ill., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The patent in suit is for improvements in flash-light apparatus. The patentee declared in his specifications that his invention—

"consists in a cheap, simple, and reliable apparatus for producing flash lights for photographic purposes, such as photographing interiors and making pictures at night."

The patent contains six claims, but only 1, 2, and 4 are in suit. Claim 1 reads as follows:

"In a flash-light apparatus, the combination of a suitable support, a pan, an anvil or firing pin arranged on one side of the pan, and a hammer arranged on the opposite side of the pan and adapted to co-operate with the pin to explode a percussion cap."

Claim 2 reads as follows:

"In a flash-light apparatus, the combination with a suitable support, a pan, a firing pin, a hammer arranged to co-operate with the pin to explode a cap arranged between the pin and hammer, a spring for throwing the hammer, and a trigger arranged to hold the hammer temporarily away from the firing pin."

Claim 4 reads as follows:

"In a flash-light apparatus, the combination, with a powder receptacle, of a firing pin extending into said receptacle, a hammer arranged to co-operate with the firing pin to explode a cap placed between said pin and a wall of the powder receptacle, a spring for throwing the hammer toward the pin, and a trigger for holding the hammer away from the pin."

The drawings and specification of the patent in suit show a pan on a suitable support, with an anvil arranged above or on one side of the pan and the hammer arranged below the pan or on the opposite side thereof, and adapted to co-operate with the anvil or pin to explode a percussion cap. But the claims do not specify that a firing pin should be above the pan and the hammer should be below. It is, however, argued that when claim 1 is read we find therein the requirement that a firing pin must be arranged "on one side of the pan"; that this means that this pan is the pan of the specification, namely a horizontal pan, as this is the only kind described therein, and which must be held horizontal, because otherwise the powder would not remain on it, but would fall off; that hence this claim requires that the anvil or firing pin must be that kind of an anvil or pin arranged as shown in the description and drawings, namely, an anvil or firing pin arranged above the cap and above the pan, and the hammer must be arranged below the pan, so as to carry out the co-operative law underlying the specification.

The invention described and claimed in the patent comprises a long, narrow, open pan, which is adapted to receive the flash powder, which is spread out over a considerable area of the pan. This pan is mounted in its horizontal position upon a standard which is adapted to be secured to a table or other support, and which is equipped with mechanism for exploding a percussion cap for igniting the flash powder. This pan is reinforced by means of a wooden strip *9* along the bottom, so as to give it rigidity. This exploding mechanism consists of a firing pin *11* disposed above the pan and between the lower end of which and the pan the percussion cap is adapted to be received. Pivotally mounted on the standard below the pan is a hammer *15* which carries a projection *14* adapted to strike the lower face of the pan opposite the point of the firing pin *11* for exploding the cap between the pan and the firing pin. The hammer is actuated by means of the tension spring *17* secured to one end of the hammer and to the standard *5*, and serves to normally hold the projection *14* in engagement with the lower face of the pan *1*. Pivotally mounted on the standard is a trigger *19*, which is adapted to engage a projection *18* on the hammer for holding the latter away from the pan in the position shown in Fig. 2. A cord *21* attached to the trigger *19* serves to enable the latter to be drawn out of engagement with the hammer, whereupon the latter flies up and strikes the pan, thus driving the firing pin into the cap and exploding the latter. The flame from the cap ignites the powder on the pan, with the usual well-known result.

It is admitted that the patentee's device is a very simple one, but it was emphasized in the argument in this court that the device embodies two fundamental scientific considerations, which are not simple or

obvious. The first of these considerations set forth is that the anvil or firing pin *11* and the cap *12* are placed upon the upper or same side of the pan upon which the flash-light powder is heaped, so that both the firing pin and the cap are in direct contact with the flash-light powder, and are "immersed" in the flash-light powder. The spark emitted by the cap is, therefore, directly communicated to the flash-light powder, which insures a rapid and reliable ignition. When the cap is exploded, the flash travels to the sides of the firing pin, and then upwardly. The location of the firing pin spreads out the heated gases generated by the percussion of the cap, so that these heated gases act upwardly upon a ring of the particles of the powder.

The second consideration set forth is that, since the hammer *14* is below the pan *1*, the upward blow of the hammer, which explodes the cap, also simultaneously jars the pan, and throws the flash-light powder upward and away from the pan. The feeble flash or explosion of the weak caps that are used is communicated to the flash-light powder under such circumstances as utilizes the entire explosive effect of the cap; the flash-light powder is in such a condition that it readily secures oxygen from the atmosphere and ensures a reliable ignition. "In other words," counsel says in his brief, "the upwardly moving hammer of the patent structure strikes the resilient and slightly depressed pan and jars it, and throws the powder upwardly, it separates the compact pile of powder placed upon the pan into upwardly moving and widely separated particles, so that each particle is freely exposed to the air, and is thrown above the percussion cap simultaneously with its explosion. The flash of the cap is prevented from moving downwardly because of the closed structure of the pan."

Because of this law of operation it is said that the structure of the patent in suit can use commercially pure magnesium powder, which is unquestionably the safest, as it is not explosive, but simply burns. The result is an instantaneous and brilliant flash, and there is no danger of the ignition being delayed, which would be a source of uncertainty and accident. On the argument great importance was attached to the use of pure magnesium, instead of the other kind of flash-light powders, which consist of a mixture of magnesium powder with chemicals of an explosive nature, such as potassium chlorate. The argument is that the upward blow of the hammer serves to shake up the powder on the pan and promote combustion thereof, on the theory that more air will be commingled with the powder by this shaking or loosening up action. The importance of the flat pan is said to be that the magnesium can be spread out over a large area of surface very thinly, thus giving ready access to air to supply ample oxygen for promoting combustion. Whether a like result was secured in any of the patents of the prior art will presently appear.

The defendant, however, denies that the upward blow against the pan will produce the result claimed. The reason given is that the blow is delivered so near to the point of connection of the pan with the standard and is so localized that it cannot possibly serve to shake up the whole pan, to produce the alleged novel result upon which the complainant chiefly relies as the principal novel feature of the patent.

If that is the patent's principal novel feature, it is strange that the patentee made no reference to it in his specification. The patent is silent as to any advantage arising from the upward blow, and this characteristic is in no way claimed, and if the purpose of constructing the pan flat was to permit the magnesium to be spread out over a large area of surface thinly, so as to give ready access to air and supply ample oxygen for combustion, it is difficult to understand why the specification made no allusion thereto.

There were six patents introduced in evidence by defendant to invalidate the patent in suit, but we find it necessary to refer to only one of them. The King patent was issued November 28, 1899, and is letters patent No. 637,800. The invention, the specification states, relates to improvements in devices for producing flash lights for photographic purposes.

"The object of the invention is to provide a simple, efficient, and compact device capable of use by a photographer or an amateur and conveniently carried with the small or folding cameras now in such common use, so that a flash light may be conveniently utilized by the amateur photographer almost anywhere."

The receptacle which holds the flash light is termed a "trough," and is shaped like a diminutive brick hod, which is made of a thin sheet of metal. On the corner of the trough is a perforation of sufficient size for the introduction of a match. On the transverse end of the trough is secured a spring. A trigger is provided, which is adapted to swing up and engage the spring. A match or "other percussion material" being inserted in the aperture, the spring snaps against the end of the material inserted and drives it against the head of a screw, which serves as an anvil, and the concussion causes the same to ignite firing powder. In his specification King states that:

"It is needless to remark that another projection than the head of the screw *F* might be provided as an anvil for exploding the match, and, for that matter, any percussion device, such as a paper cap, might be used in that position, and a pin, like the stem of the match *I*, be provided for firing the same, which would be a mere equivalent."

The only difference between the King patent and the patent in suit is that in the latter the blow of the hammer is in a direction perpendicular to the powder-supporting surface, or pan bottom, while in the former the blow is administered longitudinally of the pan. In the King patent the firing pin and the hammer are both above the pan, and the firing pin is at one side of the cap, and the pan itself is not struck upwardly, nor is it resiliently depressed.

Counsel for complainant argued that the blow of the hammer could not, therefore, stoke or agitate the powder, or throw it upwardly, so as to cause the particles of the powder to be widely separated from each other, and thus be capable of ready ignition. The result it is claimed is an unfavorable condition for reliable ignition, magnesium requiring a considerable amount of air, and if a large amount of powder should be used the spark produced by the percussion cap would be smothered by the superimposed powder, as it would not be agitated or stoked or thrown upwardly by the blow of the hammer, and if the

powder should be laid in a thin quantity, so as to be below the spot of the explosive material in the cap, the upward part of the flash of the cap would not infringe upon any of the powder, so that a great part of the igniting effect would be lost.

In the Mills structure of the patent in suit, the argument is the magnesium powder can be laid in a thick heap over the cap if a brilliant flash be desired, for the upward blow of the hammer would throw the heap of powder upward and separate the particles, and the entire flash of the cap be utilized, because the powder is thrown above the cap, and the flash of the cap is spread to the sides of the firing pin.

But this argument overlooks the fact that in the King patent, if it is desired to produce a light of considerable duration, the trough or pan can be lengthened by telescopic sections, which are adapted to slip onto the main part of the trough and lengthen the same indefinitely, so that the pan can be extended a number of inches, or several feet, for that matter. So that, while the pan of the King patent is not flat, but long and narrow, it allows the powder to be spread out in a thin line for proper combustion.

The real and only difference we discover between the device of the patent in suit and that of the King patent is, as we have stated, in the direction of the blow of the hammer. If the fact be disregarded that the patentee of the Mills patent did not claim as a feature of his patent the advantage of the jar which an upward blow afforded, it nevertheless seems to this court that the patent cannot be sustained. The modification of the King device, so that the blow should be administered upwardly, instead of longitudinally, involved simply ordinary mechanical skill.

For that reason the decree is affirmed.

KALAMAZOO LOOSE-LEAF BINDER CO. v. PROUDFIT LOOSE-LEAF CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 3026.

1. PATENTS ⊜328—INFRINGEMENT—LOOSE-LEAF BINDER.
   The Bushong patent, No. 941,757, for a loose-leaf binder, as limited by prior decisions, *held* not infringed by a modified structure of defendant.

2. PATENTS ⊜321—SUITS FOR INFRINGEMENT—PROCEEDINGS AFTER INTERLOCUTORY DECREE—DISCRETIONARY POWERS OF COURT.
   After an interlocutory decree in an infringement suit construing the patent, adjudging its validity and infringement and granting an injunction and accounting has been affirmed on appeal, the court has jurisdiction in connection with the accounting and before final decree to consider a modified structure presented by defendant, and may in its discretion adjudge that such structure does not infringe and that such modification of the infringing structures will take them out of the operation of the injunction; and such practice, involving no modification of the decree affirmed, where the matter can be fully determined on the record made without injustice to complainant, is proper and to be commended as shortening the litigation and lessening expense.

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Kalamazoo Loose-Leaf Binder Company against the Proudfit Loose-Leaf Company and William S. Proudfit, Jr. From an order made on accounting, complainant appeals. Affirmed.

Otis A. Earl, of Kalamazoo, Mich., for appellant.

Cyrus W. Rice, of Grand Rapids, Mich., and James M. Proudfit, of Chicago, Ill., for appellees.

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

KNAPPEN, Circuit Judge. This appeal grows out of this situation:

In a suit for infringement of three patents to Bushong on loose-leaf binders, the District Court found claims 13, 15, and 16 of patent No. 941,757 valid and infringed, and entered the usual interlocutory decree for injunction and accounting. The decree of the District Court as respects this patent was affirmed by this court. Proudfit Loose-Leaf Co. v. Kalamazoo Loose-Leaf Binder Co., 230 Fed. 120, 144 C. C. A. 418. Neither of the other two patents is involved here, and the provisions of the decree respecting them are immaterial.

In the progress of the accounting had under the mandate of this court, defendants presented to the District Court a modified structure which they desired to manufacture and to substitute for the infringing devices, asking the court to determine whether such modified structure infringed the claims in question. The plaintiff objected to the form of the proceeding and to the jurisdiction of the court in that regard. The court overruled the objections, and after hearing the parties held that the modified binder presented did not infringe any of the patent claims in question, and that the injunction and decree would not be violated by its manufacture and sale and the reconstruction or remodeling of present infringing binders so as to make them conform thereto. This appeal is from that order.

[1] Assuming for the present that the district judge had jurisdiction to pass upon the question whether the modified binder infringes, and that such jurisdiction was invoked by proper procedure, we have no difficulty in agreeing with the conclusion of the district judge upon the question of infringement. Claim 13 of the patent involved reads thus:

"13. In a loose-leaf binder, the combination of a pair of swinging covers, one of which is provided with an internal recess or chamber, binding strips to which the loose leaves are secured extending between the covers, and *adjusting mechanism* for the strips situated within said recess or chamber in the cover, *and arranged to be operated from outside of the chamber without opening or uncovering the same.*"

Claim 15 differs from claim 13 only in substituting "adjusting screw" for "adjusting mechanism" and in substituting for the last clause (which we have italicized) the words "and adapted to be manipulated from without the same by means of a key." Claim 16 differs

appreciably from claim 13 only in substituting for the last clause of the claim the words "adapted to be operated by means of a key without opening or uncovering the chamber."

In sustaining the validity of these claims, the district judge held that:

> "The vital and novel feature of the invention embodied in each of the three claims in suit is the means for operating and the operation of the adjusting mechanism, contained within the chamber of the cover, from without the cover, and without opening or uncovering the chamber."

This construction was, if not expressly, certainly by necessary implication, adopted by this court; and, as so narrowly limited, we upheld the validity of the claims as against the defense of lack of invention in view of the prior art. As this proposition does not seem to be questioned, we content ourselves with its mere statement.

In plaintiff's device, as disclosed by the patent, the adjusting mechanism was located in a recess of one of the covers of the book, a crosshead therein, to which one end of each of the binding strips was attached, being directly actuated longitudinally to the cover by the revolution of a screw-shaft, by use of a key inserted in the front edge of the cover. Defendants' adjusting mechanism there involved differed from plaintiff's only in these respects: It employed in place of the screw-shaft a bell-crank and worm; a key inserted in the lower edge of the cover engaged the head of the worm, the thread of which engaged the geared segment on the short arm of the bell-crank, the revolution of the worm (which lay transversely of the cover) moving the short arm of the bell-crank, and thus the crosshead to which the longer arm of the crank was attached. We held defendants' worm and bell-crank mechanism the equivalent of plaintiff's screw mechanism.

In defendants' modified structure approved by the District Court, the adjusting mechanism proper is the same as in the structure which both the District Court and this court held to infringe; that is to say, the same crosshead, worm, and bell-crank are employed. The means for operating that adjusting mechanism differs, however, in this respect: The keyhole in the cover is permanently stopped up and the worm is operated in both directions by a reversible ratchet lever within the recess in the cover; this lever when not in use lying flat in the chamber, the outer end of the lever being raised when in use. This operating mechanism is thus not without the cover, but is within it; and we entirely agree with the district judge that the adjusting mechanism cannot be operated "from without the cover and without opening or uncovering the recess or chamber in the cover"; and that the new and modified structure lacks "the vital and novel feature or element of the claims of plaintiff's patent." We see no merit in plaintiff's contention that the flexibility of the cover-flap permits the swinging of the ratchet lever, and thus the operation of the ratchet mechanism, without uncovering the recess containing it either when the sheets are lying on the front cover or when they are resting on the cover containing the mechanism. As well said by Judge Sessions:

"Even though the binder be twisted or distorted out of its normal position and condition, the chamber in the cover must be open and uncovered to some extent before the adjusting mechanism can be operated."

Indeed, the lever cannot be reached without actually entering the chamber, manually or otherwise. Moreover, practical operation of the mechanism "from without the cover" is impossible in any feasible or proper sense. As affecting the question of operation from without the cover, it may be noted that in the modified structure the adjusting mechanism can by no possibility be operated with the book closed, a feature to the existence of which in plaintiff's mechanism and in defendants' former structure we called attention on our former review. It should go without saying that the mere substitution for a removable key of a nonremovable and foldable key, located, for example, in the outer margin of the cover, and operable without opening the book or without access to the chamber, would not avoid infringement. But the instant case does not present the question of substituting one kind of a key for another, but of an operation from within, as vitally distinguished from an operation from without, the covers. Our decision on the previous review, that infringement was not avoided by the removal of the cover-flap, is not in any way inconsistent with the conclusions we have here announced. The former decision in that regard rather emphasizes the correctness of the decision here reached.

[2] Turning to the question of the authority of the District Court to determine whether the structure in question infringes: In denial of this authority plaintiff presents numerous considerations, the most prominent of which will sufficiently appear from our discussion.

That, strictly speaking, the court had jurisdiction to make the order complained of, is not open to question. The case had not gone to final decree, but was still pending in the District Court, and under its immediate jurisdiction and control; no modification of the interlocutory decree, as affirmed by this court, was made or asked, and so the case does not fall within the rule (Bissell Co. v. Goshen Co., 72 Fed. 545, 19 C. C. A. 25) which forbids the court below to modify a decree granting a perpetual injunction which has been affirmed by the appellate court. The permission to market a noninfringing structure implied in the determination that it does not infringe—including the right to change an infringing structure in the hands of users into a noninfringing device—is not a modification of a decree which forbids infringement and holds that certain other specified structures do infringe. The order complained of was thus not contrary to or outside of the mandate of this court. It is unnecessary to consider what the situation would have been had the case already passed to final decree.

Was the procedure employed irregular, as opposed to an established practice, or as against the rights of the plaintiff?

It must be conceded that the summary procedure employed is a step in advance of the usual practice in patent litigation. But this is not enough to condemn it; on the contrary, the shortening of litigation and the corresponding lessening of expense to litigants is to be commended, provided thereby the rights of the parties are fully protected and no improper burden is imposed upon the courts. For

the practice followed, a certain degree of precedent is to be found in respects more or less analogous. For instance, cases are not wanting which expressly recognize the propriety of obtaining the opinion of the court before using a device which may be the subject of contempt proceedings. In Norton v. Eagle Co. (C. C.) 59 Fed. 137, 139, which was a proceeding to punish a defendant for contempt in violating an injunction in a patent suit, the present Mr. Justice McKenna said:

"It would have been more considerate to have taken the judgment of the court on the Merriam machine before using it, and risking disobedience of the * * * court and injury to plaintiff."

And in a proceeding of the same nature (Bowers v. Pacific Co. [C. C.] 99 Fed. 745, 758) Circuit Judge Morrow called attention to the fact that "no effort was made to obtain the opinion of the court as to whether this excavator was within the scope of the injunction or not." In anti-trust cases it is the regularly established practice for the court to determine what reorganization will amount to a dissolution of the offending monopoly, and with that view to approve a given plan. In patent cases it is common practice for courts to state in their opinions that a structure having or lacking certain features would or would not infringe. And in such causes it is concededly within the power of the court, on application of a plaintiff, in connection with the accounting or otherwise, to consider and determine whether a structure not previously made the subject of evidence does or does not infringe.

We see, on principle, no adequate reason for denying to a court the like power to so act upon the request of a defendant. In respect to the practice we are considering, cases of trade-mark and unfair competition furnish, in our opinion, a strong analogy to patent causes. While there are decisions denying the power of a court in settling decree for unfair competition to prescribe that a certain form of package may be used, this court has expressly refused to recognize and follow those decisions (Coco Cola Co. v. Gay Ola Co., 211 Fed. 942, 944, 128 C. C. A. 440); and not only in the Coco Cola Case, but in other cases, has followed the practice there pursued (Merriam Co. v. Saalfield Co., 198 Fed. 369, 378, 117 C. C. A. 245; Knabe Co. v. American Piano Co., 232 Fed. 140, 146 C. C. A. 332). In the Coco Cola Case, Judge Denison, speaking for this court, pertinently said:

"It is clear that there are cases where the problem presented by the new form for which authority is asked will be so far away from the questions which the court has considered, and which the proofs cover, that it ought not to be solved without a new suit or a new proceeding; but there are many cases where the court will be as ready as it ever can be to decide such a question; and to refuse to do so, and compel a new suit, is unnecessarily to prolong uncertainty and litigation. Whether a given case falls within one or the other class, or whether opportunity for additional and summary hearing will properly take the case from the second [first] class into the first [second], can safely be left to the discretion of the court."

We think the principle thus stated applicable here. It is not, to our minds, a sufficient distinction that in the Coco Cola and other cases cited the approved package and markings were before the court on settlement of final decree; for in the instant case the accounting had not yet been completed.

There is no inherent injustice to a plaintiff in allowing a defendant to submit to the court his proposed noninfringing structure, rather than to submit himself to civil and even criminal action for contempt, as well as action for infringement. Plaintiff's right to elect whether or not to proceed against an infringer is not invaded by the exercise of a jurisdiction which it has already invoked.

The objection that the course taken below would subject the plaintiff to unnecessary and perhaps vexatious legal proceedings, and would impose an intolerable burden upon the courts, is not effective. A court is not bound to take cognizance of an application merely because it is presented; and it is to be presumed that it will do so only in a reasonably clear case, and where the question of infringement can be readily determined. In the instant case, there is not so much as a suggestion that full hearing was not had, or that, to determine the question involved, any actual trial was needed, or anything more than an inspection of the new structure and the construction of the court's decree as applied thereto.

The suggestion that a practice once adopted must be universally followed is without merit. It is not to be assumed that a trial court would permit vexatious applications, and, unless perhaps in a clear case of abuse of discretion, a trial court would not be compelled by an appellate court to act (National Co. v. Tubular Co. [C. C. A. 1] 239 Fed. 907, — C. C. A. —; Toledo Co. v. Kawneer Co. [C. C. A. 6] 237 Fed. at page 369, 150 C. C. A. 378); and an action which invaded the rights of a plaintiff would be reviewable in the appellate court. The action complained of is not subject to the criticism that it seeks the advice and counsel of the court. The statement in Bissell Co. v. Goshen Co., supra (72 Fed. at page 552, 19 C. C. A. at page 32), to the effect that "the function of a court is to consider and decide, not to advise," was used only to illustrate the binding effect on the lower court of the decision of the reviewing court. What has been said answers the propositions that the proceeding was a moot one, that the practice followed below would permit defendants to "cut and try indefinitely or until they succeed," and that similar application might be made even after final decree entered.

We conclude that the entertaining of the application in question was clearly within the sound judicial discretion of the District Court, and that that discretion not only does not appear to have been improvidently exercised, but, under the circumstances presented, appears affirmatively to have been properly exercised.

The order complained of is affirmed.

WESTINGHOUSE TRACTION BRAKE CO. v. CHRISTENSEN et al.

(Circuit Court of Appeals, Third Circuit. July 3, 1917.)

No. 2248.

1. PATENTS ⟸97—PROCEDURE IN PATENT OFFICE—RULES.
Rules established by the Commissioner of Patents, pursuant to Rev. St. § 483 (Comp. St. 1916, § 745), if not inconsistent with law, have the force of a statute.

2. PATENTS ⟸147—VALIDITY—ISSUANCE TO CORRECT MISTAKE.
A mistake or error in a patent, incurred through the fault of the Patent Office, may, under rule 170 of that office, be corrected by a certificate of the Commissioner indorsed thereon, or, if it constitutes sufficient legal ground, by a reissue; but the Patent Office has no authority, because of a clerical error in a patent, to cancel the same on request of the patentee and issue another in its place of a later date, not designated as a reissue, and fixing the expiration date the full term after its issue, and a second patent so issued is invalid.

3. PATENTS ⟸328—VALIDITY.
The Christensen patent, No. 635,280, for a combined air pump and electric motor, *held* void, as issued without authority.

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

Suit in equity by Niels A. Christensen and another against the Westinghouse Traction Brake Company. Decree of dismissal on motion of complainants, and defendant petitions for writ of certiorari. Reversed.

See, also, 235 Fed. 898.

Paul Synnestvedt, of Philadelphia, Pa., and Thomas B. Kerr, of New York City, for petitioner.

Willet M. Spooner, of Milwaukee, Wis., and William R. Rummler and Ralph M. Snyder, both of Chicago, Ill. (Joseph B. Cotton, of New York City, Lines, Spooner & Quarles, of Milwaukee, Wis., and Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., of counsel), for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In the District Court for the Western District of Pennsylvania this was a suit in equity charging the infringement of several patents; Christensen and the Allis-Chalmers Company being the plaintiffs, and the Westinghouse Traction Brake Company being the defendant. The bill was filed in March, 1916, and the answer in the month following. On February 13, 1917, the plaintiffs moved for leave to dismiss the bill, and on February 24 the court granted the motion, entering an order of dismissal at the plaintiffs' costs without prejudice to their rights, and providing that the depositions theretofore taken might be used in any other subsequent or pending litigation between the plaintiffs and the defendant. On April 23 the defendant presented to the Court of Appeals the pending petition, which sets forth in substance:

That in the bill the Brake Company was charged with infringing 3 letters patent (two others being added by amendment), two of the first three covering identically the same invention and both having been granted to Christensen a few months apart—these patents being No. 621,324, issued March 21, 1899, and No. 635,280, issued October 17, 1899, each for the full term of 17 years from its date. That the bill explains this unusual situation as follows: When the first patent issued on March 21, it contained (probably by inadvertence in the office) a sheet of drawings that the patentee had ordered to be canceled during the proceeding before the examiner. Several months later the patentee sent the letters back and demanded new letters that would omit the sheet referred to. He did not apply for a reissue, but the Commissioner granted the demand, and on October 17 canceled the old letters and issued new letters identical therewith (excepting the sheet), but running for 17 years from its own date. That the answer admits these facts, and sets up the invalidity of the second patent on the ground that it was a later grant to the same man for the same invention.

That, in addition to the facts thus charged and admitted, the bill also shows that the question of validity between the two patents has become important, because the bill also avers that the plaintiffs' machines were marked under the second patent, but contains no such averment as to marking under the first patent—this being a matter that affects the accounting, if the first patent should be adjudged valid over the second. That the dates show that both patents have now expired, although if the first patent continued to be in force it did not expire until several days after the bill was filed. That as no injunction can now issue under either patent, the bill presents only a question of recovery and accounting, so far as these two are concerned. Whichever patent be valid over the other, the District Court had in the pleadings, without regard to any other consideration, all the facts needed for a decision of this question on the merits; the bill submitting the question as an issue to be determined by the court, and praying for an injunction alternatively under the first patent or the second. The petition goes on to aver that the answer not only sets up a number of prior patents and prior uses, but pleads specially that the second patent was invalid by reason of the prior issue of the first.

The petition further avers: That both parties took testimony de bene esse and filed the depositions in court; the plaintiffs taking the testimony of ten witnesses, offering in connection therewith a number of exhibits, and introducing also a stipulation which in substance restates the facts set up in the bill and answer regarding the relation between the two patents. That afterward the plaintiffs by amendment added two other patents to their bill, and that to these an amended answer set up the defenses of laches, failure of marking and of notice, noninfringement, and lack of validity. That the defendant asked leave to amend its answer further, so as to set up as a counterclaim a certain infringement by the plaintiffs, but that this motion was denied. 235 Fed. 898. That on March 13, 1916, the plaintiffs brought a similar suit against the petitioner in Chicago, based upon the same three pat-

ents originally set up in the present suit, and that the defendant filed an answer to the Chicago suit, since which time nothing has been done therein, the plaintiffs electing to proceed in the Pittsburgh action. That the case in Pittsburgh was put down for trial and was called in November, 1916, being finally fixed for trial on January 22. That on January 20 the plaintiffs were granted a postponement until February 13, although the petitioner, with its counsel and witnesses, was then prepared to proceed. That the petitioner made ready again for the trial fixed for February 13, but that a day or two before that date the plaintiffs gave notice of a motion for leave to dismiss the bill without prejudice. That the petitioner opposed the motion on the ground that the granting thereof would deprive it of substantial rights, and that before the motion for leave to dismiss was decided the petitioner moved "for judgment upon the pleadings and proofs already filed" as to the three patents originally contained in the bill, alleging that all the facts necessary to judgment concerning the first two patents at least were already in the bill and answer, so that nothing else was needed as to them except a decision on the legal points involved. That affidavits and briefs were filed in support of the motions and in opposition thereto, and that argument was had, after which the dismissal was allowed on the conditions already stated; but that the petitioner's motion for judgment was denied on the ground that the case had not come on for trial, and that the stipulations of counsel and the exhibits were not in evidence, the court saying at the same time:

"If it were a question determinable upon reading the bill and answer, the ruling of the court might be different."

That the petitioner thereupon moved for a rehearing of its motion for judgment as to the first two patents, insisting that such motion was determinable upon the bill and answer, and that the petitioner was therefore entitled to have the case decided in order to end the litigation. That the District Court declined to pass upon the motion for rehearing on the ground that the case was no longer before the court.

The petitioner alleges that the action of the District Court in allowing the plaintiffs to dismiss, and in declining to pass upon the motion for a rehearing, deprived it of rights to which it was entitled under the law and the equity rules, especially under rule 69, and moreover that such action deprived it of its right of appeal. The petitioner therefore prays for a writ of certiorari to bring up the record to the Court of Appeals, in order that the matters set up in the petition may be reviewed, or, in the alternative, for a mandamus directing the district court to try and determine the issues raised by the bill and answer with respect to the first two patents.

The petition was filed in this court on April 17, and notice was given that the court would be applied to on April 23. The application was then made ex parte, and after consideration thereof the matter was set down for argument on June 15. On that day counsel for both sides appeared, and, after discussing the point whether the remedy sought to be invoked was appropriate, they agreed at bar that the merits of the controversy should be heard in reference to the first two patents, and accordingly argument was had thereon. Informally, therefore, but

with complete effect, the case is before us as if a certiorari had been actually issued and the record returned in obedience thereto. This agreement relieves us from considering any preliminary question concerning procedure, and we turn at once to the dispute concerning the respective validity of the first two patents. The petitioner concedes that the propriety of the District Court's order, so far as it affects the other three patents, is not before us, and it must be understood that as to these the bill stands dismissed.

The two patents in controversy were before the Court of Appeals for the Seventh Circuit in National Brake Co. v. Christensen, 229 Fed. 564, 144 C. C. A. 24, and the opinion of that court contains the following paragraphs:

"Letters patent No. 621,324 were issued March 21, 1899. Included therein was a sheet of drawings which had formed part of the original application, but had been eliminated therefrom and made part of a separate application after a division. The patentee at once rejected the letters patent, returned them for cancellation, and because of the error there was issued to him letters patent No. 635,280 on October 17, 1899. The latter patent in terms ran for 17 years from its date.

"Suit was begun on both patents, alleging an infringement of the invention, and asking that, if the latter should be deemed invalid, because not issued in conformity with the reissue statute (R. S. § 4916 [Comp. St. 1916, § 9461]), the attempted cancellation of the former should be deemed a nullity. * * *

"It is of no moment which of the two patents be held to be in force. The surrender for cancellation of the one was conditioned upon the grant of a valid legal substitute. If the Commissioner of Patents was without authority to issue the second, then, in our judgment, his action in canceling the first must be deemed legally ineffective. We agree, however, with the learned trial judge that, while Christensen's procedure did not aim at a reissue, the situation is identical with that presented on an application for reissue, and that, without formal application, the later patent might have been designated as a reissue. This is a case of a pure clerical error, not of double patenting. While two documents have been issued, there is but a single grant of one and the same right to the same person.

"That the second patent was erroneously granted for a term of 17 years from its date does not nullify it. The law itself prescribes the term of a patent; 17 years is the maximum. It may for several reasons expire at an earlier date. The failure properly to limit the term no more affects the validity in this case than it does in a case where, because of a prior foreign patent having a shorter term, the United States patent by law expires before the end of the 17 years specified in the document."

A certiorari to review the decree of the Court of Appeals was refused by the Supreme Court. 241 U. S. 659, 36 Sup. Ct. 447, 60 L. Ed. 1225. The opinion in the District Court has not been reported, but we have examined a copy, and the following extract will show the view that was taken by Judge Geiger:

"The questions arising in the case are:

"(1) Whether letters patent No. 635,280 are valid—defendant contending that they were issued without authority; that the irregularity, if it be one, of attaching to letters patent No. 621,324 the additional sheet, was subject to correction only through the medium of a reissue. An amendment to the bill was permitted to enable complainants to present all the facts, now conceded to be as above stated. If defendant is right in contending that the Commissioner of Patents was without power to grant the second patent, it ought to follow that he also lacked power to accept surrender of and to cancel the first grant. So, too, if the situation was such that complainant was entitled to a reissue, there is nothing in the reissue statute which precludes us from treating the

second as, in effect, a reissue, except the fact that it fails to limit the term to that of the first patent. While the procedure adopted by Christensen may not conform to nor have been followed with the express design of obtaining a reissue, the facts brought to the Commissioner's attention are identical with those which would have been averred and presented upon an application for reissue; and, even without formal application for reissue, the Commissioner could, in my judgment, have disposed of Christensen's application by designating patent No. 635,280 as a 'reissue.' In every aspect of the case, it appears that the government has allowed and granted a patent embodying the claims which, in the two documents, are identical. Whether the patent be evidenced by one, the other, or both, is not, in view of the issues now here material. Complainants' contention that even though the second patent on its face extends the term of the monopoly beyond that permitted by statute the court may, when necessary to protect the public or a party, give the instrument its actual limitation and effect, strikes me as fair and entirely consistent with the spirit of the patent laws. In other words, there is no reason why the irregularity of procedure should work a default or a total lapse in the patentee's right or title, especially as against one who has not been injured or misled, nor from whom relief is sought in reliance upon the irregularity. The question, upon the present state of the case, is therefore academic only."

We think it clear that the question now presented was not directly decided in the Seventh circuit. As the suit there was begun in December, 1906, when both patents were only between 7 and 8 years old, the question which patent was in force was "academic." One or the other was valid, and as the invention was identical the infringer was not harmed by being enjoined under one rather than the other. In point of fact the injunction was under the second patent, and this is the decree that was affirmed, although the opinion of the Court of Appeals may be thought to lean toward the view that the first patent continued to be in force, and that the second patent had been erroneously granted.

[1, 2] But, while it might be regarded as a matter of indifference under which patent an injunction should be granted, the situation is changed when the question of accounting is presented. The two patents have different dates of expiration, and the question of marking is also to be considered. We are therefore required now to decide between the two, for confessedly both cannot be valid, and in our opinion the decision should be in favor of the first patent. The mistake could have been corrected under rule 170 of the Patent Office—such rules if not inconsistent with law having the force of a statute. Rev. Stat. § 483; Steinmetz v. Allen, 192 U. S. 556, 24 Sup. Ct. 416, 48 L. Ed. 555; Caha v. U. S., 152 U. S. 221, 14 Sup. Ct. 513, 38 L. Ed. 415; Wilkins v. U. S. (C. C. A. 3d) 96 Fed. 841, 37 C. C. A. 588—which provides as follows:

"Whenever a mistake, incurred through the fault of the office, is clearly disclosed by the records or files of the office, a certificate, stating the fact and nature of such mistake, signed by the Commissioner of Patents, and sealed with the seal of the Patent Office, will, at the request of the patentee or his assignee, be indorsed without charge upon the letters patent, and recorded in the records of patents, and a printed copy thereof attached to each printed copy of the specification and drawing.

"Whenever a mistake, incurred through the fault of the office, constitutes a sufficient legal ground for a reissue, such reissue will be made, for the correction of such mistake only, without charge of office fees, at the request of the patentee."

Or if, because of the mistake, the specification had become either "defective or insufficient" (Hobbs v. Beach, 180 U. S. 394, 21 Sup. Ct. 409, 45 L. Ed. 586), the patentee had the right to apply for a reissue under section 4916 and the appropriate rules of the office. Instead of pursuing either of these courses, the patentee merely asked for a summary and irregular correction of the mistake, and the Commissioner complied with this request. Now, if the Commissioner had merely omitted the sheet of drawings and had given to the second patent the same date of expiration as the first, no possible harm could have been done, and his action might perhaps have been regarded as taken within the general scope of rule 170, although it did not exactly comply with the requirements of that rule. But when he undertook to fix a new date of expiration, thus prolonging the life of the patent, he did what he had no lawful right to do.

[3] The second patent was not a reissue, for it did not conform to section 4916, and it was not confined to correcting a mistake under rule 170, for it went beyond the mistake and modified the first patent in a vital particular, namely, in its date of expiration. Therefore, as the Commissioner had no warrant in the law for what he did (McCormick Co. v. Aultman, 169 U. S. 608, 18 Sup. Ct. 443, 42 L. Ed. 875), we see no escape from the conclusion that the second patent was invalid, and must now be so adjudged.

To avoid misunderstanding, and if possible to prevent further controversy on several points, we may add that the petitioner is at liberty to urge any defense that may be available under its answer, with the same effect as if the bill had been originally brought under the first patent. On these matters we decide nothing, and we express no opinion upon the question (1) whether, in view of the date when the bill was filed, the remedy in equity was open to the plaintiffs; or upon the question (2) to what extent the petitioner is liable to account in case the equitable remedy be adjudged to have been available, and the petitioner be found to have infringed.

The decree of dismissal is therefore reversed so far, and so far only, as it affects the two patents referred to, and the bill is reinstated for further proceedings in conformity with this opinion.

MOLINE PLOW CO. v. MORGAN et al.

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

No. 2410.

PATENTS ⊜328—INFRINGEMENT—CORN-PLANTER.

The Dooley patent, No. 682,178, for dropping mechanism for corn-planters, is for an improvement on prior devices only designed to secure accuracy in the number of grains dropped at one time, and must be limited to the specific device described and claimed. As so construed, *held* not infringed.

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

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

Suit in equity by Elmer E. Morgan, trustee. Deere & Mansur Company, D. M. Sechler Implement Company, Clarence H. Dooley and Harry L. Dooley, against the Moline Plow Company. Decree for complainants, and defendant appeals. Reversed.

From a decree sustaining patent No. 682,178 to Harry L. Dooley, granted September 10, 1901, and enjoining further infringement, appellant appeals. Defense, noninfringement.

The patent covers a "dropping mechanism for corn-planters," the use of which, it is claimed, resulted in greater accuracy. The claims in question are 1, 2, 9, 11, and 12 which read as follows:

Claim 1. "In a dropping mechanism for corn-planters a hopper-bottom having an annular channel into which grains settle indiscriminately a horizontal rotating ring or plate at the bottom of said channel having cells adapted to receive the grains edgewise only, and means for agitating the grains in the channel and arranging them so that they enter the cells edgewise."

Claim 2. "In a dropping mechanism for corn-planters, a hopper-bottom having an annular channel into which the grains settle indiscriminately, a horizontal rotating ring or plate at the bottom of said channel having cells adapted to receive the grains edgewise only, and projections on said ring extending up into the channel between its side walls for the purpose of agitating the grains and causing them to enter the cells edgewise."

Claim 9. "In a dropping mechanism for corn-planters, a hopper-bottom having an annular upwardly flaring channel, a rotating ring at the bottom of said channel, and a flange on said ring projecting upwardly into the channel between its side walls, said flange being cut away at intervals to form cells adapted to receive the grains edgewise only, and said flange also having portions of its outer edge chamfered off between the cells."

Claim 11. "In a seed measuring and delivering mechanism for corn-planters, an annular channel in the hopper-bottom constructed to receive the grains indiscriminately, and a horizontal rotating ring or plate at the bottom of said channel having cells adapted to receive the grains edgewise only, said plate being constructed to agitate the grains lying in the channel above and arrange them so that they enter the cells edgewise."

Claim 12. "In a hopper-bottom for corn-planters, an annular channel constructed to permit the grains to settle indiscriminately therein, a rotating ring or plate at the bottom of said channel, having cells adapted to receive the grains edgewise only, and projections on the plate extending into the channel for agitating and changing the positions of the grains lying therein from an indiscriminate arrangement to an edgewise arrangement with respect to the cells."

Efforts to perfectly control the number of kernels that might be dropped from the corn-planter at one time, have been persistently made for many years, one of the first being by Morgan, patent No. 176,190, April 18, 1876, followed by Vogel & Beitzell patent No. 254,444 February 28, 1882, Cole patent No. 439,773, November 4, 1890, Spangler patent No. 418,823, January 7, 1890; Charles H. Dooley patent No. 593,295, November 9, 1897, Harry L. Dooley patent No. 630,452, August 8, 1899. Greater accuracy was their sole object.

Morgan's contribution lay in the idea that accuracy was obtainable through a mechanism that passed one and only one kernel at a time. Since Morgan's discovery, cells or seed-cups corresponding to the size of a kernel of corn have been invariably provided. The greatest possible accuracy was not obtained by Morgan, by reason of the fact that the cells were not constructed so as to necessarily receive the kernels lengthwise.

Cole provided means for the kernels reaching the cells, and in his description he says: "The seeds contained in the hopper are forced, partly by their own weight, and partly by spiral ribs or flanges upon the upper conical side of the seed wheel, into the cups or perforations of the latter."

The Clarence H. Dooley patent No. 593,295, November 9, 1897, covers an invention which appellant relies on as the basis of its contention that claims of appellee's patent are very restricted. In the description of this patent we find the following: "The main object of my present invention has been to solve the

problem of overcoming the second hereinbefore recited defect by providing a seed measuring and delivering mechanism in the seed box which will, when operated as hereinafter described or otherwise, effectually separate single grains of seed from the supply in said seed-box, arrange them on edge, and deliver them edgewise to the seed-cups, which will receive them singly in substantially every one of the seed-cups of the seed measuring and delivering mechanism at each revolution of the series of seed-cups and deliver said single grains regularly, uniformly, and with nearly absolute certainty from each seed-cup of said measuring and delivering mechanism as said seed-cups pass successionally in their orbital paths over the throat of the seed-tube."

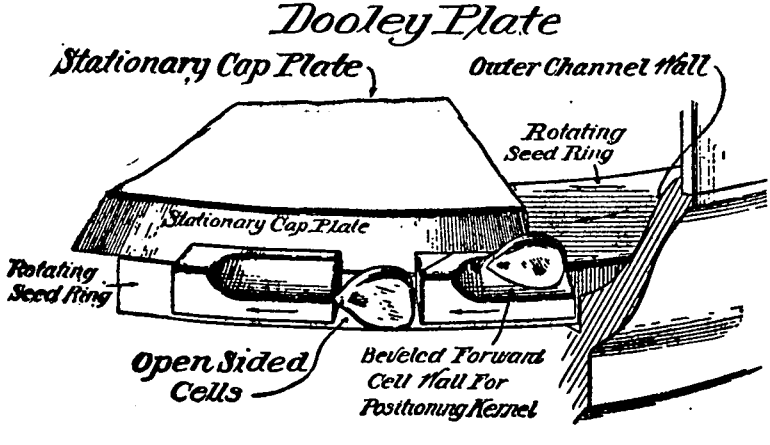
Claim 3 of this patent reads as follows: "In a corn-planter, and in combination substantially as described, a seed-cup wheel having seed-cups elongated circumferentially of said wheel and contracted or narrow radially thereof, and having an annular rim projecting upwardly from its outer side, and a central cap-plate located within said rim and at such distance therefrom as to leave a narrow groove or feedway between them which will only admit grains edgewise, and which serves to feed grains or kernels of corn edgewise to the underlying narrow seed-cups in the seed-cup plates."

In another Harry L. Dooley patent No. 630,452, we find the following: "This invention relates to improvement in corn-planters, but is more especially designed for use in connection with that class of corn-planters known as 'rotary drop check-rowers,' which class is exemplified by letters patent No. 593,295, granted to Clarence H. Dooley, November 7, 1897. In the machine of the said letters patent was effectually cured the previously existing defects in machines of this class due to the irregularity of the feed by providing a seed measuring and delivering mechanism in the seed-box, which effectually separated single grains of seed from the supply in said seed-box, arranged them on edge, and delivered them edgewise to the seed-cups, which received them singly in substantially every one of the seed-cups at every revolution of the seed-cup wheel and delivered said single grains regularly, uniformly, and with nearly absolute certainty from each seed-cup to the throat of the seed-tube as said cups passed successively in their orbital travel."

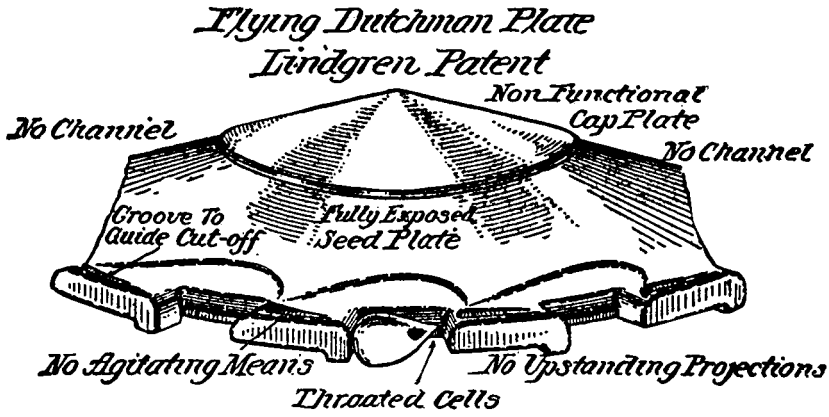
Appellant used three forms of devices, one being known as the "Flying Dutchman," and the others were known as the "Three in One" and "Gilt Edge." So far as this case is concerned, reference will be made to the latter two styles only as the "Three in One."

The drawings below are illustrative of the devices, and are nearly self-explanatory. Each represents merely the mechanism used in the bottom of a hopper, and is intended to provide a certain means for dropping a single kernel of corn at one time.

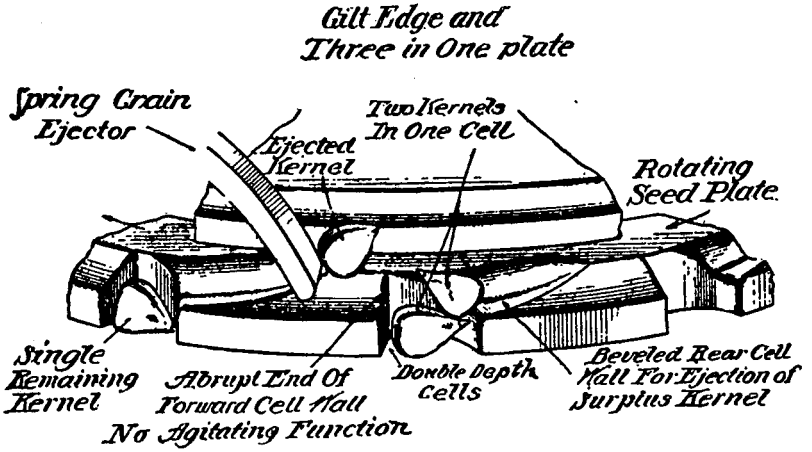
COMPLAINANTS' DEVICE.



APPELLANTS' "FLYING DUTCHMAN."



APPELLANTS' "THREE IN ONE" DEVICE.



All three devices are provided with rotating plates or rings, having cells into which the corn drops as the plates rotate.

Complainants' plate has projections called agitators, forming one wall of the cell. The combination covered by complainants' patent includes: (a) An annular channel; (b) a rotating plate provided with cells to receive a single kernel of corn; (c) an agitator as described in the drawing.

Appellants' device known as the "Flying Dutchman" has a rotary plate but no separate annular channel. Corn moves in the hopper, but not because of any agitator such as is disclosed in the corn-planting device.

Appellants' "Three in One" device has a separate rotating plate, but no agitator similar to, or the mechanical equivalent of, the agitator found in appellee's structure. The cells are of double depth, and an added element called an ejector, is provided to remove the extra kernel from the cell just before the

rotating plate permits the remaining kernel to drop into the cup below. It is provided with a trough-shaped channel into which the corn settles. The novelty consists of the means adopted to make certain that one kernel is in the cell when that cell passes over the opening below.

Thomas A. Banning and Samuel W. Banning, both of Chicago, Ill., for appellant.

H. H. Bliss, of Washington, D. C., for appellees.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). The question for determination is one of fact, and we are required merely to draw our conclusion from the foregoing statement. An examination of the drawings discloses that all of the devices have some common features, but these common features are old to the art and available to both patentees. In determining what Harry L. Dooley contributed to the art by the device covered by his patent in suit, it is necessary to first consider the particular elements in the combination that were old.

There was nothing new in the annular channel in a corn-planting device, nor in a cell for taking care of a single grain of corn, nor in an agitator as such. The idea of the annular channel, if patentable at all, was clearly anticipated by Clarence Dooley, by Spangler, and by Morgan. A cell capable of receiving a single grain of corn, as well as the size and shape of a cell capable of receiving but one kernel lengthwise, was clearly anticipated by the Clarence Dooley device, and by others.

In fact no novelty was claimed therefor. In the specifications forming a part of the patent in question, the following appears:

"No particular novelty is claimed herein for the shape or size of these cells, and in regard to this detail it need only be said that the cells are intended to receive and hold only one kernel or grain at a time, and should therefore be of a length and width adapted to the dimensions of the average grains."

It is true that the annular channel, as well as the agitator, differed in some respects from the previously patented devices. These distinctions, together with the particular combination of elements found in the claims, mark the patentable features of the invention under consideration.

In view of the prior art, appellee's patent apparatus must be confined to the specific device described in the specifications and claims. A rule of law applicable to the situation is well set forth in Sander v. Rose, 121 Fed. 840, 58 C. C. A. 176, as follows:

"When two inventors have each adopted the substantial features or elements of an earlier invention, making, respectively, but slight changes in or improvements upon the earlier device, each will be limited to his own specific form of device; and, if there are differences therein, neither device will be held to be an infringement of the other. In all such cases, the general words of the claim, especially where the claim contains words of reference to a more particular description of the thing patented, which is contained in the specification, will be held to cover only the structure or the device so particularly described."

Another rule of law, announced in the case of Water Meter Co. v. Desper, 101 U. S. 332, 337, 25 L. Ed. 1024, can also be well applied to the facts in this suit.

"Our law requires the patentee to specify particularly what he claims to be new, and if he claims a combination of certain elements or parts, we cannot decree that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality which is its equivalent."

While infringement is not avoided by the substitution of a mechanical equivalent for one of the missing elements, we are unable to find in appellants' "Flying Dutchman" any mechanical equivalent for the agitator and the separate annular channel appearing in each of the claims under consideration.

Likewise in the "Three in One" device the absence of an agitator such as is described in the claims of appellee's patent, together with the differently constructed cells, supplied with appellants' ejector, makes the conclusion that there is no infringement of appellants' devices irresistible. Each of appellants' devices fails to respond to any of the claims in controversy.

The decree is reversed with directions to dismiss the bill.

AURORA MANTLE & LAMP CO. v. KAUFMANN.

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

No. 2291.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—GAS MANTLE.
   The Kaufmann patent, No. 940,639, for an incandescent gas mantle, which consists of an inverted mantle having the bottom cut into two or four sections and united by seams forming ribs, instead of having the tube tied or shirred together to form the closed bottom, was not anticipated and discloses invention; also *held* infringed.

2. PATENTS ⟸168(2)—DIVISIONAL APPLICATION.
   That an applicant for a patent, including in his application claims for both a process and its product, on rejection of the process claims as new matter, voluntarily canceled them, with the expressed reservation of the right to make them the subject of a future application, which, when made, was recognized by the Patent Office as a divisional application, did not constitute an acquiescence in the rejection, which rendered the process patent invalid.

3. PATENTS ⟸78—PRIOR PUBLIC USE—DIVISIONAL APPLICATION.
   That a divisional application for a process was not filed until more than two years after a public use will not invalidate the patent issued thereon, where until the division the same claims were pending in the original application.

4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF MAKING GAS MANTLES.
   The Kaufmann patent, No. 975,769, for a process of making gas mantles, *held* valid and infringed.

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

5. PATENTS ⟸175—PROCESS—INFRINGEMENT.

The patentee of a process is not necessarily restricted to the order in which the steps are named in the patent.

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

Suit in equity by Otto Kaufmann, receiver for the Block Light Company of Ohio, against the Aurora Mantle & Lamp Company. Decree for complainant, and defendant appeals. Affirmed.

From a decree sustaining two patents, No. 940,639, issued November 16, 1909, and No. 975,769, issued November 15, 1910, and enjoining further infringement, appellant appeals. The defenses are invalidity and noninfringement.

The two patents cover an incandescent gas mantle and the process of making it. The subject-matter of the invention is the bottom of an inverted gas mantle. Plaintiff describes his inverted mantle as being "characterized by an open cylindrical top, which is fastened to a supporting ring by a tie thread, and by a round, dome shaped bottom of even thickness, made up of curved sections and having small interior ribs formed by the 'fabric' edges extending inward from the seams which unite the bottom sections of the mantle." The method of making the material of which these mantles are constructed is similar to other gas mantles, all being made of a very thin shell of thorium, an infusorial earth, rendered incandescent by the heat of the gas flame which strikes against it. This finished product, to borrow counsel's language, is obtained in the following manner: "The fibrous material which serves as the base for the infusorial earth with which the mantle is impregnated in the process of manufacture is burnt up and disappears in the final step of that process, which consists in shaping or 'setting' the mantle by burning it over a Bunsen or gasoline burner. The 'fabric' of infusorial earth remains."

All gas mantles must necessarily conform somewhat to the shape of the flame, in order that they may be in contact with the flame throughout, for the light is derived from the incandescence of the mantle rather than from the luminosity of the flame. Inverted mantles were first used in this country about 1903, and the development in the trade since has been rapid. Appellee alone makes between 2,000,000 and 3,000,000 a year.

Advantages of the inverted mantle, under certain conditions, over the upright mantle, are admitted, and patentee claims invention by reason of the alleged advantages of the "seamed" over the "tied" or "shirred" types. The disadvantages of the "shirred" or "tied" type are described by the patentee as follows: "Heretofore such mantles have been made by gathering one end of a tube of knitted material by the use of a string encircling one end of the tube (this is the 'tied' type), or by passing a string through the loops of the knitting and drawing the loops together (this is the 'shirred' type). This is objectionable because these methods crease and fold the fabric and make it unnecessarily weak and dense at the point where the stress is greatest when the mantle is in use, so that it soon breaks at the said weakened point, thereby rendering the life of the mantle short and uncertain, and by reason of the density of the mantle produced in the above ways an unnecessary increase in gas pressure is required to properly incandesce it, the result of which is to shorten the life of the mantle, to increase the expense of its use, to complicate its use, and render it less efficient."

Patentee's object was to abolish the folds and creases that resulted from tying or shirring the fabric and to strengthen the fabric generally, and particularly at the apex where the fabric is united, securing at the same time, it is claimed, greater incandescence. Two forms are in common use. In the one, the fabric is cut into four sections, which when sewed together, make two seams. In the other, the fabric is cut into two sections, which, when sewed together, make but one seam.

Figure A illustrates an inverted tied or shirred mantle.

Side View. Bottom View.

Figure B represents patentee's seamed mantle with two seams.

Side View. Bottom View.

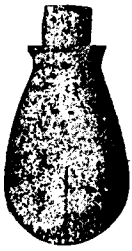
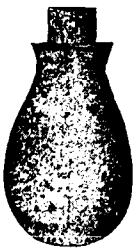
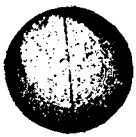


Figure C represents patentee's seamed mantle with one seam.

Side View. Bottom View.





Defendant's product is a "one" seamed type. The claims in issue of the product patent are 1–6, inclusive; 2 and 6 being representative, and as follows:

2. "An inverted mantle having a cylindrical open top, and a dome-formed smooth-surfaced base, consisting of two sections, each of the general form of a quarter of a sphere, and seamed together at their edges."

6. "A mantle for incandescents comprising a tube of fabric having a plurality of seams for closing one end of the tube, which seams extend transversely and are located within the tube, and produce reinforcing ribs extending from the median portion of the closed end of the mantle."

Claims 1 and 3 of the process patent are in issue. No. 3 reads as follows:

"The process of manufacturing mantles consisting in forming a tube of fabric, impregnating said fabric with an incandescing material, severing the fabric transversely of its length so as to form a plurality of cut and rounded edges, securing said edges together to form seams, turning said mantle inside out, and then burning said fabric over a Bunsen burner, to set the fabric in its final shape, and stiffen the seams within the mantle."

Paul Carpenter, of Chicago, Ill., for appellant.

Frederick P. Fish and Joseph L. Levy, both of New York City, for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Appellant's attack upon the validity of the product patent may be divided into the following heads: (A) Patentee's product was merely the application of practical mechanics and did not involve invention. (B) The steps applied were taken from the prior art. (C) Patentee's product is the result of actual aggregation of a number of old steps.

[1] It is urged that the securing of shape and permanency of form by the means adopted by appellee was long known to the art and had previously been covered by patents. For example, caps, mittens, hats, boots, and stockings, etc., have long been made from cloth, and shape and permanency of form secured by the methods here used. It should be borne in mind that appellee's object was to secure a mantle of greater strength and capable of furnishing greater light. The mere fact that all the elements of a new combination are old is not sufficient to prevent patentability. The fact that the end was a new and beneficial one, never before attained, is persuasive evidence of invention, even though the elements combined were well known. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. The result of this combination of known elements was much sought. Shape, as such, was unimportant; but any result that made it possible for the manufacturer to produce a mantle, the incandescent material of which was so situated in reference to the flame, that greater luminosity throughout the entire surface was secured, was desired by all manufacturers. Strength, obtained from the seams or ribs was valuable in addition to its mere contribution as a factor in securing permanency of shape, for by it the "speck" or "dark spot" on the apex of the mantle was eliminated, and at the most important part of the illuminating body greater incandescence was secured. These results so secured, even by means used in other arts, for different purposes, manifested invention.

But it is asserted that these claims of strength and increased incandescence were imaginary, mere paper claims, and are not in fact existing, and the results so obtained were self-evident. The evidence as to the extent of the patentee's contribution to the art, while conflicting, supports appellee's contention in this respect. The fact that the completed product, though more expensive than the old form of mantle, is now extensively used, and the further fact that appellant has seen fit to manufacture the product in large quantities, are convincing, if not conclusive. In view of the appellant's use of the patented invention, the claim is poorly asserted that the improvement contributed no advance in the art. Gandy v. Main Belting Co., 143 U. S. 587, 596, 12 Sup. Ct. 598, 36 L. Ed. 272; Western Electric Co. v. La Rue, 139 U. S. 601, 608, 11 Sup. Ct. 670, 35 L. Ed. 294.

Nor was the solution of the problem confronting Kaufmann a sim-

ple and self-evident one. An invention, when understood, often seems simple. But it should be borne in mind that the trade demanded a successful inverted mantle. The shirred or tied mantle only partially met the demand. Greatly increased sales in gas mantles followed. Nor was it self-evident. Experiments were necessary, according to the evidence, before the final form was perfected.

Was there infringement? In view of the testimony of the appellant's expert, this subject is hardly debatable. Its witness admitted infringement. While such an admission is not binding upon the litigant, yet this court agrees with the witness that there was unquestionably infringement. It follows, therefore, that product patent, No. 940,639, is valid and was infringed by appellant.

[2] The attack on the process patent, while differently phrased, involves the action of the Commissioner of Patents in striking out several claims appearing in the original application. Kaufmann first attempted to secure a process and a product patent through one application. The examiner ordered the claims for the process patent stricken out. Applicant was then confronted with the necessity of an appeal or the filing of a new application. The action of the Patent Office was discretionary (U. S. ex rel. Steinmetz v. Allen, 192 U. S. 547, 561, 24 Sup. Ct. 416, 48 L. Ed. 555), which discretion, unless clearly abused, was not subject to review. Kaufmann, therefore, acquiesced in the ruling and made a separate application for the patent on the process. The Patent Office understood the situation clearly, and recognized Kaufmann's right to a division. In speaking of the matter the examiner says:

"A claim similar to the claims now in this case was submitted in application No. 283,743, filed October 21, 1905, which has matured into patent No. 940,639, November 16, 1909. Said claim was rejected as involving new matter. Applicant amended the claim, but traversed the rejection of the claim as new matter, and later of his own motion canceled the amended claim, with the expressed reservation that claims to such subject-matter might be made in a future application. The office does not hold that applicant acquiesced in the rejection of claim 8 of the former application as new matter, as he expressly did not so acquiesce, and in fact no action was taken by the office on the amended claim. Moreover, on page 1, line 23, applicant apparently means to say that the application is a division of former application 283,743 of October 21, 1905."

In the light of these facts, appellant's contentions are not well taken. Its claim that the process patent covers the same invention as the article patents is unsupported by the facts and contrary to the ruling of the Patent Office.

The further objection to the validity of the process patent, that the product can be produced only by this process, and, if sustained, the process patent would unlawfully extend appellee's product monopoly, fails, because in fact the product patent can be made in other ways. Century Electric Co. v. Westinghouse E. & Mfg. Co., 191 Fed. 350, 359, 112 C. C. A. 8; Leeds & Catlin v. Victor Talking Machine Co., 213 U. S. 301, 318, 29 Sup. Ct. 495, 53 L. Ed. 805.

Its second objection, while disputing its previous position is not supported by the record. Appellant says:

"Kaufmann admits that the process in the process patent is not disclosed in the article patent, and consequently the process application could not be a divisional case."

Kaufmann's process patent is disclosed in the original application, and is restricted to the claims covering the process found therein.

[3] Appellant's contention that the process patent is invalid, because separate application was not filed until more than two years after a public use, is untenable, in view of the fact that the prior application covering the same claims had for two years been pending in the Patent Office and had been rejected because the claims for process patent were included in the application for the article patent.

Noninfringement of Process Patent.

[4, 5] As to claims 1 and 3, appellant contends patentee provides five steps, which are not infringed, because steps B, C, and D are employed by the defendant in the order of C, B, and D. Whether the patentee is restricted to the order named depends upon the subject and the character of the various steps so designated. In the present case we conclude that the claims are infringed, even though the order of the three steps B, C, and D, is changed. Gen. Electric Co. v. Hill-Wright Electric Co., 174 Fed. 996, 98 C. C. A. 566.

The other alleged differences in appellant's process from the steps outlined in appellee's claims hardly justify separate consideration. We conclude that process patent, No. 975,769, is valid, and claims 1 and 3 are infringed.

The decree is affirmed.

SOUTHERN TEXTILE MACHINERY CO. v. FAY STOCKING CO.

(District Court, N. D. Ohio, E. D. July 3, 1917.)

No. 340.

1. PATENTS ⟸202(1)—TITLE—ASSIGNMENT PENDING APPLICATION.
An assignment of a pending application with the right to the patent to be issued thereon, duly filed and recorded in the patent office, vests the legal title to the patent, when issued, in the assignee, although it is issued in the name of the assignor.

2. PATENTS ⟸202(1)—CONVEYANCE OF RIGHTS IN—ASSIGNMENT OR "LICENSE."
If an instrument transfers a patentee's entire right to all or an undivided interest in the patent, as fully as such right is conferred on him by the grant, either within the entire United States or a definite subdivision thereof, a good legal title will pass, but unless it conveys the full right to make, use, and vend, or an interest therein, the instrument is, at most, a mere license.

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

3. PATENTS ⟸286—SUIT FOR INFRINGEMENT—TITLE TO SUSTAIN.
An instrument executed by the joint owners of a patent, granting to a corporation the exclusive right to manufacture and sell the patented article during the life of the patent, or so long as it shall remain a solvent going concern, does not vest the corporation with title to the patent which will sustain a suit for infringement against third parties in its name alone.

In Equity. Suit by the Southern Textile Machinery Company against the Fay Stocking Company. Leave granted to amend bill by joining additional complainants.

Obed C. Billman, of Cleveland, Ohio, for complainant.

A. V. Groupe and C. N. Anderson, both of Philadelphia, Pa., and Hull, Smith, Brock & West, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Complainant's bill charges infringement by defendant of letters patent No. 1,050,432, issued by the United States Patent Office, January 14, 1913, to Edwin O. Davis, for a machine for uniting knit fabrics, of which letters patent complainant claims to be the sole and exclusive owner. The answer denies complainant's title and the infringement of the letters patent, and also sets up the invalidity thereof for various reasons. The questions to be decided are: (1) Whether the complainant has shown title in itself to said letters patent. (2) Whether the defendant is guilty of infringement. (3) Whether the claims of said letters patent relied on are valid.

The bill alleges that on or about November 20, 1912, Davis, by certain instruments in writing then executed and delivered, and by mesne assignments theretofore executed and delivered, assigned and transferred the entire right, title, and interest in and to the improvements and letters patent; that these instruments in writing were recorded the 19th of December, 1912, in the United States Patent Office, and that by virtue thereof the complainant then became, and ever since the dates of such assignments has been, and is now, the sole and exclusive owner thereof. These instruments in writing, it will be noted, all bear

a date prior to the date of issue of the letters patent, and that the issue was thereafter made to and in the name of Davis.

The answer, for want of knowledge and information, denies these allegations of title and demands proof. Under equity rule 30 [198 Fed. xxvi, 115 C. C. A. xxvi], this denial for want of knowledge is the equivalent of a specific denial, and puts on the complainant the burden of proving its title.

Complainant, in support of the issue of title thus tendered, produced and introduced in evidence a number of instruments in writing, eight in all, being numbered "Complainant's Exhibits No. 1" to "No. 8," inclusive. No other evidence on this issue is tendered.

Exhibit No. 1, dated September 15, 1908, is an agreement between E. O. Davis (the inventor and patentee) and R. E. Hearne, of the first part, and R. B. Phillips and H. F. Drenk, of the second part. This agreement recites that Davis is the inventor of three separate and distinct machines or attachments to be used in the manufacture of hosiery and other similar fabrics. One of these is described as a looping machine, which is the one that is the subject-matter of the patent now in litigation. This invention, it is recited, was then owned jointly by Davis and Hearne, the former having an 80 per cent. and the latter a 20 per cent. interest therein, and in any patents that might be issued on the same. This agreement, by proper and sufficient language, assigns, transfers, and readjusts the ownership of this invention so that Davis retains a 35 per cent. interest, Hearne a 15 per cent. interest, and a 25 per cent. interest each is assigned to Phillips and Drenk. It does not contain any express direction that any patent issued for said invention should be issued in the name of the several assignees.

This agreement was made in contemplation that a corporation should thereafter be organized for the manufacture of the machine, embodying this invention and other inventions described in the agreement, and that Phillips and Drenk should perform services and advance money required to get started and in operation the manufacturing of such machines. Other provisions are contained in it, regulating the rights and duties of the several parties until the corporation, in whose name the manufacturing was to be done, was in practical running condition. These provisions it is not necessary to state in detail. The parties, it was agreed, were to have issued to them the stock of the corporation thus to be organized in the same percentage proportions as their interests in said inventions.

This agreement further states that the business of this corporation—

"shall be the manufacture and sale under permits or license from the parties hereto as individuals of machinery embodying the above-named inventions."

It also provides that the parties—

"shall lease to said corporation or give it permits or licenses to manufacture and sell machinery embodying said inventions, but said inventions or patents are not to be sold to said corporation, and are to remain the property of the parties hereto as individuals, and said lease or permits are not to be for a longer time than said corporation shall remain a going concern; and any lease or permit shall contain stipulations that if said corporation makes an assign-

ment for the benefit of creditors, or goes into or is forced into bankruptcy, or goes into the hands of a receiver or other officers or court to be wound up or run, then said lease or permits are to cease at once, and the inventions and patents revert to the parties hereto as individuals in the proportions above named."

Exhibit No. 2 is an agreement dated March 20, 1909, and recorded in the United States Patent Office December 19, 1912. All four joint owners of the inventions described in the first agreement are the first parties thereto, and the complainant, the Southern Textile Machinery Company, is the second party. This agreement recites the application by Davis for the patents and the ownership thereof by the first parties in the percentage proportions already given, and—

"for the further consideration of all the capital stock of said company, including the stock of the incorporators and original subscribers, namely, twenty thousand dollars of the capital stock of said company to be held and owned by the parties of the first part hereto in the percentage proportions [already given],"

provides that—

"the said parties of the first part hereby lease and grant to the party of the second part the exclusive right or license on the conditions hereinafter named, however, to manufacture or have manufactured and to sell said machines or appliances or any improvements that may hereafter be made thereon and patented, from now on until the expiration of the patents or prospective patents on same."

One of the prospective patents therein referred to is the looping machine now in litigation.

The conditions "hereinafter named" provide that the lease or license was not to last for a longer time than the Southern Textile Machinery Company remained a going concern, and that, if the conditions recited in the quotation above from the first agreement should come to pass, the lease or license to the complainant should immediately cease, and all said inventions and patents, and the right to manufacture and sell, should revert to the first parties in the same percentage proportions. Such title as was passed to Phillips and Drenk by the first agreement, and as is not transferred by this agreement, still remains in them so far as the record in this case discloses.

Exhibit No. 3, dated March 22, 1909, is between Davis and Hearne, of the first part, and Phillips and Drenk, of the second part. It modifies in part the obligations assumed by Phillips and Drenk in the first agreement, but does not modify the provisions above stated as to the title to the patents. On the contrary, the last paragraph thereof reiterates that provisions relating to title and ownership shall remain unchanged, and that a license to manufacture and sell may be granted to the complainant, as stated in the former contract.

Exhibit No. 4, dated April 13, 1909, and recorded in the United States Patent Office December 19, 1912, is between E. O. Davis, R. B. Phillips, and H. F. Drenk, Hearne not being a party to it. Its provisions show that a disagreement had arisen between the parties thereto about the conduct of the business of the Southern Textile Machinery Company (complainant herein). This agreement was made to

adjust all differences and to eliminate future disagreements. Its provisions are not otherwise material to the present issue.

Exhibit No. 5, dated April 23, 1909, and recorded in the United States Patent Office February 7, 1910, is an express assignment from Edwin O. Davis to Phillips and Drenk of each a 25 per cent., and to Hearne a 15 per cent., interest in the invention covered by application serial No. 491,511, being the application on which the letters patent now in litigation was issued. It also authorizes and requests the Commissioner of Patents to issue said letters patent to the respective parties in these percentage proportions.

Exhibit No. 6, dated August 10, 1910, and recorded in the United States Patent Office September 1, 1910, is an express assignment from Davis and Hearne to the complainant of their retained 50 per cent. interest in the inventions covered by application serial No. 491,511, being the one here involved. It does not authorize nor request that the patents to be issued shall be issued in the name of the complainant, the Southern Textile Machinery Company. It recites that a 50 per cent. interest had previously been conveyed to Phillips and Drenk. It is made subject to the terms and conditions of a contract and assignment of even date, entered into between Davis and the Southern Textile Machinery Company, which is referred to and made a part thereof, but which does not appear in the record. It is inferable from a later writing that it provided merely for the payment of certain moneys by the complainant to Davis.

Exhibit No. 7, dated November 20, 1912, and recorded in the United States Patent Office December 19, 1912, is in form an absolute assignment from Davis to the Southern Textile Machinery Company (complainant herein) of all Davis' right, title and interest in certain inventions and patents to be obtained therefor. No more definite description, by number or otherwise, of the inventions or patent applications are given, but it may be assumed that the invention and patent now in litigation was included.

Exhibit No. 8, dated November 20, 1912, and recorded in the United States Patent Office December 19, 1912, is a formal assignment from Davis to the complainant herein, the Southern Textile Machinery Company, of his inventions covered by several applications, including application serial No. 491,511. It requests the Commissioner of Patents to issue the letters patent in the name of the company.

For reasons not explained, the letters patent were issued thereafter in the name of Edwin O. Davis, and not to any one or all of his assignees. No assignment or transfer after issue in his name appears to have been made by him to complainant or any other person.

Defendant's contention is that, inasmuch as the letters patent were issued to Davis, the entire legal title thereto is still in him, and that, if this be not true, Phillips and Drenk are the joint owners with complainant of each a one-fourth interest therein.

[1] As appears from the foregoing statement, Davis and Hearne reserved a 50 per cent. interest in the invention covered by the patent application, and this interest was absolutely assigned to the complainant. The instruments of assignment, however, were executed and re-

corded in the Patent Office at a date prior to the date of issue of the letters patent. It does not, in my opinion, follow from these facts that the complainant has not acquired a complete legal title to this 50 per cent. interest. It is settled law that an assignment vests legal title in the assignee, even though executed prior to the issue of the letters patent, and the letters patent are thereafter issued in the name of the assignor. This is established by the following authorities: Walker on Patents (5th Ed.) §§ 274, 274a; Gayler et al. v. Wilder, 10 How. 477, 13 L. Ed. 504; Railroad Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Wende v. Horine (C. C.) 191 Fed. 620.

[2] A different situation, as appears from the above statement, exists with respect to the other 50 per cent. interest originally assigned to Phillips and Drenk. They have not executed any instruments in writing purporting to assign that interest to the complainant. It may be admitted that any instrument in writing which purports to convey the inventor's or patentee's entire right to his patent or to an undivided interest therein will be regarded as sufficient to convey title, even though the words "assignment" and "transfer" are not employed. If the instrument does in fact transfer the inventor's or patentee's entire right to all or an undivided interest therein as fully as such right is by the patent conferred on him, either within the entire geographical limits of the United States or a definite subdivision thereof, a good legal title will pass. This law is established by the following authorities: Walker on Patents (5th Ed.) § 274; Rapp v. Kelling (C. C.) 41 Fed. 792; Johnson R. R. Signal Co. v. Union Switch & Signal Co. (C. C.) 59 Fed. 23; Paulus v. Buck Mfg. Co., 129 Fed. 594, 64 C. C. A. 162; Waterman v. Mackenzie, 138 U. S. 252, opinion 256, 11 Sup. Ct. 334, 34 L. Ed. 923.

The entire right acquired by one to whom letters patent are issued is defined by section 4884, United States Revised Statutes (Comp. St. 1916, § 9428). This section confers for a term of 17 years "the exclusive right to *make, use and vend* the invention or discovery throughout the United States, and the territories thereof." The monopoly thus created is an entirety, and cannot be divided into parts, except as is authorized by the United States Statutes. These statutes authorize the patentee or his assignee, by an instrument in writing, to transfer "the exclusive right to make, use and vend the invention throughout the United States"; also to transfer an undivided part or share of that exclusive right, or to transfer that exclusive right within and throughout a specified part of the United States. If the instruments in writing, properly interpreted, confer or transfer a lesser interest than any one of these, the right transferred will at most be only a license. See Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923, and cases therein cited.

[3] The instruments in writing here relied on say in explicit terms that Drenk and Phillips are not parting with their title or ownership. They do not purport to sell or transfer their interest in the patent applied for, either in the entire United States or in a specified part of it. This limitation or reservation is reserved and expressly set forth in all the writings to which either of them is a party. They purport

to give, or to be willing to give, permits or licenses to *manufacture and sell* only. These permits or licenses are coextensive, both as to duration and extent, with the letters patent, except for the forfeiture conditions contained in the written instruments. These clauses stipulate that in the event of complainant's insolvency, assignment for creditors, appointment of a receiver, etc., the lease, permits, or licenses shall at once cease, and the inventions and patent shall revert to Phillips, Drenk, and others. These forfeiture conditions, it might be argued, are in the nature of conditions subsequent, and until the conditions were broken and the rights of forfeiture exercised the entire title and interest have passed to complainant.

I might be inclined to adopt this view, and to regard the instrument in writing as an absolute assignment, conferring a good title, at least, in equity, except for the limited nature of the lease, permit, or license granted or agreed to be given by these instruments. It will be observed the right thus agreed to be given is only to *manufacture and sell;* it does not include the exclusive right to *use* the invention.

In view of the authorities presently to be cited, it must be held that complainant has acquired, both at law and in equity, something less than the entire right conferred by the letters patent upon the patentee. The law in this respect has been established by many decisions. The exclusive right thus acquired by a patentee consists of three things: (1) The right to make, (2) the right to use, and (3) the right to vend the invention or discovery. If any one of these three is not assigned or granted, the grantee acquires, at most, only a license. See the following: Gayler et al. v. Wilder, 10 How. 477, 494, 495, 13 L. Ed. 504; Mitchell v. Hawley, 16 Wall. 544, 21 L. Ed. 322; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; Waterman v. Mackenzie, 138 U. S. 252, opinion 255–257, 11 Sup. Ct. 334, 34 L. Ed. 923.

In Waterman v. Mackenzie, supra, 138 U. S. page 256, 11 Sup. Ct. page 335 [34 L. Ed. 923], Mr. Justice Gray says:

"Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use, and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using, and vending two machines, excludes all other persons, even the patentee, from making, using, or vending like machines within the district. Wilson v. Rousseau, 4 How. 646, 686 [11 L. Ed. 1141]. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it. Gayler v. Wilder, above cited. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. Mitchell v. Hawley, 16 Wall. 544 [21 L. Ed. 322]. So is an instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others.

Hayward v. Andrews, 106 U. S. 672 [1 Sup. Ct. 544, 27 L. Ed. 271]. See, also, Oliver v. Rumford Chemical Works, 109 U. S. 75 [3 Sup. Ct. 61, 27 L. Ed. 862]."

This being the law, complainant has a good title as to one half of the letters patent now in litigation, and, at most, a license as to the other half. In this situation, the parties entitled to maintain an action for an infringement has often been under consideration, and it is settled law that a licensee, or one of two or more joint owners of a letters patent, cannot maintain a suit in equity to enjoin infringement without uniting the licensor or the other joint owners. See the following: Gayler et al. v. Wilder, 10 How. 477, 494, 495, 13 L. Ed. 504; Waterman v. Mackenzie, 138 U. S. 252, 255, 11 Sup. Ct. 334, 34 L. Ed. 923; Walker on Patents (5th Ed.) § 399.

In Waterman v. Mackenzie, supra, 138 U. S. page 255, 11 Sup. Ct. page 335 [34 L. Ed. 923], Mr. Justice Gray says:

"In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff."

Walker on Patents (5th Ed.) § 399, says:

"Owners in common of patent rights must sue jointly for their infringement, or the defendant may plead in abatement or demur, or, in suit in equity, move to dismiss. This rule applies where a patentee has assigned an undivided part of his patent, and also to cases where the owner of the patent has granted an undivided interest therein, in that part of the territory of the United States wherein the infringement sued upon was committed. In the first of these cases the action must be brought by the patentee and assignee jointly, and in the other case it must be jointly brought by the owner of the patent and his grantee. Indeed, the rule necessarily applies to every case where a plurality of persons own the undivided interest in a patent right, whether in the whole or only in a part of the territory of the United States."

These rules of law are based on the fundamental consideration that all persons interested in the subject-matter of litigation or to be affected by a decree should be made parties, because it is the aim of courts of equity to do complete justice, and to settle the rights of all parties in one suit, in order that litigation may end and a multiplicity of suits be avoided. A decree does not bind absent parties, and they may thereafter harass the defendant with another action based on the same cause of action. A defect of parties in this sense is so vital that a court cannot proceed to judgment under such conditions.

So far as the record discloses, this is the situation now presented. It will be necessary that new parties be made, or sufficient facts alleged, showing either a lack of interest, or an adequate reason for not making them parties, before this cause can proceed further.

Leave will be given complainant, either by amendment to the present bill, or by intervention at the instance or on behalf of Phillips and Drenk, or in other appropriate manner, to obviate the difficulties disclosed by the present state of the record. If this cannot be done, a decree dismissing the bill will have to be entered.

SCHAUM & UHLINGER, Inc., v. COPLEY-PLAZA OPERATING CO.

(District Court, D. Massachusetts. July 20, 1917.)

No. 802.

1. PATENTS ⟸310(2, 10)—SUIT FOR INFRINGEMENT—PLEADING—AMENDMENT.
A bill for infringement of a patent which does not allege that the patent was issued in the name of the United States under the seal of the Patent Office or that it was signed by the Commissioner, nor annex a copy of the patent or make profert thereof, is defective, but is amendable under equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii).

2. PATENTS ⟸312(1)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.
Where a bill for infringement alleges that the patent was issued to another than the applicant as assignee, it will be presumed that an assignment sufficient to pass title was before the Patent Office.

3. PATENTS ⟸310(1)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.
An allegation in a bill for infringement that a person named was "within the meaning of the statutes of the United States then in force the inventor" of the patented process, while informal, is equivalent to an allegation that he was the original and first inventor or discoverer.

4. PATENTS ⟸310(1)—SUITS FOR INFRINGEMENT—ALLEGATION OF TITLE.
An allegation in a bill for infringement that the patent was prior to the filing of the bill "by various mesne assignments duly assigned to" complainant, but without specifying such assignments, is insufficient to show title in complainant, but may be amended.

5. PATENTS ⟸310(1)—SUITS FOR INFRINGEMENT—ESSENTIAL ALLEGATIONS OF BILL.
Equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), providing that a bill shall contain a short and simple statement of the ultimate facts, does not change the previously settled requirement that a bill for infringement must contain distinct allegations of compliance with Rev. St. §§ 4886, 4887, as amended by Act March 3, 1897, c. 391, §§ 1, 3, 29 Stat. 692 (Comp. St. 1916, §§ 9430, 9431), although the facts should be shortly and simply stated.

In Equity. Suit by Schaum & Uhlinger, Incorporated, against the Copley-Plaza Operating Company. On motion to dismiss bill. Granted, subject to leave to complainant to amend.

Alfred H. Hildreth and Van Everen, Fish & Hildreth, all of Boston, Mass., for plaintiff.

Oliver Mitchell, of Boston, Mass., and Edwin F. Thayer, of Attleboro, Mass., for defendant.

DODGE, Circuit Judge. None of the defects claimed to exist in this bill for infringement of a patent seem to me jurisdictional in the sense contended for by the defendant. If they exist, I cannot regard them as requiring dismissal of the bill without leave to amend, in view of equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii).

[1] To show itself the owner of a monopoly granted by public authority, the plaintiff has alleged only that one Uebersax, "being, within the meaning of the statutes of the United States then in force, the inventor of a certain new and useful process," duly filed an application for a patent therefor, and that on June 3, 1913, "all of the requirements of the statutes then in force having been complied with," Unit-

ed States patent No. 1,063,478 was duly issued on said application, with further allegations as below, showing the ultimate vesting of title thereto in the plaintiff.

There are no allegations that said patent was issued in the name of the United States, under seal of the Patent Office, or that it was signed by the Commissioner, as required by Rev. Stats. § 4883, as amended by Act Feb. 18, 1888, c. 15, 25 Stat. 40 (Comp. St. 1916, § 9427). These omissions, in connection with the fact that no copy of said patent is annexed and no profert thereof made, leave the bill defective. Fichtel v. Barthel (C. C.) 173 Fed. 489. It is understood that the plaintiff intends asking leave to amend by making profert of the patent. If this is done, the above defects will be cured, according to the case cited.

[2] The bill alleges that said patent was issued to Wenger & Co., as the assignee of Uebersax. There is no allegation of an assignment in writing by him to Wenger & Co., entered of record in the Patent Office before issue. But, having held, in Beckwith, etc., Co. v. Gowdy, 244 Fed. 805, Nos. 628, 630, Eq., in this court, that in such a case assignments sufficient to pass title from the applicant to the assignee named may be presumed to have been before the Patent Office until the contrary is shown, I cannot hold this omission material. See opinion in the above case dated August 5, 1916.

[3] The bill alleges Uebersax to have been, "within the meaning of the statutes of the United States then in force, the inventor" of the patented process. I do not think it necessary to hold the omission to allege that he was "the original and first inventor or discoverer" of said process a material omission. This, although not clearly and definitely expressed, I consider sufficiently indicated by the language used.

[4] The bill alleges that the patent, with all rights of action for its infringement, was, prior to the filing of the bill, "by various mesne assignments, duly assigned to" the plaintiff. There is no specification of the assignments referred to; and without such specification I think the bill makes an insufficient showing of title in the plaintiff. The plaintiff is understood to acquiesce in this view and to intend asking leave to amend so as to supply this deficiency.

[5] Except as contained in or to be implied from the above terms wherein issue of the patent is alleged, the bill omits to allege fulfillment of the conditions precedent to the issue of a valid patent specified in Rev. Stats. § 4886, and also omits to negative the filing of any foreign application such as would bar the issue under section 4887. Whether or not these omissions leave the bill insufficient is the question to which the argument has been mainly devoted.

There can be no doubt that before the present equity rules went into effect the omitted allegations were essential. See Bayley, etc., Co. v. Braunstein, etc., Co. (D. C.) 237 Fed. 671, in which many prior decisions are cited. See, also, American, etc., Co. v. National, etc., Co. (C. C.) 127 Fed. 349 (1904); Moss v. McConway, etc., Co. (C. C.) 144 Fed. 128 (1906); Walker, Patents (5th Ed. 1917) § 579. McCoy v. Nelson, 121 U. S. 484, 7 Sup. Ct. 1000, 30 L. Ed. 1017, upon which the plaintiff places some reliance, does not appear to have been

ever recognized as an authority to the contrary. The bill there under consideration does not appear in full in the report, and Justice Blatchford states (121 U. S. 487, 7 Sup. Ct. 1002 [30 L. Ed. 1017]) that it was "in accordance with approved precedents, and * * * in the usual form."

But under rule 25 (198 Fed. xxv, 115 C. C. A. xxv) a bill need only contain "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." Does this require a different conclusion as to the omitted averments now under consideration?

The defendant relies on Maxwell v. National, etc., Co. (D. C.) 205 Fed. 515 (1913), in which Judge Ray declined to strike out such averments, being of opinion that the new rules were not intended to change the settled practice requiring allegations showing compliance with sections 4886 and 4887, and also on Bayley, etc., Co. v. Braunstein, etc., Co. (D. C.) 237 Fed. 671 (1916), in which Judge Learned Hand sustained a motion to dismiss for want of such allegations, although the bill contained allegations to much the same effect as those found in the present bill, that the patentee "was entitled to a patent * * * under the provisions of the statutes in such case made and provided." Judge Hand, like Judge Ray, considered allegations going no further than to show issue of the patent sued on as allegations of evidence, not of ultimate fact, and held the formerly settled rule unaffected by rule 25.

The plaintiff relies on Zenith, etc., Co. v. Stromberg Co. (D. C.) 205 Fed. 158 (1913), wherein Judge Tuttle denied a similar motion to dismiss, regarding the former necessity for express allegations of compliance with the requirements of sections 4886 and 4887 as done away with by rule 25. To this decision, though rendered some three months earlier, Judge Ray's decision, above cited, makes no reference. The plaintiff relies also on Gen, etc., Co. v. Nikolas (D. C.) 207 Fed. 111 (1913), wherein Judge Chatfield, as to the matters now being considered, agreed with Judge Tuttle. This decision, made some two months later than Judge Ray's, contains no reference thereto.

In Pittsburg, etc., Co. v. Beler, etc., Co. (D. C.) 222 Fed. 950 (1915), a decision made, not on motion to dismiss, but on final hearing, Judge Orr called attention to the undue amount of space taken up in the bill before him by the unnecessarily expanded form wherein all its allegations and prayers were expressed. He found it unnecessary for the purposes of the case before him to determine whether or not averments of compliance with all statutory conditions precedent to the granting of a patent were required, under the new rules, as above; but he forcibly recommended the avoidance of the unnecessary verbiage formerly common in bills for infringement, as serving no useful purpose. I am entirely in accord with these recommendations, and with the similar suggestions made by Judge Ray in his opinion above cited.

Upon the question now being considered, I agree with Judge Ray and Judge Hand, and hold, as they have held, that rule 25 does not change the previously settled requirement of distinct allegations of

compliance with sections 4886 and 4887. Such allegations were previously held necessary because they were of facts essential to the validity of the patent sued on, and therefore to the relief sought. If essential to this extent, I must consider them statements of ultimate facts, as distinguished from statements of mere evidence, for the purposes of rule 25. Said facts can be shortly and simply stated in various ways; one way being that suggested in Judge Ray's opinion above referred to ([D. C.] 205 Fed. at page 521). There will be no occasion for a return to any of the unduly prolix forms wherein they have sometimes been stated. Perhaps they may be capable of sufficient statement in a form even more condensed; but the language whereby this bill attempts to cover them seems to me altogether too general and indefinite.

The bill affords no express description of the alleged invention, although Uebersax is alleged as above to have invented "a certain process or method," etc., afterwards patented, and said process or method, as "shown, described, and claimed" in the alleged patent, is alleged to have proved itself of value by commercial success, and also to have been infringed by the defendant. This is not a description sufficient for the purposes of a bill not setting forth or making profert of the patent referred to, by the amendment said to be intended as above, however, this defect will be cured.

Among the prayers for relief is one for the surrender and destruction of all apparatus used or intended for use in the alleged infringement. The patent, so far as appears from the bill, covering only a process or method, the bill appears to show no ground, as it stands, for the granting of any such relief. But this objection, since it would at most justify only the striking out of the prayer referred to, need not be further considered at present.

The result is that the bill is insufficient as it stands, and must be dismissed if not amended. Unless amended within ten days from this date, there may be a decree dismissing it, with costs.

THE GILBERT R. GREEN.

THE DOBSON BROS.

(District Court, E. D. New York. July 30, 1917.)

ADMIRALTY ⇐51—DEATH OF DEFENDANT—SUBSTITUTION OF PARTY—OPENING DEFAULT.

The attorneys for the individual defendant, in an action in admiralty against a ship and its owner, having allowed default without bringing to the court's attention the death of such defendant, and so keeping open the time for applying for further opportunity to answer, and having let the term of court and the period fixed by admiralty rule 40 for moving to open default decree expire, before asking the court to give deceased's representatives opportunity to contest the action in his place, and the defense which they offer not showing that deceased was not the proper person to defend, or that his attorneys were not bound to avoid default, and default having been allowed against the ship, the motion will be denied.

In Admiralty. Action by the Hecker-Jones-Jewell Milling Company against the steamer Gilbert R. Green, Thomas McIntire, its owner, and the barge Dobson Bros. On motion, after default, to give the representative of defendant McIntire, deceased, opportunity to defend in his place. Motion denied.

Duncan & Mount, of New York City, for libelant.
Foley & Martin, of New York City, for claimant.

CHATFIELD, District Judge. Death of the plaintiff abates certain actions and stops the trial of other causes until the proper parties are brought in. But the death of the defendant, in most cases, requires mere notice of that fact and a substitution of those entitled to defend, if they have no new issue to raise. Entry of judgment by default against a dead defendant may furnish an adjudication of his rights by which his estate will be bound, if the defendant or his attorneys, prior to the decease, were properly before the court and the default was not occasioned by the death.

A default for other reasons cannot be opened upon the ground of the death alone. The estate or attorneys for the deceased should come in and secure the substitution, to meet the situation, and could open any default, if not too late to do so, and if the laches be explained.

In this case there was an appearance for the respondent by attorneys who ceased to represent him. The new attorneys, who to the knowledge of the court and proctors for the libelant were conducting the litigation before the respondent's death, but who had not been substituted of record, did not seek to obtain time to answer when he became ill, and did not seek to delay the proceedings in the case at the time of his death, nor did they, until after the entry of the decree, have the death noted on the record. They have let the term of court and the period fixed by rule 40 expire before asking the court to give the representatives an opportunity of contesting the action in the place of the deceased. The defense which they offer would not have shown that the deceased was not the proper party to defend the action, or that his attorneys were not bound to avoid default. This action was also pending in rem against the boat on the same allegations of fault and liability. As to that, default was allowed, without reservation of the right to contest the charge of fault. The incapacity and death of the respondent was a matter which the proctors should have brought to the court's attention, so as to have the time kept open within which they might act to protect themselves.

The evidence does not show any information conveyed to the proctors for libelant, or the clerk of the court, which made the entry of the decree a clerical mistake, or based on error of fact that, if corrected, would have made the judgment void. S. M. Hamilton Coal Co. v. Watts, 232 Fed. 832, 147 C. C. A. 26; United States v. Mayer, 235 U. S. 55, 35 Sup. Ct. 16, 59 L. Ed. 129. The mistake here was that the attorneys did not keep the time to answer open, and the right to be substituted as a party to the suit would not extend the time to apply to the court for further opportunity to so do.

Motion denied.

THE SEA FOAM.

(District Court, W. D. Washington, N. D. May 8, 1917.)

No. 3589.

MARITIME LIENS ⊂=37—PRIORITIES—TIME OF ACCRUAL OF CLAIM—HARBOR VESSELS.

The 90-day rule established by the District Court of the Western District of Washington for the classification of maritime liens applies as between liens for wages, as well as to liens for repairs and supplies.

In Admiralty. Suit by the Port of Seattle against the gasboat Sea Foam; Leonard Barnhill and Arthur Gaaseland, interveners. On exceptions by intervener Gaaseland to report of commissioner. Exceptions denied.

Daniel Landon, of Seattle, Wash., for intervening libelant Gaaseland.

J. M. Boyle, Jr., of Aberdeen, Wash., for intervening libelant Barnhill.

NETERER, District Judge. This boat was libeled to recover for labor and material supplied in repair work to the vessel between the 27th day of December, 1916, and the 15th day of January, 1917. Intervening libel was filed by Leonard Barnhill to recover seaman's wages earned on the vessel between January 27 and March 27, 1917, in the sum of $175. Arthur Gaaseland intervened, alleging that there was due him $337.50 seaman's wages from the 15th day of June, 1916, to the 1st day of November, 1916. The case was referred to the commissioner to hear the testimony and report findings and conclusions. Leonard Barnhill is given a lien of the first class, Arthur Gaaseland of the second class, and the port of Seattle of the third class. Gaaseland files exceptions to the report upon the ground that the classification was wrong, and that Barnhill and Gaaseland should be in the same class.

The 90-day rule established by this court in The Edith, 217 Fed. 300, is invoked by Barnhill, and the excepting intervener contends that this rule cannot apply to a claim for wages. The court's attention has not been directed to any convincing authority, and there is no apparent reason, why the distinction should be made. The same rules apply to liens for wages as to liens for materials, supplies, and repairs. The Dubuque, 2 Abb. U. S. 20, Fed. Cas. No. 4,110, in which the court said:

"In determining this question, the same rule applies to liens for wages as to liens for repairs and supplies."

And to the same effect is The Nebraska, 69 Fed. 1009, 17 C. C. A. 94. Both of the claims being for wages, there is no reason apparent why the 90-day rule should not have operation as between these claimants. This view has been indorsed by the Circuit Court of Appeals of the Second Circuit in The Samuel Little, 221 Fed. 308, 137 C. C. A.

136, in which Circuit Judge Rogers exhaustively discussed the 40-day rule of the Southern district of New York, where the same contention was made as is made in this case.

The exceptions are denied, and a decree directed in accordance with the report of the commissioner.

ATHERTON et al. v. BEAMAN.

(District Court, D. Massachusetts. April 20, 1917.)

No. 786.

BANKRUPTCY ⊂=293(1)—TRUSTEES—PLENARY ACTION.

Trustees in bankruptcy may resort to a plenary action in the District Court to protect their right to the possession of personal property belonging to the bankrupt.

In Equity. Bill by Percy A. Atherton and others, trustees in bankruptcy, against Nathaniel P. Beaman. On motion to dismiss. Motion overruled.

Swift, Friedman & Atherton, of Boston, Mass., for plaintiffs.

Foster & Turner, Reginald Foster, Wm. D. Turner, and George Hoague, all of Boston, Mass., for defendant.

MORTON, District Judge. If trustees in bankruptcy may resort to a plenary action in this court to protect their right to the possession of personal property belonging to the bankrupt, the present bill of complaint concededly states a case. In Whitney v. Wenman, 198 U. S. 539, at page 553, 25 Sup. Ct. 778, 49 L. Ed. 1157, a plenary suit instituted by trustees in bankruptcy to regain possession of property alleged to belong to the estate was expressly approved by the Supreme Court.

The question raised by the motion to dismiss is concluded by that decision, and the motion must be overruled.

GOULD v. SUBURBAN GAS & ELECTRIC LIGHT CO.

(District Court. D. Massachusetts. February 23, 1917.)

No. 744.

1. PARTIES ⊂=59(4)—AMENDMENT.

There may be amendment to make the action by plaintiff as administrator by him as ancillary administrator; the cause of action remaining the same, to recover for intestate's death.

2. COURTS ⊂=311—FEDERAL COURTS—JURISDICTION.

It is the citizenship of the administrator suing, and not the place of his appointment, which gives a federal court jurisdiction.

At Law. Action by Chester Gould against the Suburban Gas & Electric Light Company. Plaintiff's motion to amend granted.

William H. Sleeper, of Exeter, N. H., for plaintiff.
Walter I. Badger, of Boston, Mass., for defendant.

MORTON, District Judge. The defendant moved to dismiss the amended declaration, upon the ground that a New Hampshire administrator has no right to sue in this court. The case was continued, and during the continuance the plaintiff has been granted ancillary administration on the estate of the deceased in this commonwealth. The plaintiff now moves to amend the original action, so that it shall appear that he is suing as ancillary administrator under the Massachusetts appointment. It is objected by the defendant that there can be no such amendment, and that the plaintiff must bring a new suit as ancillary administrator.

[1, 2] On questions of this character the point of inquiry is the nature of the cause of action. As long as that remains the same, the court has discretionary power to allow amendments bringing in the proper parties, as was expressly decided in Silva, Adm'x, v. N. E. Brick Co., 185 Mass. 151, 69 N. E. 1054. In this case it is clear that the cause of action has been and is to recover damages for the death of the plaintiff's intestate; there has been no change in it. Assuming, without so deciding, that the original plaintiff was not the proper person to enforce that cause of action, the court has power to allow an amendment bringing in the proper party plaintiff. In Dearborn v. Mathes, Adm'x, 128 Mass. 194, where the present question was raised after verdict, the court refused, on proceedings for review, to award a new trial, saying that, as letters of ancillary administration had been taken out in Massachusetts, the defendant was in no danger of suffering any injustice. That observation is equally applicable here. Of course, it is the citizenship of the administrator which gives jurisdiction, not the place where his appointment is made. Bishop v. Boston & Maine (C. C.) 117 Fed. 771.

The motion to amend is granted.

MOORE et al. v. NORRISTOWN TRUST CO.

(District Court, E. D. Pennsylvania. May 29, 1917.)

No. 1331.

REMAINDERS ⇐14—SALE OF INTEREST IN REMAINDER—VALIDITY.

Complainant's intestate was the owner of one-third interest in an estate in remainder after the death of the survivor of three life tenants. He sold and assigned the right to receive $400,000 out of such interest to defendant for $90,000. At that time the life expectancy of the youngest of the life tenants, computed by the American Life Tables, was 24 years. The assignor, while having ample intelligence to understand what he was doing, was intemperate and a prodigal spendthrift, weak in character, and subject to imposition by the unscrupulous; but such fact was not known to defendant, which dealt with him in good faith. He also had the assistance of counsel in the negotiations. After his death, complainant brought suit to set aside the sale; one of the life tenants being

still living. There was no offer to reimburse defendant, so as to place it in statu quo ante; but complainant asked that the transaction be decreed a sale or collateral loan, whichever might prove to be the more advantageous to decedent's estate. *Held*, that the consideration paid was not inadequate, and the sale was one which the assignor, if desiring to sell, might reasonably have made, if fully competent, and that, in view of such facts and the good faith of defendant, there was no ground which would justify a court of equity in remaking the contract as prayed for.

In Equity. Suit by Gertrude L. Moore, individually and as ancillary administratrix of the estate of Henry G. Moore, deceased, and Eliza C. Schott, against the Norristown Trust Company. Decree for defendant.

Jordan & Williams, of New York City, and C. P. Sterner and R. D. Brown, both of Philadelphia, Pa., for plaintiffs.

Alex. Simpson, Jr., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge This is a bill to cancel a conveyance, following the sale of a property, on the ground that the vendor was without legal capacity to make a valid sale. The property sold was the right to receive $400,000 out of one-third of the remainder of the estate of Andrew M. Moore, deceased, upon the death of the survivor of his three sons, the income from which remainder was payable under a spendthrift trust to the sons and the survivors until the death of the last survivor. The transfer now asked to be avoided was made July 23, 1902. At the time the expiration of life (as figured from the American Life Tables) of such last survivor was such that it is agreed that an estimate of 24 years before the remainder interest would fall in and the principal become payable was a fair one. Two of the three sons are now deceased. Each of those now deceased lived out about his expectation of life as thus estimated. The life expectation of the survivor has still some years to run. The interest affected by the assignment before us is the interest of Henry G. Moore. He is now deceased, and the bill was originally filed by his administrator. As in his lifetime he had been adjudicated a bankrupt, his trustee in bankruptcy was by amendment added as a party plaintiff. The bill as filed avers, to quote from the paper book of counsel for plaintiff:

"That at the time of said conveyance [the grantor] was mentally and physically incapacitated from executing the same, or from knowing the true extent and meaning thereof, was insane and a confirmed victim of drugs and medicines(?), was of immoral habits and a perfect tool in the hands of those whom the defendant employed to secure the signature of the said Henry G. Moore to the same."

The present counsel for plaintiff have incorporated in this statement a quotation from the bill without, we assume, adopting as their own the language in which the thought intended to be expressed is given expression. The quoted phrases are clearly intended to convey to our minds two thoughts: One is that the sale referred to was void, because made by one who was without legal capacity to contract; and the other, that the grantee had fraudulently procured the sale to be made to it. It may be stated preliminarily to any discussion of the

true fact situation that, if either of these averments were supported by anything which is in evidence in this case, the burden resting upon the trier of the facts would be, under the facts which are in evidence, rendered a very light one. Indeed, if there was anything in the case to justify a finding, or even to give to such finding color of probability of its correctness, that the sale now questioned had been brought about by the active procurement of the defendant, or the grantor had been sought out by the defendant and urged to make it, little time would be required to reach a decision indicating the decree which should be entered.

We premise the discussion of the facts, in order to shorten it, with the statement that, whatever the truth may be, there is absolutely nothing in the evidence which hints at aught else than the fact that the defendant acted without knowledge, reason to believe, or thought of anything else than that the vendor was fully competent to act, that he was acting with due deliberation and upon careful consideration, that he had the aid of competent and faithful counsel, who were advising him in what he did, and that the consideration paid was a concededly adequate and fair one for what was sold and bought. Indeed, the sole question of difference of opinion which arose between the parties or counsel was over, not the fair value of that which was sold, but over the fair value of the remainder, a third interest in which (after the life estates had fallen in) was at first proposed to be sold. All such difference of opinion was removed by the suggestion to sell, not this one-third interest in the remainder of the estate, but the right to receive $400,000 out of this one-third interest at the death of the survivor among the life tenants. We are, of course, bound to find the fact of undue or improper conduct on the part of the vendee in accordance with the evidence, whatever the truth might be surmised to be, or whatever suspicions might be aroused; but the presumption that the truth is in accord with the evidence is confirmed and strengthened by the circumstance that not even the heat of an earnest argument has induced or tempted counsel for plaintiff to hint, much less assert, that the defendant had acted otherwise than in good faith or with knowledge that the grantor was an incapable.

The whole difficulty, and the only difficulty, in reaching a satisfying judgment of the merits of this case, arises out of the existence of these two facts: One is that the grantor was a prodigal spendthrift, without other limitation to his impulse to throw away what he had than the extent of his possessions. The other is that the defendant dealt with him without knowing that he was what he was, and gave him a price for that which was sold which is not even now criticized as inadequate, much less unfair. The one fact calls loudly upon the law to protect, not the man himself, who, because he was what he was, could neither be protected nor even benefited, but to save his estate, if possible, to his family from a waste so inane as to be painful to witness. The other voices just as loudly the necessity for caution, lest injustice be done to the purchaser and injury to the public, by setting up unwise and impracticable standards and tests in business transactions.

It is as well to dispose of this latter feature of the case, for it goes to the whole bill in respect to its legal merits. In disposing of this feature we will assume (to paraphrase a citation in the paper book of plaintiff) that the—

"sale will be set aside if the vendor, while not non compos mentis or insane, was none the less so far an incapable that a contract made by him should be scrutinized with the utmost care, to determine whether in itself it was of such a character as that a person fully competent to contract would have entered into that kind of a contract, although willing to sell."

This comes close to determining whether the transaction furnishes internal evidence of such imposition or overreaching as to lead to the conclusion that no one except an incapable would have made it. In the first place, we are bound to find that the vendor protected himself absolutely against any possible undervaluation of the thing which he was selling by limiting the value of what he sold to a $400,000 interest. The sale was not of property of uncertain value, but of a fixed sum of money. It might be of less value than $400,000, but it could not be more. The then present value of the $400,000 was uncertain, because it was to come into possession at the end of three lives then in being. The time of the receipt of the money could not be known, but it could be and was determined by reference to the American Life Tables, giving the expectation of life of the youngest of the three life tenants. This, as a basis of valuation, might well be accepted by the most capable and the shrewdest of vendors. This basis, in fact, favored the vendor, because the contract was based, not upon the death of the youngest of the sons, but upon that of the survivor of the three. In golfing parlance, handicapping the players by figures representing the expectation of the life of each in reverse order, the vendee was playing a match, not with the life tenant having the lowest handicap, but playing the best ball of the three. A mere contrast of the figures, $90,000 paid and $400,000 to be received, would startle us into the conviction of inadequacy of price. When tested, however, by any known test, the application of which has been suggested, this first-blush conviction of inadequacy is changed.

Given the choice of $90,000 now, or of $400,000 to be received at the death of the survivor of three persons, the youngest of whom has a life expectancy of 24 or 25 years, any one might well hesitate which to take. Let us apply a very simple test, and assume the $90,000 to have an earning capacity of 6 per cent. Assume, further, that the interest or income was invested in that form of savings fund investment known as a building association, and as the stock matured the income with its additions reinvested. At the end of the life expectancy period, the stock would have twice matured and a third period would have been entered upon. At the first maturing period the stockholder would have had $180,000, and at the second $360,000. This, with the value of his holdings in his third investment, would have exceeded $400,000. The annuity tables reversed, and reduced to a 6 per cent. basis, and the interest tests would show a like denial of any substantial inadequacy. Reduce the figures to the form of a corporation bond or stock issue, and assume a bond or stock issue of 4,000 bonds, or

shares, of the par value of $100. Assume no interest or dividends to be either paid or earned during the lives of any of three persons of the expectancy of life, respectively, of these life tenants. Would $22.50 be deemed an unduly low price? Add to these tests the fact that the case is barren of any evidence or suggestion even that the price was in fact inadequate, and we reach pretty nearly an impossibility to discover any legal justification for a finding that any undue bargain was driven by the defendant.

The line to be drawn in cases of this general character is located for us as definitely as it can be in the citations quoted in Kilgore v. Cross (C. C.) 1 Fed. 578. From this we gather the thought that when there is capacity to act, so that we are beyond the line of legal incapacity, rendering the contract void, there must be in the case an element very much like actual fraud in order to avoid the contract as made, and there is no better nor more convincing evidence of the presence of this annulling element than the transaction itself, the binding character of which is in dispute. This internal evidence, as it may be called, must show more than mere inadequacy of price, although this, if gross, may with some evidence of incapacity, even if the latter be slight, suffice to support a decree annulling the transaction. Fraud is a term which does not lend itself to definition, nor can a measure be assigned to the mentality or intelligence required to give binding effect to a contract. The presence of legal capacity is something felt, and cannot otherwise be sensed.

One obstacle to a decree in plaintiff's favor in the present case is, not the fact that this grantor had sufficient intelligence to grasp and to discuss all the considerations which entered into the making of the contract of sale, but the absence of the employment of any artifice or undue influence, or even the acceptance of any undue benefit from the bargain by the grantee. This latter feature is the real touchstone of all these quasi incapacity to contract cases. The question is never so much what the grantor had the capacity to do, as whether the grantee received that which a right-minded person would not under all the circumstances have consented to accept, not from any grantor, but from that grantor. It is this second element which impels a court to undo what has been done by cutting the contractual ligaments by which the grantee has sought to bind the grantor. The element of incapacity is brought in to supply an excuse, if not a legal justification, for doing justice, and to bring the ruling in line with accepted legal principles. It is somewhat analogous to the expedient of bringing in the fiction of lost services to award damages to a father whose daughter has been debauched.

Another obstacle to a decree in favor of the plaintiff is interposed in that, the absence of bad faith on the part of the grantee being conceded, no means of restoring the status quo is suggested. The decree we are asked to make is nothing more or less than the rewriting of the contract to make it a collateral loan (instead of a sale) with an "if" condition. The "if" is to be resolved by the event. If the bargain as made turns out to be favorable to the grantee, the sale as made becomes a loan. If, on the other hand, the bargain results in advantage

to the grantor, the sale as made remains a sale. This view of the law of the case is in accord with all the adjudged cases to which we have been referred, some of which, listed from the citations in the paper books, are as follows: Kilgore v. Cooper (C. C.) 1 Fed. 578; Billings v. Aspen, etc., 51 Fed. 338, 2 C. C. A. 252; St. Louis, etc., v. Phillips, 66 Fed. 35, 13 C. C. A. 315; Moore v. Gilbert, 175 Fed. 1, 99 C. C. A. 141; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260; Griffith v. Godey, 113 U. S. 95, 5 Sup. Ct. 383, 28 L. Ed. 934; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597; Nace v. Boyer, 30 Pa. 99; Bank v. Fidelity, 251 Pa. 529, 97 Atl. 75.

The foregoing desultory and rambling discussion indicates with sufficient clearness the conclusion with which the trial of the case has impressed us as the proper one. These impressions may be thus summarized. The kind of man the grantor was, and the utterly inane way in which he frittered away the fortune left him by his father, and the consequent destitution to which he subjected his wife and daughter, would make any one eager to seize upon anything which would serve as an excuse for undoing anything which he had done. As in life, so in death, it is absolutely impossible to do anything to protect a man of this type or his property from himself. The world-old task of making a silk purse out of a sow's ear is easy in comparison. The parties are, however, entitled to have findings of facts as definitely formulated as the nature of the case will permit. They cannot be definitely made without restating the testimony at length. For this reason, and because the argument was had at the close of the trial without the opportunity for counsel to prepare paper books, we will answer for incorporation with this opinion any requests for findings of fact or conclusions of law which counsel care to submit.

It is an easy feat to call up in our minds a picture of this grantor as he was. He is, however, dead, and nothing but a sense of duty would reconcile us to the wisdom or necessity of "drawing his frailties from their dread abode." To produce this portrait for inspection is not an agreeable or an easy task. To adequately portray his "progress" would require the genius and the pencil of a Hogarth. The common speech of the people supplies us with a phrase which fits him as with a garment. He was a "good for nothing." As a label of his character the phrase is just. To be understood as descriptive, emphatic emphasis must be placed upon the final word. The probabilities are he was a congenital fool. The further probability, reaching a normal certainty, is that he was never subjected in his childhood and early youth to that training and discipline which to one of his weak character was absolutely necessary to make him even passably decent. As soon as he was old enough to learn of them, he indulged himself in all the vices and follies within his reach. He ran the gamut of them all—sexual immoralities, drunkenness, and vile drugs, which give their deluded victims for a brief moment a horrid counterfeit of the joys of life. The consequence was, of course, his absolute ruin. He became a moral, mental, and physical wreck, and at last presented that most disgusting,

if not pitiable, of all spectacles, a worn-out roué, cursed by desires which he could no longer gratify, and with nothing left to him except his egoism. He was throughout his whole career a most inane, profligate, and prodigal spendthrift. He threw away all he had to any one who was unscrupulous enough to pick it up. He was the easy victim of the grossest and clumsiest of frauds.

This was not because he had not the intellect to grasp and understand what he was doing, but because he was so egotistically indulgent of himself and so weak in character that he did not value what he had in hand, however great its value might be, in comparison with the gratification of the slightest whim of desire, no matter how trivial the object of his desire might be. This made of him an easy mark. There was no limit to the extent of the fraud which could be imposed upon him, other than the moderation of the one who fleeced him. This is disclosed by many of his transactions. He was, indeed, able in some of his financing to get in the position of having accomplished the impossible feat of borrowing large sums of money, running into thousands, from people who in the first place had not a dollar to loan him, and in the second place would not have advanced him a nickel. The evidence clearly shows that to have saved him from robbery in one transaction would merely have preserved what he had to become the loot of the next despoiler whom he encountered. If it were possible to have turned back into his estate any share of his interest in his father's estate, there would be grave danger it would go to those who have no just title to any of it.

The effects, physical, mental, and moral, of his indulgence in drink and vile drugs, are well described by Dr. Attex as those which always befall the victims of such vicious habits. When under their influence he was the subject of delusions and hallucinations. The after effects sent him into the horrors of a depression of spirits from which he could think of no relief except a resort to reindulgence in what had produced that condition. The delusion of being pursued remained with him for longer and longer periods. There never was a time, however, at least before the time of the contract of sale now under investigation, when, except while under the direct influence of intoxicants or drugs, he had not the intellectual capacity required for the transaction of any business act.

There is absolutely no evidence that the defendant knew or had reason to suspect that it was dealing with a man whose capacity was even open to question. The fact is, however, that he was of that type of hopeless irresponsibles that no one, no matter how high their character or unsullied their reputation, could have a voluntary dealing with him, without paying the penalty of being deemed by all who knew the grantor of being unscrupulous simply because of having had a business dealing with him. It would have been taken for granted, by those who knew Moore, that no one, unless their duty absolutely required it, would have any dealings with him, unless their purpose was to rob him. Even those who were parties to this transaction, unimpeachable as they have always been in character and reputation, are saved from this impeachment solely by the fact that they

did not treat him unfairly. In this is presented the whole merit of the defense and the weakness of the case against this defendant. The following findings and conclusions justify a dismissal of the bill:

1. The grantor had amply sufficient intelligence to understand all he was doing and to comprehend the effect of any bargain he was about to make.

2. He was, however, so weak in character, and so blinded by the strength of his impulse to gratify his desires, and so dominated by the egoism which made nothing of value in comparison with the gratification of his merest whim, that he invited himself to be defrauded by every person of evil design with whom he came in contact.

3. The defendant dealt with him without knowledge or suspicion that he was an incapable, and without anything appearing in the course of the transaction which gave notice or warning of his true character and business capacity.

4. There is nothing in the contract of sale from which it would appear that the grantor had been overreached, and no averment based upon the evidence before the court that any advantage in purpose or result had been taken of him.

5. The grantor was so far an incapable, and so far incompetent in fact to enter into any contract, that one made by him which was greatly and unduly to his disadvantage might be presumed to be the product of a fraud practiced upon him.

The bill is dismissed, with costs to defendant, and a formal decree to this effect may be submitted.

Questions as to the competency of some of the witnesses and as to the admissibility of some of the evidence were raised at the trial. In accordance with the wish of counsel, the decision of all such questions, except in one or two instances, was reserved. We have not thought it necessary to discuss the competency of any of the witnesses who testified under objection, or any of the evidence which was admitted under a like objection, because the findings of facts made have been reached independently of and without regard to all such testimony and evidence. The question of the competency of the witnesses who did not testify, or of the admissibility of the evidence which was rejected, was not discussed at the argument. We do not mean that the questions were waived, because there were other reasons for not discussing them. The undue length to which this opinion has already been drawn out is a reason, however, for us to leave all such rulings to vindicate themselves, or to the support of the counsel in whose favor the rulings were made, respectively.

VANIER v. SWETT.

(District Court, D. Maine. June 30, 1917.)

No. 371.

1. MASTER AND SERVANT ⟸101, 102(8)—APPLIANCES AND PLACES FOR WORK—DEGREE OF CARE.

An employer was bound to exercise the care of a reasonably prudent man in providing his employés with safe and suitable materials and appliances for carrying on their work and a safe place in which to perform the work.

2. MASTER AND SERVANT ⟸116(1), 190(12)—LIABILITY FOR INJURIES—SCAFFOLDING—DELEGATION OF DUTY TO FELLOW SERVANT.

Though, where a structure is erected by workmen from material furnished by the master, and the master has no control of the construction, he is not liable for injuries sustained by reason of defects in the structure, if he has used the care of a reasonbly prudent man in the selection of suitable material, the rule does not apply if the employer undertakes to furnish the scaffold for the men, who are to work thereon, and in such case the duty is one of the master's positive duties, which cannot be discharged by the substitution of a competent agent, and the negligence is the negligence of the master, without regard to the rank of different employés.

3. MASTER AND SERVANT ⟸116(1)—LIABILITY FOR INJURIES—DEFECTIVE BRACES.

Where a foreman in charge of ship carpenter work in the hold of a ship selected from a large pile of similar sticks the timber to be used in constructing braces, and sent into the hold of the vesel the exact number of pieces required for the braces, with the intent and expectation that they would be used, the employer could not defeat liability on the theory that it purchased the lumber from a reputable dealer and permitted the workmen to make their own sclection.

4. MASTER AND SERVANT ⟸185(19)—LIABILITY FOR INJURIES—INSPECTION—DELEGATION TO FELLOW SERVANT.

Where the master retains control of the work, gives directions in reference to the manner of doing it, and selects the material, the duty of inspection is imposed upon him, and if he attempts to delegate such duty to a fellow workman, the person so delegated becomes his vice principal, and the master is responsible for the negligence of such vice principal.

5. MASTER AND SERVANT ⟸279(1)—ACTIONS FOR INJURIES—COMPETENCY OF FOREMAN—EVIDENCE.

In an action for injuries caused by the breaking of a brace on which plaintiff was working in the hold of a ship, where the evidence showed that the brace was of short leaf Southern pine in a dozy condition, containing knots, and there was expert testimony that lumber of this character was brittle and liable to break when exposed to a sudden jar, but the foreman who selected the timber for the braces testified that he did not know any difference between short leaf pine and long leaf pine, that he ordered the lumber taken from a pile just as it came, and that he sent into the hold any piece of lumber that the employer furnished, the evidence did not show that the foreman had a sufficient knowledge of lumber and a sufficient appreciation of his duty to be intrusted with control of the work.

6. MASTER AND SERVANT ⟸235(7)—LIABILITY FOR INJURIES—DUTY OF INSPECTION.

Where the lumber for braces on which an employé was working was furnished by the employer, the employé was justified in assuming that it was reasonably safe and suitable and had been properly inspected, and was not required to examine the braces for himself.

7. MASTER AND SERVANT ⟸281(8)—ACTIONS FOR INJURIES—EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an employé, caused by the breaking of a brace on which he was working in the hold of a ship as he was in the act of turning for the purpose of descending, evidence *held* not to show by a preponderance that he was contributorily negligent in attempting to go down the brace as he did.

In Admiralty. Suit by Joseph Vanier, Jr., against Clinton T. Swett. Decree for libelant.

Henry Cleaves Sullivan and Benjamin Thompson, both of Portland, Me., for libelant.

Wm. H. Gulliver, of Portland, Me., for respondent.

HALE, District Judge. This suit is for personal injuries alleged to have been received by the libelant while employed as longshoreman, in ship carpenter work, fitting up the steamship Virginia, preparatory to her loading grain, while lying at a wharf in Portland harbor. The respondent was under contract with the master of the steamship to furnish labor and materials required in erecting shifting boards to fit up the steamship for loading a cargo of grain. The steamship is a large vessel, so constructed in her lower hold, with iron stanchions about three inches apart, that two-inch planks can be put in between them, extending, fore and aft, the whole length of the several holds. After these shifting boards had been put in position, uprights or breast boards were secured to them. On each side of these breast boards were two braces, constructed of timber four inches by six, extending from the breast boards to the wings of the ship, to hold the shifting boards in place, and to prevent the shifting of the cargo while the ship is at sea. These braces were prepared in the ship's hold. After each brace had been constructed, one end of the brace, the nose, as it is called, was beveled off so as to rest against the breast board. The other end was so beveled as to adapt itself to the wing of the ship. Each brace was put in place by hoisting up one end into position, so that the nose of the brace rested against the breast board, at the point where it was to be secured. The in-board end, or nose, of the brace, was then secured to the breast board by nails and by cleating across the top and along the sides. To do this work, one of the men was accustomed to carry the in-board end up a ladder, place it in position, and then get onto the brace and sit astride of it, while securing the in-board end and cleating it. On the morning of November 29, 1915, about 8 o'clock, the libelant, while in the employ of the respondent, was doing this service, and was sitting astride the brace within three or four feet from the top. After completing his work, he had started to turn around, preparatory to coming down off the brace, intending, as he testifies, to lower himself from the upper brace to the lower brace, and then to descend, with his hands on the upper brace, and his feet on the lower brace, which had already been placed in position, some seven feet below the upper brace, secured to the breast board and to the skin of the ship in the same way the upper brace was secured. While backing down

on the upper brace, preparatory to lowering himself to the lower brace, the upper brace broke, five to seven feet from the breast boards, causing the libelant to fall into the lower hold, and causing the injuries for which he seeks to recover.

[1] The pleadings and proofs show that the work was being carried on under the respondent's directions, acting through Mr. Loignons, his foreman, who selected the material with which the work should be done and ordered it sent into the hold of the vessel; that the foreman determined what part of the lumber should be used in the hold, and directed with reference to the manner of carrying on the work. The respondent was bound to exercise the care of a reasonably prudent man in providing the men with safe and suitable materials and appliances for carrying on their work and a safe place in which to perform the work. He contends that the evidence brings the case within that class of cases which hold that a master, who has provided an ample supply of appliances and materials to be used in construction, is not expected to stand over each servant every minute to discover any defect in good material; that the master must employ competent men to take charge of the work, and must furnish enough suitable material, out of which the duty devolves upon the workmen to select material for their use in carrying on the details of the work. The respondent urges that he undertook only to furnish materials, sufficient in kind and suitable in character for the work, and that the negligence in selection, if any, was the negligence of the libelant's fellow servants. He therefore relies upon the law as stated in Colton v. Richards, 123 Mass. 484; McCarthy v. Claflin, 99 Me. 290, 59 Atl. 293; Shearman & Redfield on Negligence, § 195. He contends that whatever fault there was in the wood formed a latent defect; that the material was purchased from a reputable dealer, and there was no duty on the part of the respondent to make particular inspection; but that he might properly rely upon his employés and servants to make such selection as was necessary for carrying on the work. Pellerin v. International Co., 96 Me. 388, 52 Atl. 842; Roughan v. Boston & Lockport Block Co., 161 Mass. 24, 36 N. E. 461; Reynolds v. Merchants Woolen Co., 168 Mass. 501, 47 N. E. 406; Fuller v. N. Y., N. H. & H. R. R., 175 Mass. 424, 56 N. E. 574; Patton v. Texas & Pacific Railway Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361; Texas & Pacific Railway Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Frame v. Houston (N. H.) 100 Atl. 545.

[2] It is true that, where a structure is erected by workmen from material furnished by the master, such master, having no control of the construction, is not liable for injuries sustained by workmen by reason of defects in the structure, if he has used the care of a reasonably prudent man in the selection of suitable material. There is a class of cases which holds that, when an employer furnishes proper material for a structure such as may be built by unskilled workmen, and the workmen themselves construct it as part of the work they undertake to perform, and in accordance with their own judgment, the employer is not liable for injuries sustained by a workman while subsequently using the structure, and in consequence of negligence in its

construction; the reason being that such structures do not require greater knowledge, or the exercise of more skill, than is usually possessed by the ordinary mechanic. American Shipbuilding Co. v. Lorenski, 204 Fed. 39–42, 122 C. C. A. 353.

But, as Mr. Justice Lurton said, in Chambers v. American Tin Plate Company, 129 Fed. 561, 562, 64 C. C. A. 129, 130, where the subject of the contention was a certain scaffolding:

"The rule is quite otherwise if the employer himself undertake to furnish such scaffolding for the men who are to work thereon. In such case the duty is one of those positive duties of the master toward the servant, which cannot be discharged by the substitution of a competent agent. The act or service to be done is that of furnishing a reasonably safe place or appliance, and negligence in the doing of such a service is the negligence of the master, without regard to the rank of different employés."

[3, 4] After examining the proofs, I am of the opinion that the case comes within the rule stated by Judge Lurton. The whole testimony taken together does not justify me in finding that the respondent is relieved from liability, for the reason that he purchased lumber of reputable dealers and sent into the hold of the steamship large quantities from which the workmen were to make selection, and that therefore the burden was left upon the workmen to see that proper material went into the braces. The evidence leads me to the conclusion that the respondent assumed the duty of selecting the material and performing the work, and that the lumber which went into the construction of the defective brace was selected by the foreman from a large pile containing similar sticks of timber, and was sent down by the foreman into the hold of the ship for use; that, instead of there being a large quantity sent down into the hold where this brace was made, there were sent into this hold only eight pieces of 4x6 timber, just enough to make the four braces required in this hold, and that those pieces were sent with the intent and expectation that they would be used; that in the general conduct of the business no effort was made by the foreman to have the man bringing the lumber from the wharf to the ship select pieces suitable for the special work to be done, but that they were told to take the lumber "just as it came from the pile"; that the lumber selected in this way was loaded by the workmen on trucks and wheeled down the wharf abreast of the hatch, where it was to be used; and that it was the custom of the foreman to stand by the hatch when the lumber was lowered into the hold. The answers to the formal interrogatories attached to the libel, and other testimony, leads me to believe that no inspection whatever was made of the lumber before it was sent down into the hold. The foreman testifies that, when this stock from which the brace was made was lowered into the hold, he was standing near the hatch; that he did not see anything happen in the hold which would break the stick, and he knew that it was the kind of lumber that breaks easily; it had large knots in it, which are indications that it would break easily; but that, in spite of all this, he did not make any inspection of it when it went into the hold. In cases where the master retains control of the work, gives directions in reference to the manner of doing it, and selects the material, the duty of inspection is imposed upon the mas-

ter; and if he attempts to delegate such duty to a fellow workman, the person so delegated becomes his vice principal, and the master is responsible for the negligent act of such vice principal as if the act were his own.

In Lafayette Bridge Company v. Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33, the court held:

"A bridge company owes a positive duty to its employés engaged in building a steel bridge over a river, the materials and parts of which are supported by a temporary wooden structure during the work, to furnish timbers for such structure which are reasonably fit for the purpose, and to have the same inspected by a person having the requisite technical knowledge and experience to qualify him for the duty. Where, in such a case, no inspection was made, but the timbers and plank used were selected from a larger quantity by common workmen, by direction of the foreman in charge of the work, the company is liable for the death of a workman, caused by the breaking of a defective plank, which was required to support a heavy load, the unfitness of which would have been disclosed by a proper inspection by a competent person, but was not apparent to an unskilled man."

In speaking for the Circuit Court of Appeals, Seventh Circuit, Judge Jenkins said:

"If the duty of inspection was delegated to the foreman in charge of the work, it was not performed. He instructed common laborers to select the plank, and to pick out the best. Such selection, however, is not the inspection which duty to the servant required. The common laborer might form some judgment between two sticks of timber, and select the better one as they appeared to his uninformed and inexperienced mind; but he could not discover that which required for its ascertainment technical knowledge of woods and the ripened judgment of an expert. There is no evidence of inspection by principal or by vice principal; and, failing therein, the master is chargeable with knowledge of such defects as would have been ascertained by proper inspection by a competent person."

See Twomey v. Swift, 163 Mass. 273, 39 N. E. 1018; Arkerson v. Dennison, 117 Mass. 407; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642–643, 6 Sup. Ct. 590, 29 L. Ed. 755; Snow v. Housatonic R. R. Co., 8 Allen, 441, 85 Am. Dec. 720; Farrell, Adm'x, v. Eastern Machinery Co. 77 Conn. 484, 59 Atl. 611, 68 L. R. A. 239, 107 Am. St. Rep. 45.

[5] In the case at bar, the evidence leads me to believe that the timber used for the brace in question was unsuitable for the use intended for it, and that its unsuitability could have been discovered by a competent examination by an experienced man. This piece of timber was of short leaf Southern pine in a dozy condition, containing knots; and it is shown by expert witnesses that lumber of this character is brittle and liable to break when exposed to a sudden jar, such as being thrown off a wagon. Counsel have brought before me a case which is of interest, as bearing on the facts, if not upon the law, of the case before me. In Danner v. Wells, Appellant, 248 Pa. 105, 93 Atl. 871, Mr. Justice Frazer, speaking for the court, referred to the use of unsuitable timber in the construction of a scaffold which formed the subject of contention. He said:

"Each witness of plaintiff, who was questioned regarding the use of 'short leaf' or 'bull' pine, said such material was unsuitable for scaffolding purposes under the circumstances of this case, and was referred to by the witnesses as

[being] the 'cheapest grade of lumber,' 'bad timber,' and that short leaf pine was used because 'we did not have any long leaf.' "

[6] In the case before me, the foreman testifies that he did not know any difference between short leaf pine and long leaf pine, and that he ordered the lumber to be taken from the pile "just as it came," and that he "sent down into the hold, for the men to work with, any piece of the lumber that Mr. Swett orders onto the wharf." The testimony does not induce the belief that the foreman had sufficient knowledge of lumber, and sufficient appreciation of his duty, to be intrusted with the labor and life of men committed to his charge. The libelant had no reason to rely upon his own knowledge of the strength of the timber. He had no such knowledge; his fellow workmen in the hold had no such knowledge. Whether or not they made any examination of the timber put into the braces made by them is, at law, of no consequence, under the state of facts in this case. The respondent having furnished the lumber for the braces, the libelant was justified in assuming that it was reasonably safe and suitable, and had been properly inspected. Nor is it important to inquire whether or not the fellow servants of the plaintiff were negligent (American Shipbuilding Co. v. Lorenski, 204 Fed. 39–44, 122 C. C. A. 353, supra; Felton v. Harleson, 104 Fed. 737, 44 C. C. A. 188), for the testimony is convincing that the injury was caused by the negligence of the respondent.

The whole testimony, taken together, leads to the inevitable conclusion that the respondent failed in his duty to select proper material for the timber used by his servants in making the brace in question, and that he also failed in his duty to inspect such timber as he furnished before it went into the hold for use in making the brace, and that the injury to the libelant resulted from such negligence.

[7] Was the libelant also at fault? From his testimony, he was sitting 3½ or 4 feet from the in-board end of the brace. He had just finished securing the in-board end of the brace, and cleating it. He says that, after he got through putting in the cleats around the nose of the brace, he started to put his hatchet in his belt; that he was going to descend down to the skin of the ship; that he was intending to lower himself from the top brace to the second brace, and from the second brace to the ship. He adds that this was the customary way of getting down. He says he had worked out on the brace, "no more than a foot," "just enough to turn around," and that he had just pushed himself out, in the act of turning around, when the brace broke, and that his intention was to go down by reaching his hands up and steadying himself by the upper brace, and thus proceeding down, with his feet on the lower brace. There is some evidence that this was the way others had been accustomed to go down. If the libelant had waited a short time, he could have made use of a ship's ladder somewhere about the premises, and there were other ways by which he could have descended. There is some evidence tending to show that a warning or reminder was given to him by the foreman, in reference to the unsafety of going down in the way he did. He says he did not hear anything of this kind. It is not important whether

he did or not. The whole situation was as apparent to him as to anybody.

At the hearing of the cause I was inclined to think the question of the negligence of the libelant a close question. Upon examining carefully all the testimony relating to this question, I cannot say that it is proved by a preponderance of evidence that the libelant was guilty of contributory negligence in attempting to go down the brace as he did. I think it my duty to give the libelant the benefit of whatever doubt the testimony may raise. It is quite clear, also, that there was no negligence on his part, as charged by the respondent, in failing to make any inspection of the lumber used in construction, or in any other matter brought to my attention.

It is urged by the libelant that the question of contributory negligence of the libelant is not properly brought before the court by the pleadings; but I prefer to treat it as though an amendment had been seasonably filed and the matter brought formally before me.

I conclude, therefore, that the respondent was negligent as charged in the libel, and that the libelant was injured by reason of the respondent's fault; that he was not guilty of contributory negligence, and was not at fault.

A decree may be entered for the libelant.

The libelant recovers costs.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. WHITLEY et al.

(District Court, W. D. Washington, N. D. July 25, 1917.)

No. 131-E.

1. TORTS ⟸10—ORGANIZATION OF LABOR.
The right to employ labor and the right to be employed is inherent, and an organization of laborers, intended merely to regulate their own conduct with respect to legitimate competition, is legal.

2. COURTS ⟸326—FEDERAL COURTS—JURISDICTION.
When diversity of citizenship appears, and the property rights of a street railroad company, which were very valuable, were involved, in a suit to obtain protection from striking employés, the federal court has jurisdiction.

3. INJUNCTION ⟸137(2)—TEMPORARY INJUNCTIONS—STRIKES.
A street railroad company filed a complaint in the federal court praying an injunction restraining numerous defendants and all persons combining or confederating with them from interfering with its employés in the operation of its street cars. The complaint showed that the property rights of the company were involved, and an ex parte petition for a temporary injunction alleged that defendants and other strikers prevented the operation of the company's cars, but failed to show that the picketing done by the strikers and others was unlawful. Affidavits filed in support of the application showed that mobs of strikers and their sympathizers prevented the operation of street cars, and that the police protection was insufficient, but did not in any way show that defendants were the leaders of any organization which resorted to violence to prevent the operation of the company's cars. *Held*, that in such case the company's remedy was to apply for police protection to the proper executive, and an injunction, whereby the company's property would be protected by federal marshals, should be denied.

In Equity. Bill by the Puget Sound Traction, Light & Power Company, a corporation, against A. A. Whitley and others. On ex parte application for a temporary injunction. Application denied.

James B. Howe, of Seattle, Wash., and Clinton W. Howard, of Bellingham, Wash., for plaintiff.

NETERER, District Judge. The plaintiff moves the court, ex parte, on its complaint and sustaining affidavits, for a temporary injunction—

"enjoining the defendants, * * * and all persons whomsoever combining or confederating with them, * * * for the purpose of carrying out the same objects and interfering with the plaintiff, from interfering with the employés of the plaintiff in the operation of the plaintiff's street cars in the city of Seattle, their families, relatives, and associates, and from interfering in any manner whatsoever with any property of the plaintiff; from picketing, by means of violence, by intimidation, opprobrious epithets, and from doing any of the acts complained of in the complaint; * * *" and "that the court forthwith appoint, or cause to be appointed, a sufficient number of United States marshals to protect the employés of the plaintiff and the plaintiff in the operation of the plaintiff's street cars in the city of Seattle, and in the preservation of the plaintiff's property, and also such as shall be sufficient to protect all of the plaintiff's employés from any of the acts by the defendants or any other persons complained of in the complaint."

The motion was presented day before yesterday at 12:30 p. m., at the time the court suspended for luncheon. During the lunch hour the bill of complaint and supporting affidavits were cursorily examined. On the convening of court, at 2 p. m., the matter was taken up, at which time the court stated that it appeared that the relief demanded was executive rather than judicial, and that the matter of law enforcement was a matter for the executives of the city and the state, and a responsibility which the court should not be asked to assume. Counsel requested permission to present authorities in support of their position, which was granted. At the conclusion of the argument in the motion to remand in the case of State ex rel. City of Seattle v. Puget Sound Traction, Light & Power Co., at 3:30 p. m. yesterday, the matter was again called to the court's attention, and the following authorities cited: Sailors' Union of the Pacific v. Hammond Lumber Co., 156 Fed. 450, 85 C. C. A. 16; Tri-City Central Trades Council v. American Steel Foundries, 238 Fed. 729, 151 C. C. A. 578; John Bogni v. Govannia Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions (C. C.) 90 Fed. 598 and 608; Gompers v. Buck's Stove & Range Co., 221 U. S. 418, at 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Stephens v. Ohio State Tel. Co. (D. C.) 240 Fed. 759.

It is strongly urged that this court can afford the remedy to settle the strike now pending on complainant's lines in the city of Seattle, and that the orders of this court would be obeyed, and that, if the order is not granted, the parties could not be responsible for the consequences.

This court has never hesitated to issue any or all orders or decrees which in good conscience should be granted. It has not, nor does it now, shirk responsibility. The decrees of courts are respected be-

cause they are issued, or should be issued, only when it is clearly es tablished in the mind of the chancellor that the property rights of the complainant are being violated by the parties charged. In Alaska S. S. Co. v. Longshoremen's Ass'n (D. C.) 236 Fed. 964, called to the court's attention, plaintiff was clearly in the right, and it was apparent that the court and the parties understood each other. In the jitney case, presented a few days ago, it was made clearly to appear that the franchise rights of the plaintiff were infringed upon, and the order of the court was immediately obeyed, and the hope is indulged that the parties in that case understand each other.

[1] The right to employ labor, and the right of labor to be employed is inherent and universally recognized by the courts, and emphasized by Judge Gilbert in Sailors' Union of the Pacific v. Hammond Lumber Co., supra: and, as stated in the Longshoremen's Case, supra, 236 Fed. at page 970:

"It is not unlawful for persons to combine merely to regulate their own conduct with relation to legitimate competition, although others may be indirectly affected thereby. The right of property and liberty of action is guarantied by the Constitution of the United States to every citizen of this country, and is not confined to political rights, but extends to activities in and about the daily business of life, whether it be of employé or employer. The laborer may organize for protection, and his privilege to work for whom and when he desires is granted, and the right of the employer to employ whom he elects at a satisfactory price is not denied, and neither can secure more, and must not accord less."

And at page 969 of 236 Fed. it is said:

"Organized labor is organized capital, consisting of brains and muscle, and has as lawful a right to organize as have the stockholders and officers of corporations who associate and confer together with relation to wages of employés or rules of employment, or to devise other means for making their investments more profitable. Organized labor and organized capital have equal lawful rights to associate, consult, and confer with relation to wages and rules of employment."

Justice Lamar, in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, at page 439, 31 Sup. Ct. 492, 497 (55 L. Ed. 797, 34 L. R. A. [N. S.] 874), said:

"Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association."

The employé and the employer each have their functions, their respective duties and obligations. Neither may trangress the right of the other, and a court of equity will not be moved unless the rights of one of the parties are violated, or, by the conduct of one or both of the parties, the interests of the greater party, the public, which is always the sufferer during a strike, needs the court's strong arm. The court may not be used as a strike-breaker by either party, by withholding from one party orders or decrees to which it is clearly entitled, or granting orders ex parte, where it is not made clearly to appear that the rights of the complainant are being infringed by the defendants.

Judge Hammond used this language on page 603 of 90 Fed., American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions, supra:

"Nor do I overlook the forcible argument and suggestion of counsel that practically, in a case like this, a preliminary injunction ends the strike. If you 'break the strike' by a preliminary injunction, it is urged, there is nothing more to litigate about. This may be true if the strike be then wholly abandoned, but otherwise it is not true, and its chief force is in the grave duty imposed on the court of careful consideration to see that no preliminary or other injunction issues unless according to the law and right of the case. That responsibility is not oppressive in its weight, as it should not be, for the reason that no court can or should shirk it, whatever others may be allowed to do in other branches of governmental action, but is always felt alike in all cases as a potential inducement to careful judgment, whether at the final hearing or on interlocutory application. Yet a court is not 'a strike-breaker,' as one of the affiants has been denominated, and is not engaged in that business, as such, whether it be a state or federal court, and its duties are not properly to be administered on any such suggestion. If that should be the effect of a preliminary injunction, or of a final decree, for that matter, it is only because the defendants voluntarily will have it so, and prefer to abandon all rightful action in maintaining their organized strike, because they cannot act wrongfully, or, at least, cannot do those things which are pronounced wrongful by the courts. But for that abandonment the courts are in no wise responsible; nor should that fact influence its judgment. What is really the outcome of the argument, in its logical effect, is that, if strikers cannot decide for themselves what is right and what is wrong, they must abandon the strike. But it is apparent, on a moment's reflection, that no class of the community has, can have, or should have that power. Strikers would be, indeed a favored class if it were conceded to them. And happily, they do not ask it, but yield cheerful and ready obedience to the law as declared by the courts."

[2] This court has jurisdiction when diversity of citizenship appears, and the amount involved is in excess of $3,000, and property rights of the complainant are invaded.

[3] At the time that this matter was briefly presented to the court, I was impressed with the fact that this petition should be presented to another tribunal. A careful reading of the complaint and affidavits confirms that conclusion. The duties of the court are judicial, and not executive or administrative, except as an incident. The evil complained of, as it appeared to me, was the assembing of a large number of persons who are not parties to this action, and the doing by them of some untoward acts towards the street cars of the complainant, these defendants not being directly charged with such conduct, and that the remedy needed was police protection and not the aid of the equitable arm of this court; and that this court cannot undertake to govern this city or this part of the state by injunction, and should not direct the United States marshal to man the cars of the complainant, covering a railway system in the city of Seattle of 200 miles; and the court will take judicial notice of the fact that a strike is pending in the city of Tacoma on the street railway system which is under the same general supervision, and that strikes are pending likewise in many other industrial concerns in the Pacific Northwest; and, if this court would require the marshal to police the street cars, might it not, by the same token, be required to police every shinglemill, sawmill, logging camp, or industrial concern within the district, where the parties concerned may be citizens of another state or country. There is a vast difference between protecting the property of

a nonresident against the depredations of an individual or an association of individuals who are directly engaged in damaging or destroying the property of another, and the conduct of a large number of persons associating in a public place, whose purpose may be to invade the rights of another, but who may not be directly charged with particular or specific acts. A line of demarcation must be made between the conduct of an individual or association of individuals engaged in a specific purpose or object, and the conduct of a large number of persons, sometimes denominated, and in the complaint referred to, as a "mob." As against the one application may be made to the court, and, in the exercise of sound discretion, be afforded relief. But the other clearly comes within the police power of the city, state, or nation.

An examination of the bill of complaint and the supporting affidavits in this case discloses that there are 89 persons named as defendants. It is alleged that the complainant is a Massachusetts corporation, the owner of many franchises in the city of Seattle, set out by title; that a certain dispute has arisen between the employés of the plaintiff and the plaintiff company. It is further alleged that:

"In accordance with the following provision of the plaintiff's franchises under which the street railways herein mentioned were constructed, maintained, and operated, to wit: 'That if any dispute shall at any time arise between the said grantees, their successors or assigns, and their employés, as to any matter of employment or wages, such dispute shall be submitted to arbitration. The grantees, their successors and assigns, and their employés, shall be parties to any submission, and shall be entitled to be heard by the arbitrators, and any award, when made, shall be binding and conclusive, for the period of one year from its date upon the grantees, their successors and assigns, and upon their employés.' "

That a request was made by the employés for arbitration, and said request was acceded to by the plaintiff and arbitrators appointed, but that the strike followed notwithstanding such agreement to arbitrate, and nothing was done thereunder. It is further alleged that the plaintiff then sought other employés; that on the morning of the 20th of July plaintiff applied to the mayor of the city for protection, and "that the mayor announced that such protection would be given to the plaintiff's employés and to the property of the plaintiff"; that plaintiff attempted to resume operations by starting two cars, upon each of which cars were two policemen, in the business section of the city, and when the cars were operated they were immediately attacked by a large and threatening mob, the windows of the cars were broken, missiles were hurled into the cars, and the lives and limbs of the plaintiff's employés were endangered, and such operators denounced as "scabs"; that a number of policemen refused to give any protection to the plaintiff's employés or the plaintiff's property, and some of the policemen were stripped of their authority by their sergeant; that—

"one of the police officers upon one of plaintiff's cars cursed plaintiff's operators of the car upon which he was riding, denounced them as 'scabs,' and refused to give any protection, and a number of policemen so detailed mutinied and refused to assist in protecting plaintiff's employés and plaintiff's property. The cars, owing to the violence of the mob, were prevented from being oper-

ated as had been intended, and were returned to the car barn. A great and threatening crowd gathered around the car barn, which was protected by a small number of policemen, and plaintiff was advised by the police officer in command not to resume operations until he received additional reinforcements. * * * Plaintiff again applied to the mayor of Seattle for police protection, and on the 21st inst. plaintiff again resumed operation of its street cars upon one of its lines. A great mob attacked the car, threw the trolley from the wire time after time, the windows of the car were smashed, the car wrecked, and the operators badly beaten. The mayor, the police department, and the police endeavored faithfully to protect the employés of the plaintiff and the plaintiff's property, but were unable to cope with the mob, and the car was returned to the car barn. The violence of the mob was such that it was impossible for the plaintiff to give any further service upon its street railway lines, and, while the mayor of the city and many of the policemen have endeavored to give the protection promised the plaintiff, they were unable to cope with the situation."

It is further alleged that:

"The former employés of the plaintiff who left plaintiff's employment and refused to operate the plaintiff's street railway system are all citizens and residents of the state of Washington and of King county, and some of these men combined and conspired with other citizens and residents of the state of Washington and of the city of Seattle to forcibly prevent the resumption by plaintiff of street railway service in the city of Seattle upon the lines of the plaintiff. The plan of such combination and conspiracy was to congregate around the car barns of the plaintiff, and, by threats, violence, intimidation, and opprobrious epithets, to deter new employés of the plaintiff from entering such car barns and starting street cars therefrom over the street railways of the plaintiff in the city of Seattle, and to join with numerous other citizens of the state of Washington, when such cars should leave such car barns and operate over the tracks of the plaintiff, to wreck such cars, remove the trolleys from the wires, assault and strike the operators operating such cars, denounce them as 'scabs,' apply various other opprobrious epithets to them, surround such cars with a mob, overpower the police detailed to give protection, and destroy such cars, and pursuant to such plan the defendants named in this complaint and many other persons, citizens and residents of the state of Washington, did, on the 20th and 21st days of July, 1917, commit, act, aid and assist in the commission of the wrecking of the plaintiff's cars, beating the plaintiff's employés operating the same; * * *"

—and that the defendants and numerous other persons, citizens of the state of Washington, whose names to the plaintiff are at the present time unknown, will continue to carry out the combination and conspiracy by force. It alleges that plaintiff has taken steps to employ competent street car operators who will be ready and willing to operate the street cars of the plaintiff in the city of Seattle, as soon as they can obtain protection, so that in the operation of such cars they will not be in danger of being killed or maimed by the defendants and certain other citizens of the state of Washington, who have combined with the defendants to prevent the operation of such cars, and who, unless enjoined by this court and prevented by officers acting under the authority of this court, will attack such operators of the cars of the plaintiff and kill and maim them and destroy the street cars which they attempt to operate. It is then alleged that:

"The defendants and certain other citizens of the state of Washington who have combined with them to prevent the operation of the plaintiff's street cars in the city of Seattle as hereinbefore set forth, have, pursuant to their combination and conspiracy, adopted the plan of notifying by telephone some of the

faithful employés of the plaintiff, and the families of such employés, that such employés will be killed if they remain faithful to the plaintiff, and they continue to make threats to the families of such faithful employés for the purpose of breaking down the moral courage of such employés and their families, and for the purpose of terrorizing their families, hoping thereby to compel such employés to leave the service of the plaintiff. As part of the same combination and conspiracy the defendants, acting through certain of their agents and confederates, have prevented the delivery of provisions and other supplies to the car barns of the plaintiff, using force and violence for that purpose, with the object of preventing the plaintiff from provisioning its employés at such barns, and the defendants and their confederates will, unless enjoined by the court, continue to telephone threats and to do such acts for the purpose of terrorizing the families of the plaintiff's employés and starving out such employés of the plaintiff at its car barns and other places where such employés are and may hereafter be located; * * *" and that "the defendants will also continue to picket the car barns and property of the plaintiff for the purpose of preventing ingress and egress from such property by the employés of the plaintiff and those seeking employment, and such picketing will not be conducted peaceably, but will be carried on with threats, opprobrious epithets, applying the word 'scab' to the employés of the plaintiff and those seeking employment; * * *" and that "the inability of the authorities of the city to control such mob and the defendants, and to prevent the maiming of plaintiff's employés and the destruction of plaintiff's street cars while such employés were carrying out their duty to operate the street car system, the threats, intimidation, and violence of the defendants and of the mob, have demonstrated that it will be necessary for the protection of the employés of the plaintiff and the property of the plaintiff, in the operation of its street cars, that a sufficient number of United States marshals should be appointed to prevent the plaintiff and its employés from being deprived of their constitutional rights, and to protect the employés of the plaintiff from being killed or maimed. * * *"

The supporting affidavit of E. J. McIlraith says:

"The crowd around were hurling stones. * * * The crowd was composed of striking employés, their sympathizers, and others. * * * The crowd was hurling missiles, * * *" etc.

"The crowd had pulled the trolley from the wire."

"The crowd at that point was growing rapidly, and was made up of striking employés, sympathizers, and others."

"The crowd which was beginning to fill the streets from building to building from the south side of Jackson north toward Washington."

No reference is made in this affidavit to any defendant named in the complaint, but all reference is to untoward acts of the crowd, striking employés, or sympathizers.

Hedlund's affidavit refers to the persons as striking employés, with their sympathizers, and other people, and "mob." On page 4 he states:

"Affiant particularly mentions as one actively participating in and encouraging the demonstrations occurring on the 21st day of July, 1917, aforesaid, one B. H. Moffett; that affiant mentions as particularly active in the picketing at said North Seattle Car Barn, heretofore mentioned in this affidavit, E. H. Davey and Neil McDonald."

Worthen, in his affidavit, refers to the "mob," and states (page 2):

"That immediately after throwing the said switch a number of striking employés of plaintiff and their sympathizers rushed into the street and kicked the switch back again; that thereupon the trolley on said street car was pulled off by said mob, or members of it, said mob, according to affiant's judgment, aggregating at least five thousand people. * * *"

On page 3 he further says:

"Said mob aggregating, in affiant's judgment, at least five thousand people."

And later on the same page:

"Said mob at that time, according to affiant's judgment, being composed of at least ten thousand people."

At the close of the affidavit:

"Affiant states that E. H. Davey and D. H. Moffett have been active in picketing heretofore referred to as occurring at the North Seattle Car Barn;" and "particularly in this, that said D. H. Moffett has been active in aiding and fomenting said 'mob.'"

There is no statement in the complaint or any of the supporting affidavits charging any one of the defendants with any act of destruction of complainant's property. There are statements as former employés (there are many former employés who are not defendants), and general statements that "defendants and numerous other persons" are doing acts "pursuant to their combination and conspiracy," but nowhere is a single fact stated which is attributed to any one of the defendants in the complaint upon which the conspiracy is predicated, or any statement which could be attributed collectively to the defendants, or as emanating from a co-operation or confederation on the part of the defendants; nor is the name of any of the defendants mentioned in the body of the complaint, nor in the supporting affidavits, except the names of Moffett, Davey, and McDonald, mentioned in two of the affidavits, and these three defendants are charged with being "active in the picketing at said North Seattle car barns"; and in one affidavit, "particularly in this, that said D. H. Moffett was active in aiding and fomenting said mob." Nor is there any allegation that the picketing that is carried on is not peaceable and in accordance with the provisions of the Clayton act (Act Oct. 15, 1914, c. 323, 38 Stat. 730). There is the allegation that "picketing will not be done peaceably," but no act is charged as the basis for the conclusion for future conduct.

In the absence of such statements, in view of the general charges made and the specific designation of 3 defendants out of 89, the court must conclude that full disclosure was made of known conduct of the defendants. The defendants are not charged as a society or company acting through recognized heads and leaders, with delegated authority received from the defendants. If the defendants were engaged in peaceable picketing, that is recognized by the Clayton Act, which must control the act of this court. If the defendant Moffett was engaged in fomenting the "mob" and creating a riot, he is amenable under the criminal laws of the state, and complaint should be filed with the public prosecutor, and if the affidavit presented is true, with relation to the number of people assembling when the untoward acts charged were done, then, decidedly, this is not a matter for a court of equity to dispose of, but for other departments of the government, and should be presented, if it has not already been, to the proper department, where I have no doubt it will receive consideration.

These parties are not charged with interfering with interstate commerce or United States mail, the enterprise of the complainant being entirely local.

It is needless for this court to say that it is to be regretted, in this time of stress, in this enlightened community of patriotic citizenship, and a time when the burdens of government must be almost beyond endurance, and when the eyes of a new republic just struggling to its feet are looking to us for inspiration, and a crafty autocratic foe magnifying every semblance of disagreement into national discord, for the purpose of inspiring its discouraged soldiery to renewed and prolonged combat, and thereby requiring the sacrifice of the flower of our young manhood, that the parties may not, in the spirit of the provision of the franchise ordinances set out in the complaint and herein, arbitrate all disputes and grievances.

UNITED STATES v. MINOR et al.

(District Court, W. D. North Carolina. June 20, 1917.)

COURTS ⟸262(2)—FEDERAL COURTS—EQUITY JURISDICTION—REMEDY AT LAW. Rev. St. § 967 (Comp. St. 1916, § 1608), provides that judgments of the Circuit or District Courts shall cease to be liens on real estate in the same manner and at like periods as judgments of the state courts. The United States recovered judgment against a debtor, and after the time when state court judgments would have ceased to be liens it brought a suit to sell, for the satisfaction of such judgments, lands which had descended to the debtor's heirs and been sold to a third party in a partition suit. *Held* that, the Circuit Court of Appeals having decided that section 967 does not apply to judgments in favor of the United States, the suit could not be maintained, as the government had a complete and adequate remedy by the issuance of fi. fa. or execution, and the heirs and the purchaser could be brought in upon a mere motion or citation to show cause.

In Equity. Suit by the United States against J. B. Minor, administrator of C. O. Ward, deceased, and others. On application for decree. Bill dismissed.

W. C. Hammer, U. S. Atty., of Asheboro, N. C., and Clyde R. Hoey, Asst. U. S. Atty., of Shelby, N. C.

G. S. Bradshaw, of Greensboro, N. C., for defendants.

BOYD, District Judge. This is a bill in equity filed by the United States, praying that a certain tract of land, which had formerly belonged to C. O. Ward, deceased, be sold to pay the amount due upon several judgments, which were rendered in the Circuit Court of the United States at Greensboro. The facts in the case are stated in substance in the opinion of the Circuit Court of Appeals, Fourth Circuit, in this case at May term, 1916, the opinion being reported in 235 Fed. 101, 148 C. C. A. 595, but in order to present the views of this court in the present hearing it is deemed better to restate the facts more in detail.

The judgments claimed by the United States were obtained in actions at law, one at October term, 1885, for $225, on the distiller's

bond of Joseph A. Davis, for internal revenue taxes assessed against him, on which bond C. O. Ward was one of the sureties; also judgment rendered at October term, 1881, at Greensboro, for $67.57, internal revenue taxes assessed against said Davis as a distiller, C. O. Ward also surety upon the bond which covered this tax; at the same term another judgment was rendered against the same parties on a bond of like charatcer and for a like cause of action for $64.19; at April term, 1884, of the said court at Greensboro, a judgment was rendered against said Davis and his sureties on his distiller's bond, among whom was C. O. Ward, for $18, for internal revenue taxes assessed against said Davis; at the same term another judgment was rendered against the same parties for a like cause of action for $20.70; at October term, 1885, a judgment was rendered against the same parties on the distiller's bond of Davis for taxes assessed for $33.85. These judgments all carried with them interest and cost, were docketed in said court at Greensboro, and remained unsatisfied, and are still, as far as appears of record, unpaid, except the sum of $37.97, credited on the judgment for $67.57. Writs of fieri facias were issued upon these several judgments from the Circuit Court of the United States, and levies were returned upon them as follows:

Judgment for $64.19, fi. fa. issued October 18, 1881, levied upon the lands of J. A. Davis and S. T. Barber.
Judgment for $67.57, fi. fa. issued October 18, 1881, levied upon the lands of J. A. Davis and S. T. Barber, paid into clerk's office the sum of $37.97.
Judgment for $18, fi. fa. issued June 2, 1884.
Judgment for $225, fi. fa. issued October 24, 1885.
Judgment for $33.85, fi. fa. issued October 24, 1885.
Judgment for $20.70, fi. fa. issued June 2, 1884.

The return upon each of the four last was "nulla bona." No further writs of fi. fa. or execution were issued upon any of said judgments until January 25, 1912, when at the instance of the United States attorney executions were issued upon the said judgments and returned by the marshal: "Not executed; nothing found subject to execution. Defendants dead." On June 20, 1913, the United States attorney procured transcripts from the District Court of the United States for the Western District of North Carolina, at Greensboro, of the said several judgments and caused them to be docketed in the superior court of Guilford county, N. C. Theretofore, on March 26, 1912, at the instance of the United States attorney, J. B. Minor took out letters of administration upon the estate of C. O. Ward; C. O. Ward having died intestate and without issue in November, 1900, leaving as his own heirs at law the defendants in the present case, to wit, M. J. Wrenn, John R. Ward, Andrew L. Ward, Emma Ward, Belle Bratton, Josephine Hearst, Marshal Hiatte, and Frank Hiatte. There was no administration granted until the letters issued to Minor as above stated. On October 27, 1909, the heirs at law of Ward filed their petition in the superior court of Guilford county, alleging their ownership as tenants in common of the tract of land described in the petition filed in this case, and further alleging that on account of the number of tenants and the character and quantity of the land it was in-

capable of actual partition, and they prayed for a sale of the land in order that partition might be had. An order of sale was granted on November 15, 1909, a commissioner appointed, the sale advertised and made on May 2, 1910, at the courthouse door in Guilford county, when and where M. J. Wrenn became the last and highest bidder, for the sum of $2,018. Upon a report of said commissioner, the sale was confirmed, and under a further decree of the court a deed therefor made to the purchaser, Wrenn, shortly thereafter.

On February 8, 1913, the United States attorney for this district filed the present bill in equity, setting forth the facts herein stated, though not to the same extent in detail, and praying that the land, which had descended from Ward to his heirs, and which was owned by Ward at the time of his death, and upon which these judgments were claimed to be a lien, be sold to satisfy the said judgments. The court here, upon the facts, was of the opinion that the law of North Carolina which rendered a judgment absolutely void after a lapse of 10 years applied, and this was in view of the fact that such was the law of the state of North Carolina by statute, and the further fact that the Congress of the United States had before these judgments were obtained enacted section 967, R. S. U. S. 1878, Second Edition (Comp. St. 1916, § 1608), which is in the following language:

"Judgments and decrees rendered in a Circuit or District Court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon."

And it was further the view of this court that the United States, having come into a court in North Carolina and prosecuted its claim, was bound by the procedure which had been established by law as the practice of the courts, and, although the United States attorney insisted on the previous hearing of this case that the limit of time did not affect the right of the United States to proceed to collect its judgments, that view was discarded by the court here on the ground that although laches could not be imputed to the United States, nor was it bound by the statute of limitations, yet that the question of limitations was not involved; that the North Carolina statute with reference to the liens of judgments on realty was a rule of property, and that the lien procured by a judgment ceased to exist at the end of 10 years after the judgment was entered and docketed, because it became void. This court was further of the opinion that to hold that this local law did not govern a judgment in favor of the United States would be simply to keep alive such a judgment for all time, for, if it had life beyond the period prescribed by the state law, then its vitality would be without limit. If such was the law, unsatisfied judgments in favor of the United States would no doubt in many instances embarrass the title, the sale, purchase, and transfer of real property for an indefinite period.

However, the Circuit Court of Appeals was of a different opinion, and upon an appeal in this case reversed the decree which had been entered by this court refusing the prayer of the bill of the United

States, basing its decision upon the opinion which the court entertained that the section above cited did not apply to the United States, and further that the statute of limitations could not be successfully pleaded against the United States. In this situation the case has come on for rehearing, and the United States attorney, without the introduction of any further testimony, has upon the facts shown by the record and those admitted presented a decree to the court for its signature, directing a sale of the tract of land involved by the United States marshal to satisfy the judgments.

The court, with due respect to the decision of the Circuit Court of Appeals, has declined to sign the decree presented, not that the court here has in mind any purpose to evade or to override the decision of the Circuit Court of Appeals, but adopting the opinion of the Circuit Court of Appeals as the law of the case, as the court here construes it, the decision is to the effect that the judgments involved were not void at the end of 10 years, but were still living and susceptible of being enforced by the ordinary process of fi. fa. or execution. In other words, as this court understands, a fi. fa. or execution could have issued upon each of the judgments, authorizing the sale of the land which was alleged to be subject to the lien. It may or may not have been necessary, in order to issue the fi. fa. or execution, to have made the heirs at law of Ward parties, and also the purchaser of the land at the partition sale; but this could have been done upon a mere motion or citation to appear and show cause why process in the execution of the judgments should not be issued.

Therefore it is the opinion of this court now that under these circumstances, and in view of these facts, a bill in equity was not the proper remedy. These were judgments at law, and the United States had a complete and adequate remedy to carry them into effect by a proceeding in the law case. There was no defect in the law regulating the procedure to secure the rights of the United States which needed to be supplied by a court of equity, nor was there any absence of the right to issue process in the law case which required the aid of a court of equity to secure enforcement. On these grounds the court feels constrained to dismiss the bill. It may be said that this bill had the effect of bringing the heirs at law of Ward and also the purchaser of the land into court. Although that is true, the complainant in the bill sought relief in a court of chancery, when, as has been stated, he had his full remedy at law. Bills in equity are not upheld under such conditions.

A decree will therefore be entered, dismissing the bill in this case.

In re STAR SPRING BED CO.

(District Court, D. New Jersey. August 14, 1917.)

BANKRUPTCY ⊂⊃165(1)—CHECK TO BANKRUPT—UNSUCCESSFUL ATTEMPT TO STOP PAYMENT—RIGHT OF RECOVERY—PREFERENCE.

M., who had given notes for the accommodation of S., which had not matured, but exceeded M.'s indebtedness to S. for merchandise, sent a check for part of the indebtedness, payment of which, on learning of S.'s bankruptcy, he attempted to stop, unsuccessfully, because of failure of the bank, his agent, to carry out his instructions. *Held*, that such attempt did not deprive bankrupt's estate of right to the proceeds, so that the bank, which stands in no better position than M., cannot recover the same, as a return thereof to M. would result in an unlawful preference.

In Bankruptcy. In the matter of Star Spring Bed Company, bankrupt. On review of the master's findings, denying the claim of the Security Bank of New York for a return of the sum of $879.42, the proceeds of a check drawn on said bank to the order of the said bankrupt company and paid to the receiver. Claim disallowed.

George P. Breckenridge, of New York City, for Security Bank of New York.

Rosenberg, Levis & Ball, of New York City (Nathan Bilder, of Newark, N. J., of counsel), for trustee.

RELLSTAB, District Judge. The Fourteenth Street Bank, now the Security Bank of New York, instituted proceedings before the referee in bankruptcy to recover from the receiver of the Star Spring Bed Company, bankrupt, the sum of $879.42, the proceeds of a check dated April 18, 1911, drawn by the Superior Metal Bed Company on said bank to the order of said Star Company. This check, deposited in the mail on that date, was received by the latter company on April 19, 1911, on which day it, with other assets, was turned over to the said receiver, who had been appointed by this court in involuntary bankruptcy proceedings instituted against said Star Company on the last-named date.

On the same day the Superior Company, having learned of the financial troubles of the Star Company, notified the bank not to pay said check, and the bankrupt not to use it. In a letter of the same date, viz., April 19th, sent by drawer to the bankrupt, the latter was requested to return the check and a note for $755, which accompanied it, "as (in the language of the letter) same are incorrect and for that reason are of no use." On April 20th the receiver, by telephone, inquired of the drawer concerning said letter, and was told, in substance, that the check and note were incorrect and should be returned, as the bankrupt owed the drawer money, and that it had stopped payment on the check.

On April 21st the receiver deposited the check to his credit in the Union National Bank, of Newark, N. J., and on April 24th the Fourteenth Street Bank inadvertently paid it and charged it against the account of the drawer. Subsequently this bank reimbursed the drawer and instituted these proceedings now under review, claiming that said

check was paid by mistake. The receiver offered no evidence, other than that the check was put to his credit by the Newark Bank. The referee, though reporting a summary of the evidence, made no findings of fact, deeming the case of National Bank of New Jersey v. Berrall, 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630 to be "on all fours" and controlling, and that the Fourteenth Street Bank, on its own showing, could not recover.

On a review of the referee's decision, this court pointed out that the present case differed from the New Jersey case in the important respects that this was an equitable proceeding, involving the distribution of a bankrupt's estate (a trust fund) among those ultimately entitled to it, wherein the doctrine of privity pronounced in the cited case —an action at law—had no application, and that the receiver deposited the check after the drawer had notified him that payment had been stopped, for lack of consideration. The trustee thereupon asserting that the check was in fact given in part payment of a debt, the cause was sent to a special master (the said referee being then about to retire from office) to take testimony on that subject, as well as any other that bore on the commercial relationship between the bankrupt and the drawer, contemporaneous with the giving of the check. The special master found and certified, inter alia, that this check was given by the drawer in part payment for merchandise purchased from the Star Company between the 15th and 31st of March, 1911. This finding is amply supported by the evidence.

This shows that the officers and managers of the bankrupt held shares of the capital stock of the Superior Company; that the latter had the exclusive sale of the bankrupt's manufacture in the state of New York and parts of New Jersey; that the relations between these two companies were closer and more confidential than usually subsisted between manufacturers and jobbers; that the Superior Company, in addition to making semimonthly payments for merchandise bought, in accordance with the agreement between them, occasionally loaned its credit to the bankrupt, by making and delivering to it its promissory notes; and that on its books of account the merchandise and loan transactions were kept separate, styled, respectively, "Merchandise Account" and "Advance Account"; that on April 18, 1911, when this check was sent to the Star Company, the Superior Company was indebted to it for merchandise bought the month previous to an amount exceeding that of the check, which indebtedness, according to the said agreement, was payable on that date; that at that time unmatured notes theretofore given by the Superior Company for the accommodation of the bankrupt, aggregating a sum in excess of said indebtedness, were outstanding. It is conceded that, had the drawer declined to give this check, after the maturity of said notes it could have offset any amount it would have paid on account thereof against any indebtedness it owed to the bankrupt. However, on the request of the Star Company, it chose to pay for the merchandise in accordance with its agreement, notwithstanding its liability on the accommodation notes, and credited itself with said payment in the said merchandise account. If, instead of giving this check, it had at that time paid the amount thereof in cash, or if cash forwarded by a messenger for a like pur-

pose had reached the Star Company before being overtaken by another messenger subsequently started with instructions to prevent its delivery, or if this check had been paid by the bank, without any effort on the drawer's part to stop payment thereof, the moneys thus obtained would have become part of the bankrupt's assets. If, after such a payment, the bankrupt had returned it to the Superior Company, on the latter's request, in circumstances such as controlled the demand made for the return of this check, the cash thus returned would have amounted to an unlawful preference, despite the fact that, even after such crediting of cash to the bankrupt, the Superior Company would still have been its creditor.

That the drawer made an unsuccessful attempt to stop payment of this check does not change the legal effect of the transaction. The drawer made the bank its agent to prevent its payment, and merely because the bank failed to carry out its depositor's instructions gave the latter no claim for reimbursement against the bankrupt's estate. Its intention to make payment was not overcome by its subsequent intention to stop payment. To make such change of mind effective, the latter intention would have to be carried out. Such consummation failed through the neglect of its own agent. In Mason v. National Herkimer County Bank of Little Falls (C. C. A. 2) 172 Fed. 529, 97 C. C. A. 155, affirmed 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042, it was said that a payee of a bankrupt's note given for merchandise purchased, who, after discounting it, and with knowledge of the bankrupt's insolvency, took it up before maturity for the purpose of setting it off against its debt to the bankrupt, would not be permitted to do so against the latter's trustee in bankruptcy. In the Supreme Court this statement was unqualifiedly approved; Mr. Justice Hughes saying that the allowance of such a set-off would diminish the bankrupt's estate and be in violation of section 68b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9652]), and that the indebtedness of said payee could still be collected by the trustee.

If the payee of a discounted note, who, by indorsement, has become secondarily liable to the holder, will not be permitted, in bankruptcy proceedings, to offset the amount thereof against his indebtedness to the maker, because, with knowledge of the maker's insolvency, he paid the note before maturity for the purpose of doing so, a fortiori, one who makes an unsuccessful attempt to stop payment of a check given by him for a debt will not be permitted to recover from the trustee the amount of the check, when such attempt to stop payment was made after he had notice that the payee was insolvent and had reasonable cause to believe that the nonpayment of the check would give him a preference over the other creditors of said insolvent of the same class. That the drawer of the check in question had such notice and reasonable cause to believe is established by the evidence, and that such a preference would result if the drawer were permitted to treat said check as not paid cannot be successfully gainsaid. In such a case, while its debt to the bankrupt's estate would be increased, and the net amount of its claim against the estate, after offsetting said debt against the money paid by it on said notes, would be decreased, yet the

effect of such a stating of accounts would be to enable it to retain the full amount represented by the check to the prejudice of the other creditors. If, however, the check were treated as a payment on account of its indebtedness to the estate, the amount of such payment would inure to the benefit of all the creditors, and while the amount of the Superior Company's claim against the estate would be correspondingly increased, yet, like the other creditors, it would obtain only a percentage of such increase in the distribution of the assets. In the circumstances, the receiver was justified in insisting that the intended payment, begun by giving the Superior Company's check, should be carried out. The check was paid, and to allow the drawer, or the bank, which stands in no better position than the drawer, to recover from the receiver or trustee the amount of such payment, would result in an unwarranted depletion of the estate's assets, and work out an unlawful preference to the prejudice of the general creditors, and be in violation of section 60 of the Bankruptcy Act (Comp. St. 1916, § 9644).

The contention on the part of the bank that the trustee is estopped from showing that this check was in payment of merchandise purchased, inasmuch as the drawer—Superior Company—was allowed a claim against the bankrupt, is without merit. True, the claim of said company, as allowed, was less than as presented, the lesser amount being the result of a compromise effected between the attorney of the company and the attorney of the trustee; but there is nothing in the record to indicate that in this compromise the rights of the parties involved in the controversy over this check were under consideration. The claim of the bank for a return to it of the proceeds of said check and that of the Superior Company were represented by different counsel, occupied independent positions in the bankruptcy proceedings, and were so treated, respectively, by the claimant, trustee, and referee. It would be as persuasive to say that the bank's right to a recovery was lost, because of the compromise reached on the claim of the Superior Company, as to say that the trustee was estopped from contesting the bank's claim, because of said compromise. True, the absence of the amount of this check from the credit side of the Superior Company's account reduced the amount of the latter's claim, as presented to the trustee; but whether that company would have obtained a greater allowance in said compromise settlement, if said amount had been included, is not apparent, and of no moment here.

The right of the bank in this proceeding depends, not upon its having inadvertently paid the check after being notified by the drawer not to pay, but upon whether the Superior Company's attempt to stop payment of the check deprived the bankrupt's estate of the proceeds thereof. As this is decided in the negative, the claim of the bank is without merit, and is denied.

THE GOVERNOR POWERS.

(District Court, D. Massachusetts. July 6, 1917.)

No. 1467.

1. SHIPPING ⟸209(3)—DAMAGE TO CARGO—EXEMPTION BY HARTER ACT—BURDEN OF PROOF.

   To entitle a shipowner to the exemption from liability for damage to cargo resulting from faults or errors in navigation or management of the vessel, given by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1916, § 8031), he has the burden of proving affirmatively that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so.

2. SHIPPING ⟸209(3)—DAMAGE TO CARGO—PERILS OF THE SEA—BURDEN OF PROOF.

   Where cargo received in good condition and to be delivered in like good condition, dangers of the sea excepted, is damaged on the voyage, the burden is on the carrier to show by clear evidence that the damage was within the exception, and proof that it was caused by seawater is not alone sufficient.

3. SHIPPING ⟸209(3)—DAMAGE TO CARGO—PERILS OF THE SEA.

   Whether damage to a cargo was caused by a peril of the sea, within the exception in the bills of lading, is a question of fact, to be determined upon the circumstances of each case, and depending upon whether a seaworthy ship, properly trimmed and with the cargo properly stowed, would ordinarily go through such seas without material injury to its cargo.

4. SHIPPING ⟸141(3)—LIABILITY FOR DAMAGE TO CARGO—DANGERS OF THE SEA.

   The sugar cargo of a schooner was damaged by sea water on a voyage from Cuban ports to Boston in March. During two days the vessel encountered a high wind, probably not exceeding 60 miles an hour, which was not unusual at that season. She was hove to, and there was some straining; but she lost no sails, and was apparently not thought in danger. There was evidence that the cargo was not properly dunnaged. *Held*, that such facts did not exonerate her from liability under a clause of the bill of lading excepting dangers of the sea.

In Admiralty. Suit by the American Sugar Refining Company against the schooner Governor Powers. Decree for libelant.

Carter, Ledyard & Milburn, of New York City, and G. Philip Wardner, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

HALE, District Judge. This is a libel against the schooner Governor Powers for breach of contract to carry safely a cargo of sugar to Boston from Trinidad and Cienfuegos, Cuba.

[1] The case shows that the cargo was duly shipped on board the schooner under bills of lading providing for the delivery of the goods at Boston, subject to the exception of being relieved from liability by "dangers of the sea"; the cargo was delivered at Boston, damaged by sea water. The answer alleges that the injury occurred through dangers of the sea; that the schooner encountered a gale, which caused

her seams to open and wet the sugar. The answer also sets up an alternative defense under the Harter Act, that the damage resulted from faults or errors in the navigation or management of the schooner. The relief afforded by section 3 of the Harter Act, 27 Stat. 445, to shipowners is purely statutory; in order for a shipowner to avail himself of the exemption from liability for errors in management, the burden is on him to prove affirmatively that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so. The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794; Jamison v. N. Y. & P. S. S. Co. (D. C.) 241 Fed. 389.

It is not necessary, however, to consider this aspect of the case. The principal contention cuts deeper; it arises upon the question whether the claimants have met the burden of establishing that the storm, encountered upon the voyage, constituted a "danger of the sea." The libelant contends that the damage resulted, not from perils of the sea, but from the unseaworthy condition of the vessel in respect to weakness of construction, lack of proper pumps, stoppage of limbers, leaky condition of pipes, and insufficient dunnage. The testimony on behalf of the ship shows that upon this voyage she encountered bad weather for two days, March 3d and March 4th. It is contended that this gale constituted a "danger of the sea." The captain says it was a "young hurricane"; the wind blew 90 to 100 miles an hour; that he reefed the sails and hove to: that he had the fore, main, and mizzen sails up, with one reef during the breeze, and three of the schooner's five head sails up, during the entire time the vessel was "hove to"; that, during the first day of the storm, he went twice into the 'tween-decks hold, and the lower hold, and crawled around on top of the sugar; in the 'tween-decks hold he went, on top of the sugar, from the lazaret to the after end of the after hatch, some 25 or 30 feet, and there was just enough space for him to squeeze through; that during the second day he went into both holds and crawled on the sugar; that in the lower hold, although there was more space above the sugar than in the 'tween-decks hold, he crawled only about 5 feet from the forward bulkhead aft; that, during the gale, he found 20 to 23 inches of water in the wells; that the water ran down on the sugar from the top deck; that he tried to stop the water from running down, by putting oakum in the seams.

There is testimony on the part of the crew that it was the worst storm any of them had experienced. The mate Pinkham gives these extracts from the ship's log:

"March 3d. This day came in with strong wind; took in all light sails and left others 8 a. m. 8:30 wind came from nothwest in rain squalls. 10 a. m. heavy sea. N. W. gale. Vessel laboring heavy, and shipping heavy seas; day ends same; cloudy; pumps well tended."

"Saturday, fourth day of March. This day came in with heavy n. west gale, rough sea, vessel shipping seas and laboring heavy. Lat. 31° 53' N. Long. 78° 53' W. Moderating some. P. m., rough sea; clear; vessel laboring heavy under short sail; pumps, lights, and lookout attended."

He says the storm was something very unusual; much out of the ordinary of anything he ever saw "coming up the latitude there in the

winter time"; that it was a gale from 80 to 100 miles an hour. He testified, further, however, that on the previous voyage, in the autumn of 1915, from Turks Island to Boston, with a cargo of salt, he had two sails blown away, the foresail and spanker; "but the weather was not as bad as on this voyage." His log entry on the former voyage shows as follows:

"October 30, 1915. This day came in clear; fresh N. W. wind. Reefed spanker 8 a. m., and took in light sails; fresh north gale. Noon, reefed fore and mizzen sails; hove vessel to port tack, lost foresail. 8 p. m., rough sea; put vessel before sea; 9 p. m., heading to southward."

"November 1, 1915. This day came in clear; fresh N. W. wind. Set all sail. Heading to northward. A. M. 12:30 noon, blowing gale, W. S. W.; took in spanker; reefed fore, main, and mizzen sails. Very rough sea; kept vessel off before sea carried away spanker. Bent riding sail in place of same."

The evidence on the part of the libelant shows that the gale was the ordinary gale which occurs many times during the winter or spring on the Northern Atlantic coast. The official observations of the Weather Bureau along the Atlantic coast show, on March 3 and 4, 1916, prevailing winds of moderate to gale force, along the coast as far northward as Hatteras; that the lowest barometric pressure was 29.7 on the 3d, and 29.5 on the 4th; that, in the area in the vicinity of the Governor Powers, there was an ordinary gale of a force often occurring along the Atlantic coast during the winter months; that the maximum velocity of the wind was not over 60 miles an hour. Testimony is offered, also, of other ships along the Atlantic coast, anywhere from 80 to 150 miles away from the Governor Powers. It is shown that these ships encountered a gale which did not exceed 60 miles an hour, and that the gale was not an unusual one, but such as often occurred during the winter months. The most convincing evidence touching the character of the gale is found, however, in the testimony coming from those upon the Governor Powers, showing what happened on board the ship during the storm. To this testimony I have already referred. It appears that the vessel hove to, during the storm; that she labored, strained, and opened seams around the three deckhouses and the waterways; and that a leak was found on the starboard side of the vessel below the water line, but none of her sails were carried away, although the ship was "hove to." And it appears that, during the autumn storm, a few months before, the ship had lost her foresail, and was put before the sea, while during the storm in question it was not found necessary to let her run before the wind, but, though hove to no sails were carried away. Although the mate says that the March storm was worse than the storm in the autumn, the entries in his log utterly fail to sustain this testimony. The log makes no allusion to the captain's visits to the hold, or any damage to the cargo, or any trouble found with one of the ship's pumps, although these facts are in testimony. The log does not show what sails were taken in and reefed during the rough weather encountered on the voyage in question, although, on the previous voyage in the autumn, shortening of the sails is shown, as well as the fact that the vessel was put before the wind There is nothing in the log to show that the vessel on the 3d and 4th

of March experienced unusually severe weather. She clearly did not experience so severe weather as on the voyage in the autumn previous. The captain refers to the storm as a "young hurricane"; but he inadvertently speaks of it throughout his testimony as a "breeze," and Pinkham, the mate, alludes to it as a "heavy squall." If it had been of great severity, the captain could hardly have made his excursions into the crowded hold, where he "could scarcely squeeze through."

[2] In The Folmina, 212 U. S. 354, 361, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748, it was held that when goods, received in good order on board a vessel under a bill of lading agreeing to deliver them at termination of the voyage in like good order and condition, are damaged on the voyage, the burden is on the carrier to show that the damage was occasioned by a peril for which he was not responsible. Proving that damage to cargo was caused by sea water does not establish that such damage was caused by a peril of the sea, within the exception of the bill of lading. To relieve the ship from liability, the testimony must be clear. Clark v. Barnwell, 12 How. 272, 13 L. Ed. 985; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; The Henry B. Hyde, 90 Fed. 114, 116, 32 C. C. A. 534; The Lennox (D. C.) 90 Fed. 308, 309.

[3] The case of The Frey, 106 Fed. 319, 45 C. C. A. 309, has been called to my attention. In that case the Court of Appeals of the Second Circuit found that whether under any circumstances the excessive violence of the sea constitutes a "peril of the sea," within the exception of the bills of lading, is a question of fact, to be determined upon the circumstances of each case, depending upon whether a seaworthy ship, properly trimmed, and with the cargo properly stowed, would ordinarily go through such seas without material injury to its cargo. The Newport News (D. C.) 199 Fed. 968; The Babin Chevaye, 208 Fed. 966, 126 C. C. A. 54.

In The Rappahannock, 184 Fed. 291, 107 C. C. A. 74, the case shows that the steamship encountered three severe gales in which the velocity of the wind was shown to be about 60 miles an hour; that much damage was done on deck by the waves, doors and windows were broken, fenders were carried away, and butts were started. In speaking for the Circuit Court of Appeals of the Second Circuit, Judge Lacombe says:

"The evidence showed that the Rappahannock, on this trip, encountered three severe gales. * * * The captain and mate estimated the wind velocity at 60 miles an hour. They encountered heavy seas, sometimes quartering; but in the fall of the year such gales and seas are not infrequently encountered on the lakes, as the captain himself admitted. * * * It was not supposed by any of the officers or crew of the steamer that her seaworthiness was extraordinarily tried, although, of course, she labored and strained in the gales she encountered. There was no thought of the vessel foundering or going ashore. * * * The conclusion is that the Rappahannock encountered conditions of wind and sea which were not unusual at that season of the year. Seaworthiness imports ability to meet such conditions. * * * In our opinion the claimant does not sustain the burden of proving that the leak resulted from a 'danger of navigation' within the exception of the bill of lading." The Aggi, 107 Fed. 300, 46 C. C. A. 276; The Italia (D. C.) 184 Fed. 366; The Medea, 179 Fed. 781, 103 C. C. A. 273; The Westminster, 127 Fed. 680, 62 C. C. A. 406.

[4] In the case at bar the whole testimony, taken together, particularly the evidence of what happened on the ship itself during the storm, is persuasive that the captain and crew of the schooner have greatly exaggerated the severity of the gale. From the proofs I cannot believe that the wind velocity was greater than 60 miles an hour. There was no evidence that any fears were entertained as to the safety of the ship. There is no necessity for discussing the testimony in detail. On the whole, the evidence does not meet the burden of proving that the damage came from "dangers of the sea." On the other hand, it rather tends to show that there was some straining of the ship in the storm; that her limbers were clogged; that the cargo was not properly dunnaged, but that, at the bilges, the cargo was substantially next to the ceiling; that there was no dunnage where dunnage is most required in a sailing vessel, which is, for a great part of the time, heeled over from one side to the other, so that much of the water will collect in her bilges. Such fault of dunnage was commented upon by Judge Choate in The Sloga, Fed. Cas. No. 12,955.

I am of the opinion that the facts in this case do not meet the test applied by Judge Wallace, in The Frey, supra.

Much testimony has been offered touching the construction of the vessel. It is not necessary, however, to express an opinion touching this question. In view of my finding that the schooner has not met the burden of showing that the loss was occasioned by dangers of the sea, it is not necessary to discuss, further than I have already done, the elements of unseaworthiness to which my attention has been called.

A decree may be entered for the libelant. Henry E. Warner, Esq., of Boston, is appointed assessor, to pass upon the damages and report to the court.

The libelant recovers costs.

In re GREENBAUM.

(District Court, E. D. Michigan, S. D. July 10, 1917.)

No. 3327.

BANKRUPTCY ⇐37—PROCEEDINGS—COPY OF TRANSCRIPT.

Bankr. Act July 1, 1898, c. 541, § 39a (3), 30 Stat. 555 (Comp. St. 1916, § 9623), declares that the referee shall furnish such information concerning the estates in process of administration as may be requested by the parties in interest; section 47a(5) (Comp. St. 1916, § 9631) declares that trustees shall furnish such information concerning the estates of which they are trustees and their administration as may be requested by the parties in interest; while section 49a (Comp. St. 1916, § 9633) declares that the accounts and papers of trustees shall be open to the inspection of officers of all parties in interest. Bankruptcy rule 29 of the district, providing for the allowance to the referee as expenses of administering the estate, provides that for clerical assistance in taking and transcribing the testimony of the bankrupt or other person which is actually filed in the case 20 cents per folio shall be paid; parties ordering copies thereof

to pay at the rate of 10 cents per folio. Various persons were examined as witnesses without notice to the bankrupt, and thereafter he was ordered to show cause why he should not turn over to the trustee money and merchandise claimed by the trustee to have been concealed. The testimony of such witnesses was duly transcribed, and the transcript filed with the referee. *Held*, that the bankrupt was entitled as a matter of right to a copy of the transcript of such testimony, notwithstanding objections by the trustee.

In Bankruptcy. In the matter of the bankruptcy of Joseph Greenbaum. Petition by bankrupt to review an order of the referee denying the bankrupt's petition to require the official stenographer of the referee's court to furnish the bankrupt a copy of the transcript of testimony of witnesses taken on a general examination of witnesses before the referee, together with a petition for substitution of referees. Order denying bankrupt's petition for copy of transcript reversed, and petition for substitution of referees denied.

Bela J. Lincoln, of Detroit, Mich., for trustee.
Selling & Brand, of Detroit, Mich., for bankrupt.

TUTTLE, District Judge. This is a petition for review, filed by the bankrupt herein, to review an order of the referee in bankruptcy denying a petition of said bankrupt to require the official stenographer of the referee's court to furnish to said bankrupt, upon payment therefor, a copy of the transcript of the testimony of certain witnesses taken on a general examination of such witnesses before the referee.

The sole question for review is thus stated by the referee in his report:

"May a bankrupt, as a matter of right, have the testimony of the witnesses that are taken in a bankruptcy proceeding for the purpose of informing the trustee as to the transactions of the bankrupt, and as to the disposition that has been made of his property, delivered to him by the referee, when the delivery of such testimony is objected to by the trustee, and when the trustee claims that to deliver said testimony is contrary to the rights and the interests of creditors?"

In the petition denied by the referee, the bankrupt alleged that on various occasions a number of persons, whom he named, had been examined as witnesses herein in an ex parte manner and without notice to said bankrupt; that he had, by an order of this court, been ordered to show cause why he should not turn over to the trustee certain money and merchandise claimed by the trustee to have been concealed by the bankrupt, but which the bankrupt denied having concealed; that he had been informed that it was upon the testimony of some or all of the witnesses mentioned that said order to show cause had been based; that, in order to properly prepare his answer to said order to show cause, it was necessary for him to have a transcript of the testimony of said witnesses, so that he might learn what money and property it was alleged he had concealed; that his attorney had applied to the stenographer of the referee for a transcript of testimony of said witnesses, which had been refused; and that he was entitled of right to have a copy of said transcript upon paying therefor, which he offered to do. The prayer of the petition was:

"That an order be entered requiring the official stenographer of the referee's court to furnish to him, upon payment therefor, a copy of the transcript of the testimony of such witnesses."

The answer of the trustee admitted the issuance of the order to show cause referred to; denied that it was based upon testimony of any of the said witnesses; alleged that the bankrupt was fully advised, by the facts set forth in the petition and bills of particulars upon which said order to show cause was based, as to what property and money it was alleged that he had concealed; alleged that the said witnesses had been examined by the said trustee ex parte for the purpose of informing himself concerning the acts, conduct, and property of the said bankrupt; that the said testimony could not be used against the bankrupt upon the hearing of the said order to show cause; averred that the said bankrupt had not been entitled to notice of the said examinations and was not interested therein; and denied that the bankrupt was entitled to access to a transcript of the said testimony.

The matter was submitted on the foregoing petition and answer and on the files and records in the case. According to the report of the referee, it was admitted by the trustee that a transcript of the testimony in question has been filed in the cause and charges made therefor. The referee was of the opinion that, because the bankrupt was not entitled to notice of, or to participation in, the examinations of these witnesses, which were held under section 21a of the Bankruptcy Act (Comp. St. 1916, § 9605), therefore he is not entitled to inspect the transcript of the testimony taken at such examinations.

No authorities have been cited, and I have been able to find none, precisely in point. I realize that the question is not free from doubt, and that there is much force in the reasoning of the referee. After, however, a careful examination and consideration of the provisions of the Bankruptcy Act and local bankruptcy rules which seem to me applicable, I am unable to agree with the opinion of the referee.

Section 39a (3) of the act provides that:

The referees shall "furnish such information concerning the estates in process of administration before them as may be requested by the parties in interest." Comp. St. 1916, § 9623.

Section 47a (5) provides that:

Trustees shall "furnish such information concerning the estates of which they are trustees and their administration as may be requested by the parties in interest." Comp. St. 1916, § 9631.

Section 49a is as follows:

"The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest." Comp. St. 1916, § 9633.

In the case of In re Saur (D. C.) 122 Fed. 101, a creditor, seeking to reclaim certain property from the trustee, sought access to certain papers of the bankrupt estate, which the referee refused to allow, against the objection of the trustee, on the ground that:

The provisions of the Bankruptcy Act invoked, "broad as they are, should not be construed to require the divulgence to a claimant against the general estate of information which might tend to its detriment or depletion."

In reversing the order of the referee, the court used the following language:

"The reasoning of the referee in this case appears, at first view, quite plausible. A trustee defending a reclamation proceeding apparently occupies quite a different relation toward the reclaiming creditor from what he does toward the body of general creditors. But I think, upon consideration, that the provisions of sections 47 and 49 of the Bankruptcy Act * * * give any person interested in any bankrupt estate an absolute statutory right to the inspection of all accounts and papers of the trustee, and to be furnished with any information concerning the bankrupt estate which the trustee has."

In the case of In re Samuelsohn (D. C.) 174 Fed. 911, a creditor had prayed for an order directing the trustee to file with the referee or with the clerk of the court the testimony of the bankrupts, given upon their examination, or to permit such creditor to have access thereto, which order the referee declined to make. On petition for review of the order of the referee denying the petition of such creditor, the court said, among other things:

"The question submitted for review is in principle controlled by In re Saur, 10 Am. Bankr. R. 353, 122 Fed. 101. * * * The petitioner for review was a party in interest within the meaning of sections 47 and 49. * * * The testimony taken, as authorized by the referee, is a part of the record in the proceedings, and creditors generally have access to it while it remains in the custody of the referee. * * * It is urged in opposition to permitting the petitioner to examine the testimony of the bankrupts that the interests of the petitioner and the trustee are antagonistic, and that he intends to bring suit against such petitioner to recover preferences given him by the bankrupts, and therefore a disclosure of the testimony of the bankrupts, who are hostile to the interests of the bankrupt estate, may result prejudicially to the creditors. This contention, however, is not maintainable, in view of the absolute right which a party in interest has to examine a bankrupt, and the right which he has to be informed concerning the estate by the trustee or referee."

As was said in the case of In re Waters-Colver Co. (D. C.) 212 Fed. 761:

"The statute provides (sections 47 [5] and 49) that parties in interest may inspect the records in the hands of the trustee and that the trustee must give information to parties in interest at any time."

Whether, if the transcript of this testimony had not been filed in the case, petitioner would be entitled to have access thereto, it is unnecessary to determine here. Rule 29 of the bankruptcy rules of this district, which provides for the allowance to the referee, as expenses of administering the estate, of certain sums, contains the following clause:

"For clerical assistance in taking and transcribing testimony of the bankrupt or other persons before the referee and which is actually filed in the case 20 cents per folio. No copies of testimony to be furnished at the expense of the estate. Parties ordering copies of the testimony to pay therefor at the rate of 10 cents per folio."

As already indicated, the transcript of this testimony has been filed as required by such rule. It is therefore a part of the records in the cause, and as such, in my opinion, a public document or record, and I am of the opinion that under the circumstances here presented petitioner is entitled to a copy of such transcript as prayed. As was said by the court in the case of Sloan Filter Co. v. El Paso Reduction Co.

(C. C.) 117 Fed. 504, in granting a petition for leave to obtain a copy of the testimony and documents on file in such case:

"The matter of inspecting and taking copies of public records is as old in the law as the records are old. In English law, tenants of a manor could always inspect the court rolls and books of the manor in order to ascertain their titles. Rex v. Shelley, 3 Term R. 141. So, also, where the authority of a mayor was in question, citizens could inspect the books and papers of the borough in order to determine the fact. Rex v. Babb, 3 Term R. 579. Those cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested. 1 Whart. Ev. par. 745. In American reports cases may be found to the same effect. Ferry v. Williams, 41 N. J. Law, 333, 32 Am. Rep. 219. * * * No statute is required, however, to support the petitioner's application. He is fairly within the common-law rule as one who has an interest in the subject, and therefore a right to inspect public documents affecting his interest. The petitioner is not an intermeddler in other people's affairs, nor is its application against public policy, as was the case in Re Caswell, 18 R. I. 835, 29 Atl. 259, 27 L. R. A. 82, 49 Am. St. Rep. 814. The petitioner seeks only to protect itself in respect to the matter in controversy in this cause, and for that purpose it may rightfully invoke the aid of the law to obtain a copy of the testimony and documents on file."

In Daly v. Dimock, 55 Conn. 579, 12 Atl. 405, relator had been indicted for murder, and sought by mandamus to compel a clerk of a court to allow him to inspect the transcript of certain testimony taken by a coroner, reduced to writing, and filed with such clerk, as required by a certain statute. In granting the writ of mandamus prayed, the court said:

"The Legislature required that such testimony should be reduced to writing by a sworn officer and preserved for future reference. It is enough for our present purpose to say that it is a public document, relating to matters of public interest, and required by law to be kept by a public officer, who is the custodian of the records of judicial proceedings and other public documents. The statute is silent in respect to the purpose for which such writings are preserved, and the use to be made of them, and by whom. In the absence of any limitation or restriction, we must assume that it was intended that they might be examined by any and all persons interested in the subject-matter. We do not consider that we are justified in saying that they may be inspected by one person, and not by another. In the absence of legislation to that effect, we cannot say that they are for the exclusive use of one person or officer, or that any one person or class of persons may not inspect or use them. The writing in question relates to the prosecution of an indictment before the superior court. We are asked to allow it to be used by the prosecution, and to sanction a refusal to let it be seen, even by the defense. We think, if the Legislature had intended any such distinction, it would have said so. It has not said so, and we fail to find anything in the statute to justify an implication to that effect. An attempt is made to find such an implication in that provision of the statute authorizing the inquest, or any part of it, to be held in private. No such argument can be legitimately drawn from that provision. The Legislature has not told us why that provision was inserted. Yet the reason is obvious enough. The object of the statute is to ascertain, if possible, the guilty party. If the evidence is likely to implicate some person hitherto unsuspected, it may be advisable, in order to prevent an escape, that the proceedings should be in private. But when a conclusion is reached, and the suspected party is arrested, there will ordinarily be no longer any reason for secrecy. Whatever other reasons may have existed for this clause of the statute, it is hardly possible to discover, either in the statute itself, or in any conceivable reason for it, sufficient ground for keeping the testimony private after it shall have been lodged with the clerk."

In Jemkins v. State, 45 Tex. Cr. R. 173, 75 S. W. 312, a motion was made by one charged with crime for leave to have access to the transcript of certain testimony taken before a justice of the peace shortly after the commission of such crime. The court said:

"If these proceedings were authorized by law, and the testimony of the witnesses taken down, it was a public document, and appellant, on proper motion, had a right to inspect and use it, if he deemed it necessary."

In Brewer v. Watson, 61 Ala. 310, it is said:

"An inspection of the records of judicial proceedings kept in the courts of the country is held to be the right of any citizen. 1 Greenleaf on Evidence (8th Ed.) § 471."

In Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219, in reviewing the general subject, the court used the following language:

"The documents in question are of a public nature, and the rule is that every person is entitled to the inspection of such instruments, provided he shows the requisite interest therein."

Without attempting to decide what the rights of petitioner would be if the transcript of the testimony in question had not yet been filed, which it is unnecessary to decide here, in view of the fact that such transcript has been filed, and in view, also, of the provisions of the local bankruptcy rule, already quoted, and considering the statutory provisions and authorities cited, I am of the opinion that the petitioner is entitled to obtain a copy of such transcript on the terms prescribed in the aforesaid rule, and I am therefore constrained to answer the question certified by the referee in the affirmative, in so far as it relates to the facts in the present case.

The petition of the bankrupt for a substitution of referees has been examined and carefully considered; but, in my opinion, no sufficient grounds for such substitution are shown, and such petition is therefore denied.

ACME TRANSIT CO. v. 133,000 BUSHELS OF WHEAT.

(District Court, W. D. New York. May 24, 1917.)

No. 1035.

1. SHIPPING ⊂⊃177—CHARTER PARTIES—DUTY OF CHARTERER.
   While the charterer of a vessel, even in the absence of an express agreement to unload with reasonable dispatch, impliedly agrees that the freight shall be unloaded without unreasonable delay and in conformity to the custom and usage of the port, yet, where the charter party or bill of lading or contract of affreightment makes no specific allowance for demurrage, or for any number of lay days for unloading, and specifies no definite time of discharge, the question whether the vessel was unloaded without unreasonable delay depends on the surrounding circumstances.
2. SHIPPING ⊂⊃177—CARRIERS—RISKS.
   The owners of a vessel, who suffered great loss from delay in unloading a cargo of wheat shipped at nearly the close of the navigation season, must be deemed to have assumed the risks incident to transportation at that season, when there was an emergency demand for wheat and the port of destination was overcrowded.

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3. SHIPPING ⟸184—CHARTERERS—DUTY OF.
Where a vessel was chartered for the transportation of wheat, and the charter party fixed no time for unloading and provided no lay days, the owner of the vessel cannot, by libeling the wheat, recover damages occasioned by delay in unloading the vessel on the theory that the charterer had a right of action over against a railroad company whose negligence in furnishing cars caused the delay.

4. SHIPPING ⟸171—UNLOADING OF VESSELS—CUSTOM.
Where a bill of lading specified delivery at a certain elevator at port of destination, delivery will ordinarily be made at such port in turn; vessels arriving ahead having precedence.

5. SHIPPING ⟸184—CHARTERER—NEGLIGENCE.
On a libel against a cargo on the ground of negligent delay of the charterer in unloading the vessel, evidence *held* insufficient to establish such negligent delay.

In Admiralty. Libel by the Acme Transit Company against 133,000 bushels of wheat. Libel dismissed.

Goulder, White & Garry, of Cleveland, Ohio, and Brown, Ely & Richards, of Buffalo, N. Y., for libelant.

Stanley & Gidley, of Buffalo, N. Y., for respondent.

HAZEL, District Judge. This is a libel in rem for demurrage. The material facts show that on November 26, 1915, the large freight steamer, Edwin F. Holmes, was chartered by W. A. and A. H. Hawgood of Cleveland, managers, to the Tomlinson Company for transporting wheat from Duluth to Buffalo at the rate of 4½ cents per bushel. The steamer was upbound from Toledo to Duluth at the time, and received orders at the Sault to report at Duluth to the Tomlinson Company, which had previously confirmed the charter party, and had rechartered the vessel to the W. S. Moore Grain Company; the specified shipment to be made during the first five days of December following. The wheat, consisting of 187,000 bushels, was loaded in holds 1, 3, and 4 of the vessel and consigned to W. S. Moore Grain Company, care of C. F. Strasmer, superintendent Connecting Terminal Elevator at Buffalo, with instructions on the bill of lading to notify Otto Stude & Co. of Baltimore, account James Richardson & Son, Kingston, Ontario, to whom the wheat was sold while in transit to Buffalo. Hold No. 2 contained 63,000 bushels of wheat consigned to W. S. Moore Grain Company in care of Lunham & Moore of Buffalo, to be forwarded to Boston.

The steamer arrived early in the morning Sunday, December 5th, at which time there were 39 wheat laden vessels in port, carrying in the aggregate 9,243,000 bushels of grain, awaiting discharge at various elevators—an unusually large number for so near the close of navigation. The evidence shows that 2,000,000 bushels of the grain afloat in the port of Buffalo were consigned to the Connecting Terminal Elevator where the principal cargo of the Holmes was to be unloaded for transportation to Baltimore by the Pennsylvania Railroad, as Strasmer was advised about December 8th. The amount of grain arriving in Buffalo in the autumn of 1915 is said to have exceeded all previous arrivals. This, together with the scarcity of railroad cars for trans-

porting the grain to seaboard points, caused a congestion of the Buffalo grain elevators. It is also fairly shown that there was a scarcity of ocean bottoms and tonnage at Baltimore and at the Pennsylvania Railroad terminals, which made it impossible to relieve the congestion at Buffalo and prevented the expeditious discharge of lake cargoes.

It was customary to unload cargoes in turn at the elevators to which they were consigned. Efforts were made by the trade to expedite unloading, and the managers of elevators and agents of vessels conferred daily as to the best means for remedying the situation; but, as the railroads had stopped transporting grain freely in the early days of December, it was impossible to hurry the unloading.

When the Holmes arrived at Buffalo, the Connecting Terminal Elevator, which was to receive the consignment in question, was loaded to nearly its full capacity, and the Pennsylvania Railroad, which had trackage facilities extending into the elevator, was refusing to supply cars for transportation. Her agent was informed that there were a number of cargoes awaiting unloading at the Connecting Terminal Elevator, and that he was at liberty to unload her at any other elevator in the port. But this was impossible, as other elevators were all more or less crowded, and were refusing to take export grain for transportation over Pennsylvania lines, fearing a scarcity of cars. Vessel agents were made acquainted with changes in the situation at elevators in daily meetings and conferences and by means of bulletins.

The bill of lading in evidence shows that the grain which is the subject of this controversy was to be exported to Greece by way of Baltimore, and there is evidence that it should have reached the seaboard in time for shipment during the latter part of December. Claimant did not learn of the delay until nearly the end of the month. On December 20th, a portion of the cargo was unloaded at the Marine Elevator; but there was further delay, unloading not being completed until January 3, 1916, at the Dakota Elevator. Prior thereto, on December 15th, the cargo was delivered for transportation to the Pennsylvania Railroad, and Mr. Rodgers, the agent of the steamer, accepted the "turn over."

The libel alleges generally that, as the libelant gave notice of the arrival of the grain at Buffalo and of readiness to discharge, the vessel should have been unloaded within a reasonable time, i. e., in about 6 days, and that, as the consignee was aware of the steamer's desire to leave Buffalo before midnight of December 12th (that being the time when marine insurance expired) for Ft. William to take on a storage cargo for delivery the following spring, the burden of finding a place of discharge was upon it; and that in storing grain in her hold during the winter the Holmes would have netted a profit of about $9,475.

An amendment to the libel alleges that there existed at the port a custom of unloading vessels in turn, and that, as there was failure to comply with this custom, the Holmes sustained damages amounting to $100 per day from December 12, 1915, to January 4, 1916, aggregating $1,402.50. The amended answer denied the right to recovery on the ground that the conditions were extraordinary and could not be foreseen, and prevented speedier discharge.

What are the rights of the parties?

The charter and bills of lading in evidence show fairly enough that the grain was a through shipment, as distinguished from a storage cargo, and any doubt there may have been as to this was removed by the evidence. There was some question as to whether the Richardson & Son consignment or the consignment of wheat in hold No. 2 was actually responsible for the delay; but the evidence definitely shows that whatever delay there was, was not attributable to the 63,000 bushels in care of Lunham & Moore for delivery to the Kellogg Elevator.

[1] It is true, as argued by libelant, that the rule of law ordinarily is that the charterer of the vessel, even in the absence of an express agreement to unload with reasonable dispatch, impliedly agrees that the freight shall be unloaded without unreasonable delay and in conformity to the custom and usage of the port. Scrutton on Charter Parties (4th Ed.) p. 244; McArthur Bros. Co. v. 622,714 Feet of Lumber (D. C.) 131 Fed. 389. But this is not a hard and fast rule, and, when it appears that the charter party or bill of lading of contract of affreightment makes no specific allowance for demurrage or for any number of lay days for unloading nor specifies a definite time of discharge, due regard must be given to the particular circumstances contributing to the delay and legitimately bearing thereon. Cross et al. v. Beard, 26 N. Y. 85; The M. S. Bacon v. Erie & Western Transportation Co. (C. C.) 3 Fed. 344; Empire Transportation Co. v. Phila. & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623.

The original charter and bills of lading in evidence constituting the agreement were in the usual form, and contained no words of limitation as to the time of unloading at the elevator specified therein, and therefore in my opinion whether or not the delay was unreasonable depends entirely upon the circumstances existing when the vessel arrived in port. The clogging of the elevators because of failure on the part of the railroad companies to supply cars is an element to be considered in placing responsibility for the delay.

[2] Although libelant sustained severe financial loss from delay in unloading, it must be deemed to have assumed risks incident to transportation at nearly the close of navigation, and when there existed an emergency due no doubt to demands for wheat arising out of European war conditions. The existing circumstances are controlling upon both parties, and both are required to exercise reasonable care and precaution to prevent delay. This rule was, I think, fully stated in Fulton v. Blake, Fed. Cas. No. 5,153, and again later in the case reported at 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623, where the responsibilities arising from charters are ably discussed.

[3] Libelant has pointed out that several vessels arriving in port after the Holmes were unloaded ahead of her, but in each instance this was due to the size of the cargo which permitted putting it in certain spare places in the elevators, and fails to show want of diligence and care on the part of the consignees in securing facilities for unloading. In fact, the Holmes, owing to the depth of her draft, was able to go to only certain of the elevators.

There was some testimony of movements of cars over railroads other than the Pennsylvania line, Mr. Williamson testifying that other railroads "acted pretty fair" and "took care of us," and libelant insists that the Pennsylvania Railroad broke its contract with the consignee, which has its right of redress for the breach, while the vessel must proceed against the grain itself. But to hold that the claimant of the grain should enforce a problematical liability against the railroad company and permit libelant to enforce a lien on the grain in rem for demurrage or warehousing would not in my opinion be a just disposition of the controversy, in view of the fact that libelant has not proven that the owner of the grain did not exercise reasonable diligence to discharge the vessel, and, besides, it could have protected itself by a contract definitely fixing the time of unloading or by providing for lay days. Riley v. 3,000 Railroad Ties (D. C.) 38 Fed. 254. Indeed, it possessed better facilities for learning the condition of the port than Richardson & Son who bought the cargo afloat.

[4] As the bill of lading specified delivery at a certain elevator which had connections with the Pennsylvania line, delivery would ordinarily have to be made at such place in turn; vessels arriving ahead having precedence. Such was the holding by Circuit Judge Coxe, then sitting in this district as district judge, in The J. E. Owen (D. C.) 54 Fed. 185. There, it is true, the court pointed out in the opinion that no demand had been made upon the consignees to furnish another elevator, and the implication might be drawn that, if such a demand had been made of the consignees in this case, they would be liable for any delay occurring thereafter.

[5] Mr. Rodgers testified substantially that, if the Holmes had promptly taken the shipment to another elevator, and if arrangement had been made to divert an equal amount of grain to another railroad, it would have been possible to unload the vessel more promptly; but I am in doubt as to whether there could have been a diversion from the Pennsylvania line after December 15th, when the cargo was delivered to the Pennsylvania for shipment, without damage to the owner of the grain. There is no authority for declaring that a contract for affreightment to unload at a certain railroad line puts upon the consignee or shipper the burden of changing the contract to facilitate unloading the vessel. While emergencies may arise, and indeed have arisen herein, which oblige both parties to adapt themselves to circumstances so as to minimize possible damage to either, I nevertheless think that nothing has been adduced to substantiate the amendment to the libel or the negligence of the consignee in not using diligence to discharge the vessel in view of the circumstances (Riley v. A Cargo of Iron Pipes [D. C.] 40 Fed. 605; The J. E. Owen, supra; Williscroft v. Cargo of Cyrenian [D. C.] 123 Fed. 169), or that this delay in discharging the vessel was unreasonable in view of the extraordinary conditions.

It would, of course, be difficult to determine that the owner of the grain had exercised reasonable diligence in discharging the vessel if there was evidence of a willingness on the part of other elevators to take the grain, or on the part of other railroads to transport it at the

same tariff rate to Baltimore in time for shipment to Greece, its ultimate destination; but the evidence shows that the consignee apprised the vessel of his willingness to have her unload at any other elevator, giving her, as it were, the freedom of the port; but no other elevator would receive the cargo, owing to the uncertainty, as testified by Mr. Smith, who was thoroughly acquainted with transportation conditions, of obtaining cars at their terminals not alone on the Pennsylvania line but also on other railroad lines.

Under the circumstances evidenced herein, there is no justification for making an exception to the rule that the carrying vessel, failing to provide for demurrage or to limit the lay days, cannot recover loss of profits or damages sustained by detention. The libel is dismissed, with costs.

In re FETTERMAN.

(District Court, N. D. Ohio, E. D. July 17, 1917.)

No. 5752.

1. BANKRUPTCY ⊂=143(12)—PROPERTY PASSING TO TRUSTEE—STATUTE.

Under Bankr. Act July 1, 1898, c. 541, § 70a, par. 5, 30 Stat. 565 (Comp. St. 1916, § 9654), declaring that property of a bankrupt which prior to the filing of the petition he could by any means have transferred, or which might have been levied on and sold under judicial process against him, shall pass to the trustee, but that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself or his estate, or personal representatives, he may, within 30 days after the cash surrender value has been ascertained and stated by the company issuing the same, pay or secure to the trustee the sum stated and continue to carry the policy free from the claims of creditors, an insurance policy though obtained by the bankrupt will not pass to his creditors unless it has a cash surrender value payable to the bankrupt, his estate, or personal representative, and so a life policy issued on application of a bankrupt in favor of his wife, which reserved in the bankrupt no power to change the beneficiary, and declared that the cash surrender value should be paid only upon execution and delivery to the insurer of a satisfactory release of all interests and claims to the avails, will not pass to the trustee.

2. BANKRUPTCY ⊂=396(3)—EXEMPTIONS—INSURANCE POLICY.

Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (Comp. St. 1916, § 9590), declares that it does not affect exemptions in favor of a bankrupt prescribed by the state laws in force at the time of the filing of the petition in the state wherein the bankrupt was domiciled. A voluntary bankrupt domiciled in Ohio had previous to bankruptcy applied for a life policy naming his wife as beneficiary, which reserved to him the right to change the beneficiary and declared that, upon default in payment of any premium after two full premiums had been paid, the policy might be surrendered with the written assent of the person to whom it was made payable. Gen. Code Ohio, §§ 9393, 9394, declare that any person may effect insurance on his life for any definite period of time, or for the term of his natural life for the sole benefit of his widow and children or either and that the net amount of such insurance shall be payable to the widow or children for their own use exempt from all claims of creditors of such deceased person. *Held*, that such policy was exempt though a subsequent section of the Ohio Code authorized recovery of premiums paid in fraud of creditors.

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

In Bankruptcy. In the matter of the bankruptcy of Louis R. Fetterman. Petition by the bankrupt to review an order of the referee denying the bankrupt's claim that insurance policies were exempt. Order reversed.

Thompson, Hine & Flory, of Cleveland, Ohio, for bankrupt.
Spear, Mills, Knight & Godfrey, of Cleveland, Ohio, for trustee.

WESTENHAVER, District Judge. The bankrupt, Louis R. Fetterman, in the schedule filed with his voluntary petition in bankruptcy October 5, 1915, claimed as exempt two policies in the Berkshire Life Insurance Company for $1,000 and $1,500, respectively, by virtue of sections 9393, 9394, and 9395, G. C. of Ohio. The trustee first set aside these policies as exempt, and exceptions being filed to his report, thus setting them aside, by leave obtained from the referee, the trustee filed an amended report, refusing to set them aside. Bankrupt having excepted to this later action of the trustee, the referee held that the policies were not exempt, and ordered the bankrupt to surrender them. A petition to review this order is now before me for decision.

Upon an examination of the referee's findings of fact, I was of opinion that sufficient facts were not found to enable me to decide properly the questions involved, and thereupon counsel, at my request, stipulated the policies into the record to be considered by me.

The $1,000 policy was issued August 3, 1899. It was issued on the application of the bankrupt in favor of his wife. It reserves no power in the insured to change the beneficiary. It is a straight life policy, payable only at the death of the insured. It has a cash surrender value which shall be paid only upon the execution and delivery to the company "of a satisfactory release of all interests and claims to the avails thereof."

The $1,500 policy was issued October 10, 1913. It was issued on the application of Louis R. Fetterman for the benefit of his wife. It is a straight life policy, payable only at his death. It reserves to the insured the right to change the beneficiary without his wife's consent. It provides that, upon default in the payment of any premium, after two full annual premiums have been paid, the policy may be surrendered "with the written assent of the person to whom it is made payable."

It is conceded that the wife is still living, and that no appointment of any other person has been made by the insured as beneficiary in the second policy.

[1] Upon these facts two questions are presented for decision: (1) Whether under section 70a of the Bankruptcy Act these policies, or either of them, pass to the trustee to the extent of the cash surrender value thereof; (2) whether under sections 9393–9396 and 9398, G. C., these policies, or either of them, are exempt from the demands of creditors, and therefore protected by section 6 of the Bankruptcy Act.

Section 6 of the Bankruptcy Act is as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of

the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Section 70a, par. 5, is as follows:

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

In Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, these provisions were construed, and it was held that section 6 of the Bankruptcy Act protected any exemption given by state law of insurance policies, even though under section 70a of the Bankruptcy Act they possessed a surrender value which would pass to the trustee.

In Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, it was held that a cash surrender value of a policy allowed by the insurer, even though not provided in the policy, would pass to the trustee under section 70a of the Bankruptcy Act. In passing, it should be noted that one policy in that case, payable to the bankrupt's wife, if she should survive him, was dropped from the controversy (205 U. S. page 205, 27 Sup. Ct. 488, 51 L. Ed. 771), evidently because all parties were of opinion that nothing passed to the trustee.

Obviously, section 70a of the Bankruptcy Act applies only when an insurance policy has a cash surrender value, payable to the bankrupt, his estate, or personal representatives. The language used admits of no other conclusion. If a policy is made payable to some person other than the bankrupt, manifestly the proceeds thereof do not belong to him and are not a part of his assets which would pass to the trustee. If the cash surrender value is not, by the terms of the policy, payable to the bankrupt, but is payable to a beneficiary, the same conclusion follows. If the cash surrender value is payable only to the insured with the consent of all persons interested in the policy, or on a release of the person's interest, then manifestly the same conclusion follows, for the beneficiary is the person who owns or is primarily interested in the cash surrender value, and it is his consent or release which the company must have before paying the cash surrender value. That the rights and interest of the beneficiary of the policy, even if the insurance has been obtained by the insured, and the premiums are paid by him, are as herein stated, is sufficiently evidenced by the following authorities: Manhattan Life Ins. Co. v. Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806; Union Central Life Ins. Co. v. Buxer, 62 Ohio St. 390, 57 N. E. 66, 49 L. R. A. 737; Central Nat. Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.

In Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, section 70a of the Bankruptcy Act was further construed, and these respective rights of insured and beneficiary were recognized and applied. In that case it was held that, independently of the state exemption laws, no interest was acquired by a trustee of a bankrupt in life insurance policies, except on the conditions and to the extent provided in this section. Prior thereto the inferior United States courts of different jurisdictions had been divided. Some had adopted the view that all life insurance policies, payable to the insured and which might be levied upon and sold under judicial process, even though they had no cash surrender value, should pass to the trustee; but this case finally established the proposition that life insurance policies, having no cash surrender value payable to the bankrupt, his estate, or personal representatives, do not pass to the trustee as general property, but remain the property of the bankrupt, who is not limited in dealing with them. Mr. Justice Day sums up the reasons for this holding in these words:

"Congress undoubtedly had the nature of insurance contracts in mind in passing section 70a with its proviso. Ordinarily, the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly embarrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance."

It was accordingly held that the cash surrender value at the date of the filing of the petition should be paid to the trustee, even though the bankrupt between that time and the date of adjudication had committed suicide, thereby maturing the face value of the policy. Similar holdings were made in Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929.

As a result of these decisions, the policy payable to the wife, in which is reserved no right to change the beneficiary, does not pass to the trustee.

[2] As to the policy in which is reserved the right to change the beneficiary without her consent, and providing a cash surrender value upon default after payment of two annual premiums, a different question is presented. In some cases it has been held that the insured's absolute dominion and control is the equivalent of a policy payable to the insured, or his estate or personal representatives. These

cases are collected in a note, page 1017, Collier on Bankruptcy. A similar holding was made by the Circuit Court of Appeals, Fifth Circuit, Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, in which Burlingham v. Crouse, supra, is cited.

On the other hand, a different conclusion seems to me to follow from certain other decisions rendered since Burlingham v. Crouse, supra, was decided, namely, In re Churchill, 209 Fed. 766, 126 C. C. A. 490; In re L. Hammel & Co., 221 Fed. 57, 137 C. C. A. 80; In re Arkin, 231 Fed. 947, 146 C. C. A. 143. These decisions are by the Circuit Courts of Appeals of the Second and Seventh Circuits.

I shall not at this time express an opinion in view of this apparent conflict of authority, for I am of opinion that the second policy, in which the right to change the beneficiary is reserved, is exempted under the Ohio law. It was so held in Re Schaefer (D. C.) 189 Fed. 187, and in Re Young (D. C.) 208 Fed. 373, 31 Am. Bankr. R. 29, decided by Judge Killits. These cases were decided before the amendment of 1913, 103 O. L. 558. The 1913 amendment, as I construe it, does not change the law as it previously stood, except to include, within the exemption provisions, policies made payable to other dependent relatives, or to creditors. Policies payable to wife or children, which are exempted by this amendment, were, in my opinion, exempted under the old law.

This conclusion follows also from Lytle v. Baldinger, 84 Ohio St. 1, 9, 10, 95 N. E. 389, Ann. Cas. 1912B, 894, which was also decided under these sections of the General Code, prior to the 1913 amendment. In that case the life insurance policies were payable to the insured. He, while insolvent and shortly prior to his death, transferred these policies to his wife and children; and shortly after his death, and after the proceeds had become available, an action was brought by creditors to set aside this transfer as made with intent to hinder, delay, and defraud creditors. It was held that the action could not be maintained, and that insurance policies were not a part of the property of an insured, which could be said to have been transferred in fraud of creditors. The reasoning of Judge Donahue, who delivered the opinion, shows clearly that these sections were construed as exempting policies and the proceeds thereof payable to a wife or children, or transferred and assigned by the insured to them, or for their benefit, from the demands of creditors; and that the remedy of creditors, if any, in this situation, is under section 9395, G. C. of Ohio (R. S. § 3628). This section limits the creditors' right to premiums paid in fraud of creditors.

That question is not before me. Both Lytle v. Baldinger, supra, and Central Nat. Bank of Washington v. Hume, supra, may be consulted in determining the extent of this right in the creditors, and the conditions under which it is available to them.

I am of opinion that the beneficiary, the wife, is entitled to retain both policies. The order of the referee will therefore be reversed. An exception may be noted on behalf of the trustee.

CITY OF BREMERTON v. NORTH PACIFIC PUBLIC SERVICE CO. et al.

(District Court, W. D. Washington, N. D. July 13, 1917.)

No. 3608.

1. EMINENT DOMAIN ⊂=169—CONSTRUCTION OR ACQUISITION OF LIGHTING PLANT—PRELIMINARY PROCEEDINGS—ORDINANCE.
   Under Rem. & Bal. Code Wash. § 8006, which provides that, when a city desires to acquire a lighting plant, the council shall by ordinance "specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be," and submit the proposition to the voters at an election, as construed by the Supreme Court of the state, the proposition submitted to the voters must not only specify and adopt a system, but must place a limit on the expenditure to be made, and also provide the means for its payment, and unless a valid ordinance has been submitted and adopted the city cannot maintain proceedings for the condemnation of property.
2. EMINENT DOMAIN ⊂=45—LIGHTING PLANT—CONDEMNATION OF PROPERTY IN ANOTHER CITY.
   Under the laws of Washington a city cannot acquire by condemnation a lighting system in another city, nor the franchise granted therefor by the latter city.

At Law. Action by the City of Bremerton, Wash., against the North Pacific Public Service Company and the Fidelity Trust Company of Tacoma. On demurrer to amended complaint. Demurrer sustained.

Marion Garland, City Atty., of Bremerton, Wash., and James W. Bryan, of Seattle, Wash., for plaintiff.

Stiles & Latcham, of Tacoma, Wash., for defendants.

NETERER, District Judge. The city of Bremerton seeks to condemn a certain lighting plant owed by the defendant North Pacific Public Service Company, covering certain franchises in the city of Bremerton, the county of Kitsap, the town of Port Orchard, and the city of Charleston, Wash. The action was commenced in the state court and removed to this court. Process was served on the 19th of March, 1917. A demurrer was filed to the original complaint and sustained. An amended complaint was filed in this court on the 19th of June, 1917. In the amended complaint, after alleging the corporate capacity of the plaintiff as a city of the third class, it is stated:

"That on or about the 28th day of October, 1912, the city council of the city of Bremerton duly passed an ordinance, entitled 'An ordinance for the purchasing, acquiring and constructing of an electric lighting system for the city of Bremerton, and providing for the borrowing of money to be used therefor by issuing the negotiable coupon bonds of said city of Bremerton in the sum of twenty-five thousand dollars, and for the issuance and negotiation of special lighting fund bonds against the earnings of said electric lighting system in such further sum or sums as to the city council may seem proper, and providing for the holding of a special election for submitting the said proposition to the qualified voters of the said city of Bremerton for ratification or rejection,' which said ordinance was approved on the 28th day of October, 1912, and was thereafter published as by law provided, a copy of which said ordinance is hereto attached, marked 'Exhibit A' and made a part of this amended complaint."

It is alleged that the ordinance was submitted to the qualified electors pursuant to the provisions of said ordinance, and that on the 14th of May, 1917, the city council of the city of Bremerton, by resolution duly passed, entered into negotiations with the defendants, the owners of the plant, "and every effort was made by the city council through its officers and agents to come to an agreement as to the proper price to be paid for said plant, * * *" and "that a resolution was passed by the city of Bremerton, offering and tendering to the said defendant $75,000 cash, * * *" and that the defendant refused to accept the said sum, and that it is impossible to come to an agreement; that because of the growth of the community in which the defendants operated, extensions were made, and that "in accordance with said natural growth and extending said business and system the said wires and poles have been extended through the city of Charleston and over its streets under and by virtue of a franchise obtained from the city of Charleston, and which said franchise is now in force and is owned by the said North Pacific Public Service Company; that the said wires and poles have been extended over contiguous unincorporated territory and have also been extended within the town of Port Orchard; that the entire distributing system is one single system having a common source of supply and a common main connection therewith; that it is impossible to divide or segregate the said plant into different units, and that it is the desire and purpose of the city of Bremerton to take over the entire system as one unitary and complete system"; that the city of Bremerton desires to condemn and take over all of the property of the said company, both personal and real, situated within the city of Bremerton and the territory contiguous thereto, and used in or in any way connected with the said lighting and power plant and system; "that the said property * * * consists of poles, wires, transformers, office fixtures, which said wires and poles are located over and on the streets of the city of Bremerton and Charleston and the town of Port Orchard and over the county roads in the territory contiguous thereto. * * *" Then follows a description of the property, including the franchises granted by the county commissioners of Kitsap county, by the city of Charleston, and of the streets and highways in the county covered by the plant of the defendant.

Motion to dismiss has been filed, on the ground that the amended complaint does not remedy the defect disclosed by the original complaint. A demurrer is likewise filed upon the ground that the petition does not state facts sufficient to constitute a cause of action or to entitle the petitioner to any relief. They will be considered together and as challenging the sufficiency of the petition.

[1] The question, at the outset, is whether the plaintiff shows its qualification under the statutes of Washington to exercise the right of eminent domain. That the city has the power to purchase or acquire by condemnation proceedings a light and power plant is conceded. Section 8006, Remington & Ballinger's Code of Washington, provides that the council shall by ordinance specify and adopt the system or plan proposed and declare the estimated cost, and submit for ratification or

rejection to the qualified voters at the election such proposition, except in cases when an existing plant is extended or increased, or for betterments to such plant, or where the charter authorizes the council to provide by ordinance such utility, for which no general indebtedness is to be incurred, and, if general indebtedness is to be incurred, it must be assented to by three-fifths of the qualified voters of such city, voting at a general or special election. The ordinance attached to the complaint as a basis for this action does not conform to the requirement of this section of the statute. The title of the ordinance is as follows:

"An ordinance for the purchasing, acquiring and constructing of an electric light system for the city of Bremerton, and providing for the borrowing of money to be used therefor by issuing the negotiable coupon bonds of the said city of Bremerton in the sum of twenty-five thousand dollars, and for the issuance and negotiation of special lighting fund bonds against the earnings of said electric lighting system in such further sum or sums as to the city council may seem proper * * *"

—and then submits three proposed plans. Propositions 2 and 3 do not submit a "plan or system" adopted, but leave the matter for the future determination of the council, clearly not within the provisions of the law. Section 8006, Remington & Ballinger's Code of Washington, provides that the council, by ordinance, "shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be." A liberal construction might hold sufficient proposition 1, which, in substance, is to purchase, acquire, or condemn, "by whatever negotiations, condemnation suits, or proceedings may be found necessary or appropriate, * * *" provided it had included a legal plan for payment. The Supreme Court of Washington, in Hansard v. Green, 54 Wash. 161, 103 Pac. 40, 24 L. R. A. (N. S.) 1273, 132 Am. St. Rep. 1107, and Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998, held that payment is as much a part of the "plan or system" as is the purchase, and that the method should be provided in the ordinance. While the ordinance provides for the issuance of bonds to the amount of $25,000, the estimated value of the plant is placed at $125,000, and proposition 1 provides that:

"Such other and further sum as may be required as aforesaid for payment of and for the said electric lighting plant over and above the said sum of $25,000 shall be derived from the sale by the said city of Bremerton, on the open market, at such terms and upon such conditions as may be deemed wise and proper. The special lighting fund bonds of the said city which said bonds shall be a lien upon the profits and revenues of said lighting plant, subject to the terms and conditions set forth hereinafter in this ordinance."

The amount is left indefinite, and clearly within the holding of the Supreme Court in Uhler v. Olympia, supra, in which the court said that "the purpose of the statute was to compel a reasonably definite estimate of the value of the thing to be purchased beyond which the council could not go," and further said:

"It will be seen that this section of the ordinance violates the spirit and intent of the act giving the council power to pass an ordinance providing for the submission of such questions. The council had fixed, as the estimated sum necessary to purchase the waterworks, $90,000. It could not, therefore, make its own act indefinite by providing, in the event a larger sum became necessary

after the condemnation to carry out the purpose intended, that it might provide by supplemental ordinance for the issuance of bonds in the total amount necessary, whatever that sum might be. If the council could do this, it could make out of the statute a mere form and leave the citizen as uninformed as to the probable amount of the bond issue as if no sum had been fixed as an estimate at all. It could fix an estimate at, say, $25,000, without reference to probable values, and issue bonds at will and to any amount."

In the instant case, while in the preamble the value of the plant is placed at $125,000, there is no limit to the amount of bonds which might be issued. This is clearly insufficient. Uhler v. Olympia, supra.

It is said that the court is not concerned with the legality of bonds in this case, and that subsequently an ordinance could be passed and submitted after the value of the plant was ascertained. The statute, however, provides a method, which is that a "plan and system" must be adopted, and the estimated value to be expended, and the payment, the Supreme Court, supra, says is a part of the plan. This court must adjudicate the necessity, and also, prima facie at least, the qualification under the statute of the plaintiff to exercise the right, and if it is apparent upon the face of the complaint that the requirements of the statute and the decisions of the state Supreme Court have not been complied with or conformed to, the court would not do an idle thing and proced in the cause. The Supreme Court, in State ex rel. Wright v. Tacoma, 92 Wash. 591, 159 Pac. 765, did say that "such additional costs * * * as might be incurred should not go unpaid, but should be paid out of the earnings of the plaintiff"; but in that case provision was made for such payment in the ordinance, and the bond issue limited. The court did not modify its holding that the limit of the bond issue must be fixed by the ordinance, and the expression of the voters obtained thereto.

[2] Complainant seeks to condemn franchises held by the defendant in the city of Charleston, another municipality. The Supreme Court, in Spear v. Bremerton, 90 Wash. 507, 156 Pac. 825, held that the city of Bremerton could not acquire a water system in the city of Charleston, or acquire the franchises owned by the water company in the city of Charleston, saying at page 511 of 90 Wash., at page 826 of 156 Pac.:

"The power is not within the terms of the several acts to which reference has been had, and it is certainly not within the necessary implications of any of them. The purpose of the law is plain."

Light and water are included in the same acts of the Legislature, and the construction and statutory power given with relation to water franchises, I think, would equally apply to light franchises. It follows that so much of the plant as lies within the cities is not subject to condemnation by the plaintiff.

Attention has been directed to Omaha v. Omaha Water Co., 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084, as being in contravention to the rule adopted by the Supreme Court of this state, and it is urged that this court should adopt the rule announced in the Omaha Case. It will be noted that the charter of Omaha provided, among other things:

"Power to appropriate any waterworks system, plant or property already constructed, to supply the city and the inhabitants thereof with water, or any part thereof, whether lying within said city or in part without the city and within ten miles from the corporate limits of such city, including all real estate, buildings, machinery, pipes, mains, hydrants basins, reservoirs and all appurtenances reasonably necessary thereto, and a part of or connected with said system plant or property, and franchises to own and operate the same, if any."

The Omaha act was much more comprehensive than the Washington law, and that case was based upon express power granted; whereas, the Supreme Court of Washington based its conclusion upon lack of legislative authority.

The other objections raised will not be discussed.

The demurrer must be sustained.

In re DOONER & SMITH.

(District Court, D. New Jersey. August 10, 1917.)

1. MORTGAGES ⟸199(1)—RENTS—RIGHT TO.
   Ordinarily, as between mortgagor and mortgagee, the mortgagor is entitled to the rents, issues, and profits of mortgaged premises so long as he is in possession, and until the mortgagee, by showing that the mortgage security is insufficient to pay his indebtedness, takes actual possession.

2. BANKRUPTCY ⟸205—TRUSTEES—RENTS.
   Where a trustee in bankruptcy takes possession of real estate incumbered by several mortgages, and retains possession and collects rent between adjudication and foreclosure of the prior mortgages, and the proceeds from foreclosure sale are insufficient to discharge the last mortgage, such mortgagee can require application of the rents in liquidation of his mortgage, though the trustee represents the mortgagor, and under Bankr. Act July 1, 1898, c. 541, §§ 47a–60 (a), (b), 67a, 70, 30 Stat. 557, 564, 565 (Comp. St. 1916, §§ 9631, 9651, 9654), has in some particulars more extensive rights than the mortgagor for his possession is not that of the mortgagor, the change in possession being the result of operation of law, and hence such rents cannot be claimed on the theory that they were collected by the trustee as the mortgagor's representative.

In Bankruptcy. In the matter of the bankruptcy of Dooner & Smith. Petition by the Liberty Trust Company to require Nicholas Bindseil, trustee in bankruptcy, to apply, in liquidation of its mortgage, rents collected between adjudication and sale of the mortgaged property under foreclosure proceedings was denied. On proceedings to review order of referee. Order reversed, and trustee directed to make payment to petitioner.

Bilder & Bilder, of Newark, N. J., for trustee.

Archibald F. Slingerland, of Newark, N. J., for petitioner.

DAVIS, District Judge. The Liberty Trust Company, petitioner herein, on December, 19, 1914, when the Dooner & Smith Company was adjudicated a bankrupt, held a third mortgage against certain real estate belonging to the bankrupt. Nicholas Bindseil, trustee in bank-

ruptcy, collected the rents from the mortgaged premises from the adjudication until the sale of the same under foreclosure proceedings of the said mortgage on March 4, 1916. The sale was made subject to the first and second mortgages. Not sufficient money was realized from the sale to pay the third mortgage indebtedness. A deficiency of $5,827.02, with interest thereon from December 18, 1915, remained. The Trust Company filed its petition before the referee, praying that the trustee in bankruptcy be directed to pay the rent collected by him from the said premises as aforesaid to the Trust Company, in liquidation of the said indebtedness. The referee, upon argument of the rule to show cause, made an order dismissing the petition. That order is before this court for review.

[1] There is no evidence before me to show that the petitioner took any steps to have a receiver appointed or the rents sequestered during the bankruptcy proceedings and the foreclosure of its mortgage. That it did not take any I understand to be admitted. The first steps toward having the rents sequestered was the filing of the petition with the referee for said purpose. The petitioner contends, in substance, that it has a lien upon the said rents by virtue of its mortgage, which is prior to the claims of general creditors. This is denied by the trustee, who claims that his status, so far as the mortgaged premises are concerned, is that of the mortgagor, and that he should receive the rents for the benefit of the general creditors. The general rule, without exception, is that, as between mortgagor and mortgagee, the mortgagor has the right to the rents, issues, and profits of the mortgaged premises so long as he is in possession, even though the rents be expressly pledged for the payment of the mortgage; or, as stated in some cases, until the mortgagee, upon showing that the mortgage security is insufficient to pay his indebtedness, takes actual possession or possession is taken in his behalf. Gilman v. Illinois & Mississippi Telegraph Co., 91 U. S. 603, 23 L. Ed. 405; Hitz v. Jenks, 123 U. S. 306, 8 Sup. Ct. 143, 31 L. Ed. 156; Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609; Teal v. Walker, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; Sage v. Memphis & Little Rock R. R. Co., 125 U. S. 378, 8 Sup. Ct. 887, 31 L. Ed. 694; Freedman's Sav. Co. v. Shepherd, 127 U. S. 494, 8 Sup. Ct. 1250, 32 L. Ed. 163; Wiswall v. Sampson, 55 U. S. (14 How.) 52, 14 L. Ed. 322; United States Trust Co. v. Wabash Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752; In re Hasie (D. C.) 206 Fed. 789. The reason for this rule has been variously stated: Possession of the mortgaged premises, either by the mortgagor or mortgagee, draws to it the right to receive the rents; ownership of the equity of redemption entitles the owner to rents and profits; the agreement was to pay interest, not rent. Gorden v. Lewis, Fed. Cas. No. 5,613; Kountze v. Omaha Hotel Co., 107 U. S. 393, 2 Sup. Ct. 911, 27 L. Ed. 609.

Vice Chancellor Van Fleet in Leeds v. Gifford, 41 N. J. Eq. 464, 5 Atl. 795, said:

"It (rent) was as absolutely free from all lien or other claim on the part of the complainant (mortgagee) as it would have been if the mortgagor had de-

rived it from some other source than the mortgaged premises. As between the complainant and the mortgagor, the money was the property of the mortgagor as completely and as unconditionally as it would have been if the relation of mortgagor and mortgagee had not existed between them."

The mortgagor, being in possession and entitled to the rents, may appropriate them "to his own use."

[2] When, however, the property of a mortgagor is taken out of his hands by insolvency or bankruptcy proceedings, and he can no longer appropriate the rents "to his own use," neither the mortgagor nor mortgagee being in actual possession, we have a new situation and a new problem. To whom do the rents of mortgaged premises, collected by the assignee in insolvency proceedings or the trustee in bankruptcy, and not distributed at the time the mortgagee seeks to have them applied in payment of the deficiency of his mortgage upon foreclosure, belong? The answer to this question depends upon the nature of the interest of the mortgagee in the mortgaged premises in such circumstances. It is claimed on the one side that the trustee, representing the creditors, stands in exactly the position of the mortgagor in relation to these rents, and therefore they belong to the general creditors; it is claimed, on the other, that when insolvency or bankruptcy takes the mortgagor's property out of his hands, and the mortgaged premises are insufficient to pay the mortgage indebtedness, the mortgagee is substantially the owner of the mortgaged premises. The nomenclature used by courts in defining the mortgagee's interest in such cases is not uniform. "Substantial owner," "virtual owner," "equitable owner" of the land are terms applied to his interest therein. I have been able to find but few opinions on the precise point involved in this case and they are not in accord. The following cases hold, in substance, that the assignee or trustee, having the status of the mortgagor, represents the general creditors, and therefore the rents belong to him: In re Foster, Fed. Cas. No. 4,963, affirmed in Foster v. Rhodes, Fed. Cas. No. 4,981; In re Hasie (D. C.) 206 Fed. 789, 30 Am. Bankr. Rep. 83. Over against these cases stand Hutchinson, Assignee, v. Straub et al., 16 Ohio Cir. Ct. R. 452; In re Industrial Cold Storage & Ice Co. (D. C.) 163 Fed. 390, 20 Am. Bankr. R. 904; In re Torchia, 188 Fed. 207, 110 C. C. A. 248; Id. (D. C.) 185 Fed. 576, 26 Am. Bankr. R. 188. In the case of Hutchinson, Assignee, v. Straub, the owner of the real estate executed a mortgage thereon June 12, 1893, to the St. Bernard Loan & Building Association Company to secure a loan of $3,500. On January 18, 1896, she made an assignment to Mr. Hutchinson of all her property, including the mortgaged premises in question, for the benefit of her creditors. The real estate was sold under order of the court, but did not sell for enough to pay the mortgage and interest which had accrued thereon. Between the assignment and the sale, the assignee collected $335.50 in rents. The common pleas court directed that the assignee apply the rents collected as aforesaid, or a sufficient amount thereof, to pay in full the mortgage indebtedness. The assignee excepted to this part of the order. The circuit court said:

"In some cases rent not due is considered as real estate, as, for instance, between an executor or administrator and an heir. And in a case of this kind, as it issues out of the land mortgaged to the building association, we think that it partakes of the nature of the land itself, that the assignee would hold it as the trustee of the mortgagee rather than for the general creditors, who had no lien on the land itself or of the proceeds thereof."

The court said in the case of Wiswall v. Sampson, 55 U. S. (14 How.) 52, 64, 14 L. Ed. 322:

"The effect of the appointment (of a receiver) is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver."

In the case of In re Torchia, 185 Fed. 576, the District Court, referring to the decision in Re Industrial Cold Storage & Ice Co., supra, said:

"It seems to me that the only theory upon which such decision can rest is that the mortgagee is either in possession through his trustee, to wit, the assignee, under the deed of voluntary assignment, or entitled to such possession by the voluntary act of the assignor. Under the Bankruptcy Act of 1898, § 70 (Act of July 1, 1898, c. 541, 30 Stat. 565 (U. S. Compiled Statutes 1901, p. 3451), the trustee is vested with the title of the bankrupt mortgagor by act of law and not by the act of the bankrupt. The mortgagee is no nearer to the possession of the mortgaged premises after the election of a trustee than he was before. He could not have higher rights against the trustee than he had against the bankrupt."

The trustee, by section 70 of the act, is "vested by operation of law with the title of the bankrupt," but this does not mean that his status is exactly that of the mortgagor for all purposes. In some particulars his rights are greater than those of the mortgagor. Bankruptcy Act 1898, §§ 47 (a) (2); 60 (a) (b); 67 (a); 70. The Circuit Court of Appeals, in reviewing the case In re Torchia, supra, said:

"It was there (Wolf's Appeal [106 Pa. 545]) determined that, after insolvency has taken the debtor's real estate out of his hands, its income or product belongs to the lien creditors, who have thus become its virtual owners, and we can see no sufficient reason why the same rule should not apply to real estate in a court of bankruptcy. It has already been so applied in this circuit. In re Industrial Cold Storage & Ice Co. (D. C.) 163 Fed. 390." 188 Fed. 207, 110 C. C. A. 248.

In the case of In re Industrial Cold Storage Co., supra:

"No proceedings were taken by the mortgagee to sequester the rents as by obtaining the appointment of a receiver before bankruptcy or by a direct application to the bankruptcy court."

It was there, however, decided that the mortgagee was the virtual owner of the land and entitled to the rents. This case was approved by the Circuit Court of the Third Circuit. In re Torchia, 188 Fed. 207, 110 C. C. A. 248; Id. (D. C.) 185 Fed. 576, 26 Am. Bankr. R. 188. The facts of this case were practically identical with those in the case at bar. In Pennsylvania a mortgage, though in form a conveyance of title, is in reality, both at law and in equity, only security for the payment of money or the performance of other collateral contract, passing no estate in the land which may be taken in execution for the mortga-

gee's debt. Rickert v. Madeira, 1 Rawle (Pa.) 325; Bower v. Oyster, 3 Pen. & W. (Pa.) 239; Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713; Lennig's Estate, 52 Pa. 135. In New Jersey the same theory of the nature of a mortgage prevails. Wade v. Miller, 32 N. J. Law, 296; Shields v. Lozear, 34 N. J. Law, 496, 3 Am. St. Rep. 256; Kircher v. Schalk, 39 N. J. Law, 335; Colton v. Depew, 59 N. J. Eq. 126, 44 Atl. 662. The precise point at issue in the case at bar has never arisen, to my knowledge, in New Jersey. I, therefore, feel constrained to follow the opinion of the District Court in the case of In re Industrial Cold Storage & Ice Co., and of the Circuit Court in the case of In re Torchia, supra. The order of the referee will therefore be reversed, and an order made directing the trustee to apply the interest to the payment of the mortgage of the petitioner.

In re EMIGH et al.

(District Court, N. D. New York. July 23, 1917.)

BANKRUPTCY ⇐241(1)—PROCEDURE—SPECIAL EXAMINATION OF WITNESS.

A witness other than the bankrupt called under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 551 (Comp. St. 1916, § 9605), for special examination "concerning the acts, conduct, or property" of the bankrupt, after adjudication and appointment of a trustee, may, in the discretion of the referee, be examined privately, and is not entitled as matter of law to be represented by counsel even though he has filed a claim against the estate which is contested, where the merits of his own claims are not a subject of the examination. Nor is the bankrupt entitled to be present or represented by counsel at such examination.

In the matter of Mott Emigh and Martin J. Straub, individually and as copartners of the firm of Emigh & Straub, bankrupts. On questions certified by referee.

This is a review of the rulings of Hon. Edwin A. King both as special master appointed to examine the alleged bankrupts and witnesses prior to the appointment and qualification of the trustee and as referee in bankruptcy at the first meeting of creditors duly called and held subsequent to the appointment of the trustee, at which meeting one George A. Straub was duly subpœnaed and in attendance as a witness in behalf of the trustee in bankruptcy, and by which rulings the referee held that the trustee was entitled to a private examination of the witness, the examination being under section 21a of the Bankruptcy Act; that the witness was not entitled to have counsel present in his own behalf during his examination, it appearing that he had presented a claim against the estate in bankruptcy amounting to some $7,000 which had been objected to, but which was not then in controversy; that the bankrupts were not entitled to be present at and during such examination, either in person or by counsel; and that the general public was not entitled to be present at such examination.

It is assumed it was not proposed to examine into or inquire as to the merits of the claim of George L. Straub, the witness, as there is nothing in the record certified to this court indicating such purpose.

Thos. O'Connor, of Waterford, N. Y., for trustee.

O'Brien & Murray, of Troy, N. Y., for witness Geo. A. Straub.

J. A. Murphy, of Troy, N. Y., for bankrupt.

Martin J. Straub, in pro. per.

RAY, District Judge (after stating the facts as above). The referee has certified to this court the following questions:

"1. Is a witness, under section 21a, entitled as matter of law to be represented by counsel upon his examination?

"2. Does the fact that such witness happens also to be a creditor, or an alleged creditor, of the bankrupt, entitle him so to be represented by counsel?

"3. Upon such examination is the bankrupt, or his attorney, entitled as matter of right to be present?

"4. Upon such examination is the public as such, or any particular citizen as such, entitled as matter of right to be present?"

Section 21a of the Bankruptcy Act provides as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

This section is silent as to the attendance of counsel for the witness or the bankrupt if it be the bankrupt who is to be examined. This section presupposes a special examination and a special order for the examination. It may be had at the time of the first meeting of creditors, but is not necessarily a part of the proceedings at such first meeting. If made a part of the proceedings at the first meeting of creditors, it would seem clear that not only the bankrupt, but all creditors, would have the right to be present with counsel, but if not made a part of the proceedings of such first meeting, but is had for a special purpose as mere discovery, a different question arises. This review does not necessarily involve the rights of the bankrupt when under oath, as neither of the bankrupts was sworn. The questions certified concern the rights of a witness, his counsel, and of the general public. The proceedings before the special master as such had not been concluded, and from the record before me I conclude that the examination of Straub was intended to be had under the provisions of section 21a.

Black on Bankruptcy, § 267, pp. 648, 649, says:

"A stranger to the proceedings (that is, one who is neither the bankrupt himself nor a creditor) when summoned to appear and be examined in bankruptcy, at the instance of the trustee or the creditors, has no right to have the attendance and advice of counsel at his examination. Neither is a creditor of the bankrupt a 'party' to the proceeding, in any such sense as to entitle him to interfere with it or be represented in it by counsel, or at least it is in the judicial discretion of the referee to permit or refuse such representation. But in the case of the bankrupt himself, it is different. The rule is well settled that he is entitled to be attended by his counsel on his examination, and that the attorney may interpose objections to any improper questions propounded to the bankrupt. But the bankrupt has no absolute right to consult with his counsel before answering any given questions, or to take his advice as to the necessity of his answering the question or the form of his answer. This privilege may be allowed to him by the referee, if the circumstances render it proper, but it cannot be claimed as of right. The referee has a discretionary power to allow such a consultation of the bankrupt with his counsel, and whether or not it shall be allowed must be determined by him according to the circumstances of each particular case. On this point it has been said: 'There may be a case in which such a privilege might or should be allowed,

as, for example, where the examination might implicate the bankrupt in a criminal charge, or require the disclosure of facts against which he is protected by law. But even in such a case, the presence of the bankrupt's counsel will generally, if not always, furnish all the protection needed without the allowing of a private consultation.' "

He cites the following authorities:

"In re Feinberg, 3 Ben. 162, 2 N. B. R. 425, Fed. Cas. No. 4,716; In re Fredenberg, 2 Ben. 133, 1 N. B. R. 268, Fed. Cas. No. 5,075; In re Feeny, 1 Hask. 304, Fed. Cas. No. 4,715; In re Stuyvesant Bank, 6 Ben. 33, 7 N. B. R. 445, Fed. Cas. No. 13,582; In re Schonberg, 7 Ben. 211, Fed. Cas. No. 12,477; In re Howard (D. C.) 95 Fed. 415, 2 Am. Bankr. R. 582; In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161, 13 Am. Bankr. Rep. 11; In re Comstock, 3 Sawy. 517, 13 N. B. R. 193, Fed. Cas. No. 3,080; In re Tanner, 1 Low. 215, 1 N. B. R. 316, Fed. Cas. No. 13,745; In re Patterson, 1 N. B. R. 150, Fed. Cas. No. 10,815; In re Judson, 2 Ben. 210, 1 N. B. R. 364, Fed. Cas. No. 7,562; In re Collins, 1 N. B. R. 551, Fed. Cas. No. 3,008; In re Lord, 3 N. B. R. 243, Fed. Cas. No. 8,502."

In 2 Remington on Bankruptcy (2d Ed.) §§ 1573, 1574, pp. 1456, 1457, it is said:

"Sec. 1573. *Witness, as Such, Not Entitled to Attorney.*—A witness is not entitled as such to have an attorney, and his attorney need not be allowed to participate in the proceedings.

"Sec. 1574. *But is Entitled if Witness be Creditor or Bankrupt.*—But if the witness is also a creditor who has proved his claim in the proceedings, or if he is the bankrupt himself, it would seem he may, as being a party to the proceedings, be entitled to an attorney and to have his attorney heard on the propriety of questions and to participate in the examination precisely as could any creditor who is not a witness. A contrary rule would allow creditors who were not witnesses to have attorneys participate in the examination, but would debar creditors who were witnesses from the exercise of the same right. So, also, by the same contrary rule, a bankrupt, who in fact is precisely as much of a party to the proceedings as any creditor, would not be entitled to have his attorney participate in the examination when the bankrupt himself was a witness, but would be entitled to participate in the proceedings when he was not a witness. The contrary rule thus would lead to absurdity.

"So, while it still remains true that as a mere witness neither a bankrupt nor any creditor is entitled to counsel, yet, as parties to the bankruptcy proceedings, they are so entitled, and both the bankrupt's attorney, and also any creditor's attorney, is entitled to cross-examine witnesses, where the examination is a 'general' examination."

Remington cites the same cases.

In Re Abbey Press, 134 Fed. 51, 67 C. C. A. 161 (C. C. A., Second Circuit) 13 Am. B. R. 11, it is said:

"Finally it is contended that the petitioner was entitled to be represented by counsel. No authority is cited in support of this proposition. Such a course would be contrary to the rulings in other courts, and, as we understand it, contrary to the practice and decisions in the bankruptcy courts. In any event, no such representation should be allowed except in the discretion of the court; that is, of the referee."

I do not find that this holding of the Circuit Court of Appeals in this, the Second Circuit, has been overruled. It must be accepted as the law as to the examination of a person who is a mere witness. But what is and what should be the rule when the witness so called for examination is also an alleged creditor, having presented a claim which is disputed by the trustee?

In Matter of Adler & Co., 21 Am. Bankr. R. 302, the referee said and held:

"I denied the right of counsel for the bankrupt to be present, because:

"First. The inquiry 'is of necessity to a considerable extent a fishing expedition.' In re Foerst, 1 Am. B. R. 259, 93 Fed. 190.

"Second. The purpose of the examination being to take necessary steps for the discovery, possession, and preservation of the estates, if any hidden assets should be disclosed, the presence of counsel for the bankrupt, at time of disclosure, would put it in the power of the bankrupt to remove said assets from their hiding places before legal process could issue.

"Third. The examination is not intended as a means of producing testimony, pertinent to issues on trial, and is not directed to a defined issue between parties. In re Fixen, 2 Am. B. R. 822, 96 Fed. 755; In re Wilcox, 6 Am. B. R. 362, 109 Fed. 628."

This holding was confirmed by the District Judge. These reasons apply equally if not with greater force to the examination of a third party witness, whether having a claim or not, provided the examination of the witness in the absence of his attorney does not involve the merits of his claim. In my judgment it would violate the proprieties, as well as a proper respect for the administration of justice, to subpœna a person claiming to be a creditor of the bankrupt under section 21a and compel him to submit to a private examination in the absence of his counsel, assuming he requests counsel, involving the merits of his claim. But as to matters which do not involve the merits of the claims of the witness against the bankrupt estate, I can see no objection to the full and complete examination of the witness, even though he be a creditor or an alleged creditor in the absence of both the bankrupt and his counsel and the absence of counsel for such witness. In my judgment it would be an abuse of discretion on the part of the referee to allow counsel for the trustee to go into matters involving the merits of the witness' claim, he being a witness under special order and special examination. It would be unfair and might be seriously prejudicial. I do not think a proper regard for the interests of general creditors would justify such action. At the first meeting of creditors, of which all creditors have notice (section 58, Bankruptcy Act [Comp. St. 1916, § 9642]), and at all adjournments thereof, the bankrupt may be examined. Witnesses may be examined and proof taken as to claims. These proceedings should be open to the public, and the bankrupt is then and there entitled to counsel. While the witnesses are publicly sworn and examined at such a meeting, they are not entitled to counsel, except when in the discretion of the referee or court counsel ought to be permitted. But special examination of the bankrupt and of his wife and of witnesses under special order pursuant to the provisions of section 21a are a different matter, and are had for a different purpose. The two proceedings should not be confused or conducted the one as a part of the other. These special examinations, while a proceeding in the case before the referee or judge, are not a part of the open court proceedings proper and ought not to be. If so conducted the object and purpose of such examination will be defeated.

It is now settled by the Supreme Court, notwithstanding many decisions in the lower courts to the contrary, that the moment a petition

in bankruptcy is filed, whether voluntary or involuntary, and a receiver appointed, the administration of the estate has begun, and an order may be granted under section 21a for the examination of the bankrupt or any designated witness or witnesses. Cameron v. United States, 231 U. S. 710, 716, 717, 34 Sup. Ct. 244, 246, 58 L. Ed. 448. The court says of this section:

"The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated."

It is apparent that notice to creditors of examinations under section 21a is not contemplated by the act. In fact in involuntary cases such notice would be impossible, as there are no schedules or list of creditors in such cases and the creditors of the bankrupt are largely unknown. These examinations are held mainly for the purpose of discovery, and there is every reason that they should proceed expeditiously. There is no issue framed and no contest. There is no reason why a witness should be attended by counsel and no reason why the bankrupt himself on such examination should be attended by counsel, as his testimony cannot be used against him in any criminal prosecution. In this case the proceeding has gone to adjudication and the appointment of a trustee and the filing of schedules, and the creditors are known, but these facts do not necessarily avoid the necessity and propriety of an examination under section 21a, or call for notice to creditors when such examination is had. The examination under this section is confined to the acts, the conduct, and the property of the bankrupt. The referee or special master must, of course, exercise a wise discretion in conducting such an examination. In the examination of the witness George A. Straub, under section 21a, the referee must not permit the merits of Straub's claim against the bankrupt estate to be gone into in the absence of his counsel, and if questions are propounded which the witness thinks would incriminate him, he should be allowed to consult his counsel before answering or declining to answer. I think a bankrupt, when examined pursuant to a special order under section 21a, occupies the position of a witness merely, but I am not called upon at this time to decide that question.

My conclusions are that the witness Straub had no right as matter of law to a public examination; that in the discretion of the referee or special master a private examination was proper without the presence of the witness' counsel or that of the bankrupt and his attorney, assuming that the merits of his claim were not gone into. This is of course on the assumption that the examination was being conducted under section 21a, and not as a part of the proceedings at the first meeting of creditors.

UNITED STATES v. WILCOX et al.

(District Court, D. Rhode Island. July 23, 1917.)

1. CONSPIRACY ⊂⊃43(6)—INDICTMENT—SUFFICIENCY.
In an indictment for conspiring to injure, oppress, threaten or intimidate a voter in the free exercise of his right of voting for representative in Congress, in violation of Cr. Code, § 19 (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]), an allegation that it was proposed to do this by peremptorily ordering, requiring, and directing him to vote for a particular candidate was without substance and of no legal effect, as peremptorily ordering, requiring, and directing, does not amount to intimidation, nor does it injure, oppress, or threaten.

2. CONSPIRACY ⊂⊃43(6)—INDICTMENT—SUFFICIENCY.
An allegation that it was proposed to accomplish the purpose of such conspiracy by threatening to use efforts to cause one of the defendants to withdraw his custom and trade from such voter unless he would vote as directed was insufficient, in the absence of any allegations giving weight or value to such efforts or to such defendant's trade or custom, or to show any probability that the threats alleged would produce coercion.

3. CONSPIRACY ⊂⊃27—CONSPIRACY TO INTIMIDATE VOTER—OVERT ACTS.
A threat by one of the defendants to withdraw his trade and custom from the voter unless he worked for a particular ticket was his individual act, and not an overt act in execution of the alleged conspiracy punishable under Cr. Code, § 19.

Henry C. Wilcox and others were indicted for conspiracy. On demurrers to the indictment. Demurrers sustained.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. The demurrers raise the question whether the indictment sufficiently charges a conspiracy to violate section 19 of the Criminal Code, and more specifically whether it properly charges that the defendants did "conspire to injure, oppress, threaten, or intimidate" one Adelbert A. Martin in the free exercise and enjoyment of the right of voting freely for a candidate for representative in Congress. The proposed means to this end are set forth as follows:

"By peremptorily ordering, requiring and directing said citizen to vote for one Roswell B. Burchard for representative in said Congress at said election at all events, and without reference to whether said Roswell B. Burchard was the candidate of his, the said Adelbert A. Martin's choice for representative in said Congress, and to threaten to use their efforts to cause one John McCarthy, who was a principal customer of said Adelbert A. Martin in connection with his, the said Adelbert A. Martin's, business of supplying poultry to hotel keepers and others, to withdraw his custom and trade from said Adelbert A. Martin unless he would so vote for said Roswell B. Burchard, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

[1, 2] "Peremptorily ordering, requiring and directing" does not amount to intimidation; nor does it "injure, oppress or threaten." These words are without substance and are of no legal effect.

"* * * To threaten to use their efforts to cause one John McCarthy * * * to withdraw his custom and trade from said Adelbert A. Martin unless he would so vote for said Roswell B. Burchard," etc.

—does not amount to a charge of a conspiracy to make direct threats of a loss of custom, but merely of a conspiracy to make threats to use their efforts to cause John McCarthy to withdraw his custom.

We have then a conspiracy to threaten—to use efforts to cause—John McCarthy to withdraw custom. But John McCarthy, one of the defendants, as is stated on the brief of the United States, is the same John McCarthy upon whom efforts are to be made. As to this defendant, the present case is a case of primary impression; for John is charged with conspiracy to threaten, to use efforts, to cause, John (i. e., himself) to withdraw his own custom. If John were to threaten the voter that he (John) would use his own efforts to cause himself to withdraw his custom, this would make the withdrawal conditional upon John's making up his own mind, and detract much from the menace, even if it were also threatened that the other conspirators would unite with their efforts to cause John, John's own efforts to cause himself to withdraw his custom from the voter.

[3] Though section 19 does not require it, the second count contains allegations of overt acts. One of these is that John McCarthy said to the voter that unless he worked for the ticket on which Burchard was a candidate for representative in Congress, etc., McCarthy would withdraw his trade and custom. This individual act of John McCarthy's, however, does not fall within the federal statutes, and cannot be brought within section 19 of the Criminal Code, to make a case of federal jurisdiction upon the theory that the scheme or plan which preceded it was shared with one or more other persons. John's threat as set forth as an overt act was a direct threat of the withdrawal of custom. His intention to do what he did is a presumption of law. The conspiracy charged is merely to threaten to use efforts to cause John to withdraw his custom.

John's direct threat, therefore, is not pursuant to the conspiracy, and is not an overt act in execution of the alleged conspiracy, but remains his individual act, and is not subject to punishment under section 19 of the Criminal Code.

In the conspiracy to threaten "to use their efforts" the threatened efforts of the other defendants are to be made upon John, while John's threatened efforts are to be made upon himself.

The practice of preferring indictments for conspiracy in cases of completed offenses, where there are two or more participants, has become very extended; but care should be taken that the practice should not be unduly extended, nor the federal conspiracy statutes be stretched to enlarge federal jurisdiction so that it will cover individual acts of interference with state elections; for this is contrary to the policy of federal noninterference in state elections, which is so fully recognized by the Supreme Court in United States v. Gradwell et al., April 9, 1917, 243 U. S. 476, 37 Sup. Ct. 407, 61 L. Ed. 857.

Whether a mere general allegation of a threat of withdrawal of custom, without additional allegations to show that this custom was of

such pecuniary value as to make the threat a substantial menace, would amount to a charge of intimidation is doubtful. The doubt increases when the threat is merely of efforts to cause a withdrawal of custom or trade of an undefined value. There appears to be nothing in the indictment from which the legal inference can be drawn that substantial pressure or duress was to be exercised upon the mind of the voter, or that there was substantial menace in the proposed threats.

As was said in United States v. Cruickshank, 92 U. S. 542, 559, 23 L. Ed. 588:

"It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

The court is not enabled to say on reading this indictment that if the facts stated are true an offense has been committed by the defendants. The indictment, in my opinion, should allege a conspiracy to commit acts of intimidation or make threats sufficient in severity or apprehension to influence the mind of a person of ordinary firmness. See U. S. v. Huckabee, 16 Wall. 414, 432, 21 L. Ed. 457. A normal person "peremptorily ordered" would probably be no more influenced than by the peremptory orders found upon election posters, "Vote for A——."

An accusation of a criminal purpose must be stated positively; and nothing can be brought into the indictment by argument or other than necessary inference. It is not a necessary inference, nor a permissible inference, that a threat to use efforts to cause a withdrawal of custom would be regarded as raising an apprehension of an actual loss of custom of substantial value. The indictment cannot be aided by any facts not appearing upon the face of the indictment, nor can the overt acts be resorted to to aid the allegation of conspiracy.

Reference to the overt acts shows a threat of withdrawal of custom by the defendant John McCarthy, an offense not cognizable by federal courts. The attempt to define in the indictment a conspiracy under section 19 in which John is joined to others and others joined to John in a common purpose is, in my opinion, unsuccessful.

John's individual threat to use his efforts to cause himself being rejected as a pleader's fantasy, there remains only a conspiracy of the other defendants to threaten the voter with efforts to cause John to withdraw his custom.

As there are no allegations which give weight or value to either the efforts or the custom, or show any probability that the threats alleged would produce coercion, it does not appear that there was any conspiracy to intimidate or oppress a voter.

Demurrers sustained.

UNITED STATES v. WELCH et al.

(District Court, D. Rhode Island. July 23, 1917.)

1. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
Allegations, in an indictment for conspiring to intimidate a voter, that it was proposed to accomplish this purpose by peremptorily ordering, requiring, and directing him to vote for a particular candidate were of no legal effect.

2. INDICTMENT AND INFORMATION ⟸70—REQUISITES OF ACCUSATION—ARGUMENTATIVENESS.
In an indictment for conspiring to intimidate a voter in violation of Cr. Code, § 19 (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1916, § 10183]), if allegations that defendants intended to threaten to use their efforts to cause sentence to be pronounced upon the voter on a criminal charge then pending against him for sentence was intended to charge a direct threat to have sentence pronounced, it was argumentative, and violated the rule that the offense must be stated positively, and that nothing can be brought into the indictment by argument or otherwise than by necessary inference.

3. CONSPIRACY ⟸28—CONSPIRACY TO INTIMIDATE VOTERS.
A conspiracy by defendants to threaten a voter to use efforts to have sentence pronounced against him in a case pending against him for sentence was not a conspiracy to injure, oppress, threaten, or intimidate such voter in the free exercise of his right of voting, as whether such a threat would naturally raise in the mind of the voter any further apprehension of the infliction of sentence than he would otherwise apprehend and could amount to coercion was too conjectural.

4. CONSPIRACY ⟸43(6)—INDICTMENT—SUFFICIENCY.
An indictment, alleging a conspiracy to threaten a voter with reference to the consequences of his vote for representative in Congress by telling him that he had better look out, and that defendants had got something on him, was too vague to charge a conspiracy to intimidate the voter, without an innuendo.

Patrick Welch and another were indicted for conspiracy. On demurrers to the indictment. Demurrers sustained.

Harvey A. Baker, U. S. Atty., of Providence, R. I.
Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. The demurrers raise the question whether the indictment sufficiently charges a conspiracy under section 19 of the Criminal Code, to injure, oppress, threaten or intimidate a voter in the exercise of a right to vote freely for a representative in Congress.

[1] The indictment is in some respects similar to the indictment in the case of United States v. Henry C. Wilcox et al., No. 150, 243 Fed. 993, opinion handed down this day. It contains the same allegations relating to "peremptorily ordering, requiring and directing" a voter, and the ruling in the former case that these words are without substance and of no legal effect is equally applicable to this case.

The indictment differs in respect to the proposed threats. The first count defines the following as the means intended:

"And to threaten to use their efforts to cause sentence to be pronounced upon him on a certain criminal charge then still pending against him for sen-

tence in the city of Newport, in said state of Rhode Island, under the liquor laws of that state, unless he would so vote for said Roswell B. Burchard," etc.

The second count contains this language:

"To threaten the said Edward Whitehead with reference to the consequences of his vote for representative in Congress, by saying to the said Edward Whitehead, 'You had better look out; we have got something on you.'"

[2] The third count contains a similar allegation. The first intended threat set forth is not, as the brief of the United States contends, a threat of sending to jail, but only a threat to use their efforts to cause sentence to be pronounced upon a certain criminal charge then still pending for sentence. As was held in the Wilcox Case, a threat to use efforts to a certain end cannot be regarded as in substance the same as a direct threat of the thing to be accomplished by such efforts. If so intended, the pleading is argumentative, and violates the rule that the offense must be stated positively, and that nothing can be brought into the indictment by argument or other than necessary inference.

[3] If there is a conspiracy to coerce a voter the intended means should appear to have some adaptation to this end. A threat to make a charge of crime, or to institute a criminal prosecution, is of something within the power of the threatener, and may amount to intimidation. When, however, a criminal case has reached a point where it is "still pending against him for sentence," it rests between the prosecution and the court. The threat of "efforts to cause sentence to be pronounced" is very vague. Presumably sentence is to follow in due course of law, and this would be apprehended by the voter. Whether a threat to use efforts that this be brought about would naturally raise in the mind of the voter further apprehension of the infliction of sentence, and whether this could amount to coercion, is too conjectural for the practical purposes of the law; especially when there is added to the doubt whether anything could be done a doubt of the ability of the defendants to "use their efforts" successfully.

[4] The language of the second count is too vague to show a substantial menace. Without an innuendo it cannot be regarded as of any legal effect in a criminal indictment.

The demurrers are sustained.

STORY v. PERKINS, Deputy U. S. Marshal, et al.

JONES v. SAME.

(District Court, S. D. Georgia. August 20, 1917.)

1. CONSTITUTIONAL LAW ⇐83(2)—SELECTIVE DRAFT—CONSTITUTIONALITY OF DRAFT.
   The selective draft law of May 18, 1917, does not contravene Const. Amend. 13, inhibiting slavery and involuntary servitude.
2. ARMY AND NAVY ⇐1—OPERATION AGAINST FEDERAL STATUTE.
   The common-law right to "remain within the realm" cannot prevail against explicit provision of an act of Congress.

3. CONSTITUTIONAL LAW ⇐38—OPERATION AGAINST FEDERAL STATUTE.
An Act of Congress can be held invalid only if contravening the Constitution, though inimical to the common law.

4. ARMY AND NAVY ⇐20—SELECTIVE DRAFT—POWER OF CONGRESS.
The power of Congress under Const. art. 1, § 8, cl. 12, to raise and support armies, is plenary; so that, as it may summon to the army every citizen, it may summon such as it desires.

5. ARMY AND NAVY ⇐5½—SELECTIVE DRAFT—"MILITIA"—"ARMY"—NATIONAL GUARD.
Const. art. 1, § 8, cl. 15, empowering Congress to call out the militia to execute the laws of the Union, suppress insurrection, and repel invasion, neither limits its use of the national army, which is not the militia, an "army" being a body of men whose business is war, while the "militia" is a body of men composed of citizens occupied temporarily in the pursuit of civil life, but organized by discipline and drill, and called into the field for temporary military service when the exigencies of the country require it, nor prevents summoning to the army one who is a member of the National Guard.

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

6. ARMY AND NAVY ⇐1—EMPLOYMENT ABROAD—POWER OF CONGRESS.
Under the power given Congress by Const. art. 1, § 8, cl. 18, to make all laws necessary and proper for carrying into execution the foregoing powers, which include the power to provide for the common defense and general welfare, it may employ the army abroad.

Petitions for habeas corpus, one by John Story, the other by Albert Jones, against H. W. Perkins, Deputy United States Marshal, and another. Writs denied.

L. D. McGregor, of Warrenton, Ga., Thomas E. Watson, of Thomson, Ga., and J. Gordon Jones, of Cordele, Ga., for John Story and Albert Jones.

Erle M. Donalson, U. S. Atty., of Macon, Ga., for defendants.

SPEER, District Judge. [1] Albert Jones and John Story imprisoned in the Richmond county jail under commitment for unlawfully failing to register for military duty as required by the act of Congress of May 18, 1917, known popularly as the selective draft law, have made application for writs of habeas corpus. They allege that their imprisonment is unlawful. They charge that the enactment, made to raise a national army, is violative of the Constitution of the United States. It is insisted that the authority exercised by the United States under this legislation is void, because the act contravenes the Thirteenth Amendment. This provides that:

"Neither slavery nor involuntary servitude, except as punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

To agree to this contention we must conclude that a soldier is a slave. Nothing could be more abhorrent to the truth, nothing more degrading to that indispensable and gallant body of citizens trained in arms, to whose manhood, skill, and courage is and must be committed the task of maintaining the very existence of the nation and all that its people hold dear. The Grand Army of the Republic, the Confed-

erate Veterans, and the Sons of Veterans are not maintained to preserve the traditions of slavery. Nations do not pension slaves to commemorate their valor. They do not "give in charge their names to the sweet lyre"; nor does "sculpture in her turn give bond in stone and ever during brass to guard and to immortalize the trust."

[2-4] The sole additional ground of the petition is that by the common law it was the right of petitioners to "remain within the realm," and that this right should now be held to relieve them from military service beyond the borders of the United States. The reply is that the common law, that is, the immemorial English law, cannot prevail as to the United States or its people against the explicit provision of an act of Congress. Nor has a court of the United States power to declare an act of Congress invalid because it is inimical to the common law. The touchstone for such judicial power is the Constitution, and nothing else. It remains to be determined whether the Constitution has conferred authority on Congress to enact this law. Clause 12 of article 1, § 8, of the Constitution empowers Congress "to raise and support armies." This power is plenary. It is not restricted in any manner. Congress may summon to its army thus authorized every citizen of the United States. Since it may summon all, it may summon any. Said the Supreme Court in the case of United States v. Tarble, 13 Wall. 408, 20 L. Ed. 597:

"Among the powers assigned to the national government is the power 'to raise and support armies.' * * * Its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the army shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldiers shall be received, and the period for which they shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned."

[5] It is urged that by this legislation Congress has taken over and in this way conscripted the National Guard. This, it is said, is the state militia. It is contended under clause 15 of the article and section above quoted that such militia can be used only to execute the laws of the Union to suppress insurrection and repel invasion. Since these petitioners are not members of the National Guard, in no event could their rights in this way be affected. But the national army is not the militia. An "army" is a body of men whose business is war. Burroughs v. Peyton, 16 Grat. (Va.) 475. The "militia" is:

"A body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized by discipline and drill, and called into the field for temporary military service when the exigencies of the country require it." Id.

As we have seen, Congress in the exercise of the power to raise armies may summon to the colors every citizen. It follows that the states, even if they so desire, cannot defeat this power by enlisting such citizens in the state troops or National Guard. Was this possible, it would be also possible for the states to prevent altogether the raising of armies by Congress.

[6] There remains to be considered the contention that Congress cannot employ the national army to be created by virtue of this legislation in foreign lands or beyond the seas. If this is true, then indeed is our country impotent. Then must its people indeed suffer in their

own homes, in their cities, and on their farms all the horrors of invasive war. Its military leaders must ignore the settled principles of their science, that the best defensive is the most vigorous offensive. The keen swords of its sons, instead of flashing over the guard of the enemy and piercing his vitals, must be held immovable as if on an anvil, to be shattered by the reiterated blows of his hammer. Deprived of our aid in the field, successive defeats will visit and crush our allies. Their lands conquered, their navies taken, we must then in turn, solitary and alone, meet on our own soil the impact of victorious and barbarous legions whose laws do not forbid them service abroad, but which inspire their fierce and veteran armies to deeds of conquest in every clime.

Was this contention maintainable, the misguided men who for their personal ease advance it might all too late discover their fatal error. They would discover it in the flaming homesteads, in the devastated fields, in murdered brethren, in outraged wives and daughters, in their lands, their factories, their merchandise, their stock, their all, cooly appropriated by the conqueror, as his own, their institutions destroyed, homeless, landless, and beggars, to spend whatever interval of degraded life remains to them in abject slavery to the conqueror. But our organic law does not so shackle the gigantic energies of the great republic. After the enumeration of the powers of Congress, among them, as we have seen, "the power to raise and support armies," in clause 18 of article 1, § 8, it provides the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof." Here is the great reservoir of power to save the national existence.

It is said that there is no express power to send armies beyond the sea. True; but there is no express power to enact the criminal laws of the United States; none to convey the public domain; to build transcontinental railroad; nor to construct the Isthmian Canal; nor to create the Interstate Commerce Commission; nor to declare the Monroe Doctrine; nor to make the Louisiana Purchase; nor to buy Alaska; or to take over Porto Rico and the Philippines. This has all been done under the great power to promote the general welfare, just as the selective army will be created under the law here assailed "to provide for the common defense." And beyond and above all is the inherent power of every nation, however organized, to utilize its every man and its every energy to defend its liberty and to defeat the migration to its soil of mighty nations of ferocious warriors, whose barbarous inhumanity for three years has surpassed all others since the death of Attila, the Scourge of God.

The writs are denied.

In re C. W. BARTLESON CO.

(District Court, S. D. Florida. August 14, 1917.)

No. 1527.

1. BANKRUPTCY ⟸95—REFERENCE TO MASTER.
While in involuntary proceedings the question of bankruptcy must, under Bankr. Act July 1, 1898, c. 541, § 18d, 30 Stat. 551 (Comp. St. 1916, § 9602), be decided by the District Judge, and while jurisdiction must first be decided, references to masters to take testimony and report the same, with findings of fact and law, recognized by equity rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv), are permissible.

2. BANKRUPTCY ⟸95—REFEREE IN BANKRUPTCY AS MASTER—QUALIFICATION.
The referee in bankruptcy is not disqualified by interest to be appointed master in a bankruptcy case, because of the fees as referee to which he will be entitled if the alleged bankrupt be adjudged a bankrupt, the testimony being signed by the witness, unless this is waived by the parties in interest, after being transcribed into longhand, and reported to the court, and the judge's findings and judgment being made thereon; the master's findings of fact and law being merely advisory.

3. BANKRUPTCY ⟸95—REFERENCE TO MASTER—SHOWING AND NOTICE.
Bankruptcy proceedings being governed by the practice in equity, reference to a master to take testimony and report findings should only be on notice and showing, as required by equity rules 46, 47, 59 (198 Fed. xxxi, xxxv, 115 C. C. A. xxxi, xxxv).

In Bankruptcy. In the matter of the C. W. Bartleson Company, alleged bankrupt. On motion to vacate orders of reference. Motion granted.

Haley & Heintz, of Jacksonville, Fla., for petitioning creditors.

George M. Powell and Fleming & Fleming, all of Jacksonville, Fla., for alleged bankrupt.

CALL, District Judge. This cause comes on to be heard upon the motion of the bankrupt to vacate two orders of reference heretofore made in this cause, one on April 19, 1917, and the other August 10, 1917.

The first order refers the issues made by the petition for involuntary bankruptcy and the answer thereto to C. S. Adams, Esq., as special master to ascertain and report the facts, with his conclusions thereon. The second order recognizes the first order of reference, and then refers the issues made by certain petitions of intervention and the answers thereto, together with all undetermined issues pending in said cause to the same master to ascertain and report the facts, with his conclusions thereon.

The motion to vacate said orders sets out four grounds: (1) That the court has no jurisdiction to make and enter such order. (2) That under section 18, subd. "d," of the Bankruptcy Act, the judge must hear and determine contests on involuntary petitions in bankruptcy in person, and cannot refer the issues to a master to take testimony and report the same, together with his findings, to the court. (3) That the special master to whom the issues were referred is referee in bankruptcy, and to the extent of his fees as such referee in the event of an adjudication is interested, and therefore an improper person to

be appointed such special master. (4) That said orders of reference were made without notice to the bankrupt.

[1] The first two grounds were argued together, and the case of King v. Bank of Whiting, 179 Fed. 694, 103 C. C. A. 240, was cited and relied on to sustain the bankrupt's position. There can be no question but what the question of bankruptcy vel non must, under the provisions of section 18, subd. "d," of the Bankruptcy Act, be decided by the District Judge. The referee as such has no jurisdiction to make such decision; and under the circumstances of the case of King v. Bank of Whiting, supra, the question of the jurisdiction of the court should have been first decided, before proceeding to take testimony on or hear the issues made on the question of bankruptcy. This was a petition to revise the order of the District Judge refusing the bankrupt this orderly procedure. The court emphasizes this view, when it says, on page 696:

"Orderly procedure required, as we believe, its determination by the District Judge as a condition precedent to inquiry upon the other issues of fact raised by the pleadings. Direct hearing of the testimony upon an issue of such nature would seem desirable; but if that course is impracticable, reference to a ministerial officer to take and report such testimony cannot rightly extend the hearing as well to the subordinate issues, not open to inquiry until jurisdiction to proceed therein is ascertained and found by the District Judge."

The court uses this language, following the above, as follows:

"The court can confer no authority upon the referee (as master or otherwise) to decide these issues, nor to rule thereon either finally or temporarily."

But I cannot believe that this last sentence quoted was intended to be taken literally without reference to the context, but when read with the context means that until the determination of the question of jurisdiction the District Judge could not refer the other issues made by the pleadings. The question of jurisdiction must first be decided. Unless such was the meaning of the court, then this decision would hold that, no matter what the condition of the business before the court, the judge must sit and hear the witnesses in every involuntary bankruptcy, and this view is contrary to the language of this particular case, and the cases of In re Lacov, 134 Fed. 237, 67 C. C. A. 19, and Clark et al. v. American Manufacturing & Enameling Co. et al., 101 Fed. 962, 42 C. C. A. 120.

References to masters to take testimony and report same with findings of fact and law are recognized by equity rule 59, and no one would claim that by such reference the chancellor abdicated the duty to decide the questions involved. As said by the court in Re Lacov, supra:

"This method of taking testimony is the usual one in courts of equity, and the act does not provide that all the testimony shall be taken in the presence of and hearing of the judge."

Unquestionably it is much better and more satisfactory to the judge, if the dockets of the court would permit of the judge hearing the witnesses in all cases triable before him; but I apprehend that there are few, if any, districts where the same can be done, and certainly not

in this district. Therefore such references are necessary and usual to dispatch the business before the court, and are not inhibited by the Bankruptcy Act.

[2] The third ground of the motion is based on the idea that the master appointed, being the referee in bankruptcy, is interested in having the bankrupt adjudicated a bankrupt, because in that event he would be entitled to fees as referee in addition to his fees as such master.

The universal procedure in cases of this kind is for the testimony of witnesses appearing before the master to be taken stenographically, and, unless waived by the parties in interest signed by such witness after being transcribed into longhand, and this testimony, together with the exhibits, if any, filed by the parties, reported to the court, together with the findings of fact and law by the master; his findings of fact and law being merely advisory to the court. The testimony is what the judge makes his findings and judgment on. Therefore the third ground of the motion appeals with little force to me. The pride of opinion and desire to have his findings approved by the judge upon his consideration of the evidence and the law would more than counteract any tendency to find the involuntary petition sustained because of any probable fees the referee might thereafter earn. There is no such interest as would disqualify the referee to be appointed master in bankruptcy cases.

[3] I come now to the fourth ground of the motion. These references were made without notice to and without the consent of the bankrupt. Rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv) provides:

"Save in matters of accounting a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it."

Rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) requires:

"In all trials in equity the testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or these rules."

Rule 47 (198 Fed. xxxi, 115 C. C. A. xxxi):

"The court * * * for good and exceptional causes for departing from the general rule to be shown by affidavit may permit the deposition of named witnesses * * * to be taken before an examiner or other named officer, upon notice and terms specified in the order."

Bankruptcy proceedings being governed by the practice in equity, it seems to me that an appointment of a master in a bankruptcy case to take testimony and make report of his findings, etc., should only be made upon notice and the showing required by rule 59. The late equity rules adopted by the Supreme Court were framed with this in view, that the judge would sit and hear the witnesses, and, as before said, where this is possible, it is much the most satisfactory way. But rules 59, 46, and 47 recognize that conditions may be exceptional, and such a rule cause delay rather than expedition, as was intended and provided for the appointment of masters, commissioners, and examiners. In the instant case no showing was made before the order of reference was made, and no notice given to the bankrupt.

For this reason the motion to vacate said orders should be granted. It has been the usual course in this district that such orders should be made, and parties have heretofore acquiesced in the same; but that is no reason why an unauthorized practice should be continued.

An order granting the motion to vacate the orders of reference will be entered.

In re LA JOLLA LUMBER & MILL CO.

(District Court, S. D. California, S. D. June 18, 1917.)

No. 2608.

1. BANKRUPTCY ⟸342½—CLAIMS—REVIEW OF REFEREE'S RULINGS.
On review of an order of the referee allowing a claim in part, error cannot be predicated on the sustaining of objections to questions, where the referee was not at the time informed concerning the evidence which it was proposed to elicit.

2. BANKRUPTCY ⟸342½—CLAIMS—REVIEW OF REFEREE'S RULINGS.
On review of an order of the referee allowing a claim, the referee's findings, sustained by evidence, will be upheld.

3. BANKRUPTCY ⟸326—CLAIMS—SET-OFF AND COUNTERCLAIM.
The liability of a creditor of a bankrupt corporation on an unpaid stock subscription is not a debt or liability which may be set off against the claim of the creditor, under Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (Comp. St. 1916, § 9652), providing that, in cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt set off against the other, as the stock subscription liability is a trust fund, and must be collected and distributed pro rata to all creditors, even though there is only one delinquent stockholder.

4. CORPORATIONS ⟸351—LIABILITY OF DIRECTORS—FORM OF REMEDY.
Under Civ. Code Cal. § 309, providing that the directors of corporations must not create debts beyond the subscribed capital stock, and that for a violation thereof the directors under whose administration it may have happened are in their individual capacity jointly and severally liable to the corporation and its creditors to the full amount of the debt contracted, the liability of a director can only be enforced by a bill in equity, wherein all the facts and parties are brought before the court.

5. BANKRUPTCY ⟸326—CLAIMS—SET-OFF AND COUNTERCLAIM.
Where the creditor of a bankrupt corporation was liable as director, under Civ. Code Cal. § 309, such liability was a trust fund for the benefit of all creditors ratably, and could not be set off against the creditor's claim.

6. BANKRUPTCY ⟸288(1)—COLLECTION OF ASSETS—FORM OF REMEDY.
The liability of a creditor of a bankrupt corporation on his unpaid stock subscription and as director, under Civ. Code Cal. § 309, should be determined by a plenary action, in which all existing equities may be properly regarded.

7. ESTOPPEL ⟸68(4)—DEFENSES INCONSISTENT WITH PREVIOUS CLAIM OR POSITION.
A creditor of a bankrupt corporation, contending that his liability as a director in the corporation must be established in a plenary action, will be estopped from claiming that it should have been adjudicated upon the allowance of his claim.

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8. BANKRUPTCY ⊂⇒360—DIVIDENDS—WITHHOLDING PAYMENT.
Where a creditor of a bankrupt corporation is liable on an unpaid stock subscription and as director in the corporation, the dividends on his claim will not be paid, pending an adjustment of his liability.

In Bankruptcy. In the matter of the La Jolla Lumber & Mill Company, bankrupt. On review of an order of the referee allowing a claim in part. Order confirmed, and objections to the claim dismissed without prejudice.

R. L. Horton, of Los Angeles, Cal., for one of the largest creditors.

Johnson Puterbaugh, J. C. Hizar, and Chas. G. Briggs, all of San Diego, Cal., for trustee.

Gibson, Dunn & Crutcher, of Los Angeles, Cal., and Ward, Ward & Ward, of San Diego, Cal., for claimant.

TRIPPET, District Judge. B. B. Harlan presented a claim to the referee for allowance. The trustee objected to the allowance of the claim, and filed written specifications of his objections. The referee disallowed some of the items of the claim, but allowed the claim for the sum of $9,532.41. The matter comes before the court on a petition of the trustee to review the order of the referee allowing the claim.

[1, 2] I will consider the specifications of error in the order in which they appear in the petition for review. The first assignment of error is that the referee erred in sustaining objections to certain questions. When the objections were made to questions, the referee was not informed concerning the evidence which the trustee proposed to elicit by asking said questions. The court, therefore, cannot determine that the referee erred in sustaining the objections. The alleged error to the effect that the claim was not sufficient in form is not well taken. No reason was pointed out in argument to the court why the claim was not sufficient in form. The claim that the burden of proof was on the trustee is immaterial. Concerning the question as to whether the claim is barred by the statute of limitations, the referee having decided that the evidence showed that the claim was not based on a stated account, and there being evidence to sustain it, the court will uphold the findings of the referee. The same is also true of the claim that the corporation was a "self-serving" corporation, whatever that may mean.

There are two matters presented by this record that are worthy of particular comment: (1) Did the trustee have a right to plead as a set-off or counterclaim the alleged liability of the claimant for unpaid subscription to the capital stock of the company? (2) Did the trustee have a right to plead as a set-off or counterclaim the alleged liability of the claimant created by section 309, C. C., wherein it is provided that the debts of the corporation shall not exceed the subscribed capital stock of the corporation, and making the directors liable for violating said section?

[3] The first proposition has been considered by the Supreme Court of the United States, and by other federal courts, and it has been uni-

formly held that the liability for unpaid stock subscription is not a debt or liability falling within the meaning of section 68 of the Bankrupt Act. These cases were instances wherein the trustee in bankruptcy was seeking to collect the unpaid subscription, and the delinquent stockholder sought to offset an indebtedness of the corporation against the liability for unpaid subscription. The authorities are all collected in Kiskadden v. Steinle, 203 Fed. 375, 379, 121 C. C. A. 559. The reason for this rule is that the stock subscription liability is a trust fund, and the amount which the stockholder is liable to pay belongs ratably to all the creditors, and that the amount owed upon the stock must be paid in and be distributed pro rata to all the creditors. It therefore follows that the unpaid subscription to stock cannot be appropriated either to the reduction or the payment of a debt owing by the corporation to a delinquent subscriber. The duty of the trustee is plain: He must collect the unpaid subscription in full, and not allow any creditor to get more than his proportionate share, by reason of the fact that the corporation may be indebted to him; and this is true, whether there is only one delinquent stockholder or many.

[4, 5] The liability of a director under section 309, C. C., can only be enforced by a bill in equity, wherein all the facts and parties are brought before the court. Winchester v. Mabury, 122 Cal. 522, 55 Pac. 393; Winchester v. Howard, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153. The two cases cited were not cases construing section 309, but they were construing a liability very similar to that created by section 309, C. C. It seems to me that the liability created by section 309, C. C., falls within the same reasoning that applies to an unpaid stock subscription, and is a trust fund for the benefit of all the creditors, ratably.

[6, 7] It is my opinion that the liability for an unpaid subscription to stock, and the liability created by section 309, C. C., should both be determined by plenary action, in which all existing equities may be properly regarded by the court. The claimant in this case has contended that the liability arising under section 309, C. C., must be established in a plenary action. The claimant, therefore, as to that matter, will be estopped from claiming that it should be adjudicated upon the allowance of the claim.

The objections made to the allowance of the claim on account of unpaid subscription to stock should have been dismissed without prejudice; and the same is true as to the liability under section 309, C. C. An order will be made to that effect.

[8] An order will be made confirming the allowance of the claim by the referee. The order, however, will direct that no dividends shall be paid upon the claim, pending an adjustment of the liability of the claim for unpaid stock subscription and for liability under section 309, C. C. These dividends will be held, in the discretion of the referee, until such time as the trustee shall have had reasonable opportunity to collect said liabilities.

MEMORANDUM DECISIONS

CANGEN v. CRAMER et al. (Circuit Court of Appeals, Second Circuit. June 23, 1917.) No. 255. Appeal from District Court of the United States for the Eastern District of New York. William E. Warland, of New York City, for appellant. James R. Hodder, of Boston, Mass., for appellees. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

ECKERSON et al. v. TANNEY et al. (Circuit Court of Appeals, Second Circuit. June 6, 1917.) No. 264. Appeal from the District Court of the United States, for the Southern District of New York. Blauvelt & Warren, of New York City (George A. Blauvelt, Francis J. MacIntyre, and Maurice J. O'Callaghan, all of New York City, of counsel), for appellants. Servin & Cox, of Middletown, N. Y. (Abram J. Rose, of New York City, and Abram F. Servin, of Middletown, N. Y., of counsel), for appellees. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Decree (235 Fed. 415) affirmed.

KLINE BROS. & CO. v. LONDON & LANCASHIRE INS. CO. (Circuit Court of Appeals, Second Circuit. May 8, 1917.) No. 237. In Error to the District Court of the United States for the Southern District of New York. Erwin, Fried & Czaki, of New York City, for plaintiffs in error. Hartwell Cabell, of New York City, for defendant in error. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Submitted without argument. Judgment affirmed.

THE PLINY FISK. (Circuit Court of Appeals, Second Circuit. June 6, 1917.) No. 236. Appeal from the District Court of the United States for the Southern District of New York. Carpenter & Park, now Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for The Pliny Fisk. Macklin, Brown & Purdy, of New York City (Pierre M. Brown and Frank J. Whitcomb, both of New York City, of counsel), for claimants. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed.

PRINCE v. HARTMANN. (Circuit Court of Appeals, Second Circuit. March 13, 1917.) No. 212. Appeal from the District Court of the United States for the Southern District of New York. Alfred B. Nathan, of New York City (Sidney J. Loeb, of New York City, of counsel), for appellant. Edward Fillmore, of New York City, for appellee. Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed.

GENERAL ELECTRIC CO. v. ELECTRIC CONTROLLER & MFG. CO. (Circuit Court of Appeals, Sixth Circuit. October 3, 1917.) No. 2884. On application to modify mandate. Denied. For original opinion, see 243 Fed. 188.

PER CURIAM. Defendant urges that one form of its apparatus, shown by diagram No. 1, does not respond to claim 7, and that the injunction and accounting to be had in the court below should be confined to the other forms of construction. This contention was not specifically presented upon the

hearing nor considered; but it has now received our attention. We state only our conclusion. Claim 7 calls, in terms, for a master switch circuit having contacts controlled by throttle, and a branch circuit from the master switch circuit through each rheostat magnet with contacts in this branch circuit to be closed by the rheostat magnets. Diagram No. 1 shows what is practically a master switch circuit, but the throttle is not in the distinctive master switch circuit but is in a subsidiary circuit leading from the main line, and the branch circuit which successively affects the rheostat magnets is a branch from this subsidiary circuit and not directly from the master switch circuit. It is thus apparent that the precise and specific nomenclature of the claim is not met; but we think there is full equivalency. What we have called the subsidiary circuit is closed and made active by the operation of the master switch in the master switch circuit. From the point of view of the invention which we have taken, it is of no importance whether the controlling throttle is situated in and the branch circuit leads from that circuit which is under the indirect control of the master switch and by the operation of that switch has become practically a part of its circuit. The application to modify the mandate as to diagram No. 1 must be denied; and the order as to costs in this court will remain unchanged.

END OF CASES IN VOL. 243