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

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This is a Key-Numbered Volume

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

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

AMENDMENTS TO RULES

UNITED STATES CIRCUIT COURT OF APPEALS

FIRST CIRCUIT [1]

December 4. 1917. Rule 24 amended by adding the following section:

7. Every brief of more than twenty pages shall contain on its front fly leaves a subject index with page references, the subject index to be supplemented by a list of all cases referred to, alphabetically arranged, together with references to pages where the cases are cited.

[1] For other rules, see 150 Fed. xxxvii, 79 C. C. A. xxxvii, 235 Fed. v, 148 C. C. A. v.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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[1] Resigned September 17, 1917. [2] Appointed October 1, 1917.

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[3] Died November, 1917.

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CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

PREEMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. June 28, 1917.)

Nos. 2224–2226, 2232, 2233, 2237, 2261, 2346, 2347.

1. POST OFFICE ⊂=48(4)—MISUSE OF MAILS—INDICTMENT—SUFFICIENCY.
An indictment with counts under Criminal Code, § 37, Act March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. 1916, § 10201), charging a conspiracy to violate section 215 (Comp. St. 1916, § 10,385) with reference to using the mails in the execution of a scheme or artifice to defraud and other counts charging violation of section 215, setting forth generally the scheme to defraud, was not bad for failure to set out the contract with the victims or to set out that such contract was entered into, such matters being merely evidence to show the manner in which the scheme would be made effective.

2. INDICTMENT AND INFORMATION ⊂=65—MISUSE OF MAILS—SUFFICIENCY.
Such indictment was not bad for failure to state that the collection agency through which defendants realized on their scheme was a corporation, etc., or to show the relation of defendants to the agency; such matters being matters of evidence.

3. POST OFFICE ⊂=35—MISUSE OF MAILS—INDICTMENT—SUFFICIENCY.
In a prosecution under Criminal Code, § 215, letters set out in the indictment advising of the receipt of a list of claims by the collection agency through which defendants operated and of the intended call of a special agent to close up the contract through which defendants realized on the scheme showed on their face that they had some power or instrumentality in the execution of the scheme to defraud.

4. POST OFFICE ⊂=35—MISUSE OF MAILS—LETTERS TO OR FROM OTHER VICTIM.
In a prosecution under Criminal Code, § 215, for using the mails in the execution of a scheme to defraud, the letter which is mailed need not be one to or from the intended victim of the fraud.

5. POST OFFICE ⊂=35—MISUSE OF MAILS—LETTERS—KIND.
The scheme being one for obtaining money, the use of the mails for the purpose of assisting in retaining the money or to convey to the victim assurances calculated to lull him into inaction is within Criminal Code, § 215, condemning the depositing in or taking from the mails any letter, etc., for the purpose of executing any scheme to defraud.

6. POST OFFICE ⊂=48(4)—MISUSE OF MAILS—INDICTMENT—SUFFICIENCY.
An allegation that the letters therein set out were mailed "for the purpose of executing the said scheme and artifice to defraud and for the purpose of attempting so to do," the letters themselves indicating that they had such tendency, sufficiently alleged that the letters were mailed for the purpose of executing the scheme.

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7. CONSPIRACY ⊂⊃43(9)—INDICTMENT—SUFFICIENCY.
Counts charging "that defendants * * * wrongfully, etc., conspired, etc., together * * * for the purpose of executing the said scheme and artifice to defraud * * * and attempting to do so, to place and cause to be placed letters in the post office," sufficiently charged a conspiracy to use the mails in the execution of the alleged scheme to defraud and showed that the letters and other things therein stated as overt acts had power to effect the object of the conspiracy.

8. CRIMINAL LAW ⊂⊃444—EVIDENCE—ACCOUNT BOOKS—IDENTIFICATION—SUFFICIENCY.
In a prosecution under Crim. Code, §§ 37, 215, charging that defendants through collection agencies used the mails in the execution of a scheme to defraud by securing in advance of collection "realization charges," a book in which were entered such charges received by the manager of the Chicago office and admitted in the light of an admission or declaration of the defendants was sufficiently identified if shown to have been kept with the knowledge and under the general directions of such manager.

9. POST OFFICE ⊂⊃49—USE OF MAILS—EVIDENCE—MOTIVE AND INTENT.
Where the fraudulent scheme had been shown, it was competent to prove the extent to which the charges were solicited and secured as bearing on the motive and intent, although in many cases it did not appear whether the fraudulent representations were made to secure them; the scheme not being concocted with reference to any definitely intended victims.

10. CRIMINAL LAW ⊂⊃1169(1)—REVIEW—ADMISSION OF EVIDENCE—HARMLESS ERROR.
The essential elements to be shown were the fraudulent scheme and the use of the mails in its execution and admitting in evidence an account book showing the receipt of $130,000 realization charges was without prejudice; it not being necessary to show the extent of the success of the scheme.

11. CRIMINAL LAW ⊂⊃447—PAROL EVIDENCE RULE—APPLICABILITY.
In such prosecution the rule against varying written contracts by parol was inapplicable, the contract with the victims being merely one of a series of evidentiary facts bearing upon the ultimate question whether a scheme or artifice to defraud through the mails was devised or intended to be devised.

12. POST OFFICE ⊂⊃49—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
Evidence *held* insufficient to show that the warnings given agents against making the false representations charged were made in good faith and with intent that they should be acted upon.

13. POST OFFICE ⊂⊃35—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
The fact that after defendants received advance payments for the collection of claims which they knew to be worthless they attempted to make collections would be no excuse.

14. POST OFFICE ⊂⊃35—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
That the contract with the victim had three years in which to run did not make the defendants immune from prosecution for the period fixed in the contracts.

15. POST OFFICE ⊂⊃35—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
In a prosecution for using the mails in furtherance of a scheme to defraud in violation of Crim. Code, § 215, it is not necessary that nothing is to be given in return for the money.

16. POST OFFICE ⊂⊃35—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
In a prosecution under Crim. Code, § 215, it is not essential to prove that the scheme contemplated a use of the mails; it being sufficient to prove that the mails were in fact used in the execution of the scheme.

17. POST OFFICE ⟸35—WRONGFUL USE OF MAILS—EVIDENCE—SUFFICIENCY.
Where the execution of the scheme to defraud would have been utterly impossible without the use of the mails, all who participated in the scheme would be guilty, although they did not actually deposit or take from the mails any letters.

18. POST OFFICE ⟸49—INTENT TO USE MAILS—EVIDENCE—SUFFICIENCY.
Evidence that the conspiracy to defraud was to be executed, and that the use of the mails was indispensable to its execution, sufficiently showed the intent to use the mails as a part of the conspiracy.

19. POST OFFICE ⟸49—INTENT AND GOOD FAITH—EVIDENCE.
Evidence that the bankrupt debtors of the victims had been discharged, throwing light on the collectibility of the accounts, was competent as throwing light on the intent and good faith of defendants in representing that they could and would collect the claims.

20. CRIMINAL LAW ⟸200(6)—DOUBLE CONVICTION—IDENTITY OF SUBJECT-MATTER.
In a prosecution under Crim. Code, §§ 37, 215, where the conspiracy counts set forth as overt acts the mailing of letters not set out in counts under section 215, the contention that a conviction on the conspiracy counts, as well as on the others is a double conviction was untenable.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Abram H. Preeman and others were convicted under an indictment charging under Criminal Code, § 37, a conspiracy to violate section 215 and a violation of section 215, and bring error. Judgments affirmed.

An indictment of 35 counts was returned against plaintiffs in error (hereinafter called defendants). Demurrers were overruled, and after a long trial a general verdict of guilty was found against all. Motions for new trial and in arrest being denied, judgments were entered, and the defendants sentenced. Each prosecutes a writ of error; the errors assigned, and the transcript, briefs, and arguments presented, being by stipulation applicable to all the defendants.

Counts 25, 26, and 35 charge defendants under section 37, U. S. Criminal Code, with conspiring to violate section 215 of that Code; all the other counts charging in varying language a violation of said section 215. The general purport of the facts appearing from the very voluminous transcript will be set forth as briefly as may be.

In the early 80's a concern known as the Barr & Widen "Commercial" Agency, composed of one Barr and one Widen, established a collection and credit reporting business or agency at St. Louis, Mo., for making local collections for and credit reports on merchants and others of that city. The concern did considerable business and enjoyed a good reputation. In about 1900 they began to do business outside of St. Louis; the solicitation and transaction of the collection business outside of St. Louis being thenceforth carried on under the name of Barr & Widen "Mercantile" Agency. In 1904 Barr died. Shortly before his death defendant Wendler became associated with the concern as general manager of the "Mercantile," Widen attending to the affairs of the "Commercial," which under its old name continued to carry on the local business. In 1909 Wendler became a partner of Widen, but the names of the concern remained unchanged. Widen died in November, 1912. From time to time there was developed a plan for soliciting business from outside concerns all over the United States, through agents instructed and trained to solicit contracts from prospective clients, and to obtain from them payment in advance of sums called "realization charges."

The plan of procedure during the period of time particularly here involved, for interesting the outside clients in the proposition, as appears from testi-

mony of representatives of many of the concerns with whom the Mercantile had dealings, and of solicitors and agents through whom the business was conducted, was substantially as follows: Under the general direction of defendants Wendler and Preeman, at considerable expense persons were sent to various District Courts of the United States, there to examine the bankruptcy records, and tabulate the bankruptcies there shown for a considerable number of years back, listing the various creditors and data which the records disclosed as to the claims. This information was sent to Wendler at St. Louis, or to defendant Preeman at Chicago, his chief assistant. The data thus secured was classified, so that the bankrupt claims shown by the various court records to be owing to a concern of a given city would appear together. In the general office the data concerning the several creditors in a city about to be visited was transcribed upon cards; each card containing the information thus gathered in regard to outstanding bankrupt claims of a given creditor concern of the city. These cards were known as "leads" or "lead cards," and all the cards for a given city were sent to the agent about to visit the city to afford the agent information which, when used as contemplated, was calculated to arouse or stimulate the interest of the prospective client in the proposed plan.

The proposition to join a commercial agency ordinarily striking no responsive chord in the prospect, the agent would casually inquire if the concern had not some time before sustained loss through a certain bankruptcy. Receiving an affirmative reply, the agent would suggest further facts in regard to the loss that the particular lead card showed, and might inquire as to other bankruptcies in which the lead card had informed him the prospect was interested. The prospect, not suspecting the deliberate manner whereby the information had been obtained, nor the purpose of it, would inquire how the agent knew of these things, and was informed that his concern made a specialty of looking up and collecting desperate claims, particularly from bankrupts, and would then suggest as to one or more of these bankruptcies that they had discovered a responsible silent partner, or that the debtor had concealed a large amount of assets or had in some other suggested manner perpetrated a fraud upon his creditors, and would often say that they had already instituted proceedings for other creditors of the same bankrupt which promised very early success, and would like to include this claim, and in many cases would state that attachment proceedings had been begun, or were about to be begun on discovered property, and that they had property secured sufficient to pay the creditors, and that it would be a matter of only a short time, frequently fixed by the agent, before the claims against the bankrupt, which were turned over to them, would be realized fully or in large part. The calculated and the frequent effect of such representations was to induce in the mind of the prospect a belief that, if the claim was turned over, payment within a short time (often designated) would be certain to follow.

This agent did not proceed so far as to suggest that the prospect should make any payment in advance, but he invariably suggested to the prospect that not only as to the claims referred to, but as to the collection of all old and desperate claims, his concern were specialists, and that, if the prospect would supply him with a list of all his old and desperate claims, he would send in the list to the home office, and obtain from the office a proposition for the collection of such claims, and that, if the prospect did not accept the proposition, no possible liability would be incurred. This appearing to be fair, a list of such old delinquent claims was prepared and given the agent, and was by him mailed to Wendler or Preeman. Thereupon a letter was sent by Wendler to the prospect, advising of receipt of the list handed the solicitor for the purpose of arriving at a basis for charge for the service, and that in due time a special agent will call and submit a contract.

In the course of a few weeks another person would call on the prospect, presenting a proposition for making the collections, which was in the form of a long contract, mostly in fine print. This man was known as the "contract man" or "closing man"; the solicitor who secured the list being known as the "list man" or solicitor. Through the presentation of the proposed contract the prospect was first informed that he was expected to pay the agency in

advance a specific sum which was written in the contract. It appears that the sum to be paid was usually arrived at through Mr. Preeman first making an estimate of the amount to be written in the contract as the "minimum recovery," to be later explained, which was arbitrarily fixed at approximately 20 per cent. of the total of the claims listed, and that the "realization charge" was arbitrarily fixed at 25 per cent. of the "minimum recovery," so that, in case the prospect had submitted old claims aggregating, say, $20,000, the minimum recovery would be fixed at about $4,000, and the realization charge at about $1,000, which last amount the contract man undertook to get the prospect to pay in advance. Of course, the prospect generally demurred to paying anything in advance, particularly the amount asked, which was usually a substantial sum. In the excellent "teamwork" which the evidence revealed, it appears that the contract man was also supplied with "lead cards," and in most instances he knew generally or specifically the particular sort of story the list man had told the prospect concerning the collectibility of the bankrupt claims. Such stories, which never had the remotest foundation in truth, beyond the fact that the bankrupt claims existed, the contract man would reiterate, and in many instances amplify, stating (out of whole cloth) the further progress that had been made in a particular matter, holding out roseate prospect of speedy realization thereon, in which case, through such collection alone, the required advance payment would be largely, if not fully, repaid, or even yield a surplus over the payment, but usually suggesting that, unless the prospect promptly came in, he would lose the benefit of the proceedings which were in progress against the particular bankrupt debtor. That the list men and contract men well knew that all these stories of secret partners, concealed assets, fraud, attachment, and other proceedings, and all the representations as to the collectibility of the bankrupt claims were wholly false, appears from the fact that they themselves usually concocted the particular tale to suit the particular case.

To enable contract as well as list men to further impress the prospect, each of them was provided with a formidable outfit of letters of recommendation, some purporting to be originals, but most of them photographs or other reproductions, lauding the agency for its achievements, and some of them referring to specific instances where collections had been made from debtors who had gone into bankruptcy. Some of the latter were genuine letters, but the evidence shows they were obtained from the creditor, under his belief that the agency had made the collection from the bankrupt, when in truth the agency, or rather some of the defendants, paid the creditor the claim (generally a small one) for the very purpose of procuring from the creditor the letter, to be used by the agents as a lure to obtain business from others. The uncontradicted evidence of bankrupts showed a number of instances where the bankrupt referred to in the letters did not know of the agency or the defendants, and had made no such payment. Other such letters purported to be on the letter heads of corporations with high-sounding names, but which had no existence, and the letters were pure fictions. Others of such letters were shown to be absolute forgeries. Quite occasionally prospects were referred to St. Louis banks or business houses for the responsibility of the concern, and these knowing nothing of the "Mercantile," but only of the "Commercial," which operated wholly in St. Louis, would occasionally make favorable reply, without knowledge of any distinction between the "Commercial" and the "Mercantile." Indeed, the agents were not allowed to operate in St. Louis, and "realization charges" were not solicited there.

The "Mercantile" agents were not only prohibited from operating in St. Louis, but were also warned not to solicit business from any former clients of the agency anywhere. So particular were the managers in this regard that the "lead cards" themselves showed on their face whether or not the concerns thereon referred to had ever been clients of the "Mercantile," and, if so, the positive instructions were to avoid them. Agents were also strictly forbidden from calling on members of an organization known as the Credit Men's Association, and the lead cards showed who were such; the abbreviations "OC" and "CMA," often appearing in lead cards and frequently in letters, being well understood by the agents referred to as meaning "old clients" and members of

the "Credit Men's Association," who were in no event to be solicited—old clients, for manifest reasons, and the others because of the activity of the Credit Men's Association in exposing and warning against the operations of the "Mercantile."

In many instances the representations made were supplemented by the agent's promise that if within a short period, as promised, varying from a few weeks to a year, sufficient was not collected and paid over to the client to equal the realization charge, the difference would be returned to him. It was often also represented that the realization charge would be used to pay expenses incurred for costs, attorney's fees, and the like in the claims in which the represented proceedings were begun or about to be commenced.

Influenced by such representations, the victims frequently signed the contract, paying the contract man, usually by check to the agency, sums varying in amount from $50 to $3,000, the aggregate of the realization charges as to which there was evidence offered of such representations to bring about their payment being many thousands of dollars. In many instances the prospect, becoming at once suspicious, undertook, occasionally with success, to stop the payment of his check. To circumvent this as far as possible banking arrangements were made in several of the cities in which business was being solicited, whereby the checks might be cashed at local banks.

When considerable time had passed since the payment, and, as was always the case, nothing was heard from the agency, the client would write for information, and would receive a letter explaining the difficulty of collecting old claims, and exhorting the client to be patient. In the first letter, or later, the client would refer to the agent's promise of speedy results as to particular claims, and thereupon Wendler would write calling attention to the contract, and to the statements therein, as well as in the literature of the agency, that the terms of the written contract may not be varied by its agents. In this connection it may be stated that in case the prospect called attention of the contract man to that part of the contract which prohibited agents from making any such representations or variation, the contract man would produce his printed card, which described him as "special representative," and would explain (as per his previous instruction) that he did not come within the class of solicitors as mentioned in the contract, but that he, as "special representative," had full power to make binding promises, even though the form contract was thereby varied.

It appears that in most, if not all, instances when claims were received, they were listed at the St. Louis office, and a form letter demanding payment would be sent out to the debtors named, and this was about all that would be done, except when the client made complaint further form demand letters would be sent out. In practically no case as to which evidence was offered was anything collected on the list of accounts submitted, nor any effort made to collect, beyond sending out the form letters. Indeed, it is apparent from the evidence not only that practically all such listed old accounts were absolutely worthless, but that the agency and the persons acting and dealing in its name had not the slightest reason to believe they were otherwise.

Notwithstanding the representations as to the use to be made by the agency of the realization charges, it appears that as fast as received they were divided in the proportion of 35 per cent. to Wendler for the St. Louis office, 65 per cent. to Preeman, who gave the contract man 25 per cent., the list man 10 per cent., retaining the remaining 30 per cent. for his own compensation and to pay the expenses of the Chicago office; and the evidence plainly warrants the inference that it was never intended any substantial portion of the realization charges should be devoted to the expense of collecting the listed claims, nor indeed that there would be any expense beyond that for clerical work, postage, and stationery for sending out the form letters.

Defendant Preeman was first employed at the St. Louis office in 1906, and about 1909 came to Chicago and assumed charge of the fieldwork. Under his general direction the men were trained in the agency work, and there are in evidence many letters between Wendler and Preeman and different ones of these agents. The defendants, other than Wendler and Preeman, were list men or contract men, some both at different times. Day and Minehart were the

most active in securing the realization charges. Finkelman, Pender, and Stevens were in this respect next in importance. As to Fellers and Worman there were comparatively few instances shown where they were instrumental in securing the realization charges, but nevertheless such instances appear as to each of them. All the agents were duly trained and instructed, and most, if not all, participated in instructing and training some of the many others for this work.

The evidence offered in defense consisted wholly of the testimony of several employés of the St. Louis office, from which it appears that in that office there was employed a corps of assistants, largely typewriter girls, through whom there was conducted an extensive correspondence with reference to the collection of claims which came to the office; that each claim received had attention, which consisted mainly in sending to the debtor, the form letters; that the agency had formulated a list of attorneys in most of the cities of the United States to whom claims were sent for collection, and through whom occasional suits were brought to collect claims; that during the period of time covered by the inquiry the agency had collected for and remitted to clients generally claims of a very considerate aggregate, and that a few of the collections made were from bankrupt debtors, and that the clients themselves had been supplied with and had made use of form letters which the agency had supplied them, with which they had themselves collected a considerable number of claims without charge by or commission to the agency, and that in certain instances the service to clients had proved satisfactory.

Sentences were:

Wendler and Preeman: Each three years imprisonment on each of counts 1 to 6, 11 to 16, 18, 19, 20, 28, 29, 32, and 33, to run concurrently, and fine of $1,000 on each of these counts; three years on counts 7 to 10, 17, 21, 24, 27 to 30, 31, and 34, to run concurrently beginning at expiration of sentence on former counts, and fine of $1,000 on each of these counts; two years on each of counts 25, 26, and 35, to run concurrently and to commence at expiration of sentence on counts last mentioned, and fine of $3,000 on each of these three counts—aggregate as to each, imprisonment eight years, and fine, $41,000.

Day and Minehart: Each two years on each of counts 25, 26, and 35, to run concurrently, and fine of $5,000 on count 25; two years on each of counts 1 to 24 and 27 to 34, to run concurrently beginning at expiration of sentence on previous counts—aggregate as to each, imprisonment four years, fine, $5,000.

Finkelman, Pender, and Stevens: Each two years on each of counts 25, 26, and 35, and fine of $2,500 on counts 25; one year on each of counts 1 to 24, and 27 to 34, to run concurrently beginning at expiration of sentence on preceding counts—aggregate as to each, imprisonment three years, fine, $2,500.

Fellers and Worman were each sentenced to nine months' imprisonment in House of Correction on each of counts 1 to 35, to run concurrently.

Many errors are assigned; those we deem sufficiently important being stated where they are considered in the opinion, in which also some further facts are given.

Patrick H. Cullen, of St. Louis, Mo., and William S. Forrest, of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and Henry W. Freeman, 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. It is urged that the indictment is defective in failing to set out the contract above referred to, or to set out that such contract was entered into. The case of Hurst v. State, 39 Tex. Cr. R. 196, 45 S. W. 573, and others are cited to sustain the contention. But they are cases where the defendants were charged with the offense of obtaining property through some fraudulent scheme or pretense. This indict-

ment charges defendants with using the mails in execution of a scheme or artifice to defraud which they had devised; the conspiracy counts charging a conspiracy to so use the mails. Where the charge is that of obtaining property by fraud, the material elements of the fraudulent scheme whereby the property was obtained should be set forth in the indictment; but here it is necessary only to set forth generally the scheme or artifice which the defendants devised, and to charge the use of the mails in execution of the scheme. Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Bettman v. United States, 224 Fed. 819, 140 C. C. A. 265; Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341; Gourdain v. United States, 154 Fed. 453, 83 C. C. A. 309. And the scheme itself is not required to be charged with the detail and particularity necessary in an indictment for the specific offense of obtaining property through false representations. Bettman v. United States, supra; Emanuel v. United States, 196 Fed. 317, 116 C. C. A. 137; Blanton v. United States, 213 Fed. 320, 130 C. C. A. 22, Ann. Cas. 1914D, 1238; Foster v. United States, 178 Fed. 165, 101 C. C. A. 485.

In apt language the counts set forth the scheme to represent that bankrupt debtors of the victim had fraudulently concealed assets, or that there were responsible secret partners; that seizures of property had been made or were about to be made for other creditors; that the collection would surely be made; and other of the alleged knowingly false and fraudulent matters and things above stated. We regard the contract as evidence tending to show the manner in which the fraudulent scheme to obtain money would be made effective, and as such unnecessary to be referred to in the indictment.

[2] 2. Insufficiency is claimed because the indictment fails to state what the Barr & Widen Agency is, whether a partnership, corporation, or whatever else, and because the relation of the defendants to the agency is not stated. Had the Barr & Widen concern been a defendant or a victim of the fraud, it might have been necessary to allege its capacity as a business entity. But, appearing only as a means through which defendants realized upon their scheme to defraud, it is not material what was its precise legal capacity. If defendants fraudulently devised a scheme to falsely represent the "agency" as having done things which it had not, or as having information concerning, or taken steps affecting certain bankrupt debtors, which it had not, the fraudulent scheme is the same, whether the alleged "agency" be corporation, partnership, or what not. In brief for defendants it is said:

"The allegations all the way through indicate, however, that it [the agency] is a body of men that have been engaged in the collection business."

This being so, the indictment sufficiently advised defendants that the "agency" had in some capacity the right to transact business, and could have participated in the execution of the scheme which defendants had devised. If in preparing their defense defendants needed to be more fully informed of the legal capacity of the agency, motion for a bill of particulars would doubtless have elicited whatever, if any, further facts thereon the government possessed. Foster's Federal

Practice, § 522; May v. United States, 199 Fed. 53, 117 C. C. A. 420. And what is said on this point applies as well to the contention as to failure to allege the relation of defendants to the "agency." Whether they constituted it or were employed by it, or whether they had or had not a right to make representations concerning it, were matters, not of allegation, but of evidence, bearing on the proof of the scheme and its conception and operation.

[3] 3. It is insisted that the letters set forth in the several counts as having been mailed inherently show they had no power or tendency to execute the alleged scheme, and that it is not sufficiently alleged that they were mailed for the purpose of executing the scheme. Our reading of the indictment letters, far from convincing us that on their face they had no power or tendency to execute the fraudulent scheme, induces the opposite conclusion. The letters set forth in 14 of the counts are presumably to various of the intended victims, signed by defendant Wendler, and are all in substantially the following form appearing in count 11:

"Stromberg Motor Devices Co., Chicago, Illinois—Gentlemen: We are in receipt of advice from our solicitor of the list of your present delinquent claims, that you had handed him, for the purpose of arriving at the basis for charge covering our service, and one of our special representatives will call upon you in the near future regarding the same. Thanking you for your courtesy in the matter, we beg to remain, very respectfully, Barr & Widen Mercantile Agency, F. L. Wendler, General Manager. April 23, 1912. L-30."

Surely such letters advising of the receipt of the list of claims, and of the intended call of a special agent to close a contract, show on their face they had some power or instrumentality in the execution of the scheme to defraud.

[4] In most of the other counts under section 215 the letters set forth as having been mailed in execution of the scheme to defraud are from Preeman to various agents in the field, some referring to the sending of lead cards, other encouraging the agent, or giving directions relating to the business of realizing on the alleged plan fraudulently to secure money from victims. The letter which is mailed need not be one to or from the intended victim of the fraud, in order to come within the terms of section 215. The execution of the scheme may be, and here was, most effectively furthered, and the purpose of its execution or attempted execution most directly served, through communications by mail between the persons who concocted or entered into it.

[5] Some of the indictment letters refer to the stoppage by the victims of payment on checks given for realization charges, and one of them (count 22) is an acknowledgment of receipt of a list of claims and of a contract, promising prompt attention and enclosing further blanks for claims. The scheme alleged, being one for obtaining money through the fraudulent representations and practices set forth, the use of the mails, even after the money is received, for the purpose of assisting in retaining the money, or to convey to the victim assurances calculated to lull him into inaction and to postpone, perhaps indefinitely, his taking action in respect to his loss, is within the purview of the

law which condemns depositing in or taking from the mails any letter, etc., for the purpose of executing any scheme to defraud. Farmer v. United States, supra.

[6] The counts charge that the letters therein set out were mailed "for the purpose of executing the said scheme and artifice to defraud, and for the purpose of attempting so to do"; and as the letters themselves do not indicate that they could not and did not have such tendency, but, on the contrary, carry the inference that they could and did, we find no merit in the contentions in this regard.

[7] 4. The conspiracy counts (25, 26, and 35) are criticized mainly for their alleged failure sufficiently to aver that the conspiracy charged does not include in its purview the use of the mails in the execution of the contemplated fraud, and that the indictment letters and the other things stated therein as overt acts manifestly had no power to effect the object of the conspiracy. The counts charge:

"That the defendants * * * unlawfully, etc., conspired, etc., together, * * * for the purpose of executing the said scheme and artifice to defraud * * * and attempting to do so, to place and cause to be placed letters in the post office."

We regard this as sufficient averment of a conspiracy to use the mails in execution of the alleged scheme to defraud. Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; Emanuel v. United States, 196 Fed. 317, 116 C. C. A. 137.

In each of these counts the sending of letters of the same general purport as those heretofore referred to is charged by way of overt acts, and in counts 25 and 26 there are further charged as overt acts such things as sending lead cards, securing lists of delinquent accounts, the meeting of certain of the defendants at particular places—all charged as having been done in pursuance of the conspiracy and to effect its object.

It seems clear that all such acts from their very nature may well have been influential in effecting the object of the conspiracy, and without here presenting analysis or discussion of counsel's elaborate argument to the contrary, we find the counts sufficient in this respect.

Other objections to the indictment are urged with much detail of argument and authority, but they seem to be largely refinements of such matters as we have considered, and in most instances quite too hypercritical to serve as substantial and fatal objections to the indictment or any of its counts, which, upon careful consideration, we conclude duly and sufficiently advised defendants of the nature of the charges thereby preferred.

[8] 5. Error is assigned on the admission in evidence of a certain book in which were entered the "realization charges" which were received at Preeman's office for about three months of 1912. A tabulation of these showed a total of about $130,000 received for this period. It is claimed not only that the book was inadmissible as not being properly authenticated, but that in no event were its contents competent evidence, and that great harm accrued to the defendants through its admission, because it showed not only the realization charges as

to which there was offered evidence of fraud, but also realization charges as to which there was no evidence of any fraud offered, and also many which were not sent in by defendants, but by other agents in the field.

As to the authentication of the book, it appears that it was regularly kept in the Chicago office, where defendant Preeman was in control. Those who kept the book were his employés, and it may well be concluded that it was under his general direction that the book was kept, although he made no entries in it. Preeman and the other defendants were interested in the book, in that it was the record of the realization charges, of which Wendler, Preeman, the solicitors, and the list men were to receive certain proportions. The men who kept the book testified to the correctness of its entries, which were made as the checks were received, and even if the book were required to be authenticated with the particularity of account books offered in evidence on behalf of those by or for whom they were kept, we find such requirements to have been substantially complied with. But the book was offered and admitted rather in the light of an admission or declaration by the defendants or some of them, and as such the book would be sufficiently identified if shown to have been kept with the knowledge and under the general direction of defendant. Bettman v. United States, 224 Fed. 819, 140 C. C. A. 265.

[9, 10] As to the contention of the incompetency of the book, it did not appear that the fraudulent scheme proved was concocted with reference to any definitely intended victims, but should be operative as to any and all whom the agents might undertake thereby to influence. Indeed many of the other agents shown by the book to have secured such realization charges, were of the witnesses by whom the fraudulent scheme was proved. The fraudulent scheme being shown, it was competent to prove the extent to which realization charges were solicited and secured, as bearing on the motive and intent of those who concocted the scheme, even though in many cases it did not appear whether fraudulent representations were made to secure them. It must be borne in mind, however, that the extent of success of the scheme as charged under section 215 was in no manner necessary to be shown, the only essential elements being the fraudulent scheme and the use of the mails in its execution. But in any event no prejudice to the defendants resulted from this evidence. Even had the jury believed that the total amount of realization charges shown in the account book had been secured by the defendants, and by fraud, nevertheless they could only have found the defendants guilty, which was all they could do with the proof showing only $10,000 of these realization charges to have been so secured by them.

And in this connection it may be noted that one line of defense consisted in showing by witness Salter the great volume of business which the agency had transacted—the many thousands of claims handled, and of dollars collected since the year 1901. And one item of evidence was a long list of realization charges aggregating many thousands of dollars, collected from concerns not in evidence as complaining, showing in each such case where collections had been made of at least two and

one-half times the amount paid. On cross-examination Salter testified without objection that about 12,000 had paid realization charges. Surely all this evidence coming from practically the only witness of importance offered for the defendants, and designed to show the magnitude of the business which the agency transacted, is quite inconsistent with any claim of prejudice arising from evidence offered by the government of large receipts of realization charges within a given time.

[11] 6. It is seriously contended that all evidence was incompetent whereby it was shown that defendants had made representations of promises to intended victims inconsistent or conflicting with the terms of the contracts which were executed, on the ground that, the contracts being in writing and signed by the parties to them, no evidence was admissible to vary their terms. As before observed, the indictment charges the use of the mails by defendants for the purpose of executing the alleged scheme or artifice to defraud, and if the evidence shows that the scheme devised or intended to be devised was the false representation of past or existing facts to induce belief of ability to collect certain stale accounts, and that thereby the intended victims were to be defrauded of their money, it is not essential that one of the steps in the carrying out of the fraudulent scheme was the signing of a contract. The rule against the varying of written contracts by parol, applicable to instances where the contract is the subject-matter of the controversy, has no relevancy here, where the contract is merely one of a series of evidentiary facts bearing upon the ultimate question whether a scheme or artifice to defraud was in fact devised or intended to be devised.

The relation of the contract to the transaction was well described in a letter of October 12, 1912, from Preeman to agent Lappe, when, as trouble seemed to be brewing for the "agency," he wrote:

"Relative to the contracts received, wish to advise you there has been still another change made in the contract, namely, as per sample herewith inclosed, and I understand this will be the final contract—at least, until the present agitation subsides. The firm has been compelled to make this change on account of certain statements made by the contract men regarding matters of fact relative to claims. If it were not for the fact that I have been on the firing line myself, and sold a great many contracts, I might be inclined to make the statement that it will be hard to close these contracts. My experience, however, teaches me that the contract has very little to do with it, and I think you will find this to be a fact after you get out on the proposition."

[12] 7. The claim is persistently made that under all of the evidence the conclusion of guilt is wholly unwarranted as to any of the defendants, mainly because: (a) The agency repeatedly instructed and warned agents against making any of the false representations charged and proved as constituting the alleged scheme to defraud, and the contract form as well as the printed letter heads of the agency carry on their face notice that the agents had no power to make representations or agreements not contained in the form of the contract; (b) the contract provides for a three-year term of service of the agency, during which time all delinquent accounts of the client must be sent to the agency for collection, and that not till the end of that period could it be known whether the contract was or would be fulfilled; (c) the

agency in good faith intended and tried to fulfill the contract, undertook to collect each account sent it, and did in fact collect large amounts for clients, and stood ready to serve them as in the contract provided during the term of its existence; that in practically every instance as to which proof showed the money was obtained through the fraud alleged the three-year period had not expired, and that the executed contract was broken by the client through failure to send to the agency current delinquent accounts, and that as a further consideration for the contract, the agency was to furnish and did furnish clients certain form letters for collection by the client of its own accounts, and that thus everything in the way of service and the like which was intended to be given and which the contract provided should be given the client was in fact given, or the agency in good faith stood ready to give it.

It appears that in most instances an agent entering the service of the "agency" was required to acknowledge receipt of a printed circular called "Instructions to Solicitors," in which it was stated, among other things, that the solicitor's power was limited to soliciting and closing the printed contracts unchanged, and forbidding the use of testimonials except such as were supplied by the agency, and from securing business by other than "legal, legitimate, and truthful methods," and from stating to prospective clients that the agency "has any knowledge whatever as to any matter of fact that would make possible or probable the collection at any time of any claim," or that the "agency has made any investigation as to the collectibility of any claim prior to the closing of the contract," or that the "agency will refund all or any part of the realization charge in case this agency fails to recover the amount of minimum recovery." In the contract forms and on other stationery was also printed notice of the solicitor's want of power to vary the form of contracts.

If all this has been in good faith, with expectation of observance of these instructions, it might carry inference of the innocence of wrongdoing of those in charge of the project, men like Preeman and Wendler; but if, on the other hand, these fulsome warnings and notices appear from the evidence to have been merely a hypocritical pretense devised and employed with the view only of protecting from possible evil consequences of the scheme, a foil to parry the charge of fraud in case of prosecution, the fraudulent scheme and purpose is thereby only intensified. That this was really "an anchor to the windward" to provide for safety in time of stress, the jury was well warranted in concluding from the evidence. On cross-examination by defendants' counsel of different agents, letter after letter from Wendler was produced reproving the agent for making misrepresentations complained of, and threatening discipline and discharge; but few, if any, were for such cause discharged, none permanently, notwithstanding the constant stream of complaints coming to Wendler from the victims of the misrepresentations and promises of the very kind so peremptorily forbidden to be made in the "Instructions to Solicitors." A significant instance occurred in 1909 when Preeman then a field man had been instrumental in obtaining a contract, with the result that shortly afterwards a letter from the victim reached Wendler calling attention to the representations which Preeman had made to secure it; whereupon

Wendler wrote the usual reply, stating that Preeman was only a solicitor, and that if promises, representations, or changes in the contract had been made by him the responsibility was up to Preeman and the victim, and not the "agency," but assuring the victim that Preeman's services had been dispensed with, and that notice to that effect had been duly published. But contemporaneously with this correspondence it appears there were continuous lively and friendly exchange of letters between Wendler and Preeman, referring, among other things, to this contract, but without suggestion of dismissal or disciplining of Preeman; on the contrary, his rapid rise in the service appears, soon becoming, and thenceforth remaining, second in importance only to Wendler himself.

At times there was indeed reproot of agents, genuine reproof; but not because of the fact of misrepresentation, but the quality of it, in the rashness and imprudence displayed, as for instance, where an agent, utterly without any foundation in truth, stated that a certain named boat then alleged to be at a certain named dock was about to be attached by the agency, and again that an automobile of a certain debtor would pass through a nearby point at a certain time in the near future and would be seized by the agency—all as inducements to the client to close at once so as to get in on the proceeds. Of course, such representations were too specific and immediate to be at all consistent with safety, and for such gross imprudence reproof manifestly was well merited.

Agent after agent testified to being advised to pay no attention to such instructions and warnings; that these were merely for protection in case of trouble. And the agents themselves, when expressing worry about their own possible liability, were assured that whoever executed one of these contracts "signed away his life," and that there could be no possible "come-back." Two letters from Preeman to agent Myers, written in the early fall of 1912, well illustrate the utter hollowness of any pretense of virtue in these oft-reiterated instructions and warnings. One reads:

"You must adhere strictly to your printed instructions to solicitors signed by you and refrain absolutely from making any representations to any prospective client or patron that you or Barr & Widen Mercantile Agency have any knowledge of any kind or character as to any matter of fact regarding the collectibility of any claim or claims, or that any claim of client or patron had been investigated prior to execution of contract."

And the other:

"Relative to instructions to solicitors which you inclosed, duly signed, wish to state that it does not amount to a row of pins, and you are not signing away your life, as you say. They have received enough complaints about you and Kaiser, and I have been instructed several times to discharge both of you, which I did when I was in Phila., but as you have been subsequently reinstated, of course it has been necessary to have new instructions. Do you get me?"

But the plan of operation itself clearly shows that it was not intended nor expected that these instructions and notices would be complied with; else what possible purpose did the lead cards serve? Why did the principal defendants, at the expense of so much effort and money,

evolve this elaborate "lead" system, if it was to have no place in their enterprise? Why put the agent in possession of information regarding stale and admittedly uncollectible bankrupt claims of the intended victims unless representations concerning such claims were contemplated? Plainly the truth concerning such claims would have accomplished nothing. Of the significance of the "leads" Preeman wrote agent Millard:

"Up to three years ago we secured business in the same manner as other agencies do as we had no leads."

The conclusion is irresistible that the "leads" were devised as a basis for the false, but alluring, tales which this large company of trained agents with singular sameness related all over the country, to induce creditors of bankrupts to part with large sums in the hope of realizing on claims they had long regarded, as in fact they were, irretrievably lost. In the elaborate briefs and arguments no possible function for the "leads" is suggested, other than as the vehicle for the plausible presentation of gross untruths to further the mulcting of gullible business men. The very list plan and Wendler's letters acknowledging receipt of the lists, indicate that prior investigation of the list claims would be made to give a basis in each case for the terms of a contract which would be submitted; and when the contract was presented the victim was led to believe that investigation of the collectibility of the claims had in fact been made, and that it was this factor which entered largely ino the fixing of the amount of the realization charge stated in the contract, although in truth no investigation of any kind was ever made, or intended to be made. These instructions and warnings, therefore, far from exculpating the defendants, only fortify the conclusion that there was here a premeditated scheme of widespread and profitable deception.

[13] It is earnestly pressed upon us that, the contract being for services, proof of "an honest intent to render the service stated in the contract is wholly inconsistent with guilt." If by these flagrantly false representations of existing facts persons were induced to believe there would be speedy collection of certain of their hopeless claims, and were thereby inveigled into making substantial advance payments, will the fact that the recipient intends to do, and after securing the payment, actually does, all that can be done to make the collection (though well knowing that no effort would be availing), neutralize his culpability in the formulation of the fraudulent scheme to obtain the advance payment? Manifestly not. If it were otherwise, the most deliberate and circumstantial plan of deception to obtain in advance payment for services would be rescued from the charge of being in law "a scheme or artifice to defraud," if only there is present an intent to render service, which, as here, can avail the victim nothing.

The real and ultimate "service" contemplated as the result of the false representations was the collection of the old and delinquent uncollectible accounts. If the fact of intention to send letters in each case demanding payment of the listed claims will obviate the implication of the defendants "having devised a scheme or artifice to defraud," a more effective investment in envelopes, form letters, and postage

stamps could scarcely be imagined, nor a more cheap, simple, and efficacious instrumentality for deliverance from the toils of the law be conceived.

It is evident that the only thing intended to be done, or in fact done, towards collection, was the sending out of the form letters demanding payment, and then after a time, if the client manifested impatience at the delay in the realization of the promises and expected results, another letter or two, all at trifling cost, practically nothing compared with the payment made, the defendants all the time well knowing that neither such puny effort, nor any effort, could by any possibility bring any degree of success.

[14] We do not consider the three-year period provided in the contract as of any essential consequence. It would be serious, indeed, if persons could by fraudulent means secure advance payment upon a contract which had three years or more to run, and would thereby be immune from prosecution for the fraud for the period fixed in the contract. If the present payment of the realization charge was to be secured through the fraudulent scheme alleged, it is immaterial for how long or short a term the contract in which it was mentioned undertook to bind the parties, nor indeed whether the victim, after paying his money and signing the contract, did, or did not continue to comply with its terms. Besides, what of those many instances shown in the record where, in pursuance of the same fraudulent scheme, the schemers were not successful in procuring a contract to be signed, or, in securing the realization charge, notably those cases where the victim gave bank checks on which he succeeded in stopping payment, thus saving his money? In all such where the use of the mails was shown in attempted, though unsuccessful, execution of the scheme, section 215 was not less violated than in those where the scheme proved successful.

Defendants' counsel place much stress on the voluminous evidence of collections made and work done by the agency as bearing on the good faith of the defendants. It was testified that from 1901 to 1912 accounts collected by the agency amounted to about $650,000; that the agency had a list of lawyers all over the country to whom claims might be sent, and a force at St. Louis which made effort to collect every claim which came to the agency. As to the total of the collections in these 11 years (most of the time being before this "realization charge" scheme was conceived), it may be said that, where clients sent to the agency their current collections accruing after the contract was made, the ordinary results in the handling of such accounts, as might reasonably be expected, were achieved. Undoubtedly attempt was made to collect all such, particularly as regular collection commissions or fees were to be paid the agency for each collection, wholly aside from the "realization charge." But as to the stale accounts concerning which the untruths were put forth, it can make no material difference that it was really intended there should be sent out letters demanding payment, or that, if subsequently other accounts are sent in, effort will be made to collect them. The evidence discloses no rational purpose in sending out the letters about the stale bankrupt claims, except perhaps to provide some proof of good faith in the transaction in case

that was ever questioned. This may also be said of that part of the contract by which the agency obligated itself, without extra charge, to supply the client on request, printed forms of dunning letters to enable the client thenceforth to make his own collections without further expense, by employing this vari-colored literature of graduated degrees of persuasion and insistence. But even this contractually proposed generosity does not import into the transaction such substantial consideration to the victim as will obviate the conclusion that the evidence shows a scheme or artifice to defraud. Conceding the intention to give something in return for the money which it was fraudulently planned to secure—stationery for dunning letters, making demands upon debtors, attempts to collect new accounts, and the like—this is not inconsistent with having devised a scheme to defraud, as is contemplated by the act.

[15] In Bettman v. United States, 224 Fed. 819, 140 C. C. A. 265, it was well said:

"It is not necessary to criminality under the act that nothing whatever is to be given in return for the money."

The "minimum recovery" clause of the contract is urged as further indicating fairness of the transaction; it being contended that through it, if the collections made did not equal the minimum recovery stated in the contract (usually fixed at four times the realization charge), a certain amount would be returned to the client. From casual reading it might be concluded that such was the effect of the clause, but analysis and comparison with other parts of the paper shows it to be a mere collocation of words and phrases signifying nothing. Whatever right in this respect it seems to confer on the victim appears to be at the option of the agency, to refund, or to continue its service to the client for another year, the client, of course, receiving back none of the realization charge, and the agency continuing its "service" for yet another year, the client being bound for that additional time to send in all of its current delinquent accounts for collection at usual rates, to a concern whose operators had already fraudulently separated him from a substantial amount, under the guise of a "realization charge."

[16] 8. It is maintained that the evidence fails to show that any of the defendants except Wendler and Preeman used or caused to be used the mails, or that the use of the mails in execution of a scheme to defraud was shown to have been part of the alleged conspiracy. Under section 215 it is not essential that the use of the mails be contemplated by the fraudulent scheme. It may have been carefully designed to avoid using the mails altogether, but if in the execution of the scheme the mails are in fact used, the act is violated. Farmer v. United States, 223 Fed. 903, 139 C. C. A. 341.

[17] True it is that the evidence as to some of the defendants does not show them to have physically deposited in or taken from the mails any letters. But it is inconceivable that the scheme here charged and proved could have had vitality without using the mails. Preeman was at the Chicago office, Wendler at St. Louis, and the agents were in the field all over the country. Frequent communication was essential to progress and success. The material for the lead cards had to be gath-

ered from various parts of the land, and literature and supplies sent back and forth. The intended victims were in most cases large business concerns of the different cities of the land with whom much of the business must in the nature of things have been carried on by correspondence. Without the use of the mails the formulation and execution of the fraudulent scheme would have been an utter impossibility. It follows that all who participated in the scheme contemplated the use of the mails in the execution of their common design; and when to this end Preeman and Wendler made use of the mails it was not only on their own behalf, but as well on behalf of their coparticipants, and their acts in this regard became the acts of each of them. This is not less true where the prosecution is under section 215 than under the charge of conspiracy. Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; Belden v. United States, 223 Fed. 726, 139 C. C. A. 256.

[18] And as to the conspiracy, the evidence showing, as it does, that it was to be executed, and that in its execution the use of the mails was indispensable, the intent to use the mails as a part of the conspiracy is thereby sufficiently shown. Farmer v. United States, supra. In Wilson v. United States, 190 Fed. 430, 111 C. C. A. 231, in affirming conviction under an indictment containing counts for misuse of the mails and for conspiracy to misuse the mails, it was said:

"They could accomplish their objects only through the use of the mails and through the use of the mails has come this condemnation under a federal statute."

[19] 9. Error is claimed to have intervened in the admission of evidence as to the bankruptcy of certain persons, the claims against whom are charged to have been a subject-matter of the fraudulent scheme. No impropriety is asserted in showing that such persons were adjudicated bankrupt, but the errors claimed are that in the instrument of evidence showing them to have been adjudicated bankrupt in some instances it appeared also that they had been discharged from bankruptcy, and the contention is that it was improper to show the discharge. Even if this were incompetent to be shown, we do not understand how the evidence could in any manner have harmed defendants. But we believe it was competent as bearing on the collectibility of the accounts against the bankrupts, and as thus throwing light on the intent and good faith of the defendants in representing they could and would collect such claims.

10. Complaint is made that the court did not charge the jury in accordance with certain requests for charges made on behalf of the defendants. In so far as such requests are not covered by the charge which the court gave, they refer to the contract and its asserted influence on the issues herein as contended for on behalf of defendants. This we have already considered in dealing with that subject, and it need not be further discussed in this connection. The charge which the court gave was not objected to, but we find no material error in it, neither in what it includes, nor in what it fails to include, it being particularly urged by counsel (though no such objection was made at the time) that the charge did not sufficiently present the case to the jury.

[20] 11. In support of the earnest contention that through conviction

on the conspiracy counts as well as on the others there is a double conviction, it is said that in each of the conspiracy counts there is set forth as the overt acts the mailing of certain letters, which letters are also stated in some of the other counts as letters mailed in violation of section 215; the proof showing such letters to be in fact the same. Under the facts here, the case of Ryan v. United States, 216 Fed. 13, 132 C. C. A. 257, decided by this court, is controlling upon this contention. There the indictment joined counts charging defendants with the consummated act of aiding and abetting in carrying explosives on passenger trains with counts for conspiracy to so transport explosives. Overt acts were charged, apart from the actual transportation of the explosives, and the court, speaking by Judge Seaman, said:

"Thus the counts for conspiracy, on the one hand, and those for aiding and abetting unlawful carriage of explosives, on the other hand, cannot rightly be defined as 'interdependent,' nor were both charges either proved or provable by the same evidence, as contended; and the further contention that commission of the offenses averred in the last-mentioned counts was relied upon and involved for conviction under the conspiracy counts is unsupported by the averments in such counts, wherein neither of such commissions of offense is set forth in the specification of overt acts, so that no question arises whether their averment therein as overt acts would affect the rule above stated as to the independent nature of the other counts. Undoubtedly the evidence introduced in support of the conspiracy charge may well serve as evidence tending to support the charges of aiding and abetting commission of the offenses averred in the other counts; but this coincidence in part gives no support to either contention of identity of the offenses charged, or of identity of the evidence involved for conviction. It is obvious that proof to convict of commission of the unlawful carriages, as aiders and abettors, must extend beyond the requirements for proof of the conspiracy."

The situation there does not differ materially from what here appears. Here, as there, is found the coincidental fact that the evidence to prove the scheme to defraud serves also as evidence tending to support the conspiracy charge. Under section 215 an actual use of the mails is essential to conviction. Under section 37 the overt act to complete the offense may be any act. It may be mailing a letter or anything else. If the act charged and proved as the only overt act under section 37 were the mailing of a letter, and the same letter only was charged and proved as the letter mailed in execution of a scheme to defraud alleged under section 215, it may well be that the mailing of the one letter, completing as it would an offense under section 37, and at the same time an offense under section 215, would not admit of the defendant's conviction and punishment under more than one charge, so proved; and such state of facts would well justify the doubts expressed by Judge Denison in the recent case of Hendrey v. United States, 233 Fed. 5, 147 C. C. A. 75.

But that is not the situation with which we are dealing. The conspiracy counts do set forth as overt acts the mailing of letters, some of which appear in counts under section 215; yet each of the conspiracy counts set forth as overt acts the mailing of letters not set out in the counts under section 215 as the letters mailed in execution of the scheme. Counts 25 and 26 further charge as overt acts, other things, such as procuring lists, sending out lead cards, and meeting together, or of mailing letters other than letters charged and proved as complet-

ing offenses under section 215, the proof of which established the conspiracy charged, as an offense separate from those charged and proved under section 215. Applying the rule laid down in the Ryan Case, it follows there was here no double conviction.

While we have confined our discussion to those contentions we deemed most important, we have given consideration to all the points raised, and from a perusal of the record and study of the extended briefs and the arguments, oral, printed and written, we conclude no error appears which would justify disturbance of judgment as to any of the defendants.

Judgments affirmed.

SWIFT v. BLACK PANTHER OIL & GAS CO.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1917.)

No. 4749.

1. COURTS ⟸508(1)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

In a case in which a federal court first obtains jurisdiction of the subject-matter in controversy, and where it acts in aid of its own jurisdiction, to render its orders or decrees, or the title or disposition under them of the property within that jurisdiction effectual, it may, notwithstanding Rev. St. § 720, now Judicial Code (Act March 3, 1911, c. 231) § 265, 36 Stat. 1162 (Comp. St. 1916, § 1242), enjoin or restrain all proceedings in the state court which would have the effect of defeating or impairing its jurisdiction, or the orders, decrees, or titles it has made or is making in the exercise thereof.

2. COURTS ⟸508(3)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

In a suit in a federal court by the United States to set aside a patent to an Indian allottee for land on which his heirs had executed separate oil and gas leases, by consent of all parties a receiver was appointed and authorized to enter into a contract with the lessee, by which it was to pay over to the receiver the royalties under the leases and retain as its own the remainder or working share of the oil and gas produced, free from any further claim thereto. Afterward one of the heirs, who was a party to the suit, sold and assigned his interest under his lease, and the assignee brought an action in a state court against the lessee and recovered a judgment for royalties, upon which he obtained an execution and injunction. *Held*, that the federal court not only had jurisdiction, but that it was its duty to protect the lessee in its rights under the contract by enjoining the enforcement of such judgment.

3. INJUNCTION ⟸148(1)—INJUNCTION BY FEDERAL COURT TO PROTECT JURISDICTION AND DECREES—SECURITY.

Act Oct. 15, 1914, c. 323, § 18, 38 Stat. 738 (Comp. St. 1916, § 1243b), is inapplicable to, and does not require security upon, the issue by a federal court of a restraining order or interlocutory order of injunction to prevent the impairment or defeat of the just exercise of its jurisdiction, or to protect and enforce its orders, judgments, or decrees, or titles and rights thereunder.

4. APPEAL AND ERROR ⟸87(3)—DECISIONS REVIEWABLE—INTERVENTION.

In intervention there are two classes of cases, one in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discre-

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

tionary with the court. There is another class, in which the petitioner claims a lien upon or an interest in the specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his lien or interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. In this second class of cases, the petitioner has an absolute right to intervene in the proceeding, and permission for him to do so is not discretionary with the court, and its order refusing permission is reviewable by appeal.

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

Suit in equity by the United States against Bessie Wildcat and others. From an order granting an interlocutory injunction obtained by the Black Panther Oil & Gas Company, George M. Swift appeals. Affirmed.

Malcolm E. Rosser, of Muskogee, Okl. (J. R. Miller and T. R. Dean, both of Sapulpa, Okl., F. F. Lamb, of Okmulgee, Okl., Geo. S. Ramsey, of Muskogee, Okl., and Edgar A. De Meules, of Tulsa, Okl., on the brief), for appellant.

A. C. Cruce, of Oklahoma City, Okl. (C. B. Stuart, M. K. Cruce, J. R. Keaton, Frank Wells, and D. I. Johnston, all of Oklahoma City, Okl., on the brief), for appellee.

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

SANBORN, Circuit Judge. George M. Swift appeals to this court from an interlocutory decree of the United States District Court for the Eastern District of Oklahoma which enjoins him from enforcing—against the three-fourths working interest, or the proceeds thereof derived, or to be derived, during the receivership in the suit of United States v. Bessie Wildcat and others in that court by the Black Panther Oil & Gas Company, a corporation, hereafter called the Panther, from the operation for oil and gas on the northwest quarter of section 9, township 18 north, of range 7 east, in Creek county, Okl., under the lease thereof to the Panther made by the receiver by order of the federal court on April 20, 1914—the judgment or decree of the state district court of Creek county, Okl., in the suit of Swift, Trustee, v. Panther, rendered January 15, 1916, for Swift's recovery of the Panther out of the said three-fourths working interest of $113,330.56 and one-eighth of the oil derived from the land subsequent to December 15, 1915, either by writs of execution, or garnishments, or injunctions in or issued out of the state court.

Before the issue of the injunction of the federal court challenged, Mr. Swift, for the purpose of enforcing his decree, had caused the state court to issue a writ of execution, and had caused the sheriff to levy it upon and to advertise for sale thereunder the interest of the Panther in the land and in the oil and gas produced therefrom, had caused certain third parties to be garnisheed as creditors of the Panther, and had obtained an order from the state court on March 29, 1916, forbidding the Panther from paying out any money or doing anything of any kind that might prevent it from paying over all the money it then had, or might thereafter obtain, from any banks, or from the sale

of any oil or gas or other of its property, to the clerk of the state court, to apply upon Swift's judgment in case such court, or any other court, should subsequently order such judgment to be so paid. In this state of the case the Panther presented to the federal court in the Wildcat suit, to which it was a party defendant from its commencement, a petition for its injunction against Swift's interference by means of the execution, garnishments, or injunction of the state court with the ownership or disposition by the Panther of the three-fourths working interest in the oil and gas derived under the receiver's lease, or in the proceeds thereof, on the ground that Swift was estopped by the proceedings in the Wildcat suit, to which his assignor and predecessor in interest was a party before Swift obtained his claim, from in any way enforcing that claim against that three-fourths interest or any of the proceeds thereof. Swift answered the petition of the Panther, evidence was introduced by each of the parties, and after a full hearing the court sustained the position of the Panther and ordered the issue of its injunction.

[1] The first reason urged upon our attention by counsel for Mr. Swift for the reversal of the interlocutory decree of the federal court for the issuance of its injunction is that the national court had no jurisdiction to issue its injunction, because section 720 of the United States Revised Statutes, which is now section 265 of the Judicial Code, reads:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In support of this contention counsel cite Diggs & Keith v. Wolcott, 4 Cranch, 179, 2 L. Ed. 587, Peck v. Jenness, 7 How. 612, 623, 624, 625, 12 L. Ed. 841, Haines v. Carpenter, 91 U. S. 254, 23 L. Ed. 345, Whitney v. Wilder, 54 Fed. 554, 4 C. C. A. 510, and other cases of like character wherein the state court first acquired jurisdiction of the subject-matter in controversy. In cases of this class this act of Congress undoubtedly controls, and the federal courts may not interfere by injunction or otherwise with the proceedings of the state courts which have first acquired jurisdiction of the subject-matter. But it is equally true that in a case in which a federal court first obtains jurisdiction of the subject-matter in controversy, and where it acts in aid of its own jurisdiction to render its orders or decrees, or the title or disposition under them of the property within that jurisdiction, effectual, it may, notwithstanding section 720, Revised Statutes, now section 265 of the Judicial Code, enjoin or restrain all proceedings in the state court which would have the effect of defeating or impairing its jurisdiction, or the orders, decrees, or titles it has made or is making in the exercise thereof. Sharon v. Terry (C. C.) 36 Fed. 337; French v. Hay, 22 Wall. 250, note, 22 L. Ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; Julian v. Central Trust Company, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629; Starr v. Chicago, Rock Island & P. Ry. Co. (C. C.) 110 Fed. 3, 6; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; Lang v. Choc-

taw, Oklahoma & Gulf R. Co., 160 Fed. 355, 359, 360, 87 C. C. A. 307, 311, 312; Kansas City Gas Co. v. Kansas City (D. C.) 198 Fed. 500, 526; Guardian Trust Co. v Kansas City Southern Ry. Co., 171 Fed. 43, 49, 96 C. C. A. 285, 291, 28 L. R. A. (N. S.) 620; Western Union Tel. Co. v. U. S. & Mexican Trust Co., 221 Fed. 545, 553, 137 C. C. A. 113, 121; McKinney v. Landon, 209 Fed. 300, 305, 306, 126 C. C. A. 226, 231, 232. The law upon this subject has been repeatedly declared by the Supreme Court and by this court. In Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 359, 360, 87 C. C. A. 311, 312, the rule was thus stated by this court:

"The court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court and entitles the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal. Farmers' Loan & Trust Company v. Lake Street Railroad Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; Peck v. Jenness, 7 How. 612, 12 L. Ed. 841; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Central Bank v. Stevens, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; Williams v. Neely, 67 C. C. A. 171, 185, 134 Fed. 1, 15, 69 L. R. A. 232; Barber Asphalt Co. v. Morris, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; Gates v. Bucki, 53 Fed. 961, 969, 4 C. C. A. 116, 128, 129. * * * The jurisdiction of a court over a subject-matter or a cause once lawfully acquired includes the power to enforce its judgment or decree, and to protect the title of those holding under it from every attempt to avoid or annul it. Chicot Co. v. Sherwood, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 37 L. Ed. 546; Julian v. Central Trust Company, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629; Wabash Railroad Company v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182 [52 L. Ed. 379]; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 949, 66 C. C. A. 55, 59, 67, 67 L. R. A. 761; Brun v. Mann, 80 C. C. A. 513, 151 Fed. 145 [12 L. R. A. (N. S.) 154]."

The foregoing rules are no longer debatable, and by them the injunctive order of the federal court must be tested. The exact subject-matter in controversy between the two courts is the three-fourths working interest in the oil and gas and in the proceeds of that interest derived and to be derived by the Panther, during the receivership in the federal court, from the land leased to the Panther by the receiver by order of that court on April 20, 1914, and the first question is: Which court first lawfully obtained jurisdiction of that subject-matter? The answer is found in the claims of the parties and the history of the proceedings in the two courts.

[2] Prior to May, 1903, the land here in question had been allotted and patented under the acts of Congress to Barney Thlocco, a Creek Indian. On November 1, 1913, the United States commenced a suit in equity against Bessie Wildcat, the Panther, Martha Jackson, a minor, Saber Jackson, as her guardian and next friend, and others, to avoid the allotment and patent to Thlocco, and to exclude the defendants in that suit from any right or title to the land and to the oil and gas that might be derived therefrom. The defendants Martha Jackson and her guardian, Saber Jackson, answered, and claimed that Thlocco died in 1904 intestate, that Annie Nevy was his sole heir, that Saber Jackson

married her, that Martha Jackson was their daughter, that Annie Jackson, formerly Annie Nevy, her mother, has also died, and that consequently Martha Jackson is the sole heir and the owner of the land, and Saber Jackson has a life estate in the land as tenant by the curtesy consummate. On November 13, 1913, Saber Jackson made an oil and gas lease of this land to J. Coody Johnson, whereby the lessee agreed, among other things, to pay to Jackson as rental one-eighth of all the oil and gas that should be produced and saved from the land. Johnson's interest under the lease was subsequently assigned to and became vested in the Panther on February 4, 1914. The Panther also became the lessee of Martha Jackson, by her guardian, Saber Jackson, under an oil and gas lease whereby it agreed to pay as rental to her one-eighth of all the oil and gas produced and saved from this same land.

On April 17, 1914, on the petition of the plaintiff in the Wildcat suit and some of the defendants therein, including Martha Jackson and Saber Jackson, as her guardian, and with the consent of all the other defendants, the federal court appointed a receiver to cause and direct the production of oil and gas from this land and ordered and directed him to make a formal agreement with the Panther for the development of the land and the production of oil and gas therefrom on the following terms, among others: That the Panther should deliver or pay to the receiver one-fourth of all the oil and gas produced from the land, that the Panther should give to the receiver for the benefit of the parties to the suit a satisfactory bond to perform the provisions of its agreement, that the receiver was—

"authorized and directed to release to the said Black Panther Oil & Gas Company, and its assigns, free from any claim of any party to this action, * * * the working interest in the oil and gas produced by the said company from the above described land, that is to say, all the oil and gas so produced in excess of the royalty portion of one-fourth of the gross amount of production."

Thereafter, pursuant to this order and direction of the court, the receiver and the Panther made a formal written agreement which embodied the terms specified in the order of the court, and thereunder the Panther has ever since been in possession of the property, producing or causing others to produce oil and gas from the land, and has been paying or delivering one-fourth thereof to the receiver or to his order.

On November 23, 1914, Saber Jackson, who had not theretofore been a party to the Wildcat suit, otherwise than as guardian for Martha Jackson, intervened in that case in his own behalf and filed his answer and cross-bill, wherein he set forth his claim to a life estate in the land as tenant by the curtesy, and prayed that he be decreed to have such life estate and to have such further relief as might be just. His answer and cross-bill opened with these words:

"Comes now Saber Jackson, and by leave of court first obtained files this his answer and cross-bill in the above-entitled cause, hereby submitting to all of the orders, judgments, and proceedings heretofore had in said cause, as fully as though he had been made a party defendant herein from the institution of the suit."

On December 4, 1914, Saber Jackson assigned to George M. Swift all his rights to any oil and gas that had been or might be derived

from the land by virtue of his lease of November 13, 1913, to Johnson, to whose rights as lessee the Panther had succeeded in February, 1914. In February, 1915, Swift presented to the federal court a motion for leave to intervene as a defendant in the Wildcat suit and tendered his answer and cross-bill. In his motion and in his cross-bill he set forth the claim of Saber Jackson to an estate by the curtesy consummate in the land, Jackson's lease to Johnson and the assignment of the lessee therein to the Panther, and Jackson's assignment of his lessor's interest in that lease to him, Swift, and prayed, among other things, that he might be decreed to be the owner of the estate by the curtesy consummate in the land and of one-eighth of all the oil which had been or should be produced from the land by the Panther. On February 22, 1915, the federal court denied his motion for leave to intervene. Having been denied his right to present to the federal court his claim to the estate by the curtesy in the land and to one-eighth of the oil and gas extracted therefrom by his lessee, the Panther, Swift, on February 25, 1915, brought an action in the district court of Creek county, Okl., on his lease, against his lessee, the Panther, for the one-eighth of the oil and gas reserved to him by the lease, and this was the first time any action or proceeding relative to the subject-matters in controversy in the Wildcat suit appeared in the state court. The action in the state court resulted, on February 5, 1915, in its decree that Swift should recover $113,330.56 of the Panther on account of the rent reserved in the lease made by Saber Jackson, of which Swift was the lessor's, and the Panther was the lessee's, assignee, and for other relief, and it is from enforcing that decree by the application to it, by means of the writs of execution, the garnishments, and the injunctions of the state court, of the working three-fourths interest in the oil and gas, or the proceeds thereof assured to the Panther free from the claims of all the parties to the Wildcat suit by the order of the federal court of April 17, 1914, that the interlocutory decree of the federal court enjoined Swift.

The chronological statement of the proceedings in the two courts, which has now been made, demonstrates the fact that before any action or proceeding was commenced in the state court invoking its jurisdiction of any interest of any party in the Thlocco land, or in any of the oil or gas derived or to be derived therefrom, the federal court, by means of a suit in equity brought by the United States against the parties claiming interests in that land, and the oil and gas to be derived therefrom, had acquired full jurisdiction of the land, of the lease by Saber Jackson now held by Swift, and of the oil and gas produced and to be produced therefrom, had, with the consent of all the parties to that suit, appointed a receiver, who had taken possession of the property by his lessee, the Panther, had caused and directed its receiver to make, and that receiver had made, a written agreement with the Panther to the effect that it should produce oil and gas from the land and pay to the receiver, for the benefit of the parties to that suit, one-fourth of the oil and gas so to be produced and its proceeds, and that the Panther should retain and own three-fourths thereof called the working interest, free

from any claim of any party to the Wildcat suit; that after this agreement was made by order of the court, Saber Jackson, the lessor from whom Swift derives all his interest, had, before he assigned his lessor's interest in that lease to Swift, voluntarily intervened and become a party defendant in the Wildcat suit, and had thereby subjected himself, all his interest in the land, in the lease under which Swift claims, and in the oil and gas produced from the land by the Panther, to the previous orders and proceedings in the federal court, including that order whereby that court assured to the Panther the three-fourths working interest in the oil and gas produced and to be produced by it, free from any claim of any party to the Wildcat suit, in consideration of the Panther's agreement to pay and its continuing payment of one-fourth of the oil and gas it produced to the receiver for the benefit of those parties.

After all these proceedings, and still before the action was brought in the state court, Swift acquired from Saber Jackson, who was then a party defendant in the Wildcat suit, his lessor's interest in his lease to Johnson, while the latter's interest as lessee was vested in the Panther before the Panther received the receiver's lease. As Swift took his interest from Jackson after the latter had submitted himself to all the orders and proceedings in the Wildcat suit, and after Jackson had become a party to that suit, Swift took that interest with all the privileges and advantages, and subject to all the estoppels and disadvantages, under which Jackson himself held them; and as Jackson was estopped, by his submission to the previous orders of the court when he intervened, from denying or assailing the contract of the receiver and the court with the Panther, to the effect that the Panther should have and own the three-fourths working interest in the oil and gas free and clear of the claims of any of the defendants in the Wildcat suit, and that those defendants should look to the one-fourth interest in the oil and gas alone for their rental or royalty, so also was Swift, taking his interest pendente lite, bound by the same estoppel.

After that estoppel had become complete by virtue of the order and contract of the federal court with the Panther, and by the Panther's reliance and action upon them, Swift undertook to disregard it, and to collect the royalty or rental on his lease by his action in the state court out of the very three-fourths interest which his representative, the federal court, had assured to the Panther free from Swift's claim, in consideration that the Panther would pay one-fourth of the oil and gas it produced to the receiver for his benefit and for the benefit of the other parties to the Wildcat suit; and it was against his making this collection from that three-fourths by the use of the writ of execution, the garnishments, and the injunctions of the state court that the federal court issued the injunction from which this appeal was taken.

The unavoidable conclusion is that the federal court, long before Swift's action in the state court was commenced, acquired jurisdiction and possession of the Thlocco land and the leases thereof, of the oil and gas produced and to be produced from it by the Panther during the pendency of the Wildcat suit, and of the controversies

concerning all these matters; that it had plenary jurisdiction, notwithstanding the provisions of section 720, Revised Statutes, now section 265 of the Judicial Code, to enjoin or restrain Mr. Swift from using the writs of execution, the garnishments, or injunctions of the state court to defeat or impair the jurisdiction of the federal court, or the orders, decrees, or titles it has made, or shall decree or make, in that case; and that the first position of counsel for Mr. Swift in this case is untenable.

The next contention is that the injunction of the federal court against the enforcement by Swift of the judgment of the state court by its writs of execution, garnishments, and injunctions was unwarranted, because such enforcement will not deprive the federal court of the possession of the land, or prevent its receipt of the one-fourth of the oil and gas produced by the Panther under the lease made by the receiver. But the record convinces that the only property the Panther had or has had since the receiver's lease is its interest in this land, in the improvements thereon, and in the oil and gas produced therefrom under its leases from Martha Jackson, Saber Jackson, and the receiver, and the three-fourths working interest in the oil and gas and its proceeds assured to it by the order and agreement of the court made at the time of the receiver's appointment. To this three-fourths interest and its proceeds the court, the legal representative for this purpose of the defendant Saber Jackson, and of his successory lessor pendente lite, Swift, assured the title free and clear of their claims as lessors in consideration of the one-fourth of the oil and gas to be produced, which the Panther agreed to pay and pays to the receiver for the benefit of the parties to the Wildcat suit. The enforcement of the execution, the garnishments, or the injunction of the state court will necessarily impair or destroy the Panther's title to this three-fourths or to its proceeds, and apply some or all of them to the payment of the rent reserved in Jackson's lease which he assigned to Swift. But the court's order and contract with the Panther at the time of the appointment of the receiver limited the source, as against the Panther, from which any of the parties to the Wildcat suit and those claiming under them could collect rentals reserved in their leases of this land to the one-fourth of the oil and gas which the Panther agreed to pay and paid to the receiver for their benefit, and it unavoidably estops all the parties to that suit and Swift, claiming under one of them, from collecting or applying any of the three-fourths interest, or any of its proceeds, to the payment of those rentals.

The result is that the federal court not only had the jurisdiction and the power, but it was its duty by its injunction, to protect the title of the Panther to this three-fourths interest and to its proceeds, which that court had assured to it free from the claims of the parties to the Wildcat suit, and of Swift claiming under one of them, against the attempt of any of them, by subsequent proceedings in other courts, or otherwise, to evade the estoppel by which they were bound, or to impair or destroy the title of the Panther to the three-fourths interest in the oil and gas and its proceeds. Chicot County v. Sherwood, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 37 L. Ed. 546;

Julian v. Central Trust Company, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629. The equities of the Panther were far superior to those of Swift, and they imposed upon the court below the judicial duty to make the order and decree challenged by this appeal.

The conclusions which have been stated were not reached without a deliberate consideration of the arguments of counsel and the authorities they cite to the effect that Saber Jackson's agreement to be bound by the prior proceedings in the Wildcat suit when he intervened was merely conventional, and did not estop him or Swift, claiming under him, from collecting of the Panther outside the Wildcat suit the rents reserved in Jackson's lease. On November 23, 1914, when Jackson made that intervention, he was the lessor in a lease of this land in which the Panther then was, and had been since February, 1914, the lessee. The Panther was then in possession of the land, producing oil and gas and paying one-fourth of it to the receiver for the benefit of the parties to the Wildcat suit, under the order and agreement of the court of April 17, 1914. That order and contract had been made with Jackson's consent as guardian of his daughter, Martha Jackson.

Counsel assert again and again that the order and agreement with the Panther, assuring to it the title to the three-fourths working interest free from the claims of the parties in the Wildcat suit, did not exempt that three-fourths interest, or its proceeds, from liability to levy and application to the payment of the debts of the Panther, and this is undoubtedly true as to all its creditors who were not parties to or bound by the proceedings in the Wildcat suit. It is conceded that before he intervened in that suit Jackson was at liberty to sue the Panther in any competent court for the rents reserved in his lease, and to collect them by the process of that court out of the three-fourths working interest received by the Panther under its lease from the receiver. But the Panther was in possession, producing oil from the land and paying one-fourth of it to the receiver of the court for the benefit of the parties to the Wildcat suit, under an order of the court the legal effect of which was to estop the parties to that suit from collecting out of the oil and gas produced by the Panther the rents reserved in their leases from any other source than from the one-fourth which the Panther agreed to pay for a title to the other three-fourths free from their claims.

Jackson, at the time he intervened, had the option to stay out of the Wildcat suit and collect his rent elsewhere, if he could, or to intervene, become a party to that suit, and pursue his just share of the one-fourth interest which was being collected therein for the benefit of the parties to that suit. He could not do both. The rental reserved in his lease was one-eighth of the oil and gas produced and saved. He could not become a party to that suit, thereby make himself a party to the order and agreement of the court that the source of his recovery of his rents reserved should be limited to his just share of the one-fourth the Panther was paying in consideration of its title exempt from the claims of the defendants in that suit to the other three-fourths, and at the same time recover his rents from the three-fourths. He exercised his option, intervened, and became a party

defendant in the Wildcat suit. The general rule is that the intervener is in the same situation, bound by the same orders, has the same right, and is subject to the same estoppels as though he had been a party from the commencement of the suit. French v. Gapen, 105 U. S. 509, 525, 26 L. Ed. 951; Rice v. Durham Water Co. (C. C.) 91 Fed. 433, 434.

When Jackson intervened he expressly declared in his answer and cross-bill that he submitted to all the orders, judgments, and proceedings theretofore had in the Wildcat suit as fully as though he had been a party defendant from the commencement of the suit. The order and contract of lease between the court and the Panther were a part of the proceedings theretofore had to which he submitted. Under these circumstances there is no persuasive reason why he, or his assignee, Swift, should be relieved from the general rule of equity practice, or from Jackson's express submission to the previous orders and proceedings in the Wildcat suit, while, on the other hand, equity and justice alike demand that they should not be so relieved, and the conclusion is that they are both estopped, by the order and agreement of the court and the intervention of Jackson, from applying any part of the three-fourths working interest, or of the proceeds thereof, thereby assured to the Panther free from the claims of the parties to the Wildcat suit to the payment of the rents reserved in Jackson's lease of November 13, 1913.

[3] Finally, it is insisted that the decree for the injunction should be reversed, because section 18 of the act of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," provides:

"That, except as otherwise provided in section 16 of this act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby." 38 Stat. 738, c. 323 (Comp. St. 1916, § 1243b).

And the court below ordered and issued its injunction without compelling the Panther to give any bond, although counsel for Mr. Swift moved the court to require it.

But the restraining order and injunction in this case were issued by the court below, in lieu of proceedings for contempt of that court, to prevent the impairment and defeat of the just exercise of its undoubted jurisdiction to protect and enforce its lawful orders and to preserve the title made by it under them. The unlawful interference of Mr. Swift with the enforcement of the just orders and the preservation of the lawful titles made by the court below was a contempt of that court, and, if continued, might well have been punished as such. The issue of the injunction was but a milder method of protecting its jurisdiction, orders, and titles from unlawful impairment. There is nothing in section 18 to indicate, and, until that intention is clearly expressed, it cannot be presumed that the Congress intended thereby to limit or condition in any way the power of the federal court by means of its injunction, any more than by means of proceedings for contempt,

to preserve and protect its jurisdiction, acts or titles from unlawful impairment or destruction. Section 18, Act Oct. 15, 1914, is, like section 720 of the Revised Statutes, now section 265 of the Judicial Code, inapplicable to injunctions of the federal courts issued for this purpose. Moreover, Mr. Swift has sustained no loss or injury from the absence of the bond, for the condition of it would have been to pay such costs and damages as he would have suffered if he should be found to have been wrongfully enjoined or restrained, and he is found to have been rightfully enjoined and restrained. If now this court were to reverse the order and decree for the injunction, that act would be a futile one, for, in view of the opinions of the court below and of this court, the former would undoubtedly immediately issue another like injunction. The order and decree for the injunction are not reversible, because no bond was taken.

The conclusion which has been reached upon the merits of this case seems to demonstrate the fact that the court below unwittingly fell into an error in denying the motion of Swift for leave to intervene, to answer, to file a cross-bill, to plead and to prove in the Wildcat suit his claim under his lease, and there to recover his just share of the one-fourth interest secured to the receiver for the benefit of the parties in that case. As we have seen, he is estopped by Jackson's intervention in that case from enforcing his claim against the three-fourths interest the Panther has secured, and, as the Panther has no other property, and, as Swift claims to have succeeded to Saber Jackson's interest, he is entitled to Jackson's share of the one-fourth interest going to the receiver. As that one-fourth interest is within the exclusive jurisdiction of the court below in the Wildcat suit, and as Swift's only remedy to collect the rent reserved in the lease he holds is by an intervention in that suit, the court below cannot justly deny him the right to intervene, and to secure an adjudication of the merits of his claim therein, while at the same time it denies him, as it has in our opinion rightfully done, the right to enforce his claim outside that court by levy upon and application of the three-fourths interest going to the Panther to the payment of his claim.

[4] In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the court; another class in which the petitioner claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. The petitioner, who has a claim of the latter class, has an absolute right to intervene in the proceeding in which the court holds the exclusive custody and dominion of the property, permission for him to intervene is not discretionary with the court, and he may review by appeal an order refusing that right. Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 552, 137 C. C. A. 113, 120; Credits Commutation Co. v. United States, 177 U. S. 311, 317, 20 Sup. Ct. 636, 44 L. Ed. 782; Credits Commutation Co. v. United States, 91 Fed.

570, 573, 34 C. C. A. 12; United States Trust Co. v. Chicago Terminal Transfer R. R. Co., 188 Fed. 292, 296, 110 C. C. A. 270; Minot v. Mastin, 95 Fed. 734, 739, 37 C. C. A. 234, 239; United States v. Philips, 107 Fed. 824, 46 C. C. A. 660.

It may be that the order denying Swift leave to intervene may be reviewed as an intermediate order on an appeal from the final order of decree in the Wildcat suit by Jackson, who perhaps represents Swift's claim in that suit in his absence (Western Union Telegraph Co. v. United States & Mexican Trust Co., 221 Fed. 545, 551, 137 C. C. A. 113, 119); but it is desirable, in the interest of a speedy and conclusive disposition of the receiver's one-fourth interest and its proceeds, if it is not already too late, that Swift, if he still desires, should yet have an opportunity to prove and plead his claim and have an adjudication of it upon its merits in the Wildcat suit in the court below, before that court enters its final decree of distribution therein, and although the order denying his intervention is not reviewable on this appeal, the views of this court regarding his right to intervene have been expressed, in the hope that the court below may yet find a way to permit him so to do.

The injunctive order and decree was just and equitable, and it is affirmed.

RYAN v. OHMER.

(Circuit Court of Appeals, Second Circuit. May 31, 1917.)

No. 233.

1. EVIDENCE ⟸441(1)—PAROL EVIDENCE—ORAL NEGOTIATIONS.
   The execution of a written contract supersedes and merges all oral negotiations or stipulations concerning its terms.
2. CONTRACTS ⟸147(1)—CONSTRUCTION—INTENTION OF PARTIES.
   The intent of the parties to a contract, as expressed in the writing signed by them, must govern in determining their rights as derived therefrom.
3. CONTRACTS ⟸155—CONSTRUCTION—CONSTRUING IN FAVOR OF PROMISEE.
   The language of a contract must be interpreted in the sense in which the promisor knew, or had reason to know, that the promisee understood it.
4. CONTRACTS ⟸148—CONSTRUCTION—PRIOR NEGOTIATIONS.
   In case of doubt, all the negotiations between the parties may be considered in arriving at the true intent of the parties.
5. EVIDENCE ⟸450(5)—PAROL EVIDENCE—AMBIGUITY.
   A memorandum of an agreement between complainant and defendant that, if any order for shrapnel fuses was received by or through either of them "from Colonel M.," the profits should be divided as therein stated, was not so clear as to its meaning as to make it improper to admit evidence as to the circumstances out of which it arose.
6. BROKERS ⟸49(1)—CONSTRUCTION OF CONTRACT.
   Defendant solicited complainant's aid in financing an Ohio corporation, of which he was president, and complainant suggested the possibility of procuring contracts for war munitions. M. had a contract with the Russian government for 2,000,000 shrapnel shells, and had offered the contract to a Canadian corporation. One of the difficulties in the way of its acceptance was to find some one who could supply the necessary time

fuses, and M. promised the Canadian corporation's president to aid in finding contractors to furnish the necessary parts. In a search for a manufacturer he was introduced to complainant, who told him that he had a party who could furnish the fuses, and later brought him and defendant together. Subsequently defendant's Ohio corporation contracted with the Canadian corporation for the manufacture of the fuses. Pending the negotiations, complainant and defendant executed a memorandum of their agreement, providing for a division of profits on any order "received from Colonel M. by or through either of us." *Held* that, in the light of the circumstances, the language "from Colonel M." did not mean that the contract must be one with M., but one obtained through his instrumentality, while the words "by or through either of us" did not mean that the contract must be one under which defendant individually should agree to manufacture the fuses.

7. APPEAL AND ERROR ⊂=1011(1)—REVIEW—QUESTIONS OF FACT.

The finding of the District Court, on conflicting evidence warranting such finding, that the contract which defendant obtained for his company was obtained through M., within the meaning of his contract with complainant, would not be disturbed, when not clearly erroneous.

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

Suit by Thomas J. Ryan against Will I. Ohmer. From a decree for complainant, defendant appeals. Affirmed.

See, also, 233 Fed. 165.

The complainant is a citizen of the state of New York, residing in the Southern district in said state. The defendant is a citizen of the state of Ohio. The original complaint also made a party defendant the Recording & Computing Machines Company, a corporation organized under the laws of Ohio, afterwards referred to herein as the Ohio Company, and also the Canadian Car & Foundry Company, Limited, a corporation organized under the laws of the Dominion of Canada, afterwards referred to herein as the Canadian Company. The defendant is the president and a stockholder in the Ohio Company, which was engaged at the time of the negotiations between the parties in a business which had no relation to the manufacture of munitions of war or any parts thereof. Afterwards an amended complaint was filed against the defendant Ohmer alone.

The suit is brought for an accounting under a written agreement, signed by the parties and dated New York, February 20, 1915, which reads as follows: "This is a memorandum of an agreement or understanding that, if any order is received from Col. Mackie by or through either of us for shrapnel fuses within the next sixty (60) days, the personal or individual profits from the order or orders shall be divided as follows: Sixty per cent. to W. I. Ohmer. Forty per cent. to Thos. J. Ryan." The bill of complaint sets forth that in January, 1915, complainant and the defendant entered into a contract or arrangement by which they became joint adventurers in the manufacture of munitions of war or parts thereof, directly or indirectly, for governments at war in Europe; that the complainant's part in this business was to bring the defendant into touch with persons having contracts for such commodities to let, and defendant's part was to perform any contracts so obtained through the Ohio Company, or other instrumentality. It is alleged that pursuant to this arrangement complainant found a contract for time fuses for Russian shrapnel shells, and through his instrumentality the defendant was brought into touch with the persons having this contract to place, with the result that a contract for the manufacture of 2,000,000 shrapnel fuses was given to the Ohio Company by the Canadian Company. This contract, with certain modifications and supplements thereto, is now being performed by the Ohio Company, and the profits thereunder are accruing. When the negotiations between the Canadian Company and the Ohio Company were approaching consumma-

tion, the complainant suggested to the defendant that some scheme or arrangement should be entered into for the ascertainment of the profits arising to defendant therefrom, and that some method be fixed for the distribution and division thereof between complainant and defendant in pursuance of their agreement of February 20th. Defendant denied the existence of any such arrangment.

Thereupon this suit was commenced, having for its objects (1) to establish the complainant's rights to a share of the profits arising from said contract: (2) to procure from defendant an accounting of the profits arising from said contract and the payment of complainant's 40 per cent. thereof to him; and (3) in aid of complainant's rights, such injunctive relief as might be necessary to make effective the affirmative relief sought. The District Court entered a decree adjudging that the allegations of the amended bill of complaint had been sustained by the proofs. The decree requires the defendant to account forthwith to complainant for all profits derived by him from the contract made between the Ohio and Canadian Companies, dated March 1, 1915, and any modifications thereof or additions thereto, whether the said profits were in the form of dividends upon the stock of the Ohio Company or increase in the value of his shares, and to account and pay over to complainant 40 per cent. of the profits derived by the defendant, in whatsoever form the same may be. It directs that said accounting shall proceed from time to time, as the profits may accrue, until the contract has been fully performed. It requires the defendant to use his control over his company for the purpose of having the profits ascertained as speedily as is practicable and upon such ascertainment paid and declared as dividends to stockholders of the company. It provides that, pending the completion of the contract of March 1, 1915, and the modifications and additions thereto, and a full and final accounting, the defendant is restrained and enjoined from causing or permitting the Ohio Company to divert or utilize any of the funds derived by that company by reason of the contract which may or should be declared as dividends; and the defendant is further enjoined from selling, transferring, or in any manner alienating or incumbering any of the shares of stock owned by him or for his benefit, or from alienating, transferring, or disposing of any part of the profits derived from the contract, unless and until the rights of the complainant in the profits have been ascertained and fully satisfied; and a special master is appointed, before whom the defendant is directed to make the accounting. From this decree the defendant has appealed.

Walter C. Noyes, of New York City (H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, of counsel), for appellant.

William A. Barber, of New York City, Peter S. Grosscup, of Chicago, Ill., and Joseph Diehl Fackenthal, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This suit is brought to obtain from the defendant the complainant's proportion of the profits realized from an order, alleged to have been obtained through Col. Mackie, for shrapnel fuses. The claim arises under the written memorandum signed on February 20, 1916, and which is hereinbefore set forth. The parties who signed the writing do not agree as to what it means. The defendant insists that the District Court has misinterpreted, misconstrued, and misapplied it; and we are now asked to review the whole of the interlocutory decree, not merely the part granting the injunction, and, if such review warrant, to direct that the bill be dismissed.

[1-4] The written memorandum the parties signed was the culmination of a series of negotiations and activities on their part. It will be admitted at the outset, for the law is well settled to that effect, that the

execution of a contract in writing supersedes and merges all oral negotiations or stipulations concerning its terms. It will also be admitted that the intent of the parties, as expressed in the writing they have signed, must govern the court in determining the rights of the parties as derived therefrom. Indeed, the rule is that greater regard is to be had to the clear intent of the parties than to any particular words they may have used in the expression of their intent. Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64 (1872); Hoffman v. Ætna Fire Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337. The language used must be interpreted in the sense in which the promisor knew, or had reason to know, that the promisee understood it. Tallcott v. Arnold, 61 N. Y. 616; Jordon v. Dyer, 34 Vt. 104, 80 Am. Dec. 668; Evans v. McConnell, 99 Iowa, 326, 63 N. W. 570, 68 N. W. 790. And the rule is clearly established that in case of doubt all the negotiations between the parties may be considered in arriving at the true intent of the parties. Jennings v. Whitehead, etc., Mach. Co., 138 Mass. 594; Kennedy v. Porter, 109 N. Y. 526, 17 N. E. 426; Freeman v. Bartlett, 47 N. J. Law, 33.

To understand this contract, it is necessary to consider the negotiations which led up to it. In January, 1915, the defendant solicited the aid of complainant in financing his Ohio Company. At that time the complainant suggested to defendant the possibility of procuring for that company contracts or orders for the manufacture of munitions of war, or parts thereof, directly or indirectly for the governments at war in Europe, and the complainant agreed to bring the defendant into touch with parties having such contracts to let. The written memorandum was drawn, which provides that, "if any order is received from Col. Mackie," the profits shall be divided in the manner specified. Col. Mackie is a reserve officer of the Canadian Army. He was in Russia in October, 1914, where he met the artillery board, and after weeks of negotiations he and three other officers associated with him obtained a contract with that board to supply it with 2,000,000 shrapnel shells complete, with a right in the board to increase the number of shells to 5,000,000. Mackie then returned to England in January, 1915, where he met Senator Curry, the president of the Canadian Car & Foundry Company, and offered him the contract. The latter was not certain whether he could meet the Russian requirements, and the matter was left open to be decided after Curry's return to Canada.

One of the difficulties in the way of the acceptance of the contract by the Canadian Company was to find some one who could supply the necessary time fuses. Mackie promised Curry to aid him in bringing in real contractors who could furnish the component parts needed by the Canadian Company to fill the contract, and Curry asked Mackie to join his organization, which the latter did, taking a seat in his office. Mackie, in his search for a proper party to manufacture the time fuses, came to New York and was introduced to the complainant, Ryan, who told him that he had a party who could furnish the fuses. Later Mackie introduced Ryan to Curry. Then, Mackie testifies, "some days after, Mr. Ryan and I met again, and I asked him to produce his man; if he was not an actual manufacturer, not to bring him." The result was that complainant caused defendant and Mackie to meet. "Mr. Ohmer," Mackie testifies, "came to my room and presented one or two

American-made Russian time fuses. I had with me, in my possession, the time fuses as given to me by the Russian military authorities. I compared Mr. Ohmer's time fuses and those, and after a conference of probably two hours I decided that Mr. Ohmer was not of the floating characters that we were meeting so frequently, but that he was really a man who could make time fuses, and I told him I would bring him to Senator Curry, and he would have to negotiate the contract with Senator Curry or with the Canadian Car, who had decided to take it over, or had taken it over, at that time." This Mackie did, with the result that on March 22, 1915, defendant obtained for his Ohio Company the contract from the Canadian Car & Foundry Company for the manufacture of shrapnel fuses; and Mackie testified that complainant brought the defendant to him pursuant to his request. While Mackie was under cross-examination, counsel said:

"What we want to know is whether you were representing the Canadian Car & Foundry Company at the time of your conversation with Mr. Ohmer?"

To which the witness replied:

"All of the time in America, excepting a pause of about two days, when it looked as if Senator Curry could not arrange finances, each and every person whom I approached or who approached me on boxes, shells, powder, etc., each and every man knew and was given to understand that I was for the Canadian Car; that I was not tooting any horn."

He was then asked:

"What were your duties with the Canadian Car & Foundry Company at that time? What was the nature of the services that you were rendering?"

This was answered as follows:

"Weeding out the chaff from the thousands of men who were calling at the hotel and at the offices or elsewhere, making the selection of Mr. Ohmer in preference to ten other men who said they could make time fuses."

Then followed questions and answers which are reproduced in order:

"You were making the selection of Mr. Ohmer for the Canadian Car & Foundry Company?"
"Yes."
"In making this selection, as you stated, you had no power to make a contract with Mr. Ohmer?"
"None whatever. I should say I was to make the selection of the good from the bad to present to Senator Curry."
"When you interviewed Mr. Ohmer, pursuant to the introduction of Mr. Ryan, you did so in the interest of the Canadian Car & Foundry Company, for them, and not for yourself?"
"For them."
"Not for yourself?"
"No, sir; not whatsoever."
"At the time you could not have executed a contract with Mr. Ohmer for the manufacture of fuses, could you?"
"No."

In the same connection the testimony of the counsel of the Canadian Company, who was also chairman of the executive committee of that company, Mr. Cahan, throws light on the matter under consideration. The witness details a conversation which occurred between himself, Senator Curry, and Col. Mackie, in which the importance of finding a

factory available for the manufacture of time fuses was discussed. He testified that:

"Col. Mackie spoke up and reviewed the conversation he had had with a man named Thomas Ryan. He reported to Senator Curry and to me the purport of a conversation that had been dribbling down for two or three days that Ryan said he had a factory available, and a man available, who could make time fuses. Up to that time I had never heard of Will I. Ohmer. Senator Curry was hurrying away, and I went to my room and drew up a letter to Flint, which meant the exclusion of Flint and the prospective keeping in of Kirby and Bird, and he then turned to Mackie and me, and he said, 'Mackie, this time fuse situation is very difficult and delicate, and I want you to get after Ryan and find out who it is that can manufacture time fuses,' and he turned to me and he said, 'I want to see that everything possible is done to find out about these time fuses, to find out from Bird what Yale and Towne can do, and find out whether Flint controls them;' and as a result of it he left. Mackie came to my room, and I impressed upon him the necessity, and stated how important it was that he should get after this man Ryan and get after him immediately. I told him that I was convinced that, if we turned Flint out, Flint would close up this Yale & Towne opening which had been discussed so much. The next morning I delivered the letter to Bird, and had a row with Flint, and informed Mackie, I think by telephone, that Flint was out, and how was he getting on in finding out about these time fuses. My memory is that I came back to the Hotel Manhattan, being rather anxious about it, and Mackie said, 'I have found out from Ryan that the man who was available was Ohmer.'"

The defendant admits that complainant introduced him to Mackie, and that at that time he had no contract with the Canadian Company. Mackie testifies that he told the defendant that Curry, the president of the Canadian Company, had close relations with one Kirby of Dayton, Ohio, and that he suggested to defendant that he have Kirby substantiate any statements the defendant made about his ability to manufacture time fuses, and that on that day the defendant wired Kirby, who came on to New York, Curry being in New York. The defendant admits that on the day he talked with Mackie he wired for Kirby to come to New York; but he denies that Mackie advised him to wire Kirby, or that he advised him to have Kirby substantiate his statements. We can see no reason why Mackie should have testified falsely, or what interest he could possibly have had to misrepresent what occurred. Mackie is not in any way identified with Ryan, and testified at the trial that he had not seen Ryan since the negotiations, but that he thought he would know him if he met him. "That is my total connection with him." It is very evident from testimony that Senator Curry reposed confidence in Kirby, who had been president of the National Association of Manufacturers and was well qualified to give him information, especially as respects the defendant and his plant, and that Kirby recommended the Ohio corporation and advised Curry to enter into negotiations with defendant.

The complainant testified concerning a conversation with the defendant at the time the memorandum of February 20, 1915, was drawn as follows:

"I said to Mr. Ohmer that this is the first contract that we have, and I am going to be liberal with you. I am going to make a suggestion that you have 60 per cent. and I should have 40 per cent. The percentage was not put in the original memorandum, and I think Mr. Ohmer said, 'I do not own all

the stock of the Recording & Computing Machines Company, and if you should have 40 per cent. of this contract you would have more really than I would,' so he asked me to specify that as to his personal relation as to the stock."

When the defendant was on the stand, he was asked by the court as to the words "from Col. Mackie," inserted in the written memorandum of February 20, 1915.

"Do I understand by that interlineation that you accepted anything that came through Col. Mackie?"

And he replied:

"If it came from Col. Mackie."

Then followed:

"That contract was to be accepted from your dealings with Mr. Ryan?"
"If anything came from Col. Mackie."
"What?"
"In the way of orders."
"As I understand you—I did not catch the other day the full significance of those interlineations—after it was written out you then insisted upon that insertion, the interlineation there, and the purpose of that insertion was that for all orders that had come through Mackie the profits were not to be divided with Ryan?"
"No; any order that Mackie could place the profits arising, any commissions from that order, would be divided. At that time, you see, I had a number of people like Canadian Car & Foundry Company and the Westinghouse and the National City Bank and the New York Air Brake Company all working on the same Russian order. Now here comes another. Mr. Ryan said Col. Mackie was the man who could give a real contract, and I made him state in there that it was to be Col. Mackie and no one else, because some one else might have come in here and been some of the same people I was figuring with —from Col. Mackie and no other."

Senator Curry testified that he thought Kirby introduced Ohmer to him. In this respect his testimony did not agree with that given by Col. Mackie to which reference has already been made.

[5, 6] The written memorandum which is the basis of this suit was hastily written out by the complainant, who is a layman, at the hotel in which he and the defendant were conferring. Upon the suggestion of the defendant, who is also a layman, the words "from Col. Mackie" were inserted. The meaning of the words interpolated is not so clear as to make it improper to admit evidence as to the circumstances out of which the memorandum arose. The rule applicable to such a situation and the authorities supporting it have been stated in an earlier part of this opinion. In the light which the circumstances afford it is evident to us that the language "from Col. Mackie" did not mean that the contract would have to be a contract with Col. Mackie, but one obtained through the instrumentality of Mackie. Neither did the words "by or through either of us" mean that the contract would have to be one in which the defendant individually should agree to manufacture the fuses. The defendant's own testimony makes it entirely clear that it was understood that, if the contract was obtained by his company, the condition of the written memorandum would be fulfilled, provided it came from Mackie. That testimony also makes it clear that the profits to be divided were not the profits made by defendant's

company but that portion of those profits realized by the defendant as a stockholder in the company. So far we have no difficulty.

[7] The question of real difficulty is to determine whether the contract which the defendant obtained for his company was obtained through Mackie. That is a question of fact which is not free from difficulty. And it is made difficult by conflicting testimony. If Ryan, Mackie, and Cahan tell the truth there is no difficulty in reaching the conclusion that the contract came through Mackie's suggestions, notwithstanding the fact that those suggestions might never have come to fruition, had it not been for Kirby's indorsement. But Mackie directed defendant's attention to the relations between Kirby and Curry, and, if his story is true, to the importance of bringing Kirby on from Ohio to assure Curry that defendant's company was equal to the undertaking. So far as the record discloses, Mackie and Cahan have no financial or other interest in the outcome of this litigation. The District Judge, who saw and heard the witnesses, has held that upon the evidence the contract came through Col. Mackie, and this court would not be justified in substituting its judgment for his, unless clearly convinced that his conclusion was erroneous, and we have no such clear conviction.

The court does not in this opinion pass upon any of the questions raised by the defendant as to the scope and form of the interlocutory decree, and this opinion is without prejudice to the right of the defendant to raise all such questions as he may be advised upon appeal from the final decree.

Decree affirmed.

UNITED STATES v. MISSOURI PAC. RY. CO.

MISSOURI PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 5, 1917.)

Nos. 4793, 4794.

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—COMPUTATION.
Under Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), providing that no telegraph operator shall be on duty for longer than 9 hours in any 24-hour period at continuously operated offices, where an operator was on duty regularly from 7 a. m. to 3 p. m., the 24-hour period commenced at 7 a. m., and where on one occasion he was excused from 1:30 p. m. to 3 p. m., when he returned to duty and remained on duty until 5:10 p. m., the fact that he was on duty for more than 9 hours in the 24-hour period commencing at 3 p. m., was not a violation of the statute.

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EMERGENCIES.
Where a railroad dispatcher intended to have carloads of live stock picked up by a certain train, but through inadvertence and oversight failed to give the necessary orders, and to avoid holding the live stock until the next day, and causing loss and damage to the shipper and the company, ordered such cars picked up by a train which, owing to unexpected and unforeseen delays, did not leave the station where they were picked up until the operator had been on duty more than 13 hours, there was no emergency justifying the excess service under Hours of Service Act, § 2,

permitting operators to remain on duty for more than the hours thereby prescribed in case of emergency, as the oversight or inadvertence of the dispatcher could not constitute an emergency.

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EMERGENCIES.
Where a railroad dispatcher was misinformed as to the time of arrival of a train load of silk to be delivered to his road by a connecting road, and, wishing to handle such train with expedition and promptness, kept an operator on duty for more than 9 hours to hold another train and receive orders in reference thereto, and thus permit the prompt moving of the silk train, there was no emergency justifying the operator's excess service.

4. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—EMERGENCIES.
Where a railroad telegraph operator was kept on duty more than 9 hours because part of a freight train was derailed on account of a drawbar pulling out of one of the cars and falling on the track, thereby delaying a passenger train in reaching his station, and it was necessary to hold him on duty until such train arrived for the purpose of handling the mail and caring for passengers upon its arrival, the excess service was caused by an emergency and was justified.

5. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—"EMERGENCY."
That a train was delayed in leaving a station owing to broken packing rings in one of the cylinders of the engine, making it necessary to send for a relief engine, was not such an emergency as justified keeping the operator at such station on duty more than 9 hours, since while the word "emergency" as used in the law does not mean an extraordinary emergency as used in some statutes, it means more than ordinary mistakes and negligences which happen in the practical operation of railroads.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Emergency.]

Stone, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit for statutory penalties by the United States against the Missouri Pacific Railway Company. Judgment sustaining demurrers to certain counts and overruling demurrers to other counts (235 Fed. 944), and each party brings error. Affirmed.

John A. Gordon, Asst. U. S. Atty., of Denver, Colo., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for the United States.

J. W. Preston, of Pueblo, Colo. (Edw. J. White, of St. Louis, Mo., B. P. Waggener, of Atchison, Kan., and T. H. Devine and Todd C. Storer, both of Pueblo, Colo., on the brief), for Missouri Pac. Ry. Co.

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

CARLAND, Circuit Judge. The United States brought this action against the Railway Company to recover penalties for violations of the Hours of Service Act (34 Stat. 1415). The complaint in 12 counts charged that the Railway Company permitted certain operators at Arlington, Boone, Sheridan Lake, and Haswell, Colo., to be and remain on duty for longer hours than allowed by law in any 24-hour period.

The Railway Company answered each count of the complaint except the fourth and ninth by pleading facts which it claimed consti-

tuted an emergency within the meaning of the law. As to counts 3, 4, 5, 7, 8, 9, 10, 11, and 12, the Railway Company pleaded also in its answer that the United States in those counts had adopted an erroneous method in computing the 24-hour period during which each employé performed his service. The trial court sustained the demurrer of the United States as to all the defenses of emergency except as to count 5. It overruled the demurrer as to the defenses, which pleaded a miscalculation of the 24-hour period, so that the judgment that was finally rendered was for the United States as to counts 1, 2, and 6, and for the Railway Company as to counts 3, 4, 5, 7, 8, 9, 10, 11, and 12. The Railway Company has sued out a writ of error to review the ruling of the court as to the first, second, and sixth causes of action; and the United States has sued out a writ of error to review the ruling of the court as to counts 3, 4, 5, 7, 8, 9, 10, 11, and 12.

The questions for consideration, therefore, are as follows: (a) Did the court err in sustaining the demurrer of the United States to the Railway Company's plea of emergency to the first, second, and sixth counts of the complaint? (b) Did the court err in overruling the demurrer of the United States to the plea of emergency contained in the answer of the Railway Company to the fifth count of the complaint? (c) Did the court err in overruling the demurrer to the defense pleaded in counts 3, 4, 5, 7, 8, 9, 10, 11, and 12, to the effect that the 24-hour period within which a violation of the statute is alleged should be counted from the time the employé first goes on duty for his day's work. No error is assigned by the Railway Company as to the ruling of the court on the defense of emergency contained in the answer to counts 3, 7, 8, 10, 11, and 12, as judgment was rendered in its favor on these counts by reason of the other defense pleaded.

[1] To illustrate the defense interposed by the Railway Company as to the method of computing the 24-hour period, count 3 and the answer thereto, so far as material on this point, may be quoted as follows: Count 3:

"Defendant, during the twenty-four hour period beginning at the hour of 3:00 o'clock p. m., on September 6, 1914, at its office and station at Sheridan Lake, in the state of Colorado, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employé, to wit, W. F. Coughlin, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 3:00 o'clock p. m. on said date to the hour of 5:10 o'clock p. m. on said date, and from the hour of 7:00 o'clock a. m. on September 7, 1914, to the hour of 3:00 o'clock p. m. on said date."

Answer:

"Further answering the third count or cause of action in said complaint, defendant says that the station Sheridan Lake, mentioned therein, is what is known as a two-man station, and that the hours of service of employés thereat at the time in question were as follows: Agent's hours from 7:00 a. m. to 4:00 p. m.; operator's hours from 7:45 p. m. to 4:45 a. m. Office closed from 4:00 p. m. to 7:45 p. m. and from 4:45 a. m. to 7:00 a. m.

"That W. F. Coughlin, the employé mentioned in said count, was the agent at said station, and went on duty each day at the hour of seven o'clock a. m., and did so on September 6, 1914, and was on duty until the hour of 1:30 o'clock p. m. on said day, when he was definitely excused and entirely relieved from duty until the hour of 3:00 o'clock p. m. on said day, when he

returned to work and remained on duty until the hour of 5:10 o'clock p. m on said day, after which time he was not on duty again until 7:00 o'clock a. m on September 7, 1914, when he went on duty in regular course and remained on duty until 4:00 o'clock p. m. on said last-mentioned day, and defendant says that the twenty-four hour period referred to in the act relied on by plaintiff, so far as said agent was concerned, began on September 6, 1914, at the hour of 7:00 o'clock a. m., and not at the hour of 3:00 o'clock p. m. on said day, and that said agent was not on duty more than nine hours during the twenty-four hour period beginning at 7:00 o'clock a. m. on September 6, 1914."

The proviso of section 2 of the Hours of Service Act reads as follows:

"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 daytime, 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."

In the case of the United States v. A. T. & S. F. Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361, the United States contended that when 9 hours have passed from the moment of beginning work the statute allows no more labor within the 24 hours from the same time, even though the 9 hours have not all been spent in work. The Supreme Court refused to sustain this contention, and decided that a man employed for 6 hours, and then, after an interval, for 3, in the same 24, is not employed for a longer period than 9 hours. It, therefore, was permissible for the Railway Company to divide the hours of service provided those hours of service did not exceed 9 hours in any 24-hour period. As against the demurrer the facts stated in the defense to the third count above set forth are of course admitted. It is therefore admitted that W. F. Coughlin, the employé mentioned in the third count, "went on duty each day at the hour of 7 o'clock a. m., and did so on September 6, 1914, and was on duty until the hour of 1:30 o'clock p. m. on said day, when he was definitely excused and entirely relieved from duty until the hour of 3 o'clock p. m. on said day, when he returned to work and remained on duty until the hour of 5:10 o'clock p. m. on said day, after which time he was not on duty again until 7 o'clock a. m. on September 7, 1914, when he went on duty in regular course and remained on duty until 4 o'clock p. m. on said last-mentioned day."

These facts standing admitted, the Railway Company claims that the 24-hour period, so far as this employé was concerned, began on September 6, 1914, at the hour of 7 o'clock a. m., and not at the hour of 3 o'clock p. m., and that said employé was therefore not on duty more than 9 hours during the 24-hour period beginning at 7 o'clock a. m. on September 6, 1914.

Referring now to the charge against the Railway Company as to count 3, we find it alleged that during the 24-hour period, beginning at the hour of 3 o'clock p. m. on September 6, 1914, at the office of the Railway Company at Sheridan Lake, Colo., said Railway Company

permitted W. F. Coughlin, a telegraph operator and employé, to be and remain on duty for a longer period than 9 hours in said 24-hour period, to wit, from said hour of 3 o'clock p. m. on said date to the hour of 5:10 o'clock p. m. on said date, and from the hour of 7 a. m. on September 7, 1914, to the hour of 3 o'clock p. m. on said date. It will thus be seen that it is the claim of the United States that by virtue of the language, "any twenty-four hour period," contained in the law, it may select any 24-hour period that it chooses for the purpose of showing a violation of the law, regardless of the regular time that the employé may go upon duty. In other words, if the Railway Company shall divide 9 hours of service as it is permitted to do, then each time that an employé shall go upon duty pursuant to said lawful division of time is a time from which the 24-hour period may be reckoned.

The position of the United States does not seem to us to be fair to the Railway Company, and it must be conceded that nothing but fairness is desired in the enforcement of the law. The Railway Company is the party which must obey the law. It ought in all fairness to know before the employé is permitted to work just what is being done with reference to hours of service, so that the law may not be violated. It, therefore, by agreement with its employé, fixes the time that the hours of service shall commence and when they shall end. This being done, an inspector in the employ of the United States appears, and, looking over the record of the hours of service, arbitrarily and contrary to the agreement between the Railway Company and the employé, establishes, after the service has been rendered, a different time for the commencement of the 24-hour period, and, by combining certain isolated hours of service performed on different days, seeks to show a violation of the law. We are of the opinion that the law or justice will not permit this to be done.

It is claimed that any construction of the law which will permit the Railway Company to do that which is alleged to have been done in the answer to count 3 would nullify the statute. To show that this is so, it is contended that a 9-hour operator might be required to work for 17 hours without rest. For instance, taking the employé described in count 3 for illustration, it is claimed that he could be worked from 7 a. m. to 8 a. m. on September 6th, and then be excused from duty until 11 p. m. of the same day, and then be required to work through until 7 o'clock the next morning, when he again would be obliged to begin his regular day's work and work through until 4 p. m. that day. In view of the fact that no instance of this kind is shown to have ever occurred, and the improbability that it will ever occur, we may say, in the language of the Supreme Court in the case above cited, "This hardly is a practical suggestion." If any such abuse of the law shall happen, Congress undoubtedly will regulate the matter by proper legislation.

The employé mentioned in the third count had an unbroken rest between the time when he finally quit work on September 6th and the time when he again resumed his duties on September 7th of 13 hours and 50 minutes, so that it appears that he was not overworked or deprived of a proper period of rest. In using the expression "any

twenty-four hour period," Congress did not intend to describe what should constitute in any particular case a 24-hour period. The time when an employé should go to work and when he should be allowed to quit, provided the law was not violated, was left to the agreement between the employé and the employer. It would seem natural that an employer might on occasions, for the convenience of its employés, or to suit the exigencies of traffic, permit or require an operator to divide his usual hours of service. While not conclusive as to the meaning of the law, the declarations of the report of a committee of Congress having in charge a bill are often referred to as highly persuasive for the purpose of showing how the framers of the law understood it.

In the Congressional Record for March 3, 1907, vol. 41, p. 4543, it appears that while Senator Patterson was speaking on this same statute he asked Senator Flint, who was acting as spokesman for the Conference Committee having the bill in charge, the following questions: "Is the twenty-four hour period to be fixed arbitrarily by the company? Is the twenty-four hour period a calendar day? Is the twenty-four hour period to commence with each individual workman as he enters upon the duties of his twenty-four hours of labor?" Senator Flint answered the questions as follows: "The last statement of the Senator is the correct statement." We are of the opinion that the trial judge did not err in his ruling upon this question.

[2] There remains to be considered the question as to whether the facts pleaded in answer to the first, second, fifth, and sixth counts of the complaint constitute emergencies within the meaning of the law. The facts alleged in the answer to the first count of the complaint are substantially as follows: Arlington, Colo., may be called, with reference to the Hours of Service Act, a day station. The hours of service of the operator, and who was also the agent, were from 8 o'clock a. m. to 8 o'clock p. m., with an hour off for dinner from 11 o'clock a. m. to 12 o'clock noon. The employé worked on the day alleged in the complaint during his regular hours, and also was permitted to remain on duty from the hour of 8 o'clock p. m. until the hour of 11 o'clock p. m.

The Railway Company, to justify this excess of service of more than 13 hours during the 24-hour period, alleges that there had been delivered to the Railway Company at Arlington for transportation over its line of railway and connecting lines to Denver, Colo., three carloads of live stock, which live stock had been loaded on the cars of the Railway Company early on the morning of the day mentioned in the first count, and which the dispatcher intended to have picked up and transported in a train passing through Arlington about 10 o'clock a. m. on said day, but said dispatcher, through inadvertence and oversight, failed to give orders to said train to pick up said cars of live stock, and in order to avoid holding said live stock at Arlington until the following day, and thus cause loss and damage to the shipper and to the Railway Company, said dispatcher ordered the next following train to pick up said cars of live stock and transport the same; that said cattle were unloaded from said cars awaiting the arrival of said next following train, which in ordinary course would have arrived and picked up said live stock and would have left Ar-

lington therewith prior to 10 o'clock p. m. on said day, but owing to unexpected and unforeseen delays it did not leave Arlington until 11:10 o'clock p. m. on said day, and that it was necessary to hold said operator on duty at Arlington until the departure of said train in order to assist in loading said live stock into the cars, and to receive and transmit orders to enable said train to leave Arlington and reach Sugar City prior to the time when the employés in charge of said train would have been on duty 16 consecutive hours, and that Sugar City was the first station where said train crew could have been relieved from duty, there being no facilities for so doing at Arlington nor at any station between Arlington and Sugar City, and that the failure on the part of the Railway Company to handle said live stock as it did, following the oversight to deliver the dispatch as aforesaid, would have resulted in heavy damages to said live stock and large financial loss to the Railway Company in consequence. The foundation of the alleged emergency is the fact that the dispatcher inadvertently and through oversight failed to give orders to the train to pick up the cars of live stock. We are clearly of the opinion that the facts pleaded do not constitute an emergency within the meaning of the law. If oversight or inadvertence on the part of an employé should be held to constitute an emergency, the law would fail of its purpose.

[3] The facts pleaded to the second count of the complaint as constituting an emergency are as follows:

"Further answering the second count or cause of action of said complaint, defendant says that the station of Boone mentioned therein was what is known as a two-man station, the agent's hours being from 6 o'clock a. m. to 3 o'clock p. m., and the operator's hours from 3 o'clock p. m. to 12 o'clock midnight, and the office under ordinary circumstances being closed from midnight until 6 o'clock a. m.; that on September 2, 1914, the telegraph operator and employé mentioned in said count was on duty from 3 o'clock p. m. until midnight, and was also on duty from 1:30 o'clock a. m. on September 3, 1914, to 3:30 o'clock a. m. on said date, but defendant says that an emergency existed justifying said operator being on duty for a period of 11 hours in the 24-hour period beginning with 3 o'clock p. m. on September 2, 1914, in that defendant's dispatcher in charge of dispatching trains on the division of defendant's railroad from Pueblo, Colo., to Hoisington, Kan., had been misinformed as to the time of arrival of a train load of silk known as a silk special, to be delivered by the Denver & Rio Grande Railroad Company to this defendant at Pueblo for transportation over defendant's line of railroad east, and that said silk special arrived at Pueblo at 2:45 o'clock a. m. on September 3, 1914, instead of two hours later, as it had been reported to defendant's dispatcher that said silk special would arrive and be delivered to this defendant; that the transportation of silk is very profitable to the carriers handling same, and in order to secure said business it is necessary to handle said silk specials with great expedition and promptness and to lose no time in the transportation thereof; that the danger of theft in handling such shipments is very great, making it inadvisable to permit same to remain at terminals or elsewhere longer than is absolutely necessary to make up trains, and that, to avoid a delay of at least two hours to said silk special at Pueblo, it was necessary for said dispatcher to call said operator on duty at 1:30 o'clock a. m. on September 3, 1914, in order to have said operator hold another train at his said station and receive orders in reference thereto, and thus permit the prompt moving of said silk special, and that said operator was held no longer than was absolutely necessary for this purpose."

Manifestly the facts pleaded as stated above do not constitute an emergency. The foundation of the alleged emergency is that the dispatcher was misinformed as to the time of the arrival of a train load of silk.

[4] The facts pleaded as constituting an emergency in the answer to the fifth count of the complaint are as follows:

"Further answering said fifth count or cause of action, defendant says that if the twenty-four hours beginning with the hour of 3:00 o'clock p. m. on September 28, 1914, constituted a twenty-four hour period within the meaning of the act referred to, an emergency existed justifying the employé mentioned in said cause of action being on duty for such time in excess of nine hours as he was on duty during that period, in that seven cars of freight train known as 'Extra East 1280' were derailed at mile post 446, about one mile west of Bay, a station on the line of defendant east of Sheridan Lake, on account of a drawbar pulling out of car C. & N. W. 73958 in said train, and falling on the track, and notwithstanding the diligent efforts of the defendant, the track was not cleared until 4:15 p. m. on said last-mentioned day, as a result of which passenger train No. 1 west-bound to Sheridan Lake and points west thereof was greatly delayed, and could not and did not reach Sheridan Lake until 5:40 o'clock p. m. on said last-mentioned day, though but for said derailment said train No. 1 would have reached Sheridan Lake before the hour of 4 o'clock p. m. of said day, but on account of said derailment, and said train No. 1 being late as aforesaid, it was necessary to hold said employé on duty after the hour of 4:00 o'clock p. m., when he would otherwise have been relieved from duty for the twenty-four hour period beginning at 7:00 o'clock a. m. on September 28, 1914, and to retain said employé on duty until the hour of 5:40 o'clock p. m. on said day, when said train No. 1 arrived at Sheridan Lake, for the purpose of handling United States mail to and from said train and caring for passengers."

We are of the opinion that the facts above stated do constitute an emergency within the meaning of the law.

[5] The facts pleaded in answer to the sixth count, as constituting an emergency of the complaint, are as follows:

"Further answering the sixth count or cause of action in said complaint, defendant says that an emergency existed justifying the employé mentioned in said count being on duty for any time for which he was on duty in excess of nine hours during the twenty-four hour period in question, in that passenger train No. 3 westbound, which was due to and did arrive at Sheridan Lake at 3:15 o'clock a. m. on October 10, 1914, and which was due to depart therefrom at said last-mentioned hour, was delayed at said station owing to broken packing rings in one of the cylinders of engine No. 1247 which was hauling said train, which rendered said engine incapable of moving out of Sheridan Lake, which necessitated sending a relief engine for said train from Horace, Kansas, which was the nearest station at which said relief engine could be secured, which relief engine did not reach Sheridan Lake until 5:20 o'clock a. m. on said last-mentioned day, and which necessitated retaining said employé on duty after the hour when he would ordinarily have been released, to wit, 4:45 o'clock a. m. on said day, and until the arrival of said relief engine for the purpose of dispatching said train No. 3 out of said station."

In our opinion the facts above pleaded do not constitute an emergency within the meaning of the law. In United States v. Southern Pacific Co., 209 Fed. 562, 126 C. C. A. 384, we decided that with reference to the question of emergency each case must depend upon its own facts. While we may consider the dictionary as to the meaning of the word "emergency," we cannot wholly be guided by that definition in the practical operation of a railroad. The courts must de-

termine each case so that the object which Congress had in view in enacting the statute may be promoted and at the same time give the Railroad Company, in the practical operation of its road, the benefit of the emergency clause. The word "emergency," as used in the law, does not mean an extraordinary emergency as used in some statutes, but it means more than the ordinary mistakes and negligences which happen in the practical operation of railroads. United States v. Southern Pacific Co., 209 Fed. 562, 126 C. C. A. 384; United States v. D. & R. G. Ry. Co., 220 Fed. 293, 136 C. C. A. 275; United States v. B. & O. Ry. Co. (D. C.) 226 Fed. 220; United States v. C. & N. W. Ry. Co. (D. C.) 219 Fed. 342; United States v. K. & C. S. Ry. Co., 202 Fed. 828, 121 C. C. A. 136; United States v. D. & R. G. Ry. Co., 233 Fed. 62, 147 C. C. A. 132; United States v. Missouri Pacific Ry. Co., 213 Fed. 169, 130 C. C. A. 5.

No error appearing in the record, the judgment below is affirmed.

STONE, Circuit Judge (dissenting). I feel constrained to dissent from that portion of the judgment and opinion which holds that the 24-hour period contemplated by the statute does not mean "any 24-hour period." The statute is highly remedial, designed to protect the lives and property of the employés and of the public from casualties occasioned through lack of vigilance of employés caused by overwork.

That construction should be adopted which will best preserve that object. The illustration in the above opinion of the court demonstrates that, under the construction contended for by the Railway Company, an employé whom the statute determined it would be unsafe to keep employed longer than 9 hours out of 24 could be employed 17 hours uninterruptedly without violating the law. In my judgment, the objections to a construction permitting such overwork are not met by the view that it is improbable of occurrence. The particular illustration certainly reveals the possibilities. The very instances involved in this case show the probabilities of conditions differing only in degree, but not in kind, from the illustration.

I agree with the court that one of the considerations to be borne in mind in construing the law is fairness to the railway in the practical operation of its business. The law was not intended to burden the carrier any further than necessary to properly effectuate its main object. On the other hand, the railway must bear such burdens as are intended to be placed upon it by the statute, and the prime one of those is to so arrange the hours of its employés that, outside of the excepted instances named in the statute, none of them shall, under any circumstances, be employed exceeding the stated number of hours, as the statute reads, "in *any* twenty-four hour period."

J. L. OWENS CO. v. OFFICER et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. June 5, 1917.)

Nos. 4788, 4789

1. INJUNCTION ⟸158—PRELIMINARY INJUNCTION—CONSTRUCTION AND SCOPE OF ORDER.
   A judgment defendant brought a suit in equity to establish its right to set off against the judgment a cross-claim on which a separate action was then pending. It also moved for a preliminary injunction restraining enforcement of the judgment until the action on the cross-claim should be determined, which motion was granted on condition that complainant pay a sum approximately equal to the difference between the amount of the judgment and of the cross-claim. *Held*, that the order for injunction was solely for the purpose of preserving the status quo and was not an adjudication of the right of set-off.
2. INJUNCTION ⟸158—PRELIMINARY INJUNCTION—CONSTRUCTION AND SCOPE OF ORDER.
   An order granting a preliminary injunction, when clear and unambiguous, cannot be narrowed nor broadened by the terms of the writ or supporting bond.
3. INJUNCTION ⟸158—PRELIMINARY INJUNCTION—CONSTRUCTION OF ORDER.
   A preliminary injunction restraining enforcement of a judgment until the amount of complainant's recovery in a cross-action, which it desired to set off against the judgment, should be "definitely and finally adjudged," remained in force after the rendition of judgment in the cross-action so long as the defendant therein had the right to have the same reviewed by motion for new trial or proceedings in error.
4. JUDGMENT ⟸883(11)—SET-OFF OF JUDGMENTS—SUIT TO ENFORCE RIGHT OF SET-OFF—ISSUES.
   In a suit in equity to secure a set-off of judgments in actions at law, the judgments are immune from attack, and the court is without power to require a reduction of complainant's judgment as a condition to the granting of the relief prayed for.

In Error to and Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action at law by I. E. Officer and others against the J. L. Owens Company. To review an order entered on motion after judgment, defendant brings error. Suit in equity by the J. L. Owens Company against I. E. Officer and others. From an order entered on motion, complainant appeals. Reversed.

The writ of error and the appeal in these two cases, presenting the same points for decision, have been by counsel and will by the court be treated together. They are taken from identical rulings on identical motions filed by the J. L. Owens Company, in Law, No. 338, I. E. Officer v. J. L. Owens Co., and in Equity, No. 64, J. L. Owens Co. v. I. E. Officer et al. The motions had sought to secure the recall of an execution issued on a judgment in favor of the plaintiff in Law, No. 338, and the setting off of a judgment in favor of the company in a third cause, Law, No. 351 (entitled J. L. Owens Co. v. I. E. Officer), against the above judgment in No. 338. The rulings allowed the motions, but only upon condition that the company reduce the amount of its judgment in No. 351 by $5,100. This condition being unacceptable, the company brings the rulings here for review.

To understand the matters involved, it will be helpful to keep in mind the sequence and to consider the proceedings in these three causes, giving particular attention to the above motions and rulings and also to the preliminary

injunction proceeding in Equity, No. 64. Law, No. 338, was an action for breach of contract by Officer against the company; Law, No. 351, was a suit by the company against Officer upon promissory notes executed by him to the company in connection with the above contract; Equity, No. 64, was a bill by the company against Officer and his counsel to secure set-off of judgments in the above two cases.

I. E. Officer contracted with J. L. Owens Company to represent it as an exclusive sales agent. To establish a credit against which he might order machinery, he deposited with that company his six promissory notes, aggregating $10,000, secured by five notes of $1,000 each owned by him. Claiming that this contract had been breached in several particulars, Officer sued the company in the United States District Court, that cause being Law, No. 338. Before this suit the company had realized on the above collateral notes for $5,000. The amount of damage prayed in No. 338 was $15,000. The three items of damage submitted by the court were: The above notes for $10,000 and interest, the above collateral notes for $5,000 and interest (less expense of realizing on them), and the loss of net profits under the contract. This last amount was claimed by Officer to be about $5,000. These three items, if all had been found in full, would have totaled more than $20,000, so that Officer, before submission of the case, asked leave to amend his petition by augmenting the prayer for damage to $25,000. This was denied. Verdict and judgment for $15,000. After judgment the court intimated that the amendment should have been allowed and that a new trial would be granted if asked by the plaintiff. Plaintiff preferred to hold his judgment, no such motion was filed by either party, and the judgment has become final. In the above suit the company declined to plead the notes for $10,000 as a counterclaim or to tender them before verdict in an effort to reduce damages.

The very day Officer secured the above judgment the company started in to reduce it by the principal and interest of the above notes for $10,000. It filed suit against Officer on these notes, asking recovery of principal and interest aggregating about $13,000. This suit was Law, No. 351. A few days later, November 13, 1915, the Company filed a motion in No. 338, praying that it might deposit in court the notes for $10,000 to be accepted by Officer and credited, principal and interest, upon his judgment, or, if he refused to so accept and credit them, then that the notes be retained in the custody of the court until No. 351 should be determined, and that any amount therein recovered be set off against the above judgment; execution in No. 338 meanwhile to be stayed upon proper conditions. This motion was denied without prejudice to the same matter being brought up in some other form.

Whereupon the company, on December 4, 1915, filed its bill in Equity, known as Eq. No. 64. This bill had in view the setting off of judgments in No. 338 and No. 351, and, to assure that result, the restraint of execution in No. 338 until the ascertainment of the amount of any judgment in No. 351. Two days later notice and application for order and order issued thereon in Eq. No. 64 to show cause why "an injunction shall not issue in said action restraining the enforcing and collection of the judgment obtained" in No. 338 "until the second action [No. 351] * * * shall have been tried and judgment entered, and why said last-named judgment when obtained shall not be offset against" the judgment in No. 338. The hearing under this order to show cause resulted (January 8, 1916) in the following order:

"Ordered: (1) That the Owens Company pay to defendant the difference between the amount now appearing to be due on the notes and the amount now accrued on the judgment. (2) That the Owens Company stipulate to put the case against Officer on the April term of this court for trial. (3) That the Owens Company put up a bond in the sum of $15,000, conditioned for the payment of the balance of the judgment in case the Owens Company does not secure judgment against Officer on the notes. Further ordered, that on compliance by the said Owens Company with the above-named conditions the injunction herein prayed for may issue."

The conditions of this order having been complied with by the company, the following writ of preliminary injunction issued on January 20, 1916:

"Whereas, under date of January 8, A. D. 1916, there was entered an order

by Judge Wilbur F. Booth in the above-entitled cause granting a preliminary injunction against the defendants herein, the issuance of which said injunction was conditioned upon the compliance by the plaintiff herein with three certain and specific conditions contained in the said order of January 8th; and whereas, each and every one of said conditions has been duly complied with: Now, therefore, know ye, that you, I. E. Officer, Benjamin Drake, N. E. Pardee, and P. L. Solether are hereby enjoined and restrained from causing an execution to be issued upon the judgment obtained on October 25, A. D. 1915, in the sum of fifteen thousand dollars ($15,000) in that certain action wherein I. E. Officer was plaintiff and the J. L. Owens Company, a corporation, was defendant, until the trial of the case of J. L. Owens Company, a corporation, against I. E. Officer shall have taken place, and the amount of plaintiff's recovery therein against said I. E. Officer shall have been definitely and finally adjudged."

The condition of the injunction bond approved by the court was:

"Now, therefore, the condition of the above obligation is such that the above-bounden J. L. Owens Company shall pay said judgment for $15,000 with costs and interest in case the said J. L. Owens Company shall recover nothing in its said action upon said promissory notes, or, in case said J. L. Owens Company recovers judgment on said notes, to pay to said I. E. Officer, his executors, administrators, or assigns, the unpaid balance on said judgment for $15,000, with interest and costs, after offsetting against said judgment for $15,000 any judgment that may be obtained by the said J. L. Owens Company against said I. E. Officer in its action upon said promissory notes, then this obligation shall be null and void, otherwise of force."

On January 20th the judgment in No. 338 was credited with $2,221, the amount paid under the above order.

On April 18, 1916, the company, through a directed verdict, obtained judgment in No. 351 for $13,291.08. Execution under this judgment was stayed until submission (June 10, 1916) of motion for new trial, which is yet under advisement. June 14, 1916, execution issued in No. 338 for full amount of judgment less above payment of $2,221. June 19th writ of execution served on company. The same day the company filed in No. 338 and Equity, No. 64, identical notices and motions, upon which the court that day issued its orders to show cause why the above execution should not be recalled, and why a set-off pro tanto of the judgments in No. 338 and No. 351, subject to the court's ruling on the motion for new trial in No. 351, should not be allowed. Upon hearing of these motions the court (July 6, 1916) entered in each of the two cases (omitting preliminary portions) the order following:

"Orders that said motion to offset the judgment in favor of J. L. Owens Company in case Law, No. 351, against the judgment entered in favor of I. E. Officer in case Law, No. 338, be and the same is hereby granted, on condition that said J. L. Owens Company shall, within ten days after receiving notice of the filing of this order, file its consent in writing with the clerk of this court that the judgment heretofore entered in favor of said J. L. Owens Company in said case Law, No. 351, be reduced by deducting therefrom the amount of fifty-one hundred dollars ($5,100). Ordered, further, that during said period of ten days hereinbefore mentioned, or until the further order of this court, the levy under the execution in case No. 338 shall be stayed. Ordered, further, upon failure of said J. L. Owens Company to file the consent above specified within the time above set forth, the present motion shall stand in all things denied. No costs will be allowed either party upon this motion."

After filing unsuccessful motions for amendment of these two orders, the company perfected this writ of error in No. 338 and this appeal in Equity, No. 64, from the above orders of July 6th and the denial of the applications to amend the same. These motions for amendment do not change the questions presented by the orders and decisive here; therefore the court will, for convenience, consider the matter as though upon the orders alone.

Francis B. Hart, of Minneapolis, Minn. (J. A. Mansfield and R. S. Jones, both of Minneapolis, Minn., on the brief), for plaintiff in error and appellant.

Benjamin Drake, of Minneapolis, Minn. (Frank C. Brooks, N. E. Pardee, and P. L. Solether, all of Minneapolis, Minn., on the brief), for defendants in error and appellees.

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

STONE, Circuit Judge (after stating the facts as above). [1] The contentions of the parties are somewhat complicated. They involve not only the proceedings immediately attacked, but also those of the above preliminary injunction in Equity, No. 64.

The company claims that the preliminary injunction proceedings in Equity, No. 64, constituted an adjudication of a right of set-off of the two judgments, with full settlement of the terms thereof, and also an order of preliminary injunction restraining execution in No. 338 until final determination of No. 351. Therefore the court, in ruling on the motions brought here, had no right to attach any additional conditions to the set-off of judgments, and it should also have recalled the execution because in violation of the injunction.

Officer, on the contrary, claims that there was no adjudication of set-off in Equity, No. 64, but simply an order for a preliminary injunction to continue in force only until entry of judgment in the trial court in No. 351, which was on April 18, 1916. That even if the preliminary injunction be regarded as in force after April 18, 1916, the ruling upon the motion last filed in Equity, No. 64, constituted a final determination of the only question on the merits present in that case, and into it was merged and absorbed this preliminary order of injunction. That the determination of the motions in No. 338 and Equity, No. 64, was the first and a complete adjudication of the matter of set-off.

It is therefore necessary to determine the scope of the order resulting in the preliminary injunction in Equity, No. 64, and afterwards the propriety of the orders involved here.

Equity, No. 64, had as its aim the acquisition of a right of set-off of any judgment which might be obtained in No. 351 against the existing judgment in No. 338. A set-off of judgments presupposed a payment of any balance of one judgment over the other. Here it was definitely known to all parties that the judgment in No. 338 would exceed any possible recovery in No. 351 by more than $2,000, and the company did not seek to prevent or delay the payment of the recognized balance. But the set-off it sought would be defeated unless execution in No. 338 for an amount sufficient to cover its hoped-for judgment in No. 351 could be prevented. Therefore the ancillary relief of a temporary order restraining execution in No. 338 until the amount, if any, of the judgment in No. 351 could be settled was vitally necessary. This was sought by the motion for a preliminary injunction filed in the equity suit. This motion also asked the rather unusual thing that the only other point in the entire bill—the whole merits of the controversy in the equity suit, the matter of set-off of judgments—be determined in this preliminary proceeding.

In our judgment, the order of January 8, 1916, was for a preliminary injunction pure and simple. This injunction was granted

upon conditions just and protective to both parties, with the object of maintaining the status quo until the amount of the judgment in No. 351 could be ascertained. There was no ruling at that time upon the merits of the case. We do not believe the trial court, if it had intended in that order to pass on the merits of the entire case, would have done so solely by faint inference in its statement of the conditions upon which immediate ancillary relief would be granted. It was natural and proper that the court, in considering the conditions upon which it would order the preliminary injunction, should have in mind and provide for the protection of both parties until its final decision on the merits. This it did and no more.

What has just been said as to the character of this order must have been the view which counsel for the company took. Otherwise it is not clear why five months later, when the execution in No. 338 was issued and they endeavored to have it recalled, they sought to have this very matter of set-off adjudicated. If it had been finally determined in their favor in a court term then passed without appeal, why should they seek to open it again and ask for its entire readjudication? But this they did, for in the notices of the filing of the motions to recall this execution the objects of the motions are stated to be the recall of the execution, the taxation of the costs thereof, and the granting of "an order offsetting that certain judgment had and obtained in said court on the 18th day of April, 1916, in favor of J. L. Owens Company and against said I. E. Officer, in the sum of thirteen thousand two hundred ninety-one and $^{8}/_{100}$ dollars ($13,291.08), against the judgment rendered in court docket No. 338 in favor of said Officer." And such motions, after ten paragraphs of recital including no suggestion that the matter of set-off had already been anywhere adjudicated, pray for an order to show cause why the execution should not be recalled, and "also that said parties be required to show cause, if any there be, why the judgment obtained by the J. L. Owens Company against said I. E. Officer on April 18, 1916, in the sum of thirteen thousand two hundred ninety-one and $^{8}/_{100}$ ($13,291.08) dollars and costs to be taxed therein in the sum of twenty ($20.00) dollars statutory costs and clerk's fees, shall not be set off against the judgment rendered October 25, 1916, in favor of said Officer pro tanto, and that said J. L. Owens Company be required to pay no other or greater sum, if any such there be, than the deficiency existing after this said judgment shall have been so offset, and that the court shall make an appropriate order whenever final judgment shall be arrived at in Case No. 351, J. L. Owens Company v. I. E. Officer, making such offset, and that the writ of injunction be declared in full force and effect until the final determination of the litigation between said parties, as also for such other relief as equity may direct."

[2] Counsel have called attention to the terms of the writ of preliminary injunction and of the supporting bond in this connection. The writ and bond cannot narrow or broaden the application of the order upon which they are based. If the order was doubtful or ambiguous, a consideration of the writ and bond would be allowable and

helpful in ascertaining its undisclosed boundaries, but here the order is clear.

[3] Having defined the character of the order of January 8, 1916, as purely injunctive, the next inquiry regarding it is as to the termination of the restraint of that writ. Officer contends that it terminated when judgment was entered April 18, 1916, in the trial court in No. 351; the company, that it continued until any judgment secured in No. 351 should become final and fixed. We think the latter correct. The terms of the order permit that interpretation, and any other construction would place the court in the position of doing a fruitless thing. The sole object of the injunction was to prevent an execution in No. 338 until any judgment procured in No. 351 could, if the court should so decide, be used as a set-off. Unless the company procured a judgment there would be nothing to set off, and if it should do so Officer could thereafter long keep such a judgment uncertain by motion for new trial and later by writ of error. The futility, as a protection to the company, of an injunction which died when the trial court judgment might be entered, is evident. The court intended and ordered that the injunction should continue until the judgment in No. 351 was final. We think, therefore, that the issue of the execution in No. 338 was improvident and in direct opposition to the existing order of injunction.

Up to this time the company had made two unsuccessful attempts to secure rulings on the matter of set-off of judgments—once by motion in No. 338, which was denied without prejudice to renewal in some other form, and again in connection with its application for a preliminary injunction in Equity, No. 64, when the court had confined its ruling to the matter properly then in hand, to wit, the issuance of the preliminary writ. Now the proposition of set-off was again presented to the court in connection with these motions filed in No. 338 and Equity, No. 64, to recall the execution. Omitting the prayers regarding costs and for general relief, these motions presented two questions—the recall of the execution and the set-off of the judgments. The court in its rulings fairly passes upon both propositions. The substance of the orders was that the set-off would be allowed and the execution recalled on condition that the company reduce its judgment in No. 351 by $5,100; otherwise the entire motion would be denied.

[4] As set out above, we believe that that part of the orders denying recall of the execution was error, because execution was then under the restraint of the preliminary injunction issued in Equity, No. 64. As to the proposition of set-off also, we think the orders were erroneous. A proceeding to set off judgments is no place to adjudicate the rights of the parties as involved in the cases resulting in those judgments. So far as the set-off proceeding is concerned, the judgments come to it immune from attack, and as having foreclosed and finally settled the issues which gave rise to them. A very extensive examination of the authorities has failed to discover an exception to this rule. Such search reveals no attempt in any order of set-off to impose conditions which would affect the amount of either judgment. The only instance in which the full amount of a judgment

has not been used is where some portion of it has been assigned under circumstances which gave the assignment precedence over the set-off. Ex parte Wells, 43 S. C. 477, 21 S. E. 334; Hroch v. Aultman & Taylor Co., 3 S. D. 477, 54 N. W. 269; Burns v. Thornburgh, 3 Watts (Pa.) 78. In none of these cases was the integrity of the judgment questioned, but rights of third parties had attached to portions of those judgments—rights which desired the validity of the judgments to remain unassaulted. The present litigation well illustrates why there should be no departure from the rule. Here the trial court in requiring the reduction of the judgment secured by the company against Officer in No. 351 was evidently striving to rectify what it regarded as an unjust deficiency in the amount of the judgment for Officer in No. 338, caused by the denial of the request to amend the petition through augmentation of the damage prayed. If such denial was error, it was error in that case and should have been corrected therein. That it was not so corrected was no fault of the trial court, which intimated that it would grant plaintiff a new trial because of this ruling, but it was the fault of the plaintiff, who, by declining to file a motion for new trial, refused to give the court an opportunity for such correction. The issues in that case were in law and for a jury and were tried by a jury. Each party had a right to a jury trial. Besides, there was a completed adjudication in that case which so far accorded with the desires of both parties that neither filed a motion for new trial. All matters properly within the issues and judgment of that case have become res adjudicata for all time and for all purposes between the parties to that suit, and cannot be again raised by them before the chancellor or the judge exercising (as in a motion for set-off) a power in its nature equitable.

For the reasons above given, our conclusion is that the orders brought here should not have been made. Therefore they are reversed, with instructions to deny the motion in the equity case, No. 64; to deny so much of the motion in law case, No. 338, as prays a set-off of judgments; and to allow so much of that motion as prays a recall of the execution, the costs of the execution to be taxed against Officer, the plaintiff therein. All without prejudice to either party taking any proper steps to present the matter of set-off of judgments after any judgment in law case, No. 351, has become final.

PENNSYLVANIA R. CO. v. MINDS (two cases).
SAME v. MINDS et al.

(Circuit Court of Appeals, Third Circuit. July 20, 1917. Rehearing Denied October 8, 1917.)

Nos. 2194, 2195.

1. COMMERCE ⊂=94—INTERSTATE COMMERCE COMMISSION—AMENDMENT OF PLEADING.

A railroad company discriminated against a partnership engaged in coal mining and against the succeeding firm, a copartnership composed of one of the original partners and the widow of the deceased partner. The Interstate Commerce Commission made awards in favor of the new firm

and of the surviving partner of the old firm. Separate suits were instituted on such awards, but they were confused, so that the surviving partner sued on the award in favor of the second firm, and vice versa. *Held*, that the railroad company could not complain because, more than one year after the awards of the Interstate Commerce Commission were made, the trial court allowed them to be transposed so that each action was upon the proper award; such amendment not affecting its rights.

2. APPEAL AND ERROR ⊂⊃1002—REVIEW—VERDICT.
Where the evidence was conflicting, the defendant is not entitled to binding instructions, and the verdict of the jury is conclusive on error.

3. COMMERCE ⊂⊃95—INTERSTATE COMMERCE—DISCRIMINATION—AWARDS BY COMMISSION.
An award by the Interstate Commerce Commission in favor of a shipper on account of discrimination in furnishing cars is only prima facie evidence of the amount of the damages, and in an action thereon that question can be litigated.

4. APPEAL AND ERROR ⊂⊃930(1)—REVIEW—VERDICT.
Where verdict, in an action by shipper for damages for railroad company's discrimination in the furnishing of cars, was much less than the amount of the award by the Interstate Commerce Commission, and there was evidence as to the damage other than the award of the commission, the verdict will be presumed to have been based on the evidence instead of the award, and is not subject to attack on the ground that the commission in making its award adopted the wrong theory as to distribution of cars.

5. APPEAL AND ERROR ⊂⊃216(1)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Where the trial court, after giving a charge which fairly presented the controversy, stated that counsel might call his attention to any points which they would like to have specifically answered, defendant, having been cast below, cannot raise in appellate court matter not then called to the trial court's attention.

6. COMMERCE ⊂⊃97—CARRIAGE OF GOODS—DISCRIMINATION—AWARD BY COMMISSION—INTEREST.
Where the difference between the verdict, in an action against a railroad company for damages for discrimination in furnishing cars, and the amount originally claimed before the Interstate Commerce Commission, was not so great as to show an undue inflation of the claim, the allowance of interest by the commission from the date of the award is not subject to attack; it not being erroneous to allow interest in such proceeding.

7. APPEAL AND ERROR ⊂⊃709—REVIEW—ABUSE OF DISCRETION.
Where, in an action against a railroad company for damages for discrimination in furnishing cars, the trial court awarded counsel fees, stating that they were confined to compensation for services in the trial court, and the facts on which the award was made did not appear, the appellate court cannot review the award on the ground of an abuse of discretion.

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

Action by James H. Minds, surviving partner of the firm of James H. Minds and William J. Matz, a partnership which lately traded as the Bulah Coal Company, against the Pennsylvania Railroad Company, consolidated with an action by James H. Minds and Julia A. Matz, copartners trading as the Bulah Coal Company, against the same defendant. There were judgments for plaintiffs (237 Fed. 267), and defendant brings error. Affirmed.

Henry Wolf Bikle and Francis I. Gowen, both of Philadelphia, Pa., for plaintiff in error.

George M. Roads, of Pottsville, Pa., H. W. Moore and John H. Minds, both of Philadelphia, Pa., and James A. Gleason, of Du Bois, Pa., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges

McPHERSON, Circuit Judge. In these cases the plaintiffs filed petitions in the District Court to enforce orders of reparation made by the Interstate Commerce Commission (23 Interst. Com. Com'n, 192); the orders being based on the railroad's discrimination against the Bulah Coal Company in the distribution of cars (20 Interst. Com. Com'n, 52). Two periods are involved, one (No. 2194), from July 1, 1902, to October 1, 1904, and the second (No. 2195), from October 1, 1904, to June 30, 1907. The cases were tried together, but separate verdicts and judgments were entered, in No. 2194 for $16,092.92, and in No. 2195 for $33,617.37.

During the first period, James H. Minds and William J. Matz, a partnership known as the Bulah Coal Company, leased and operated a bituminous coal mine known as Webster No. 4, situated on the Tyrone division of the railroad's system in the Clearfield district of Pennsylvania. The mine had no other outlet to market. Matz died in April, 1904, and Minds continued the operation as surviving partner until October 1st. On that date a new partnership bearing the same name, composed of Minds and Julia A. Matz, the widow, executrix, and sole legatee of William J. Matz, took over the mine and went on with the business until June 30, 1907. During the five years in question, whenever the railroad's available supply of cars was not large enough to carry the aggregate production of the district, the cars were allotted to the mines on a percentage basis; this percentage being determined in accordance with the railroad's rule.

[1] The coal company objected to the rule as unfair and discriminatory, and in June, 1907, attacked it before the commission. Two proceedings were brought, the first by Minds as surviving partner, covering the first period; the claim was for about $80,000 damages, and in March, 1912, a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Company, and covered the second period; the claim was for about $75,000 damages and the order, also entered in March, 1912, was for about $31,700, with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that Minds as surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Matz sued on the order entered in favor of Minds as surviving partner. This was an obvious blunder, and on April 10, 1916, the District Court allowed the orders to be transposed, the railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders. As we understand, however, this position is

not much relied on, and in any event we see no reason to say anything about it except to approve the action of the district court in setting right what was a plain and harmless mistake. Its correction did the railroad no possible injury.

In passing on the coal company's complaints, the commission decided that the railroad's rule was wrong, and had resulted in discrimination; and then announced the correct rule, which showed that the coal company had not received its proper quota. The railroad contends that the commission has not disclosed the basis on which the rule rests, but has merely stated in effect that the coal company could, and would, have mined and shipped certain additional tonnage, if its share of cars had been received. This contention is not correct, as a reading of the commission's full reports on this subject will show. Ohio R. R. Com. v. Hocking Valley Ry., 12 Interst. Com. Com'n, 398; Traer v. Chic. & Alt. R. R., 13 Interst. Com. Com'n, 451; Hillsdale Co. v. Pa. R. R., 19 Interst. Com. Com'n, 356; Minds v. Pa. R. R., 20 Interst. Com. Com'n, 52.

The basis of the commission's orders is certain findings of fact concerning the capacity at which the mine should be rated; the number of working days that should constitute an average working month; the number of additional tons that the coal company could and would have mined, sold, and shipped, during the whole five years, if the mine had received its proper share of cars; the amount of profit that would have been made on the estimated additional tonnage; the actual cost of mining per ton; and the estimated cost if the mine had received its proper share of cars. In the District Court, the coal company offered the evidence of several witnesses in addition to the findings and orders. The railroad did not, and does not, dispute the findings except in two particulars: (a) It denies that the coal company could have mined coal at a cost of 88 cents per ton, even if the proper share of cars had been furnished; and (b) it disputes the estimate of additional tonnage that the coal company would have mined and shipped during the second period, if such share had been received.

As to the first particular, the railroad insists that the coal company could not possibly escape two items of cost, namely, the mine rate of wages and the royalty, and that, even if nothing else than these items were charged against the additional tonnage, the cost of mining both the coal that was actually brought to the surface, and the estimated additional coal, would necessarily have been more than 88 cents, the cost found by the commission. And, in further reference to the cost of mining during the second period, the railroad insists that the inevitable cost would have embraced two other items in addition to the mine rate of wages and the royalty. To the railroad's evidence concerning this first particular, the coal company offered some evidence in reply, and thereupon the railroad asked for instructions whose refusal is assigned for error.

The other particular referred to relates to the second period only. The railroad contends that, when the commission estimated the additional tonnage that could and would have been mined and shipped if the coal company had received its proper share of cars, they disre-

garded their own rule of distribution. This contention bears directly upon the present controversy, because the amount of the coal company's damage depends largely on the number of cars it should have received. It would have made profits if it had been able to ship, and it could have shipped if it had received the cars, so that the railroad's failure to furnish the cars bears directly on the question of damage. The railroad's argument is that in substance the commission's rule provides as follows: The capacity of each mine in the district is to be rated by adding the tons it could produce (its physical capacity), and the average number of tons it could sell (its commercial capacity), and dividing the sum by two; the capacity or rating thus ascertained being the basis on which cars are to be apportioned during percentage periods. The first step in determining the number of cars to be allotted to each mine during such periods is to determine the proportion that would normally go to the mine. This is obtained by taking the aggregate ratings of all the mines in the district and fixing the proportion that each rating bears to the aggregate. The next step is to determine how many cars are available, and in so doing all the cars in the four classes described below are to be put into one pool. Whenever there are cars enough to carry all the coal produced, no question of diminishing the number for each mine arises; but during percentage periods the question does arise continually, for under the commission's rule the three classes of "assigned" cars must first be allotted to the mines that have a prior right thereto, and this allotment inevitably compels a readjustment of the "unassigned" or "system" cars that each mine is to receive. There are four classes of coal cars: (1) Individual or private cars, owned or leased by a shipper; (2) cars intended to carry fuel for the Pennsylvania Railroad itself; (3) cars sent by foreign railroads intended to carry their own fuel supply; and (4) other cars furnished by the railroad for general commercial use. The first three classes are "assigned" cars, and the cars in the fourth class are "unassigned" or "system" cars. The rule requires that the assigned cars shall first be given to such mines as may be designated either by the owners or lessees of the private cars, or by the respective railroads, and requires that these three classes shall be thus allotted in the first instance, without regarding the number of cars to which the particular mine might be entitled if its rating alone were considered; the result being that, when the system cars come to be distributed, they cannot be properly allotted without first taking into account the previous allotment of the assigned cars. For example: If a mine has already received assigned cars, these must be counted against the share to which its rating (if taken alone) would entitle it, so that, if the assigned cars already received equal or exceed the mine's share estimated according to its rating alone, it receives none of the system cars; while, on the other hand, if the assigned cars already received are fewer than its rating (if considered alone) would entitle it to receive, the mine does receive some of the system cars, but only so many as will bring the total number up to the rating. On this point, the railroad contends that the commission undoubtedly disregarded its own rule in estimating the additional tonnage that would have been mined and shipped by

the coal company during the second period, and has ascertained such tonnage by a different and incorrect method.

The railroad complains also about the damages recovered as interest by the plaintiffs, its position being this: Minds as surviving partner claimed about $80,000, and was awarded only about $18,600; Minds and Julia Matz claimed about $75,000, and were awarded only about $31,700—each sum to bear interest from June 28, 1907. The railroad objects to the commission's allowance of interest, and also to any allowance of interest in the District Court, on the ground that the findings and orders of the commission and the evidence offered at the trial show clearly that the plaintiffs' demands were grossly and unfairly inflated.

Finally, after the trial, counsel fees were asked for and allowed. And these are now objected to as excessive, and also as without legal warrant; the second objection being put on the ground that the fees should have been confined to the services of counsel in connection with the suits in the District Court.

[2] 1. The railroad complains, but we think without sufficient warrant, that the trial judge erred in what he said to the jury in submitting the question how much the cost of mining would have been, if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the railroad was not entitled to binding instructions. The verdict on this point must be accepted as final.

[3, 4] 2. The next matter concerns the second period only, and presents the objection on which the railroad seems to lay most weight, namely, that in making the orders of reparation the commission followed, not its own, but another, rule of distribution. In this respect the railroad contends that the situation is very much like the situation in Railroad v. Jacoby, 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. ——, and indeed is controlled by that decision. In our opinion, an important difference exists for the following reasons:

Before the commission the Jacoby Case and the case now in hand were considered in the same group, and both cases attacked the railroad's rule of distribution on the ground of discrimination. When the Jacoby Case came to be tried in the District Court, the plaintiff offered no other evidence than the commission's order, whereupon the railroad offered tables showing in detail that during the period then in question certain favored companies had received cars amounting to 59.9 and 59.6 per cent. of their ratings. Jacoby had received a much smaller percentage, and the relevancy of the tables was, not so much to prove the discrimination, as to show in connection with other evidence that the commission had calculated Jacoby's damages by using precisely the same percentages, and had thus permitted recovery (as the Supreme Court said)—

"* * * not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the commission, but upon the basis that (Jacoby was) entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in

the tables. The effect of the enforcement of such rule would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor—a result manifestly not intended by the act of Congress."

In the District Court Jacoby recovered the amount thus improperly awarded by the commission, with interest thereon, and the Supreme Court held that such a result was wrong; and that the jury should have been instructed that, if the commission's award was in fact based on the proposition that Jacoby also was entitled to cars amounting to 59.9 and 59.6 per cent., the award was erroneous, and the plaintiff should not have recovered. The Supreme Court said:

"It is urged that the testimony before the commission is not all in the record, and that for aught that appears the commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the commission. But it is difficult to reach the conclusion that the commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentage, shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the company was entitled to the specific request upon this subject submitting the matter to the jury."

In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiffs' damage. As an award by the commission is only prima facie evidence of the amount of damage, it follows that on the trial in the District Court the railroad may attack the amount, and, if the evidence show that the award is incorrect, the jury should follow the evidence and reject the award. We do not decide the question whether a plaintiff can recover more than the commission awards, but undoubtedly the railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the commission, and it seems to us therefore that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the commission's possible mistake. In the Jacoby Case the jury repeated the commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the commission's calculation, and has reached a different result.

[5] We have considered the railroad's position at some length in order to present it to the Supreme Court if the case should be reviewed

by that tribunal, but in our opinion the question is not before us on this record for the following reason: The district judge gave to the jury a clear and painstaking explanation of the questions submitted, and in general terms he instructed them about the proper method of distributing cars; but, no doubt by inadvertence (as he himself has stated in 237 Fed. on page 272), he did not call their attention in detail to some of the evidence, particularly to a table or blueprint that was regarded by the railroad as of much importance. Some of the railroad's requests for charge were based on this table, and, indeed, the argument of counsel in this court rested in large measure thereon. At the end of the charge the trial judge said:

"I think I have gone over the subject-matter of all of the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel, if they choose, may call my attention to any specific point which they would like to have specifically answered."

This was a plain request to counsel to call his attention to any omission, and in fairness to him should have been then complied with. But he was not asked to answer specifically any of the railroad's points. On the contrary, counsel replied as follows:

"In the first period we do not dispute the lost tonnage nor the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the court so charge."

The court immediately complied with this request, whereupon each party sent out its own calculation of the amount due in order to save the jury from labor. As it seems to us, the railroad should not now be allowed to complain, as it does complain by several assignments of error, that some of its requests for instruction were not given. The situation is dealt with so well in Thompson v. Lumber Co., 55 Pa. Super. Ct. 327, that we content ourselves by repeating what was said in that case by President Judge Rice:

"The charge as a whole was a clear, comprehensive, and impartial presentation of the issues of fact to be decided, and if there was omission to call attention to, or comment upon as fully as might be deemed desirable, specific facts or phases of the evidence, it was an inadvertency, which, if the judge's attention had been called to it doubtless would have been corrected. The decisions ars numerous, and are founded on just principles essential to the avoidance of undue expense and delay in the adjudication of cases, that inadvertent mistakes or omissions in reviewing the testimony should be called to the attention of the court before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. As to such inadvertent omission or mistake, it has been said, and we think the principle is applicable to these assignments, that 'a party may not sit silent and take his chance of a verdict and then if it is adverse complain of a matter which, if an error, would have been immediately rectified and made harmless.' Com. v. Razmus, 210 Pa. 609 [60 Atl. 264]; Com. v. Minney, 216 Pa. 149 [65 Atl. 31, 116 Am. St. Rep. 763]; Medis v. Bentley, 216 Pa. 324 [65 Atl. 758]; Slavin v. Northern Cambria Street Railway Co., 47 Pa. Super. Ct. 454; Com. v. Eaby, 52 Super. Ct. 619."

[6] 3. With regard to the allowance of damages for delay in the form of interest, we find no error to correct. Although such an allowance in actions of tort is not a matter of right, it is nevertheless permissible and often forms part of a verdict. On the facts of this

case we cannot say that no allowance should have been made. The only ground of the objection is the difference between the amount originally claimed before the commission and the amount finally adjudged to be due, and this difference is not of itself sufficient to require us to decide as a matter of law that the plaintiff's original claims were unduly inflated or made in bad faith. Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict.

[7] 4. As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial judge that he confined himself to compensation for services in the District Court, and, as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award.

In each case the judgment is affirmed.

BOGERT et al. v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Second Circuit. July 2, 1917.)

No. 253.

1. CORPORATIONS ⟸190—SUITS BETWEEN STOCKHOLDERS—PARTIES.
To a suit by minority stockholders against the majority stockholder based on the alleged misuse of its power as such for its own benefit and to the detriment of the minority stockholders, in which no corporate right is asserted, the corporation is neither an indispensable nor necessary party.

2. CORPORATIONS ⟸204—LIABILITY FOR ACTS OF CONTROLLED CORPORATION.
A corporation which through its control of another, which held a majority of the stock of a third corporation, caused the latter to take action detrimental to the interests of its minority stockholders, is liable therefor to the same extent as though it had been itself the holder of the controlling stock.

3. ELECTION OF REMEDIES ⟸7(1)—ACTS CONSTITUTING ELECTION—INCONSISTENCY OF REMEDIES.
A fruitless attempt to recover by an unavailable remedy does not constitute an election which will deprive one of his rights properly recoverable by a different and appropriate remedy.

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

4. EQUITY ⟸71(1)—LACHES—LAPSE OF TIME—PENDENCY OF OTHER SUITS.
The right of a complainant to maintain an effective suit to enforce his rights is not barred by laches because of the lapse of time alone where there has been no prejudice from the delay, and where complainant did not acquiesce in the situation, and was not inactive, but mistook his remedy.

Hough, Circuit Judge, dissenting in part.

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

Suit in equity by Henry L. Bogert and others, executors, against the Southern Pacific Company. Decree for complainants, and defendant appeals. Affirmed.

For opinion below, see 226 Fed. 500. See, also, 215 Fed. 218, and 211 Fed. 776.

Joline, Larkin & Rathbone, of New York City (Lewis H. Freedman and Arthur H. Van Brunt, both of New York City, of counsel), for appellant.

Dittenhoefer, Gerber & James, of New York City (H. Snowden Marshall, A. J. Dittenhoefer, David Gerber, and Dudley F. Phelps, all of New York City, of counsel), for appellees Henry L. Bogert and others.

George Gordon Battle, of New York City (H. Snowden Marshall, A. J. Dittenhoefer, David Gerber, and Dudley F. Phelps, all of New York City, of counsel), for appellees Sarah Rosenfeld and others.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The history of the long struggle of the minority stockholders of the Houston & Texas Central Railway Company with the Southern Pacific Company, arising out of the financial difficulties of the railway company, down to the present suit, can be learned by reference to Carey v. Houston & Texas Central Ry. Co. (C. C.) 45 Fed. 438; Id. (C. C.) 52 Fed. 671; Id., 9 C. C. A. 687; Id., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638; McArdell v. Olcott, 189 N. Y. 376, 82 N. E. 161; Lawrence v. Southern Pacific Co. (C. C.) 180 Fed. 822; Id., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768.

The grievance alleged in these prior suits was a corporate grievance, viz. that the foreclosure of the mortgages on the railway company's various lines had been brought about fraudulently by the Southern Pacific Company. The merits were not passed upon in any of these cases, each being dismissed on the ground that the decree of foreclosure could not be attacked collaterally because there was no proof of fraud, and in the last case supra because the railway company was an indispensable party.

The present suit on behalf of the minority stockholders was brought profiting by their previous mistakes, on an entirely different theory. It admits the validity of the foreclosure decree, asserts no corporate right of the railway company, but complains that the Southern Pacific Company has used its power as the majority and controlling stockholder for its own benefit to the detriment of the minority stockholders.

Briefly stated, the cause of action is as follows: The railway company owed two classes of indebtedness: First, interest in arrear amounting with expenses of reorganization to some $2,600,000; second, a floating indebtedness to the Lackawanna Iron & Coal Company, $555,914.25; to Morgan's Louisiana & Texas Railway & Steamship Company, $1,795,570.81; to the Southern Development Company, $858,113.15—aggregating, with interest, some $3,000,000.

The reorganization was, generally speaking, wise, fair, and eventual-

ly proved very successful. It was a part of the agreement that the Southern Pacific Company should pay the first indebtedness above mentioned, amounting to $2,602,615.77, and it did so. The stockholders of the railway company were given a right to their proportion of the capital stock of the reorganized company upon payment of their proportion of both the above accounts, which amounted to an assessment of about $71 a share. The Southern Pacific Company was given the right to take all stock not taken by the stockholders of the old company in consideration of its payment of the first account and of certain guaranties which it was never called upon to perform. As no stockholder of the old company was willing to pay the assessment of $71 a share, the Southern Pacific Company got the whole capital of $10,000,000 of the reorganized company for an outlay of about $26 a share. This is the unfairness which the minority stockholders say was imposed upon them by means of the control which the Southern Pacific Company, as majority stockholder, exercised over the railway company.

In the District Court Judge Chatfield has set forth the facts and the law very clearly in two opinions reported 215 Fed. 218, and 226 Fed. 500, and he entered a decree requiring the Southern Pacific Company to deliver to the minority stockholders of the railway company their proportionate share of the stock of the reorganized company and of the dividends collected, with interest thereon, upon payment of $26,026 a share, with interest from February 10, 1891.

We will briefly dispose of the defendant's objections, some of which were not pressed in the court below.

[1] (1) As in this case no corporate right at all was asserted, the railway company was not even a necessary party.

[2] (2) We think there is nothing in the objection that the Southern Pacific Company cannot be held liable because it was not a stockholder of the railway company. This is literally true, but the record makes it perfectly plain that through its control of the Morgan Company, which held a majority of the stock of the railway company, the Southern Pacific Company did cause the railway company to waive defenses originally pleaded in the foreclosure suit and to consent to a decree of foreclosure. It could not do with impunity indirectly what it had no right to do directly.

(3) The defendant insists that it should receive credit for so much of the railway company's floating indebtedness as it gave up to carry the reorganization through, and that the minority stockholders should be assessed for their proportionate share of it. There is great force in this contention as stated. The trouble is that it was never raised in the case by pleading or otherwise until an exception was taken to the report of the special master. There is nothing in the record to show what, if anything, the Southern Pacific Company did give up. So far as appears, it was not a stockholder of the Lackawanna Company or of the development company, and could be interested in the claim of the Morgan Line only to the extent that it would be entitled as a stockholder to receive after payment of that company's indebtedness. Furthermore, the Morgan Line was secured by bonds of the railway

company as collateral of the face value of $880,000. Under these circumstances it is quite impossible to say what, if anything, the Southern Pacific Company gave up in connection with the railway company's floating indebtedness.

(4) It is next objected that, because Lawrence, the complainant's decedent, had knowledge of and contributed to all the prior suits against the Southern Pacific Company, he is estopped by the decrees in those suits upon the principle of res adjudicata. But the issue proposed in them was different, and nothing was decided except that the respective courts had no jurisdiction.

[3] (5) Then it is argued that the complainant is concluded by virtue of an election between inconsistent remedies, to wit, because the earlier suits of which he was a promoter, proceeded on the ground of fraud, whereas this suit goes on the ground of an implied trust. But there was no election. These claims were not opposite and irreconcilable. None of the former suits passed upon the merits, the courts simply deciding that they had no jurisdiction to attack the foreclosure decree collaterally. Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249. A fruitless attempt to recover by an unavailable remedy cannot deprive one of his rights properly recoverable by a different and appropriate remedy. Standard Oil Co. v. Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; Barnsdall v. Waltemeyer, 142 Fed. 415, 420, 73 C. C. A. 515.

[4] (6) We do not think that the circumstances of this case justify defeating the complainant because of laches. One familiar ground is acquiescence, but the minority stockholders have not slept on their rights. They have been striving for many years to recover. No acquiescence, but exactly the contrary, a continuous and vigorous protest, appears. So far as the defense of laches depends, not on the mere passage of time, but upon another familiar ground, viz. a change in the situation prejudicial to the defendant, there is no evidence whatever to sustain it. The exact nature of the case has been known to the defendant from the beginning, and there is no substantial dispute of fact. No equities have intervened. It would be most inequitable to forfeit the complainant's rights notwithstanding the very long and unusual delay in prosecuting them.

(7) As the defendant owns the whole of the reorganized company's capital and contends that it is worth but little more than the assessment at $26 a share, a long inquiry would have to be gone into to ascertain its value. Therefore we think the court below was right in requiring the stock to be delivered in specie.

(8) What we have heretofore said on the subject of res adjudicata and election disposes of the objection made to the intervention of Gernsheim on these grounds. Intervention after interlocutory decree in favor of the complainant was proper. 1 Foster's Federal Practice, p. 434. The objection to the intervention of the representatives of Minzesheimer, deceased, because he is not shown to have owned his stock before the foreclosure proceedings, is founded on equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv). That rule, however, applies to stockholders' suits asserting derivative rights on behalf of the corpora-

tion, whereas this suit is a representative or class suit under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix).

Decree affirmed.

HOUGH, Circuit Judge (dissenting in part). While concurring in the main with the majority, it seems to me plain that defendant should have received credit upon the accounting for such of the floating indebtedness of the Houston, etc., Railway as it gave up in the reorganization as carried through. We have held the Southern Pacific to an account as a majoritv shareholder because the majority holder or holders of record were but defendant's puppets, to which proposition I agree.

But defendant when it took all the shares of the reorganized or new corporation, after these plaintiffs had declined to take any, certainly lost what the old company owed to the Southern Development Company and Morgan's, etc., Co., in the very real sense of having no one to pay the debts. To have caused the new or reorganized corporation to pay these debts (when Southern Pacific practically owned both debtor and creditors) would have been merely taking money out of one pocket and putting it in the other; the debts would have remained lost just the same.

It is because this defendant owned and controlled the companies which were at once confessed creditors, and themselves the immediate controllers of the old Houston, etc., Railway, that liability has been imposed on defendant; but why plaintiffs should now receive their share of what defendant got, without paying their share of what defendant lost, is quite beyond me. I think such credit or allowance inheres in the very reasons for our decision. If the Southern Pacific had itself been sole unsecured creditor of and majority shareholder in the old Houston, etc., Railway, and the same kind of reorganization had occurred, it is inconceivable that the minority stock owners would have been let in without paying their share of the floating debt. Yet we seem now to admit them as shareholders, while leaving the burden of unpaid debt to be shouldered by the concern which we hold to have been (in effect) the majority owner. That the point was not pleaded, is immaterial; the matter is a detail of accounting.

As for the difficulty of ascertaining just what was the indebtedness over collateral, it may be great; but the legal error below was in refusing to consider the matter at all.

On the question of laches, I venture to emphasize what seems to me the logical result of our decision. The action at bar was begun over 25 years after it arose. In the sense of inactivity or acquiescence there was no laches at all; but every effort was legally misdirected until this suit began. It rests not on fraud, nor concealment, but on the assertion of a legal right, which is now enforced by declaring a constructive trust and decreeing an accounting. No statute of limitations was pleaded; this we have said is not essential in equity (Waller v. Texas, etc., Co., 229 Fed. at page 92, 143 C. C. A. 363), meaning that the advantage of measuring by the statute a plaintiff's negligence in pursuit does not rest on pleading. If the act is relied on as a bar, it must be pleaded. Sullivan v. Portland, etc., Co., 94 U. S.

806, 24 L. Ed. 324. We have measured laches by analogy with the statute (Venner v. Central Trust Co., 204 Fed. 779, 123 C. C. A. 591), and done so (in admiralty) even when the party claiming the benefit was a foreign corporation in whose favor the statute did not run (Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381).

But in principle this court has adhered firmly to the doctrine that its equity jurisdiction is not subject to limitations of time or other matters created by state laws. Kirby v. Lake Shore, etc., R. R., 120 U. S. at page 138, 7 Sup. Ct. 430, 30 L. Ed. 569. And see Hubbard v. Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520. Yet where the jurisdiction is concurrent as between law and equity, the chancellor is bound to apply the statute (Hall v. Law, 102 U. S. at page 466, 26 L. Ed. 217); "in other cases (he) acts only by analogy, and not in obedience to the statutes."

It follows that the present decision holds, in substance, that there is no remedy at law for these plaintiffs, that equity is the only jurisdiction for them, and that 25 years of failure to discover an always existing cause of action, based on facts of almost public notoriety, does not constitute laches, in the absence of silence, inaction, or acquiescence by plaintiffs, or loss of advantages or change of situation caused or contributed to by plaintiffs on defendant's part.

In this holding I concur, extreme as the facts are, on the assumption that the case is not one of concurrent jurisdiction. I make that assumption only because the parties have assumed it.

EQUITABLE TRUST CO. OF NEW YORK v. WABASH R. CO. et al.

BIXBY et al. v. BLAIR et al.

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

No. 2965.

1. POST OFFICE ⇐21(4)—COMPENSATION FOR CARRYING MAILS—RIGHTS AS BETWEEN CARRIERS.

There was an established mail route over the W. Railroad from Detroit to Chicago, the compensation for which was fixed each four years by weighing all the mail transported over any part of the route. The trains of the P. Railroad between Toledo and Detroit ran over the W. Company's tracks from Romulus to Detroit; the P. Company receiving all of the revenue and paying the W. Company on an agreed trackage basis. On such trains the P. Company carried, as far as Toledo, through mails from Detroit to Cincinnati, and the mail so carried was included in that on which the compensation of the W. Company was fixed, and the W. Company was accordingly paid for the transportation thereof to Romulus. Compensation was similarly paid for the use of mail cars and for hauling them, and the W. Company recognized its obligation to pay the P. Company the portion of the compensation representing the cars hauled by that company, and regularly paid such compensation to the P. Company. *Held*, that there was an implied contract by the W. Company to pay to the P. Company the compensation received for carrying such mail, as it was the W. Company's duty to carry such mail under its agreement with the Post Office Department, and the P. Company therefore performed

the services in discharge of the underlying liability of the W. Company, for the use and benefit of that company, and the W. Company accepted such services and received the benefit thereof; nor was it material that the carrying of the mail by the P. Company was by direction of the department, as this direction pertained merely to the efficiency of the service, and not to the contract for payment.

2. POST OFFICE ⇐21(4)—COMPENSATION FOR CARRYING MAILS—RIGHTS AS BETWEEN CARRIERS.

The rule that a contract to pay cannot be implied against one who receives the benefit, where he has had no opportunity to elect, did not apply, since, while the department ordered the carrying of the mail by the P. Company, and the W. Company had no election in the specific thing, yet it voluntarily made the contract by which it put the P. Company in a position to be subject to the order, and voluntarily participated in presenting to the department the weights of the mail in question as a part of the basis of its compensation, and voluntarily received such compensation from the department.

3. POST OFFICE ⇐21(4)—COMPENSATION FOR CARRYING MAILS—RIGHTS AS BETWEEN CARRIERS.

As the W. Company expressly admitted the right of the P. Company to the mail car pay, there was no room for the inference that the services were intended to be gratuitous, as there was no substantial difference between the two classes of compensation.

4. RAILROADS ⇐208—RECEIVERS—EXPENDITURES—"TRAFFIC BALANCE."

The receivers of the W. Company were authorized to pay such compensation to the P. Company by the order appointing them and authorizing them to pay all ticket, traffic, and car mileage balances, etc., due or coming due to connecting or other railroads, since, while the amount involved was not a "traffic balance," in the strictest and most common use of that phrase, it could not be substantially distinguished therefrom.

5. RAILROADS ⇐213—RECEIVERS—PRESENTATION OF CLAIMS—ANCILLARY PROCEEDINGS.

Where receivers were appointed for the W. Company in Missouri, and an ancillary bill filed in the Eastern district of Michigan, on which the same receivers were appointed, the claim of the P. Company should be presented to the Michigan court, within whose territory the operations giving rise to the indebtedness occurred, if that court was independently administering the property in its jurisdiction, and was in a position to subject the property in Michigan to its decree, but otherwise the application should be made in Missouri.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit by the Equitable Trust Company of New York, trustee, against the Wabash Railroad Company and another, in which William K. Bixby and another were appointed receivers of such railroad, and in which Frank W. Blair and others, receivers of the Pere Marquette Railroad Company filed an intervening petition against the Wabash receivers. From an order requiring the Wabash receivers to pay the claim of the intervening petitioners, the Wabash receivers appeal. Affirmed.

N. S. Brown, of St. Louis, Mo., for appellants.

John C. Bills, of Detroit, Mich., for appellees.

Receivers were appointed for the Wabash Railroad Company in a mortgage foreclosure suit in the United States District Court at St. Louis, and since part of the railroad lay in the Eastern district of Michigan an ancillary bill was filed in that district, and the court therein appointed as receivers the same persons theretofore appointed in Missouri, which appointment had been

made December 21, 1911. The District Court for the Eastern District of Michigan also duly appointed receivers for the Pere Marquette Railroad Company. In May, 1914, the Pere Marquette receivers filed an intervening petition in the ancillary suit in which the Michigan appointment of receivers for the Wabash had been made, and thereby the Pere Marquette receivers asked that the Wabash receivers be directed to pay over certain sums which the Wabash and its receivers had received from the Post Office Department for carrying the mails, and which it was claimed equitably belonged to the Pere Marquette receivers. By the pleadings and upon a hearing before a special master, to whom the issue was referred, the following facts appeared:

The Pere Marquette, running northwesterly from Toledo, did not reach Detroit. The Wabash, running southwesterly from Detroit, did not reach Toledo. The two roads intersected at Romulus. In 1904 the Pere Marquette made an arrangement with the Wabash (put into a formal written contract in 1910) by which the Pere Marquette was permitted to run its complete passenger trains, including mail and express cars, between Romulus and Detroit over the Wabash tracks, and it paid therefor to the Wabash compensation upon an agreed trackage basis—all the revenue belonging to the Pere Marquette. There was an established mail route over the Wabash tracks from Detroit to Chicago. The compensation which was received by the Wabash was fixed at the beginning of each four-year period by weighing all the mail transported over any part of this route. The Pere Marquette (under an arrangement with the Cincinnati, Hamilton & Dayton, running from Toledo to Cincinnati) was carrying as far as Toledo through mails from Detroit to Cincinnati, and used therefor the Wabash tracks from Detroit to Romulus. Such Detroit-Cincinnati mail, passing over part of the Detroit-Chicago route, was weighed as a part of that which fixed the basis of compensation to the Wabash for the Detroit-Chicago route; and accordingly the compensation for carrying this Cincinnati mail between Detroit and Romulus was paid by the Post Office Department to the Wabash. The compensation so paid included as well charges for the use of mail cars furnished to the department for its use as railroad post offices and for the hauling of such cars. The compensation for such hauling and that for the carrying of the mail measured by weight were always separately computed and paid.

After the beginning of this arrangement, the question whether this compensation so earned by the Pere Marquette, and received by the Wabash, should be retained by the latter or turned over to the former was overlooked. In December, 1905, the manager of the Pere Marquette wrote to the president of the Wabash, reciting the situation, and saying: "We are, as you know, operating our trains over your line Romulus to Delray [a Detroit suburb] on a trackage arrangement and of course we are entitled to all the revenue. Will you kindly authorize us to make bill against your company for the amount paid to your company by the government which should have been paid to the Pere Marquette, that is $1,713.60?" To this, March 28, 1906, the president of the Wabash replied: "We have concluded that we should refund to you the amount we receive from the Post Office Department for mail compensation, and I have given instructions to have a voucher prepared in your favor covering the amount received up to December 31, 1905, viz. $1,713.60, and to have voucher made in your favor quarterly hereafter as long as you pay us for trackage under the old arrangement." This demand and payment in fact covered only the amounts paid for railway mail cars, since the payment of compensation by weight did not commence until the beginning of the next four-year period, viz. July 1, 1907.

The mail car compensation received by the Wabash has been continually paid over to the Pere Marquette, and no question concerning the same now exists. After the weight payments began, in July, 1907, the Pere Marquette officials made no claim against the Wabash for any part thereof, but apparently assumed, without looking into the matter, that the payments being made by the Wabash covered all the compensation the Wabash was receiving but which the Pere Marquette had earned. After the Pere Marquette receivers were appointed, they discovered in 1912 that such mail compensation paid and received on the weight basis had not been turned over, and they made

demand therefor on the Wabash receivers. The demand was refused, and this petition was filed.

The theory of the petition was that the moneys in question were received by the Wabash for the use and benefit of the Pere Marquette. The answer of the Wabash receivers denied liability, and set up that it was the imperative duty of the Pere Marquette, if it desired to receive any of this mail compensation, to proceed in the manner pointed out by the post office regulations for the establishment of a "lap route," which would authorize payment to be made by the department directly to the Pere Marquette. The special master, after finding the facts in detail found, as conclusions of law, that there was no implied contract, but that there was a liability as for money had and received; that the money was owing to the Pere Marquette, and not to the Cincinnati, Hamilton & Dayton; and that the claim was within the class which the order appointing the Wabash ancillary receivers directed them to pay, part of it as a preferred claim, and part of it as an expense of operation. These defenses have been treated by all parties as properly involved, and are the only ones argued in this court. On exceptions to the report, the District Court sustained the special master, and an order was entered that the Wabash receivers forthwith pay to the Pere Marquette receivers the whole sum claimed, with interest.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). Both the special master and the District Judge put the liability of the Wabash on the ground of an equitable obligation which made the money received by the Wabash "money paid for the use and benefit of" the Pere Marquette. Elaborate arguments are presented to us both in support of and against this theory; but we do not believe it necessary to decide that issue.

[1] Both tribunals have rejected the theory of implied contract because they thought the services of the Pere Marquette were not rendered to or for the Wabash, or in discharge of any obligation of the Wabash, but were rather rendered directly to the department and at its request—so that the promise to pay would be implied, if at all, against the government and not against the Wabash. This conclusion rightly follows from the grounds so assumed; but we think the premise is wrong. This Cincinnati mail from Detroit and as far as Romulus was a part of that covered by the contract between the Wabash and the department for the Detroit-Chicago route. Under the contract between the Wabash and the department, as the matter existed in 1904, it would have been the duty of the Wabash to carry this mail itself, on its own trains, as far as Romulus, if it had been so directed, and without any additional compensation. By virtue of the weighing done in 1907, a duty to pay extra compensation for this mail was recognized and liquidated, but it was recognized as a duty to the Wabash, and the agreed price was continually paid to the Wabash. So far as concerns the paying of compensation, it was immaterial to the department whether the work was performed by the Wabash or by some lessee on the Wabash rails. The special direction that this mail be carried by the Pere Marquette pertained to the efficiency of the service and not to the contract for payment. After the weighing period of 1907, if not before, there is fair analogy to a case where the owner of property has agreed with one general contractor that certain work shall be done, but has reserved

the right to direct that particular portions of the work shall be done by particular subcontractors, as might be determined with reference to the convenience of work that the same subcontractor might be elsewhere doing for the same owner.

In view of the whole situation, we think it quite right to say that these services were performed by the Pere Marquette in discharge of an underlying liability of the Wabash, and substantially for the use and benefit of the Wabash, that the services were accepted by the Wabash, and that it received the benefit thereof, viz. the sums of money paid to it on this account. Here we find all the elements of an implied contract.

[2] It it said that a contract to pay therefor will not be implied against one who receives the benefit unless he had an opportunity to elect, and that a man cannot be forced to pay for what he has had no chance to refuse. Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96. This may be conceded as a general rule, but it will not control in this case. It is true that the department directed the Pere Marquette to carry this mail, and that the Wabash had no election in the specific thing; but it had voluntarily made the contract by which it had put the Pere Marquette in a position to be subject to this order, and out of which this order might have been anticipated, it had voluntarily participated in presenting to the department the weights of this mail carried over this section of its Detroit-Chicago route as a part of the basis of its compensation for that route, and it had voluntarily collected and received from the department this very compensation. The case is quite barren of the element of compelling a man to pay for something which has come to him against his will, or not as the natural result of his own actions.

[3] There is no room for any inference that the services were unintended to be gratuitous. When another branch of the same subject-matter—the mail car pay—came to the attention of the parties, the Pere Marquette demanded that such pay be turned over, and the Wabash expressly admitted that the demand was rightful and promised to comply; and it has continually performed this promise. There is no substantial distinction between the mail car pay and the weighed mail pay; and, when the latter subsequently came into existence, to say that there was an intention for the Pere Marquette to perform the service and for the Wabash to get and keep the pay, is inconsistent with the action of both parties.

It appears that the entire running of trains by the Pere Marquette between Detroit and Toledo was pursuant to a contract between the Pere Marquette and the Cincinnati, Hamilton & Dayton, to enable the latter to get its Cincinnati-Toledo cars through to Detriot, and by which contract the Cincinnati, Hamilton & Dayton paid to the Pere Marquette a stated monthly compensation and was entitled to all the net revenue. Objection was made to allowing the Pere Marquette receivers to recover as for money received by the Wabash for their use and benefit, because, it was said, they were not the real beneficiaries, since as between themselves and the Cincinnati, Hamilton & Dayton, the fund in question equitably belonged wholly to the latter. Counsel conceded that this objection would not have force if the obligation of

the Wabash to pay the Pere Marquette rested on contract between them; and as we have adopted and approved the theory of an implied contract, this matter need not be considered.

[4] At the time the Wabash receivers were appointed, $10,025.63 of the sum awarded below had accrued, and, according to the view which we have taken, was then a debt from the Wabash to the Pere Marquette. The Wabash receivers claim that this was only an ordinary contract debt, and that they should not have been directed to pay it preferentially. The order made by the District Court for the Eastern District of Missouri, apparently in connection with the appointment of receivers, said:

"Said receivers are hereby authorized and directed from time to time, out of the funds coming into their hands, to pay * * * all ticket, traffic and car mileage balances, car per diem and amounts for car and equipment repairs, which are due or may become due to connecting or other railroads. * * *"

We think this order clearly covered this debt. It was not only an authority, but a direction, to the receivers to pay it out of income. It is true, as urged, that the amount was not a traffic balance in the strictest and most common use of that phrase, but it cannot be substantially distinguished therefrom. If the Pere Marquette had carried Chicago freight from Detroit to Romulus and there delivered it to the Wabash, which had collected the freight money at destination, the division coming to the Pere Marquette would have been on one side of the account in striking the typical traffic balance. For the purposes of these trains the rails from Detroit to Romulus were Pere Marquette rails. The Wabash collected the entire contract price for carrying all the mail hauled over any portion of the Detroit-Chicago route, but part of the mail paid for was hauled part of the way by the Pere Marquette. Not only does the language used fairly cover the situation, but we find facts which would naturally and rightly give rise to this direction, thus specifically interpreted. Connecting railroads have current accounts, back and forth, covering traffic, car mileage, etc.; one side is offset against the other side; one side is due to the railroad going into receivership, and will be withheld unless the receiver will recognize and pay the correlative indebtedness. In this very case the Pere Marquette was becoming currently indebted to the Wabash upon the trackage contract, and the Wabash did in fact sometimes withhold payments of the railway mail car compensation until the Pere Marquette paid the trackage rental. Both of the two subject-matters were not only in fact, but were regarded by both parties as, parts of one debit and credit account, upon which the balance might be either way. The fact that by mutual mistake the item of compensation for the weighed mail was being omitted from the accounts as currently stated can make no difference in the interpretation of the order.

It was also urged below, and is insisted here, that a debt of this kind could not be permitted to displace the security of the bondholders whose mortgage was underlying. The District Judge did not expressly pass upon this question. The record is insufficient to inform us whether the debt can be paid out of income, or whether resort to the body of the property is necessary. If it is claimed that such resort

will be necessary, and that the mortgagees will therefore be prejudiced, we think the burden is on the Wabash receivers to bring this fact to the attention of the court and take its further direction.

[5] Since this indebtedness of $10,025.63 was the result of operations upon that part of the Wabash road within the Michigan jurisdiction, we think the application should be made to the court below, if it is independently administering the property in its jurisdiction, and if it may be in a position to subject the body of the property in Michigan to its decree; otherwise, the application should be to the District Court in Missouri.

The order below is affirmed, without prejudice to further proceedings in accordance with this opinion.

LANDERS v. ERIE R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 19, 1917.)

No. 2945.

1. RAILROADS ⟸330(2)—CROSSING ACCIDENTS—GATES.
While the fact that gates intended to protect travelers at a railroad crossing were open relieves a traveler of the imperative duty to stop, look, and listen before going upon the tracks, and usually makes the question of his contributory negligence one for the jury, a traveler is, though the gates be open, obliged to continue to exercise the ordinary care a reasonably prudent man would for his self-protection.

2. RAILROADS ⟸330(2)—CROSSING ACCIDENTS—NEGLIGENCE.
Deceased, who followed two other travelers on foot, entered a railroad crossing at which he had an unobstructed view to the left down the west track for more than 500 feet when the gates were open. Before deceased and the others could pass, the gates were lowered, and the two pedestrians in front left the sidewalk and went diagonally north to pass between the gates at about the center of the street. Deceased followed them, being only a few feet behind, and was struck and killed by a switch engine approaching on the west track. Had he looked, deceased undoubtedly could have seen the engine, and the fact that he veered showed that he knew the gates had been closed. *Held*, that as the engine was equipped with lights, and all the bystanders heard it, deceased must be deemed guilty of negligence.

3. RAILROADS ⟸330(2)—CROSSING ACCIDENTS—NEGLIGENCE.
In such case, deceased cannot be deemed free from contributory negligence on the theory that the entire zone between the two gates was a place of danger, and that he was justified in going forward to get out of it, for the tracks were straight, and he could readily have seen the approaching engine and avoided it.

4. RAILROADS ⟸324(1)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.
In such case, deceased could not be deemed free from contributory negligence on the ground that trains on the west track habitually came from a direction opposite that from which came the switch engine that ran down deceased.

5. RAILROADS ⟸346(3)—CROSSING ACCIDENTS—CONTRIBUTORY NEGLIGENCE.
In such case, where deceased attempted to pass so close in front of the engine that he did not have more than two seconds of time, the railroad company cannot be held liable because, after the accident, his shoe was found wedged between the edge of the crossing planking and the rail,

on the theory that the defect, which was in the street, not intended for pedestrians, constituted a trap in which deceased's foot caught, for, if his foot was caught and held, the interval of time between the catching and the fatal collision was so short that the railroad operatives could in no way have avoided it.

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 Jennie Landers, administratrix, against the Erie Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Britton S. Johnson, of Kent, Ohio, and Timothy S. Hogan, of Columbus, Ohio, for plaintiff in error.

J. Paul Lamb, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Plaintiff in error was plaintiff below. Her intestate was killed by defendant's switch engine at a highway crossing in the village of Kent, Ohio. The trial court directed a verdict for defendant, on the ground of contributory negligence. Landers, the man killed, was under no contract relationship with the railroad.

The accident happened about 9 o'clock, p. m., on April 22d. Landers was on foot, going west. There were two north and south railroad tracks, constituting the double track of the main line. The crossing was protected on both sides by gates, and supplementary arms from these gates barred the sidewalk passage. Landers lived in town and was familiar with the situation. As Landers approached the crossing, there were obstructions to his view toward the south; but as he passed these obstructions, and came near the east rail of the east track, he had a clear view to the left down the west track for 500 feet. The switch engine which struck him approached on the west track from the south, running backward. A party of three undertook this crossing; Landers was a stranger to the other two, and was walking from 6 to 10 feet behind them. As they all approached and crossed the location of the east gate, that gate was open, and a street car had just come across from the west. Either then or just before, the west gates closed. They were certainly closed as early as the time when the two men ahead were approaching the west track and Landers was upon the east track. The two men left the sidewalk and went diagonally north, in order to pass between the west gates at about the center of the street. They saw the engine coming, knew that they had scant time to get across, and they did barely do so. Just as they were upon or entering upon the west track, they looked back and saw Landers following them on the same diagonal path and only a few feet behind them. After the engine passed, they did not see him, and investigation disclosed his body 30 or 40 feet north, where it had been dragged by the engine after he was hit.

[1] It is accepted by this court, as the rule of such a situation in Ohio, that open gates operate materially to lessen the degree of care otherwise incumbent upon persons about to cross a railroad; that there

is then, on the part of the traveler, no imperative duty to stop and look and listen before going upon the tracks, and that the question of his contributory negligence will usually be for the jury; but that he is, nevertheless, obliged to continue to exercise such ordinary care as a reasonably prudent man would do for his self-protection. Blount v. Railway (C. C. A. 6) 61 Fed. 375, 378, 9 C. C. A. 526; B. & O. R. R. v. Anderson (C. C. A. 6) 75 Fed. 811, 22 C. C. A. 415; Erie Co. v. Schultz (C. C. A. 6) 183 Fed. 673, 675, 676, 106 C. C. A. 23.

[2] The proper application of this rule does not cover circumstances, such as are here involved, far enough to prevent an inevitable inference of negligence. Not only was Landers on foot (an important matter as affecting both looking and listening), but before he came into the actual danger zone the west gate was lowered, and undoubtedly he saw it and started to go around. From that time on anything in the nature of an invitation to cross ceased, Landers had notice that something was coming, and if he stepped upon the west track without looking in both directions his act would clearly be negligence. There is no escape from the conclusion that he did go upon the track, intending to cross it, and while the approaching engine was within a few feet; nor from the inference that, if he looked towards the south, he saw it. Plaintiff's witnesses state the distance of the engine from Landers, when he stepped on the track, as low as 4 feet, but to consider it 20 or 25 feet is to give the benefit of every doubt, and this means not more than two seconds of time. The night was not dark, the tender carried a light, and every one of the five or six bystanders, plaintiff's witnesses, saw the engine coming, from some distance away until the accident. All of them heard either the noise of its wheels or the bell ringing. We think all reasonable minds must agree, either that Landers did not look in this direction, or else that, if he did look, he misjudged the distance, and thought he could get across ahead of the engine. In either event and upon most familiar principles he was negligent.

[3] It is argued that the entire zone between the two gates is a place of danger, and that, since he entered this zone without fault on his part, he is not to be blamed for what he did in trying to get out of it. This proposition cannot be accepted broadly enough to reach this situation. It is easy to suggest circumstances where the closing of gates while the traveler was between them would excuse conduct on his part otherwise very negligent; but here the tracks were straight in both directions, there was no other engine passing, nor any distracting noise, a man on foot could see that nothing was approaching from either direction upon the east track, and could almost instantly step back and around or under the east gates, if they were then closed. These facts cannot furnish a sufficient excuse for going upon and trying to cross the west track without looking, or for deliberately hastening across so closely in front of the engine, if in fact he saw it coming.

[4] It is also said that trains on the west track customarily came from the north, and that Landers, therefore, would not naturally have expected anything from the south. This does not excuse, unless we go to the extent of saying that, for this reason, he was not bound to pay the slightest attention to the south, from which direction the engine was coming and was almost upon him; and this cannot be said.

[5] There was also evidence from which plaintiff claims the jury would have had a right to infer that, as he was crossing the track, Landers' foot was caught and held in a hole in the planking, which defect defendant had negligently allowed to continue. It appears that, in the central part of the highway crossing, there was planking between the rails; that, at one spot, the edge of the planking next to the rail had worn away so that for the length of a foot or two there was a distance of 3 or 4 inches between the rail and the plank, along the inside of the rail, and where there necessarily was some space for the travel of the wheel flange, and that, immediately after the accident, Landers' right shoe, unbuttoned, was found so forced into this depression that it was removed with difficulty. Whether this defect in the part of the crossing intended for vehicles could, under the evidence here, rightly be thought to imply negligence on the part of the railroad as against Landers, who had left the sidewalk and was going out around the end of the gate in the roadway, is not clear; but, in view of the meagerness of the testimony concerning its exact character, we prefer to assume that plaintiff is right in this contention, and also to assume—although this comes near to being only surmise—that Landers' shoe was caught in this hole before he was struck, rather than afterwards pressed in by the flange of the wheel. Based on these premises, plaintiff urges that the effect of Landers' contributory negligence is thereby obviated, or perhaps that there is afforded thereby some reason for doubting the existence of contributory negligence. We cannot see that either of these conclusions can be drawn from the premises. If the traveler starts across the track far enough ahead of the oncoming engine so that there may be reasonable doubt of his great carelessness, the fact that his foot becomes caught in a defect is of evidential force in disputing the inference of negligence otherwise tending to arise from his failure to get across successfully; but where, as here, his action in trying to cross would raise an indisputable presumption of negligence, if the path were smooth and perfect, that presumption cannot become disputable because the path turns out to be defective.

It is doubtless true that there are circumstances where the existence of a defect in the crossing, which caught a traveler who had negligently attempted to cross, and held him until he was hit, would serve to support a recovery; but this, it would seem, must be either because the engineer was not diligent in stopping after he saw the traveler's predicament (Dickson v. Chattanooga Ry. & Light Co., 237 Fed. 352, 150 C. C. A. 366), or because the holding, in what proved to be the trap, was long enough continued so that the contributory negligence in attempting to cross might be thought to have exhausted itself, and to have been superseded by defendant's existing and continued negligence in maintaining the trap, so that thus it might be said that the contributory negligence was no longer a concurrent cause. The circumstances of this case lend no support to this theory. If there were a catching and holding, they were practically only instantaneous. The result was only that which would have followed almost any kind of misstep. To say that defendant's maintenance of the defective crossing was a supervening or proximate cause, taking effect after the

contributory negligence had ceased to have its normal consequence, would be to substitute theories for facts.

The judgment must be affirmed.

PENNSYLVANIA R. CO. v. ROGERS.

(Circuit Court of Appeals, Third Circuit. June 27, 1917.)

No. 2206.

1. NEGLIGENCE ⟸136(9, 26)—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.

When the facts as to a defendant's negligence or deceased's contributory negligence are such that all reasonable men must draw one conclusion from them, then it is the duty of the court to peremptorily instruct the jury to render a verdict accordingly; but when there is a conflict in the testimony, such as to warrant reasonable men in drawing different conclusions, questions of negligence and contributory negligence are primarily for the jury.

2. CARRIERS ⟸320(10), 347(3)—INJURIES TO PROSPECTIVE PASSENGER—QUESTIONS FOR JURY.

In an action for the death of plaintiff's husband, plaintiff testified that he alighted from a vehicle and proceeded to a railroad station to take a train, having a ticket in his pocket; that he went towards a planked crossing provided by the railroad company as the only approach across tracks to that side of the station; that as he neared the crossing he stopped to let a car pass, and, after it had passed, looked around and then walked upon the crossing. Defendant introduced testimony tending to prove that the accident happened 23 minutes before train time, from which it was claimed that he was not going to the station to take a train, but to transact business, and that he was not walking on the crossing, but on the roadbed, from two to four feet from the crossing, or at least had one foot upon the roadbed. It also appeared that a watchman at the crossing gave him no warning, and that a member of the crew on the car nearest him gave no warning until almost at the instant he was struck. *Held*, that the court properly refused to decide the questions of negligence and contributory negligence as matters of law, as these issues could only be decided after the jury had determined deceased's relation to the defendant, and questions as to the warning given, if any, and its sufficiency.

3. CARRIERS ⟸280(1)—RAILROADS ⟸358(1), 359(1)—DEGREE OF CARE REQUIRED.

The duty of a carrier to a trespasser on its tracks is the duty to avoid willful injury; its duty to a stranger or one crossing its tracks upon a legitimate errand to its station, that of ordinary care; and its duty to a passenger, care in a high degree.

4. CARRIERS ⟸247(2)—RELATION OF PASSENGER AND CARRIER—COMMENCEMENT.

The relation of carrier and passenger is created by no prescribed course of action, but is evidenced by conduct of the person in furtherance of his bona fide intention to board the carrier's train, and is complete when by such conduct he reasonably informs the carrier of that intention and brings himself within the carrier's protection.

5. CARRIERS ⟸280(1)—INJURIES TO PASSENGER—DEGREE OF CARE REQUIRED.

When the relation of carrier and passenger is established, either when the passenger has reached the carrier's premises, or when he has boarded its train, he is entitled to receive from the carrier a high measure of care; that is, all the care which the peculiar circumstances of the place and occasion reasonably require, which will be increased and diminished ac-

cording as the ordinary liability to danger and accident is increased and diminished in the movement and management of trains.

6. CARRIERS ⟸325—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED.

In exacting of a carrier a high measure of care for the protection of its passengers, the law does not withdraw from the passenger all duty to exercise care for his own protection, but apportions between them the care which in a given situation should be exercised, and the degree of care required varies with the circumstances.

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Lena M. Rogers, administratrix of Charles A. Rogers, deceased, against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Theodore Strong, of New Brunswick, N. J., for plaintiff in error.

Wescott & Weaver, of Camden, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action brought against the railroad company for negligently causing the death of the plaintiff's intestate. The verdict was for the plaintiff; the defendant sued out this writ.

Of the thirty-two assignments of error the defendant relied upon twenty-three, presenting questions, which, so far as they are substantial, may be classified as follows:

(1) Whether the court erred in refusing to direct a verdict for the defendant on the ground (a) that no negligence on its part was proven, and (b) that the intestate was guilty of contributory negligence; involving questions of fact which the court was asked to decide as matters of law,

(2) Whether at the time of his injury the intestate was upon the premises of the defendant (a) as a trespasser, (b) as one upon a legitimate errand, or (c) as a passenger; raising questions of law

(3) Whether the court erred in charging the jury as to the measure of care which in these several relations (a) the railroad company owed the intestate, and (b) the intestate owed himself.

The facts of the case were sharply disputed. The plaintiff testified that she drove to Princeton Junction with her husband; that arriving at a point opposite the station he gave her the reins, kissed her goodbye, alighted and proceeded to the station to take a train to Asbury Park, having in his pocket a ticket to that destination. She further testified, that to reach the station her husband had to cross two railroad tracks; that he went toward a planked crossing provided by the railroad company as the only approach for passengers to that side of the station; that over these tracks several trains were being shifted; that as he neared the crossing he stopped a moment to let a car pass, and after it had passed, he looked around and then walked on the crossing; that just then another train backed up and obscured her view; that she saw his hat fly off, and later was told that he had been

killed. Another witness testified that after the accident, blood stains were found upon the crossing.

The defendant contended that the intestate was not a passenger. It introduced testimony tending to prove, first, that the accident happened twenty-three minutes before train time, deducing therefrom the inference that the intestate was not approaching the station to take a train but to transact business; and second, that in approaching the station he did not walk upon the crossing, but walked on the roadbed between the two tracks and was struck by a train backing toward the crossing when he was from four to two feet from it, or when at least he had one foot upon it, arguing therefrom that he was a trespasser. D. L. & W. R. R. Co. v. James, 241 Fed. 344, — C. C. A. —. It further appeared that one of the crew of a nearby train was temporarily stationed at the crossing as a watchman, but gave the intestate no warning; and that on the car nearest the intestate as the train backed upon him was one of its crew, who gave him no warning until at the instant or almost at the instant the car struck him.

[1, 2] There thus appears a pronounced conflict in the testimony both as to the status of the intestate when upon the defendant's premises, and how and at what point the accident occurred. We are asked, notwithstanding this conflict, to hold that the trial court erred in submitting the case to the jury. The principle by which a trial court is controlled in withdrawing a case from the jury in the presence of such conflict of testimony, was considered by us in Philadelphia and Reading Railway Co. v. Marland, 239 Fed. 1, — C. C. A. —, and need not be restated, except to say, that when facts as to the defendant's negligence or the intestate's contributory negligence are such that all reasonable men must draw one conclusion from them, then unquestionably it is the duty of the court to peremptorily instruct the jury to render a verdict accordingly. But when there is conflict in the testimony such as to warrant reasonable men to draw different conclusions, questions of negligence and contributory negligence are primarily for the jury. Applying this well settled principle to the vigorously disputed facts of this case, we are satisfied that the court committed no error in refusing to decide as matters of law questions of negligence and contributory negligence, as it is clear that under the facts of the case these issues were susceptible of decision only after certain facts, such as the relation of the intestate to the carrier, the warning given, if any, and its sufficiency, had first been determined by the jury.

[3] This brings us to the question of the court's errors in charging the law. The defendant's complaint seems to be directed more to the court's refusal to accept its contention that the intestate was not a passenger than to the correctness of the law as charged upon the relation of carrier and passenger. But as we have found that the status of the intestate upon the defendant's premises was purely a question of fact, we are concerned only with the law as charged by the court upon the questions submitted to the jury. Of these the fundamental question was, whether the intestate, admittedly being upon the defendant's premises, was there as a passenger, a person upon a legitimate errand, or as a trespasser, and not knowing in which of these capacities the jury might find him, the court instructed the jury upon the law as to

each. In brief it defined the duty of the carrier to a trespasser as the duty to avoid willful injury; its duty to a stranger or one upon a legitimate errand as that of ordinary care; and its duty to a passenger to be care in a high degree; and directed the jury to apply this law as it found the fact. We discern no error in the law as stated and elaborated by the trial court.

[4, 5] The relation of carrier and passenger is created by no prescribed course of action. It is evidenced by conduct of the person in furtherance of his bona fide intention to board the carrier's train, and is complete when by that conduct he reasonably informs the carrier of that intention, and brings himself within the carrier's protection. But when the relation is established, (and it may be established when the passenger has reached the carrier's premises quite as well as when he has boarded its train) the passenger is entitled to receive from the carrier a high measure of care, that is, all the care which the peculiar circumstances of the place and occasion reasonably require, which will be increased and diminished according as the ordinary liability to danger and accident is increased and diminished in the movement and management of trains. MacFeat's Adm'rs v. P., W. & B. R. R. Co., 5 Pennewill (Del.) 52, 66, 62 Atl. 898.

[6] In exacting of a carrier a high measure of care for the protection of its passengers, varying in degree with the danger of the place and occasion, the law does not withdraw from the passenger all duty to exercise care for his own protection, but rather apportions between them the care which in a given situation should be exercised to avoid injury. Thus in Jewett v. Klein, 27 N. J. Eq. 550, the Court of Errors and Appeals of the State of New Jersey gave as the carrier's measure of care for a passenger about to cross a track to board a train on the next track the very highest degree of care, which included the duty not to move a train upon the track which the passenger was obliged to cross, and also prescribed for the passenger relatively the lowest measure of care by permitting him to assume that the carrier would do its duty, and relieving him of his customary duty to look for an approaching train. The degree of care required of both carrier and passenger varies, as we have said, with the circumstances, as where, in D., L. & W. R. R. Co. v. Price, 221 Fed. 848, 137 C. C. A. 406 (and in this case, if the intestate was a passenger), the passenger was subjected to a lesser danger than in Jewett v. Klein in crossing a track to get to the station to board a train on the opposite side. In such cases, questions whether or not the carrier was negligent and the passenger contributively negligent, have been held questions for the jury to determine on due consideration of the obligations of both the carrier and the passenger, as they arise from the peculiar dangers of the situation. Warner v. B. & O. R. R. Co., 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; Graven v. MacLeod, 92 Fed. 846, 35 C. C. A. 47; and C. & O. Ry. Co. v. King, 99 Fed. 251, 40 C. C. A. 432, 49 L. R. A. 102. This was precisely what the trial court instructed the jury in this case. We therefore find no error.

The judgment below is affirmed.

THE OCEANA.

(Circuit Court of Appeals, Second Circuit. May 25, 1917.)

No. 261.

1. MARITIME LIENS ⊂⊃21—CONTRACT FOR CONDITIONAL SALE OF VESSEL—COVENANT AGAINST LIENS.

   A contract for the sale of a vessel provided that until fully paid for the purchaser should keep it clear of liens, "and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser." *Held*, that the provision for bonding was not a permission to create liens, but one added out of abundant caution.

2. MARITIME LIENS ⊂⊃21—LIENS FOR REPAIRS AND SUPPLIES—FEDERAL STATUTE.

   Under Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1916, §§ 7783–7787), which gives a lien for repairs, supplies, and other necessaries furnished to a vessel on order of the owner or certain others, including any person intrusted with the management of the vessel in the port of supply, subject to the exception that no lien shall be conferred where "the furnisher knew or by the exercise of reasonable diligence could have ascertained" that the person ordering was without authority to bind the vessel therefor, one furnishing repairs or supplies on the order of persons intrusted with the management of the vessel is under no duty to search the records to ascertain the ownership of the vessel or the authority of such person.

3. MARITIME LIENS ⊂⊃21—LIENS FOR REPAIRS AND SUPPLIES—PURCHASES BY PERSONS INTRUSTED WITH MANAGEMENT OF VESSEL.

   The owner of a steamship made a contract for her conditional sale, providing that the purchaser should create no liens thereon until final payment. While the vessel was still in the seller's yard, and before formal delivery, agents of the purchaser were allowed to take actual charge, and to order repairs and supplies to fit her for service, and after her actual delivery and removal other repairs and supplies were procured, but not paid for, also with the knowledge of the seller, which afterwards retook possession for breach of the contract. *Held*, that all persons so furnishing repairs and supplies, whether before or after formal delivery of the vessel, without knowledge or notice of the contract of sale, were entitled to liens therefor.

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

Consolidated suits in admiralty to enforce maritime liens against the steamship Oceana; the Morse Dry Dock & Repair Company, claimant. Decree for certain of the libelants, and claimant and the Kniffin & Demarest Company appeal. Modified and affirmed.

For opinion below, see 233 Fed. 139.

Macklin, Brown & Purdy, of New York City (Pierre M. Brown, of New York City, of counsel), for appellant claimant.

Ralph James M. Bullowa, of New York City, for appellant Kniffin & Demarest Co.

Robinson Leech, of New York City, for appellees Maryland Coal & Coke Co. and W. & A. Fletcher Co.

Burlingham, Montgomery & Beecher, of New York City (E. Curtis Rouse, of New York City, of counsel), for appellees Samuel E. Hunter and others.

James W. Prendergast, of New York City, for appellees F. W. Devoe and C. T. Reynolds Co.

Russell T. Mount, of New York City, for John Wanamaker.

Alexander & Ash, of New York City, for appellees Burns Bros., Frank W. McKee, and Mutual Steam Laundry Co.

Julius Offenbach, of New York City, for appellees A. Silz, Inc., and others.

House, Grossman & Vorhaus, of New York City (Moses H. Grossman and Charles Goldzier, both of New York City, of counsel); for appellee J. & J. Eager & Co.

Carter & Carter, of New York City (Peter S. Carter, of New York City, of counsel), for appellees John Campbell and Susan M. Stewart.

Blumenstiel & Blumenstiel, of New York City (Abraham S. Arnold, of New York City, of counsel), for appellee Anheuser-Busch Agency.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. December 5, 1914, the steamer Oceana, while in their yard for overhauling, was sold by the owners, the Morse Dry Dock & Repair Company, to the Bermuda American Steamship Company, Limited. In accordance with the agreement of sale the bill of sale was deposited in escrow in the Columbia Trust Company, to be delivered only upon performance by the vendee of certain of the covenants in the agreement. It never was delivered, because the vessel was retaken by the Morse Company on account of the failure of the vendee to perform these covenants.

Between December 10, 1914, and March 8, 1915, a large amount of repairs, supplies, and other necessaries were furnished on the order of the Bermuda Company, although title was in the Morse Company by bills of sale duly recorded in the United States custom house for the port of New York, which was the home port of the vessel.

[1] The agreement of sale contained, among others, the following covenant by the vendee:

"(5) Until said ship is completely paid for, the purchaser covenants as follows:

"(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted, the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills for supplies and repairs to said ship, and exhibit at reasonable times the ship's accounts and bills to seller's representatives."

The libelants contend that this provision as to bonding is an authority to the vendee to create liens; but we regard it, on the contrary, as a prohibition added out of abundant caution.

On and after December 10th, while the vessel was still in the vendor's yard, the vendee was allowed by the vendor to take possession and fit her out at a cost of some $12,000, but she was not actually delivered to the vendee and removed from the yard until December 25th.

Sixty-nine different libels have been filed against the steamer in rem, which were consolidated in the present suit; the Morse Company, claimant, giving a stipulation in the sum of $100,000 to pay all awards to the libelants, with costs. Judge Veeder referred the claims to James K. Symmers, Esq., as special commissioner, who sustained the claims

of such of the libelants as did not know that the Bermuda Company was a conditional vendee, or who had asked the officers or agents of that company as to its connection with the steamer and been told that it was absolute owner, and who furnished repairs and supplies after December 25, 1914, the date of the actual delivery of the vessel.

He disallowed claims of certain of the libelants on the ground that they had notice sufficient to put them on inquiry as to the nature of the Bermuda Company's interest in the vessel. The District Judge sustained exceptions to the commissioner's finding that there could be no lien for repairs and supplies furnished before December 25, 1914. Evidently by inadvertence he included in this category the claim of the W. & A. Fletcher Co., $173.27 of which was disallowed by the commissioner for a different reason, viz., that they were for articles furnished, not to the steamer, but to the pier.

The Morse Company, claimant, has assigned error to the decree in allowing any of the claims, and Kniffin & Demarest Company have assigned error for dismissing their libel. The sole question is whether the court has rightly applied the act of Congress of June 23, 1910, the applicable sections of which are:

"1. Any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"2. The following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"3. The officers and agents of a vessel specified in section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

Obviously the act was passed in restriction of the rights of vessel owners and in the aid of those who furnish repairs, supplies, and other necessaries. It wiped out all difference between foreign and domestic vessels, and between repairs, supplies, and other necessaries furnished in the home port, as distinguished from those furnished in foreign ports, and between such as were ordered by the master and such as were ordered by the owners. It created a presumption of law of the vessel's liability for all repairs, supplies, and other necessaries ordered by the master, managing owner, ship's husband, charterer, any person to whom the management of the vessel is intrusted at the port of supply, owner pro hac vice, and conditional vendee. There is an exception in favor of the vessel owner, relied upon by the claimant in this suit, in the case of repairs, supplies, or other necessaries ordered by a charterer or conditional vendee, who has no authority to bind the vessel, provided the repair and supply men knew, or ought with reasonable

diligence to have learned, that the charter or conditional agreement of sale deprived the charterer or vendee of this authority.

[2] While it is true that an examination of the records of the custom house at this port would have disclosed the fact that the Morse Company, and not the Bermuda Company, was the owner of the steamer, knowledge of which fact would require the libelants to make further inquiry, we do not see any ground for holding that reasonable diligence required them to make any such search. They were entitled to a lien without giving credit to the vessel, and they were entitled to treat those intrusted with her management as authorized to order repairs, supplies, and other necessaries which would be secured by such a lien. It lay upon the claimant to show some fact or circumstance which would have put these libelants on inquiry, and it has not done so. This is the view taken by Judge Rose in The City of Milford (D. C.) 199 Fed. 956, and by the Circuit Court of Appeals for the Third Circuit in the case of The Yankee, 233 Fed. 919, 147 C. C. A. 593.

The claimant puts great stress on the decision of the Supreme Court in The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, made long before the passage of the act of 1910. It is not applicable. In that case the least inquiry would have disclosed the fact that the company operating the steamer was a charterer bound to pay for coal; but the libelant supplied coal, not on the order of the master, but of the company, without making any inquiry whatever. If he relied for his lien upon the New York statute, we have held that it would be necessary for him to prove that he gave credit to the vessel. The Electron, 74 Fed. 689, 21 C. C. A. 12. This he could not do.

[3] We agree with Judge Veeder that the Bermuda Company was a person intrusted with the management of the steamer within the meaning of section 2 of the act, while she was lying in the vendor's yard, and that repairs, supplies, or other necessaries furnished between December 10th and 25th, when she was actually delivered and removed, are as much entitled to a lien as those furnished subsequently. We also concur with his finding, and that of the commissioner, that Kniffin & Demarest Company had sufficient notice to put them on inquiry, and that therefore their libel was properly dismissed.

The decree, modified by making the claim of the W. & A. Fletcher Company $17.70, with interest from January 30, 1915, is affirmed, with interest and costs; the latter only to those appellees who have filed briefs.

MENASHA WOODEN WARE CO. v. SOUTHERN OREGON CO. et al.

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

No. 2852.

1. COURTS ⇐312(1)—FEDERAL COURTS—JURISDICTION—SUITS BY ASSIGNEE.
In a suit by plaintiff's assignor to restrain the sale of land for taxes pending a suit by the government to forfeit the title to the lands, a temporary injunction was granted on condition that plaintiff's assignor pay into court the amount of the taxes. Plaintiff advanced to its assignor the sum of $35,000, and the assignor drew checks aggregating the amount

of the taxes and delivered them to the clerk of the court, who indorsed them to the county treasurer. *Held*, that an action brought after the dismissal of such suit to recover the money so paid the clerk of the court was one for money had and received, and not one to recover upon a promissory note or other chose in action, within Judicial Code, § 24 (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St, 1916, § 991]), providing that District Courts shall not have cognizance of any suit to recover upon any promissory note or other chose in action in favor of any assignee unless such suit might have been prosecuted in such court if no assignment had been made.

2. PLEADING ⊜204(3)—DEMURRER TO COMPLAINT GOOD IN PART.
In any event, the complaint stated a good cause of action for the $35,000 advanced by plaintiff, and, as the demurrer to the complaint was general, it was properly overruled.

3. COURTS ⊜497—CONFLICTING JURISDICTION—PROPERTY IN CUSTODY OF THE LAW..
Pending a suit by the government to forfeit the title to land, the landowner brought a suit to restrain the sale of the land for taxes, and an order was granted restraining such sale temporarily and requiring the plaintiff to pay to the clerk of the court the amount due as taxes, and the tax collector to deliver to the clerk of the court proper tax receipts for such taxes, and providing that the clerk should hold such money and tax receipts until the final determination of the government's suit, and that, upon such final determination, if the land should be held to be the property of the government the money should be returned to plaintiff, but if it should be therein decided that the land did not belong to the United States then the money should be paid to the defendant unless the court should meanwhile order otherwise. The plaintiff paid the money into court, but the tax receipts were never deposited. The suit was subsequently dismissed and the judgment of dismissal affirmed. *Held* that, the temporary injunction having been granted and continued in effect for a year because of plaintiff's deposit of the money in court, it was too late for him to contend that the order was conditional and that the money was never in the custody of the law because the tax receipts were not deposited.

4. COURTS ⊜497—CONFLICTING JURISDICTION—PROPERTY IN CUSTODY OF THE LAW.
The money having been deposited in court to await final determination of the government's suit, and it not appearing that there had been any such final determination, the money was still in the custody of the law notwithstanding the dismissal of the suit in which it was ordered deposited, and plaintiff could not sue in a federal court for its recovery, but should apply to the court in which the fund was deposited for the return of the money.

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit by the Menasha Wooden Ware Company against the Southern Oregon Company and others. The complaint was dismissed on demurrer, and plaintiff brings error. Affirmed.

Action at law to recover the sum of $24,752.62 and the sum of $38,863.26, aggregating $63,615.88, which sums had been paid to the clerk of the circuit court of the state of Oregon for Coos county, in accordance with an order of that court, by the Southern Oregon Company, plaintiff's assignor, and deposited by the said clerk in the Flanagan & Bennett Bank to the credit of T. M. Dimmick as county treasurer. Defendants demur. Demurrers sustained, and amended complaint dismissed. Plaintiff brings this writ of error.

On April 17, 1916, plaintiff filed its amended complaint in the United States District Court for the District of Oregon, alleging substantially as follows:

That on July 2, 1912, the defendant Southern Oregon Company, claiming to

own certain lands in Coos county, Or., filed its bill of complaint in the circuit court of the state of Oregon for Coos county, against W. W. Gage, as sheriff and tax collector of Coos county, alleging that Gage was about to advertise and sell the lands for delinquent taxes. That it was further alleged in said bill of complaint that on March 3, 1869 (chapter 150, 15 Stat. 340) Congress passed an act granting to the state of Oregon said lands to aid in the construction of a wagon road from the navigable waters of Coos Bay to Roseburg in the state of Oregon; that on October 22, 1870 (Laws 1870, p. 40) the Legislative Assembly of the state of Oregon transferred said grant and the lands included therein to the Coos Bay Wagon Road Company; and that the Southern Oregon Company was the successor in interest of the Coos Bay Wagon Road Company and succeeded to the title of said company in said lands. That it was further alleged in said bill of complaint that the United States of America had brought suit against the Southern Oregon Company to forfeit the title to all said lands and revest the same in the government; that because of said suit the Southern Oregon Company could not safely pay the taxes; and that by virtue of the provisions of sections 3693 and 3694, Lord's Oregon Laws, Gage was about to advertise all said lands for sale for delinquent taxes and was about to issue tax delinquency certificates against all said property, which certificates might be foreclosed as provided by section 3695, Lord's Oregon Laws, and such title as the Southern Oregon Company had in said property would be sold.

That on July 3, 1912, the circuit court made an order restraining the defendant W. W. Gage as prayed for in said suit, and further ordering "that upon the payment to the clerk of this court by the plaintiff, the amount of money shown by the tax rolls of Coos county, Or., to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage, as tax collector for said county, shall also deliver to the clerk of this court proper tax receipts for such taxes, and the said clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America v. Southern Oregon Company now pending in the Circuit Court of the United States for the District of Oregon, Ninth Judicial Circuit, in whatever court said case may be finally determined; and upon such final determination, if the real estate described in the complaint shall be held to be the property of the United States, then said money so deposited to the clerk shall be returned to the plaintiff; but, if it be therein decided that said real estate does not belong to the United States, then said money shall be paid over by the court to the defendant herein, unless it shall meanwhile otherwise be ordered by this court."

That on March 15, 1913, the defendant Southern Oregon Company in compliance with the terms of said order drew its check payable to the order of James Watson, who was then county clerk, for the sum of $24,752.62, which check was duly certified by the Flanagan & Bennett Bank and delivered to the said James Watson, then county clerk. That James Watson, on July 5, 1913, without having any authority so to do, indorsed said check for payment to T. M. Dimmick, county treasurer, who on the same day presented the check for payment to the defendant Flanagan & Bennett Bank and the same was duly paid. That plaintiff is informed and believes that the defendant Flanagan & Bennett Bank has, without authority from plaintiff or the Southern Oregon Company, or at all, so to do, credited said sum of $24,752.62 on its books to the defendant T. M. Dimmick on his account with said bank as county treasurer. That said sum of $24,752.62 and the whole thereof has remained intact in the possession of said bank since March 15, 1913, and that said bank received the same as above set out to the use and benefit of the Southern Oregon Company, defendant, and the plaintiff as assignee of said Southern Oregon Company, and that any claim of defendant T. M. Dimmick to have any interest in said money is entirely unfounded.

That on March 31, 1914, plaintiff advanced and furnished to the defendant Southern Oregon Company, to be used by it in complying with the terms of said order of court and for no other purpose, the sum of $35,000, which money was deposited by plaintiff to the credit of the Southern Oregon Company in the Flanagan & Bennett Bank. That at that time the defendant Southern

Oregon Company had to its credit in the said bank the sum of $3,863.26 in addition to the said sum of $35,000, and it accordingly drew its check on the said bank in favor of James Watson, who was then county clerk, for the sum of $38,863.26, in compliance with the terms of the said order of court. That James Watson, without having any authority so to do, indorsed and delivered said check to T. M. Dimmick, county treasurer, and the latter indorsed it to the defendant bank who paid the same. That plaintiff is informed and believes that the defendant bank has, without any authority from plaintiff or said Southern Oregon Company, or at all, so to do, credited said sum of $38,863.26 on its books to the defendant T. M. Dimmick on his account with said bank as county treasurer. That said sum of $38,863.26 and the whole thereof has remained intact in the possession of said bank since March 31, 1914, and that said bank received the same as above set out to the use and benefit of the Southern Oregon Company, defendant, and the plaintiff as assignee of said Southern Oregon Company as to said $3,863.26, and directly for the use and benefit of the plaintiff as to said $35,000 above set out; and that any claim of defendant T. M. Dimmick to have any interest in said money is entirely unfounded.

That neither the said W. W. Gage, as tax collector of said Coos county, Or., nor said A. Johnson, Jr., as tax collector of said Coos county, Or., ever delivered to the clerk of Coos county any tax receipt or receipts for any taxes referred to in the complaint in said suit of Southern Oregon Company v. W. W. Gage.

That on July 3, 1914, the circuit court sustained the demurrer to the bill of complaint, filed by the defendant W. W. Gage, and, plaintiff not desiring to amend or plead further, entered an order dismissing the suit and vacating, setting aside, and revoking the temporary injunction and restraining orders theretofore issued in the case; but no order was made therein disposing of the moneys which had been paid in pursuance of the order aforesaid to the clerk of said circuit court. From this judgment an appeal was taken to the Supreme Court of the state of Oregon, where the judgment was affirmed.

That on November 30, 1915, the defendant A. Johnson, Jr., as sheriff and tax collector of Coos county, Or., issued to Coos county certificates of delinquency for the delinquent taxes for 1909 on all said property, except six small pieces upon which certificates were issued to private parties in accordance with the provisions of section 3698, Lord's Oregon Laws, and Coos county, on March 29, 1916, filed its complaint in the circuit court of the state of Oregon for Coos county against the defendant Southern Oregon Company to foreclose all said certificates of delinquency and to sell all said lands to satisfy the same, which suit is now pending.

That long prior to November 10, 1915, the defendant Southern Oregon Company duly assigned to plaintiff whatever interest it might be said to have in the sums of money so deposited with the defendant Flanagan & Bennett Bank to the credit of the defendant T. M. Dimmick, and duly authorized plaintiff to apply to said defendant bank, or to any person having possession of said moneys, or any of them, and to demand the return and repayment of the same. That due notice of this assignment was given to the Flanagan & Bennett Bank, Robert R. Watson, and T. M. Dimmick. That on November 10, 1915, plaintiff and the defendant Southern Oregon Company demanded of the last-named defendants the return of all said moneys, which was refused.

A general demurrer to the amended complaint was filed on behalf of defendants, which demurrer was sustained by the court and the amended complaint dismissed. Plaintiff alleges error.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for plaintiff in error.

Teal, Minor & Winfree, of Portland, Or., for defendant in error Flanagan & Bennett Bank.

L. A. Liljeqvist, of Marshfield, Or., for defendants in error Coos County and others.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. There is a preliminary question of jurisdiction of the subject-matter of this action in the District Court raised by the defendant Flanagan & Bennett Bank. The suit in which the money in controversy was deposited with the clerk of the court was brought by the Southern Oregon Company, a corporation organized and existing under and by virtue of the laws of the state of Oregon. The other parties to that action were citizens of the state of Oregon. The Southern Oregon Company could not bring that suit in a federal court in Oregon because of a lack of diverse citizenship in the parties to the suit. The plaintiff in this case is a corporation organized and existing under the laws of the state of Wisconsin, and invokes the jurisdiction of the federal court on the ground of diverse citizenship. The objection to the jurisdiction of the District Court was raised by general demurrer to the complaint, and is based upon the first paragraph of section 24 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1091), which provides, among other things, that:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

[1] The obvious answer to this objection of jurisdiction is that this is not a suit to recover upon any promissory note or other chose in action, but is for money had and received. The order of the court under which the money in controversy was deposited with the clerk of the court provided:

"That upon the payment to the clerk of this court by the plaintiff, the amount of money shown by the tax rolls of Coos county, Oregon, to be due from the plaintiff as taxes upon the lands assessed to the plaintiff as owners, the defendant W. W. Gage as tax collector for said county shall also deliver to the clerk of this court proper tax receipts for such taxes, and the said clerk shall hold and retain said money and tax receipts until the final determination of the case of the United States of America v. Southern Oregon Company."

The Southern Oregon Company, the plaintiff in that case, assigned its interest in that money to the plaintiff in this case.

The recital in the complaint in this case that the "Southern Oregon Company, in compliance with the terms of said order of court, drew its check payable to the order of James Watson, who was then county clerk, for the sum of $24,752.62, which check was duly certified by said Flanagan & Bennett Bank and delivered to the said James Watson, then county clerk," is simply a statement of the method adopted by the Southern Oregon Company for depositing the money with the clerk of the court; but it is wholly immaterial how the money was deposited. It is sufficient that the money was deposited and is held by the clerk of the court, or by the county treasurer subject to the order of the court.

[2] There is a further answer to this objection, that the check mentioned in the complaint and another for $3,863.26 of the same character do not account for all the money deposited with the clerk.

There remains $35,000 furnished by this plaintiff to the Southern Oregon Company in making up the total money deposited, amounting to $63,615.88. The complaint therefore states a cause of action for the $35,000, to which the objection does not apply, and, as the demurrer is general, it was properly overruled.

But we place our decision upon the ground that the suit is not open to the objection that the subject-matter is within the prohibition of section 24 of the Judicial Code.

[3] 2. It appears that the tax collector of Coos county did not deliver to the clerk of the court the tax receipts referred to in the order of the court, to be held by the clerk, with the corresponding amount of money deposited by the plaintiff, until the final determination of the case in the federal court. It is contended by the plaintiff that the order of the court was made conditional upon the tax collector depositing these tax receipts with the clerk, and, until that was done, it was merely an offer of the Southern Oregon Company to deposit the money in court, provided the tax collector deposited the tax receipts; and that the offer of the plaintiff could be withdrawn at any time until acceptance, and, as it was never accepted, the money was never in custodia legis.

The answer to this contention is that the order was not conditional, and that the money was in fact deposited with the clerk of the court and was treated by the court as a deposit pursuant to the order of the court, and it was upon this deposit supporting plaintiff's petition that the court issued its temporary order and injunction against the tax collector, and it was upon the security of this deposit that the temporary injunction was continued in effect for a year. The failure of the tax collector to deposit the tax receipts did not prejudice the plaintiff in any manner, or prevent it from having the temporary injunction and the case finally determined upon the merits. It is too late now, after the deposit has served its purpose, to claim that the order was not conditional, and that the money was not deposited with the clerk pursuant to the order of the court.

[4] 3. The next question to be considered is the defense that the money deposited with the clerk of the state circuit court in the suit of the Southern Oregon Company against the tax collector of Coos county, Or., is in custodia legis. The plaintiff contends that, when that suit was dismissed, the money ceased to be in custodia legis and became subject to process in this suit.

The objection which the plaintiff in that case had to the payment of the taxes was that the United States government claimed that there had been a breach of a condition of the grant under which plaintiff claimed title to the lands and had instituted a suit to have the lands forfeited for such breach, and it was alleged that if the government was successful in its suit the plaintiff would not only lose the lands but the taxes it might pay. To avoid this alleged hardship, the plaintiff deposited the amount of the taxes with the clerk of the court upon condition that, if upon the final determination of the government's suit it should be held that the lands were the property of the United States, then the money so deposited with the clerk should be returned

to the plaintiff; but, if it should be held that the lands did not belong to the United States, then the money so deposited with the clerk should be paid over to defendant, "unless it shall meanwhile otherwise be ordered by this court."

The defendant demurred to the complaint; the court sustained the demurrer; and, the plaintiff electing to stand on the complaint, the court dismissed the suit. On appeal to the Supreme Court of the state, the judgment of the circuit court was affirmed (Southern Oregon Co. v. Gage, 76 Or. 427, 147 Pac. 1199, 149 Pac. 472); the Supreme Court holding that, the plaintiff having the record title to the lands and being in possession of them claiming to be the owner, the assessor was required by law to list them for taxation as the property of the plaintiff, and, until a forfeiture was judicially declared, the plaintiff was in fact the holder of the legal title to the lands. It was said, further, that if the United States should succeed in having a forfeiture declared, one of the results would be that the lands would be restored to the public domain and would thereafter be nontaxable; but that, it was said, would be a mere incident of the suit and not the object of it.

The money deposited with the clerk of the court by the plaintiff was to abide the determination of the suit brought by the United States to forfeit the lands, and was therefore money placed in custodia legis; and, as the case brought by the United States does not appear to have been finally determined, the money remains in custodia legis in accordance with the terms under which the deposit was made, unless we accept the contention of the plaintiff that the dismissal of the suit in which the deposit was made has ended the litigation. But as no order has been made by the court in that suit disposing of the moneys deposited with the clerk, and no application appears to have been made by the plaintiff for such an order, we do not see how we can hold that the litigation is ended. It still remains for the court to hold the money subject to the terms under which the deposit was made, namely, to abide the final determination of the government's suit, "unless it shall meanwhile otherwise be ordered by this court"; that is to say, unless in the meantime the proceedings in the suit in which the deposit was made should require some other order by the court respecting its disposition. It seems to us that, the suit having been dismissed, this contingency has arrived and the matter should be submitted to that court for an appropriate order.

"The court in which a fund has been deposited has power to order distribution of it; and when jurisdiction is once obtained it is not lost either by the abatement of the suit, or by the dismissal of the bill. * * * The court in which the fund is deposited has exclusive jurisdiction of the question of the right to the moneys, and all claims against the deposit must be asserted there." 13 Cyc. 1038.

This conclusion disposes of the controlling questions in the case and determines that the court below was right in dismissing the complaint upon the issues presented.

The judgment is affirmed.

MENASHA WOODEN WARE CO. v. SOUTHERN OREGON CO. et al.

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

No. 2851.

In Error to the District Court of the United States for the District of Oregon; R. S. Bean, Judge.

Suit by the Menasha Wooden Ware Company against the Southern Oregon Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Dolph, Mallory, Simon & Gearin, of Portland, Or., for plaintiff in error.

W. U. Douglas, of Marshfield, Or., for defendant in error First Nat. Bank of Coos Bay.

L. A. Liljeqvist, of Marshfield, Or., for defendants in error Coos County and others.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. The facts in this case are substantially the same as in case No. 2852, just decided (244 Fed. 83, — C. C. A. —), the differences consisting mainly in the amounts involved and the name of the bank upon which the checks were drawn for the amounts deposited with the clerk of the court. These differences are immaterial in determining the questions presented to this court.

For the reasons stated in case No. 2852, the judgment is affirmed.

D'OLIER ENGINEERING CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. April 9, 1917. Rehearing Denied August 28, 1917.)

No. 2108.

COMPROMISE AND SETTLEMENT ⇐19(1)—ANNULLING SETTLEMENT—MISTAKE.

Where the contract for furnishing and installing boilers for the government made the price to be paid to depend in part on their efficiency, to be demonstrated by tests made by a government representative, an executed settlement cannot be avoided, and overpayment recovered on the ground of mistake in the test; he having acted in good faith, and the parties having accepted such action in good faith and made it the partial consideration for a settlement of other differences between them.

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

Action by the United States against the D'Olier Engineering Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

William B. King and George A. King, both of Washington, D. C. (P. F. Rothermel, Jr., of Philadelphia, Pa., of counsel), for plaintiff in error.

John H. Hall and Thomas Ross, Asst. U. S. Attys., and Francis Fisher Kane, U. S. Atty., all of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the United States brought an action at law against the D'Olier Engineering Com-

pany, to recover an alleged mistakenly made overpayment in settlement of a contract for furnishing and installing boilers for the Panama Canal. Trial by jury having been waived, the case was heard by a judge, who entered judgment for the government for the full amount of its claim. Thereupon the defendant took this writ of error. The opinion of the court below is reported in (D. C.) 215 Fed. 209. The proofs in the case tended to show that having been the accepted bidder on proposals submitted by the government, the D'Olier Engineering Company, hereafter called the contractor, on November 7, 1907, entered into a contract with the United States, represented by the Isthmian Canal Commission, to furnish and install two large boiler plants at Gatun and Miraflores. By such contract the contractor guaranteed:

"Each boiler to develop the nominally rated horse power of not more than five (5) per cent. above, at an efficiency of seventy-two (72) per cent., and a capacity for evaporation of 17,000 pounds of water per hour under the conditions of the test prescribed in paragraph 4 of the specifications, under item 1 of circular 444."

The test of this guaranty was an official one, provided for by article XI of the contract as follows:

"Article XI. As soon as practicable after erection of the respective plants on the Isthmus, and before acceptance, provided the boilers shall have successfully withstood the preliminary tests called for herein or in the specifications, there shall be conducted on at least one boiler of said plant an official test made by the engineer of the Commission in charge or his deputy designated for the purpose and an official representative of the contractor, the expense of said test to be borne by the Commission, and the same to be conducted under the conditions described in paragraph 4 of the specifications given under item 1 of circular No. 444."

The price of the boilers was fixed by article XII, which is as follows:

"The price of the boilers as given in article I is based upon an efficiency of sixty-five (65) per cent. developed by the test provided in article XI. Should the said test demonstrate that the efficiency falls short of sixty-five (65) per cent., there shall be deducted from the price of the entire plant to which the test applies one thousand dollars ($1,000) for each reduction of one below the said efficiency percentage and a proportionate amount for any fractional part of said reduction, fractions being carried to the second place of decimals. Should the said test demonstrate that the efficiency exceeds sixty-five (65) per cent., there shall be added to the price of the entire plant to which the test applies, one thousand dollars ($1,000) for each increase of one above the said efficiency percentage and a proportionate amount for any fractional part of said increase, fractions being carried to the second place of decimals. Should the efficiency developed by the said test fall below sixty (60) per cent., the contractor may be required to remove the boilers composing the plant and install, without extra cost to the Commission, boilers of the required efficiency. The boilers first installed will be used by the Commission until the substitutes have been installed, tested, and found to comply with this contract."

The scope of the test is shown by the fact that if the boilers fall below the required test, the contractor could be required to remove them and construct others of the required efficiency. The nature of the test was fixed by article XIV of the contract, which provides as follows:

"All questions relating to final inspection and acceptance of the plants or materials to be supplied hereunder, or the failure of the said plants or materials to comply with the specifications, or default in the time of delivery or

performance, or damages sustained by the Commission by reason of the failure of the contractor to comply with this agreement, shall be determined by the chairman of the Commission, or by any officer or deputy to whom the chairman may assign that duty; and such default or assessment of damages, when expressed in writing, shall be prima facie evidence of breach of contract and of the damages sustained by the Commission, and shall cast upon the contractor and his sureties the burden of showing that such finding or assessment of damages is unfair upon its face, or collusive, or was arrived at contrary to the provisions of this agreement."

It will thus be seen that the exclusive right to make the test and to determine the question of the fulfillment of the contract and its guaranties, was in the government, a situation akin to that of Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106, namely:

"The parties, however, concurred in designating a particular person, a chief quartermaster of the District of New Mexico, with power not simply to ascertain but to fix the distances which should govern in the settlement of the contractor's accounts for transportation."

The procedure provided by the contract was followed when the boilers were completed and ready for test. Such test was made on behalf of the government by one Schildhauer, representing the government, and in the presence of Lafore, the representative of the contractor. Both of these men joined in a report to George W. Goethals, the chairman and chief engineer of the Isthmian Commission, who, as provided by article XIV of the contract, either by himself or by any officer or deputy to which he might assign that duty, at the final inspection and acceptance of the plant, had the right to determine "all questions relating to final inspection and acceptance of the plants." Having received this report, Col. Goethals took up the question of closing the contract, and with the expressed purpose of "closing up the contract" and preparing a report in such shape that the "general purchasing officer of the Commission can prepare the necessary supplemental agreements, if any are necessary, or take action in the matter of making final settlement," addressed the following letter:

"Lt. Col. W. L. Sibert, Division Engineer, Gatun, Lt. Col. C. A. Devol, Chief Quartermaster, Culebra. Mr. W. W. Warwick, Examiner of Accounts, Empire. Gentlemen: Closing up the contract with the D'Olier Engineering Company for boilers, etc., at Gatun and Miraflores requires consideration and recommendation on changes in the contract, interpretation of contract specifications, and various points of fact in connection with the time of delivery, completion and delivery of the plant.

"I have received a joint report from Mr. Schildhauer and Mr. Lafore, the latter being the representative of the contractor, and before forwarding the papers to the general purchasing officer in the United States it is desired that all matters at issue between the contractor and the Commission be considered and passed upon by a committee, which is, therefore, appointed with Mr. Warwick as chairman. Col. Sibert and Col. Devol will please appoint representatives to act on this committee with Mr. Warwick, who will appoint times and places of meetings. It is expected that Mr. Schildhauer will be called upon to give any further information desired in connection with this contract and the committee should also allow any representative of the contractor on the Isthmus to appear before it.

"It is desired that the committee's report be in such shape that the general purchasing officer of the Commission can prepare the necessary supplemental agreements, if any are necessary, or take action in the matter of making final settlement.

"Respectfully, Geo. W. Goethals, Chairman and Chief Engineer."

This committee, having "carefully considered the questions which have arisen in connection with the settlement under the contracts," reported four different items of credit and one of debit against the contractor, and further a charge against the contractor of a deduction of $1,500 for superheating. This report of the committee provided for the allowance fixed by the test made by Schildhauer, who, as stated by Col. Goethals, was to be called before the committee. This bonus allowance to the amount of $5,460 constitutes the alleged overpayment in this case. The report, which was in writing, stated:

"The committee finds that the plant at Gatun (similar report as to Miraflores) has been completed and has been in satisfactory operation for more than sixty days, that the required tests have been made, and that this plant is ready for final acceptance on the conditions hereinafter stated. After consideration of the claims of the contractor with reference to the Gatun plant, the committee recommends that the following items be allowed the D'Olier Engineering Company by the chairman and chief engineer, * * * for bonus under article XII of the contract of November 17, 1908; the boilers having shown an efficiency of 79.72 per cent., being an excess of efficiency of 14.72 per cent. over the required sixty-five (65) per cent., at a thousand dollars for each per cent., or fraction thereof, of excess efficiency $14,720."

On January 31st Col. Goethals transmitted this report to Capt. Boggs, general purchasing officer of the Isthmian Commission at Washington, stating:

"The findings of this Commission have my approval. You will please enter into supplemental contracts and make payment in accordance therewith."

In pursuance of this direction, the Isthmian Commission and the contractor, with the assent of its surety, entered into a supplemental agreement, dated the 28th of February, 1910, wherein, after reciting, inter alia, that:

"Whereas the boilers of the Gatun plant did develop an efficiency of 79.72 per cent., being an excess of efficiency of 14.72 per cent. over the 65 per cent. required under article XII of the contract of November 17, 1908; and whereas, the Gatun plant did develop the superheat required by the specifications," the contract provided:

"Now, therefore, in consideration of the above and of the acceptance by the Commission of the plant notwithstanding the ascertained deficiency in superheat, and the agreement by the contractor to a deduction of $1,500.00 from the contract price on account of such deficiency, it is hereby understood and agreed that final settlement for the Gatun plant shall be made as follows:

Original contract price for Gatun plant under contract of November 17, 1908	$60,335 00	
Additional under contract of February 10, 1909	4,708 00	
For six extra oil burners furnished	403 65	
For additional enameled brick furnished	21 92	
For furnishing vitribestos pipe covering and flue lining	2,340 00	
For bonus on the excess of 14.72 per cent. over the boiler efficiency of 65 per cent. required of the boilers of the Gatun plant at the rate of $1,000.00 for each per cent. of excess thereof	14,720 00	
		$82,528 57
Less amount which the contractor hereby agrees shall be deducted on account of deficiency in the superheat of Gatun plant	1,500 00	
Less amount previously paid	63,043 00	66,543 00
Balance		$15,985 57"

From the above facts, it will be seen: First, that the question of efficiency of the boilers was passed upon and determined by the United States in pursuance of exclusive authority so to do both by the engineer Schildhauer and by Col. Goethals acting by a designated committee; second, that this test was accepted and acted upon by the engineering company in making a supplemental contract, which conceded and surrendered a superheating claim it had against the government; third, that the settlement was made in good faith by all parties, who were ignorant of any mistake having been made in the boiler test.

Some months after the settlement was made and the money paid, it was discovered a mistake had been made in the intricate calculations involved in determining the efficiency of the boilers, and that the bonus of $14,720 should have been but $9,260. For this alleged difference of $5,460 in the Gatun plant and $6,883 in the Miraflores plant, in all for $12,343, this suit was brought.

It will thus be noted that this action at law while in form for the recovery of money mistakenly paid under the contract of November 17, 1908, is in reality the annulling of the settlement of February 28, 1910, so made by the parties, of all matters in dispute under said contract. This suit is not to enforce any contract, express or implied, but it seeks to invalidate a settlement contract that has already been performed, and that without either the willingness expressed or the power possessed to restore the parties to their previous status. By this suit the government forecloses and excludes all those equitable considerations and plastic powers which a chancellor could exercise were this a bill to rescind the agreement of settlement. In effect, this suit seeks to strike from such settlement the item of bonus which was favorable to the contractor, while it still leaves in force by the settlement the item of superheating charge made against the contractor. In other words, the plaintiff seeks an alleged equity of its own, while it omits to do equity to the contractor. Moreover, it is quite evident that the lapse of time, the destruction of data, and the scattering of witnesses and disappearance of proof, which would naturally ensue when a contract was performed such a distance abroad and so many years ago, might well deter a chancellor from now undertaking, even in a bill in equity, to work out the equities and rights originally involved in the contract. That a mistake was made may be conceded, but in the making of that mistake the contractor had neither part nor knowledge, for the test was by the contract made the sole and final act of the government. No question of bad faith is involved. It is quite evident that in closing up this contract, as stated by Col. Goethals, there was required consideration, interpretation, changes, and ascertainment of facts, and that it was "desired that all matters at issue between the contractor and the Commission be considered and passed upon by a committee, which is therefore appointed." This duty the committee fulfilled, with the result that a contract of settlement was thereafter made and performed. That the mistake made was not made by the committee itself, but by the report of those who made the test, in no way changes the principle of the finality of settlements here involved, for if the court has power to unsettle the committee's settle-

ment because of the mistake made by those who made the boiler test, undoubtedly the committee had power to decline to accept the boiler test as a finality and make the result of the test an element in its report, and indeed their attention was expressly called to that feature of their work, viz.:

"It is expected that Mr. Schildhauer will be called upon to give any further information desired in connection with this contract."

The parties having accepted the committee's action as a finality and settled on that basis, the law is averse to unsettling settlements, for to warrant rescission there must be a restoration of the status in quo (1 Black on Rescission, § 127, p. 360; Felin v. Futcher, 51 Pa. Super. Ct. 241; Bispham's Equity, 196), and a party cannot recover back a proportionate amount of a price (Rand v. Webber, 64 Me. 191). While cases and text-books have been cited showing that equity will rescind an unexecuted agreement in case of mistake, yet no case is shown to us where, after a settlement has been made and fulfilled, a party to that settlement can stand on the settlement, so far as it was in his favor, and disaffirm it in items that were against his interests. But apart from all these questions, we think the case is governed by Kihlberg v. United States, supra, for here, as there, the fixation of the item in question was, by the contract, left to the determination of a certain person, and he having acted in good faith and the parties having accepted such action in good faith and made it the partial consideration for a settlement of other differences between them, this court is justified in refusing to allow such settlement to be unsettled on the ground that a mistake was made by the person empowered by the contract to make the test.

The judgment entered below will therefore be vacated, and the cause remanded for further proceedings.

THE BENJAMIN NOBLE.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2967.

1. SHIPPING ⟸121(2)—LIABILITY FOR LOSS OF CARGO—"SEAWORTHINESS"—OVERLOADING.

Under the accepted rule that to constitute "seaworthiness" a vessel must be reasonably fit to carry the cargo which she has undertaken to transport, seaworthiness must be tested by the facts and circumstances of each particular case, and the capacity of the vessel and the tonnage of her cargo may be vital factors.

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

2. SHIPPING ⟸209(3)—LIMITATION OF LIABILITY—SEAWORTHINESS—BURDEN OF PROOF.

In a proceeding for limitation of liability against a claim for loss of cargo, it is incumbent on the shipowner to prove that the vessel was seaworthy at the beginning of the voyage or that due diligence had been

used to make her so, and in that respect there is no distinction between a common carrier and a private carrier.

3. SHIPPING ⟸141(4)—SEAWORTHINESS—EXCEPTIONS IN BILL OF LADING.
A provision of a bill of lading excepting dangers of navigation cannot be permitted to affect the requirement of seaworthiness under Harter Act Feb. 13, 1893, c. 105, § 2, 27 Stat. 445 (Comp. St. 1916, § 8030).

4. SHIPPING ⟸22—REPRESENTATION BY AGENTS—IMPLIED AUTHORITY.
A corporation shipowner is charged with knowledge of the extent of the power usually exercised by its ship manager, and is bound by his acts within such limits, even though such authority had not been given in express terms when he was employed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

In the matter of petition in admiralty of the Capitol Transportation Company, as owner of the steamer Benjamin Noble, for limitation of liability. From a decree denying limitation and establishing the claim of the Cambria Steel Company, petitioner appeals. Affirmed.

For opinion below, see 232 Fed. 382.

F. S. Masten, of Cleveland, Ohio, and Charles R. Hickox, of New York City, for appellant.

Lewis Adler & Laws, of Philadelphia, Pa., and Sherwin A. Hill, of Detroit, Mich. (Francis S. Laws, of Philadelphia, Pa., of counsel), for appellee.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The steamer Benjamin Noble and her entire crew and cargo were lost on Lake Superior in April, 1914. The Cambria Steel Company, as owner of the cargo, filed two libels in personam against the owner of the Noble, the Capitol Transportation Company, one in the District Court of the United States for the Eastern District of Pennsylvania, and the other in the District Court of the United States for the Northern District of Illinois, to recover the value of the cargo so lost. Later the Capitol Transportation Company, appellant herein, filed libel and petition in the court below, praying limitation of liability, and claiming under admiralty rule 56 (29 Sup. Ct. xlvi) the right to contest its liability to any extent whatever. Appellant, in lieu of appraisal and bond, elected to transfer all that was recovered from the Noble, to wit, a lifeboat and spare wheel, and its interest in the wreck if the same should be salved. Monition having issued, the Cambria Steel Company, appellee herein, filed its claim against appellant for loss of cargo, consisting of $2{,}951^{840}/_{2240}$ tons of steel rails there stated to be of the value of $96,418.85. On the same day appellee filed answer setting up among other things: Specific denial that appellant is entitled to limitation of liability; a contract whereby appellant agreed to transport and carry for appellee in one shipment a cargo of 3,000 tons of steel rails from the port of Conneaut, Ohio, to the port of Superior, Wis., at 80 cents per gross ton, the dangers of navigation, fire and collision excepted; and allegations to the effect that appellant with knowledge of the load the steamship could safely carry, but without any knowledge in that behalf on the part of appellee, offered to furnish the steamer Noble for the service in

contemplation, and upon its own responsibility afterwards loaded the steamer with the tonnage of rails lost, as stated, and thereupon undertook to carry the rails safely from the initial to the destined port mentioned. Upon trial, in which nearly all the witnesses testified before the court, decree was entered denying to appellant its claim to limitation of liability, and allowing recovery in favor of appellee and against appellant for the stipulated value of and damage to the cargo in the sum of $94,199.51, with interest at 5 per cent. per annum from April 28, 1914. The case is reported under the title of the Benjamin Noble, 232 Fed. 382. The decree is based on a finding that from the beginning of the voyage and within the knowledge of the owner the ship was unseaworthy in the sense that she was overloaded.

We see no sufficient reason to disturb this finding unless as counsel claim it was reached through erroneous application of the law. We cannot think it necessary to refer to all the criticisms of counsel; but we may, for illustration, refer to some:

[1] (1) It is said that the trial court held the Noble "overloaded on a basis unknown in law." The accepted definition of seaworthiness is whether the vessel is "reasonably fit to carry the cargo which she has undertaken to transport" (The Southwark, 191 U. S. 1, 9, 24 Sup. Ct. 1, 48 L. Ed. 65); and this test of course is one of fact, not of law. Seaworthiness is a relative term (The Thames, 61 Fed. 1014, 1022, 10 C. C. A. 232 [C. C. A. 4]), and usually involves an inquiry into the condition or capacity of the vessel, in connection with the nature or tonnage of the cargo; as, for instance, it has been held that the condition of a vessel made it unseaworthy for carrying meat (The Southwark, supra); likewise as to the carriage of flour (The Thames, supra); as to the carriage of grain (The Fitzgerald, 212 Fed. 678, 683, 129 C. C. A. 214 [C. C. A. 6]); and as to the carriage of asphalt (Dene Shipping Co. v. Tweedie Trading Co., 143 Fed. 854, 856, 74 C. C. A. 606 [C. C. A. 2]). This is true also of a vessel which is improperly ballasted with reference to the load it carries (The Whitlieburn [D. C.] 89 Fed. 526, 528, and Sumner v. Caswell [D. C.] 20 Fed. 249, 252, 253, decisions by Judge Addison Brown); so as respects an improper distribution or loading of the cargo (The Oneida, 128 Fed. 687, 689, 63 C. C. A. 239 [C. C. A. 2]; The G. B. Boren [D. C.] 132 Fed. 887, 888; The William Power [D. C.] 131 Fed. 136, 137); or overloading a particular part of a vessel (The Kate [D. C.] 91 Fed. 679, 680, per Judge Addison Brown). It must follow, if it is not obvious, that the capacity of a vessel and the tonnage of its cargo are likewise vitally related as respects the fact of unseaworthiness. In Cincinnati Firemen's Mutual Ins. Co. v. May, 20 Ohio, 212, 226, Chief Justice Hitchcock said: "That the overloading a vessel renders her unseaworthy, there can be no doubt." This is in accord with the rule laid down by Earle, C. J., in Foley v. Tabor, 2 F. & F. 663, 664, 665, 671, 672, by the Lord Chancellor, in Steel v. State Line Steamship Co., 3 App. Cas. 72, 77, and by Lord Wensleydale in 14 Moo. P. C. C. 471, 492, 497, 2 Arnould on Marine Ins. (7th Ed.) p. 814, § 717, and Parsons on Maritime Law, p. 137; and no decision to the contrary has come to our attention; indeed, the same rule is clearly implied in the provision of the Harter Act whch requires the owner to make his vessel

"seaworthy and capable of performing her intended voyage" (27 Stat. 445, § 2). It results that seaworthiness must be tested by the facts and circumstances of each particular case (see in addition to cases above cited Ins. Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 224, 21 Sup. Ct. 591, 45 L. Ed. 830); and the advantages derived in the court below through observation of the witnesses cannot be overlooked.

[2, 3] (2) Concerning the finding of unseaworthiness, it is objected that the trial court erroneously placed upon appellant the burden of proving that the ship was seaworthy with respect to her load; and it is said that this is so whether appellant be treated as a common carrier or as a private carrier. Counsel admit that the objection is of no great consequence in view of the fact that the record has been made; and as we interpret the record the burden was not in fact placed on appellant. True, in the course of the opinion, the trial judge stated that, "while the law places the burden of proving seaworthiness upon the petitioner in a case of this kind," yet he also stated that he "directed the claimant (appellee) to put in its full case, that then the petitioners (appellant) put in their case, and that then the claimant put in its rebuttal, and that course was pursued" (232 Fed. at page 389); and it conclusively appears that the objection is immaterial, since the court further found (390): "But there can be no question of doubt in this case, as the shipper by direct and convincing evidence has proved the unseaworthiness of the carrier." Apart from this, and upon the theory that the Noble was a common carrier, it was "incumbent upon the shipowner (appellant) to prove that the vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so" (The Wildcroft, 201 U. S. 378, 386, 26 Sup. Ct. 467, 468, 50 L. Ed. 794); and even if in considering the testimony the trial judge had been in doubt as to the ship's seaworthiness, the doubt should have been resolved in favor of the shipper, for the evidence clearly shows that appellee did not use due diligence to furnish a seaworthy vessel with respect to the load attempted to be carried (The Wildcroft, supra, at page 389 of 201 U. S., at page 467 of 26 Sup. Ct., 50 L. Ed. 794). The fact that the bill of lading contained a provision excepting "dangers of navigation, fire and collision" is not important. As Mr. Justice Day said in The Southwark, supra, 191 U. S. at pages 16, 17, 24 Sup. Ct. at page 6, 48 L. Ed. 65:

> "To permit the stipulations of this bill of lading to cut down the statutory requirements of section 2 of the Harter Act would be to allow the parties to enforce a contract in violation of the positive terms of the statute."

It is, however, urged that the Noble was not a common carrier, but a private carrier, since the whole cargo belonged to appellee and the boat was not running on regular routes nor held out as a common carrier; and consequently that she was not subject to the rule pointed out touching the burden of proof. Conceding, though it is not necessary to decide, that the Noble was a private carrier, the position of appellant is not changed; for, as we have seen, the burden of proof was not cast upon appellant. Furthermore, we see no reason for distinction between a private carrier and a common carrier as respects the question or the proofs as to seaworthiness, since the obligation of each to

furnish a seaworthy boat is the same. Sumner v. Caswell, supra, 20 Fed. at pages 251, 252; The Planter, 19 Fed. Cas. No. 11,207a, 807, 808, C. C. per Circuit Judge (afterwards Mr. Justice) Woods; The Royal Sceptre (D. C.) 187 Fed. 224, 227.

[4] (3) It is contended that, if the vessel was lost through overloading to the extent of unseaworthiness, the overloading was brought about by the master without appellant's privity or knowledge, and so furnishes no reason for denying limitation of liability. We must regard this contention as ruled by the decision of this court in Great Lakes Towing Co. v. Transp. Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769. It is a mistake to say that the master alone was responsible for the overloading. The corporation itself, through John A. Francombe, was cognizant of the overloading and in effect brought it about. It is stated in appellee's brief and without apparent contradiction that appellant's "only vessel property" was the steamer Noble; and this, with the further fact that appellant was in possession of the insurance proceeds, was conceded at the oral argument. These facts should be borne in mind in determining the relations between the appellant company and Francombe. It is clearly to be inferred from the evidence that Francombe was the sole manager of the steamer Noble; that appellant had employed him in that capacity; that he was invested with and he exercised the power of the corporation in selecting and employing the chief officers, such as the master and engineer, of the vessel, and in determining what contractual services the vessel should engage in; that he was held out by the company and was recognized by persons, such as brokers, dealing in respect of the ship and her services, as the person ultimately entitled in such matters to represent and bind the corporation. The initial arrangement for the carriage of the steel rails in question was held in abeyance until it received his ultimate approval; and even the master would not complete the loading of the rails until he first obtained the sanction and direction of Francombe. In short, it is not shown that final authority in the respects mentioned resided in any person except Francombe; and he may rightfully be treated as in fact the company's manager. Since the board of directors of the corporation must be presumed to have exercised a supervision over its business, the board is to be charged with knowledge of the extent of the power usually exercised by its ship manager and held to have acquiesced in his possession of such authority, even though it had not been given in express terms when he was employed as manager of the vessel. Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 650, 651, 22 Sup. Ct. 240, 46 L. Ed. 366; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 350, 11 N. W. 187. The language of Judge Severens in the Great Lakes Towing Case, supra, at page 21 of 155 Fed., at page 617 of 83 C. C. A., 22 L. R. A. (N. S.) 769, would therefore seem to be peculiarly apposite:

"The Mills Transportation Company, being a corporation, could act only through some agency. McMorran was the manager, and was vested with authority to make such contracts as this in behalf of the owner of the vessel, and the contract was the personal contract of the corporation, not in consequence of any principle peculiar to the maritime law, but by virtue of the common-law rules of agency."

Francombe sanctioned and in effect made the verbal contract of affreightment out of which the present controversy grew; and the contractual obligation so created was the personal contract of appellant. In our view of the evidence Francombe's knowledge that the steamer was overloaded is too clear for argument. It inevitably follows that this overloading took place with the privity and knowledge of appellant.

It is insisted, however, that even this is not enough to justify denial of limitation. Admittedly this view is opposed to the decision of this court in the Great Lakes Towing Case. This is true also of the decision in The Republic, 61 Fed. 109, 113, 9 C. C. A. 386 (C. C. A. 2); in The Annie Faxton, 75 Fed. 312, 313, 21 C. C. A. 366 (C. C. A. 9); in Benner Line v. Pendleton, 217 Fed. 497, 506, 133 C. C. A. 349 (C. C. A. 2); and in The Julia Luckenbach, 235 Fed. 388, 397, 148 C. C. A. 650 (C. C. A. 2), reversing decision below; also in Gokey v. Fort (D. C.) 44 Fed. 364, 365; Rudolf v. Brown (D. C.) 137 Fed. 106, 108, 109; and the same rule is recognized, though perhaps this was not necessary, in the decision of Richardson v. Harmon, 222 U. S. 96, 103 to 106, 32 Sup. Ct. 27, 56 L. Ed. 110, and in Butler v. Boston Steamship Co., 130 U. S. 527, 553, et seq., 9 Sup. Ct. 612, 32 L. Ed. 1017. It is said that these decisions are erroneous as regards the question of limitation, and consequently that the decision in the Great Lakes Towing Case should be reconsidered. The theory of this feature of the argument is that section 18 of Act June 26, 1884, c. 121, 23 Stat. 57 (Comp. St. 1916, § 8028), operated to repeal and supplant section 3 of Act March 3, 1851, c. 43, limiting the liability of shipowners (9 Stat. 635; Rev. Stat. § 4283 [Comp. St. 1916, § 8021]); in other words, that the purpose of section 18 was at least to eliminate from old section 3 the "privity or knowledge" clause. The same contention was made in this court in support of a petition for rehearing in the Great Lakes Towing Case and upon substantially the same argument as the one presented here; but rehearing was denied. It is stated that this question is pending in the Supreme Court in the case of Benner Line v. Pendleton, supra; but we are disposed to follow the decision in the Great Lakes Towing Case.

(4) Strenuous objection is made to the trial judge's estimate of the weight that should be accorded to some of the evidence concerning the overloading of the Noble, and of the credibility of some of the witnesses upon that subject and upon still other matters involved in the controversy. We need not recount all the objections. Counsel on both sides were alert and persistent in bringing out all facts and circumstances of seeming relevancy to the issues, and the court indulged counsel in this course to a liberal degree. At the close of the trial and when the demeanor of the witnesses and their testimony were fresh in mind, the judge delivered an oral opinion which shows that he had a full appreciation of the testimony. This opinion was subsequently reduced to writing and, apart from the introduction of citations, without change of any importance. In our view of the evidence we cannot accept the claims of appellant that some of the conclusions of fact reached by the trial judge are unsupported by the testimony, much less that they are opposed to the testimony. This would be to accept part of the testi-

mony, not the whole of it; it would be to substitute our estimate of credibility derived from the record for the impressions received by the judge who actually saw the witnesses and heard them testify. We are unanimous in the belief that no prejudicial error is shown as respects any of the conclusions of fact or law. The present opinion has been prepared in deference to the earnest contentions of counsel and in an effort to meet some of the more prominent contentions, rather than in the belief that a written opinion here is necessary.

The decree must be affirmed.

In re BRANTMAN.

(Circuit Court of Appeals, Second Circuit. July 6, 1917.)

No. 231.

1. CORPORATIONS ⟸152—DIVIDENDS—RIGHT OF ACTION.
   Ordinarily, a stockholder cannot maintain an action for a dividend not declared, but if directors unreasonably and wrongfully refuse or neglect to declare dividends when there are surplus profits out of which it may be declared and there is no good reason for their failure, a stockholder may, by bill in equity, compel declaration of a dividend.
2. CORPORATIONS ⟸152—DIRECTORS—DIVIDENDS.
   Courts will not undertake to control directors in the exercise of their discretion as to declaration of dividends, unless they act fraudulently, oppressively, or unreasonably.
3. BANKRUPTCY ⟸279—TRUSTEE—RIGHTS OF.
   The trustee of a bankrupt succeeds to the bankrupt's title to corporate stock and has the bankrupt's rights and remedies as respect dividends which have been declared, or which ought to have been declared, and so where corporate directors, to protect a bankrupt, failed to declare dividends, the trustee may maintain a suit to compel declaration of dividend.
4. BANKRUPTCY ⟸288(1)—REVIEW—WAIVER.
   Where the right of trustee in bankruptcy to proceed summarily against a corporation was not questioned in the trial court, any right of the corporation to demand that it should have been proceeded against by plenary suit was waived.
5. BANKRUPTCY ⟸288(1)—SUMMARY PROCEEDINGS—RIGHT OF BANKRUPT TO OBJECT.
   A bankrupt by filing his petition submits his estate for administration in the court of bankruptcy, and cannot object that the court proceeds summarily to determine his rights.
6. BANKRUPTCY ⟸305—PROCEEDINGS—PROFIT.
   In a summary proceeding by a trustee to compel the corporation which it was alleged, to fraudulently protect the bankrupt, withheld declaration of dividends to declare such dividends so that they would pass to the trustee, it is improper to direct an accounting, but an investigation as to profits applicable to dividends should be ordered.

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

In the matter of the bankruptcy of Jacob Brantman. Schoonmaker Bros. & Brantman, Incorporated, and Jacob Brantman petition to revise an order of the District Court. Modified.

This cause comes here on petition to review an order of the United States District Court for the Eastern District of New York, entered on January 1, 1917.

The petitioner Brantman was adjudicated a bankrupt on May 17, 1916, upon a voluntary petition in bankruptcy. He was at the time of this adjudication an officer and director of Schoonmaker Bros. & Brantman, Incorporated, a corporation organized under the laws of the state of New York, and was at that time the owner of one share of stock of the par value $100 in said corporation.

The petitioner Brantman scheduled this share of stock as an asset, and upon appointment of a trustee surrendered the share to the trustee. And at the hearing Brantman testified that in addition to his salary for services rendered he was entitled to one-third of the dividends when declared by the corporation. It appears that the corporation has never declared any dividends either before or since the adjudication of bankruptcy.

On November 17, 1916, the trustee in bankruptcy moved the court for an order directing the petitioners to pay to the trustee the sum of $2,000 representing one-third of the alleged profits earned by the petitioner Schoonmaker Bros. & Brantman, Inc.

The petitioners opposed the application on the ground that the court had no jurisdiction to determine in a summary manner the questions involved, and upon the further ground that Schoonmaker Bros. & Brantman, Incorporated had not earned the sum of $6,000 or any other sum whatsoever in profits from the time of its incorporation to the date of the adjudication in bankruptcy. And on January 1, 1917, the District Judge made an order directing the petitioners to turn over to the trustee one-third of any sum which might be shown to have been earned by Schoonmaker Bros. & Brantman, Incorporated, and referring the proceeding to a special master to examine, take testimony and report as to the amount due.

H. & J. J. Lesser, of New York City, for petitioner bankrupt.

Thomas P. Hall, of New York City, for petitioner Schoonmaker Bros. & Brantman, Incorporated.

S. C. Duberstein and Leo Oppenheimer, both of New York City, for trustee Castellano.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). It appears that prior to the filing of the petition in bankruptcy Jacob Brantman, the bankrupt, and Grant P. Schoonmaker and Clifford Schoonmaker were employed by William Alsberg & Co. The bankrupt occupied the position of merchandise man and assistant buyer, and was receiving a salary of $60 a week. About November 1, 1915, the bankrupt and the two Schoonmakers agreed to end their connection with William Alsberg & Co., and to go into business together in the buying and selling of tailors' trimmings. They accordingly on November 12, 1915, organized a corporation known as Schoonmaker Bros. & Brantman, Incorporated. It is alleged that in pursuance of their agreement the bankrupt was given a salary of $40 a week, it being agreed that he was also to receive one-third of the profits of the business, the remaining two-thirds to be divided equally between the two Schoonmakers.

It appears too that at the time of the organization of this corporation a Miss Lipman had an action pending and undetermined against the bankrupt in the Supreme Court of New York, for a breach of promise to marry, which action resulted in a judgment for the sum

of $1,881.62. That judgment remains wholly unpaid. It is the only claim scheduled in the bankrupt's schedules, and the purpose of the filing of the petition in bankruptcy is to discharge that liability.

The District Judge entered an order which reads as follows:

"Ordered and adjudged that Jacob Brantman, the bankrupt herein, and the said corporation of Schoonmaker Bros. & Brantman, Incorporated, are legally responsible to the creditors of said bankrupt, and will be directed to turn over to the trustee herein one-third of that sum which may be shown to have been payable as dividends prior to the adjudication of the bankrupt, and which may hereafter be declared, or which is held as undeclared dividends earned prior to adjudication by Schoonmaker Bros. & Brantman, Incorporated, or such amount as may be shown to have been concealed from creditors of the said bankrupt, by willful and intentional neglect to declare dividends, by an intentional use of the money belonging to such dividends for other purposes, in order to aid said bankrupt in concealing same from the trustee herein. And it is further ordered that the issue as to the amount due as aforesaid be and the same hereby is referred to Eugene F. O'Connor, Jr., Esq., as special commissioner, to examine, take testimony, and report."

The trustee of the bankrupt seeks to reach whatever profits the bankrupt is entitled to in the corporation in which he holds one-third of the stock. If this corporation has made a profit of $6.000 as is alleged, and the bankrupt is entitled, as is also alleged, to $2,000, his creditors must be able to obtain the benefit of it, and they cannot be deprived of it by any failure of the directors to declare a dividend. Such a method of concealing or covering up property as these parties are alleged to have adopted cannot succeed.

[1] The directors have not declared a dividend it is true, and the general rule is well established that a stockholder cannot maintain an action for a dividend not declared. It is nevertheless true that if directors unreasonably and wrongfully refuse or neglect to declare a dividend when there are surplus profits out of which it may be declared, and there is no good reason for their failure to do so, a stockholder can file a bill in a court of equity to compel the directors to declare and pay it. Pratt v. Pratt, Read & Co., 33 Conn. 446; Beers v. Bridgeport Spring Co., 42 Conn. 17.

[2] It is also true that the courts do not undertake to control directors in the exercise of their discretion in such cases unless they act fraudulently, oppressively, or unreasonably. New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296;* Williams v. Western Union Tel. Co., 93 N. Y. 162, 192; Burden v. Burden, 159 N. Y. 287, 54 N. E. 17; Stevens v. U. S. Steel Corporation, 68 N. J. Eq. 373, 59 Atl. 905. And in the instant case the claim is that the directors are acting in collusion with the bankrupt, and therefore fraudulently, in withholding a division of the profits.

[3] The trustee of a bankrupt of course succeeds to the bankrupt's title to the stock and has the bankrupt's rights and remedies as respects dividends which have been declared or which ought to have been declared.

[4] So that if the directors of the corporation of Schoonmaker Bros. & Brantman, Incorporated, are fraudulently withholding the declaration of a dividend the trustee must be entitled to invoke the power of the court to compel the declaration of it. The bankrupt's interest

*7 Sup. Ct. 209, 30 L. Ed. 363.

in the undivided profits of this corporation is in equity his property and capable of being reached by his trustee. In this case it can be reached by summary proceedings, as the only question raised is as to whether there are any profits, and if any there be, the amount thereof that is reasonably applicable to dividends. The corporation, which has been made a party defendant, not having raised in the court below any question as to the jurisdiction of that court to dispose of the matter in a summary proceeding, its attempt to raise the question in this court comes too late. For its right to have the matter adjudicated in a plenary action is one which it can waive and did waive by failing to raise it in the trial court.

[5] The bankrupt made objections in the court below as to the right to proceed summarily against him. But he was in no position to raise such a question even in the court below. The bankrupt cannot question the court's jurisdiction to act summarily against him, for by filing his petition in bankruptcy he submitted his estate for administration to the court and established its jurisdiction to direct him summarily to turn over all property of every kind, nature, and description to his trustee in bankruptcy, as the trustee takes by operation of law the title to all his property.

[6] While the court below was right in thinking that the trustee is entitled to reach the property to which the bankrupt is equitably entitled in the undivided profits of the corporation, the form of the order is open to a slight objection, in that it practically decrees an accounting. The order should be modified so as to direct an investigation as to the profits of the company reasonably applicable to dividends. Property so discovered will be subject to the summary order of the court, under the circumstances of this case.

The decree so modified is affirmed.

HALL v. WEST JERSEY & S. R. CO.

(Circuit Court of Appeals, Third Circuit. July 30, 1917.)

No. 2222.

1. RAILROADS ⊜350(28)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Act N. J. March 31, 1909 (P. L. p. 54), which provides that, where a railroad company has assumed to establish and maintain safety gates at a crossing, in any action to recover for the death or injury of a person at such crossing at a time when the gates were not down the question of contributory negligence shall be one to be determined by the jury, does not deprive the court of the power to determine such question as one of law, where it arises on undisputed facts.

2. COURTS ⊜352—FEDERAL COURTS—PROCEDURE—STATE STATUTE.

Regarding such statute as establishing a rule of procedure, it does not apply to a case brought in a federal court in another state.

3. RAILROADS ⊜327(12)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

Plaintiff and six others were taking a pleasure ride in an automobile, which one of them was driving, when it struck the side of a railroad train

at a grade crossing, killing some and injuring others of the riders. Plaintiff knew they were approaching a crossing, and was sitting on the knee of another of the party on the front seat beside the driver. The view of the track was obstructed by a building until they were within 15 feet of it, when it could be seen for 2,000 feet. *Held*, that it was as much the duty of plaintiff as of the driver to look out for the train and give warning of its approach, and that under the undisputed facts she was chargeable with contributory negligence, which defeated a right of recovery.

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

Action at law by Jane T. Hall against the West Jersey & Seashore Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

A. T. Ashton, of Philadelphia, Pa., for plaintiff in error.

Sharswood Brinton and John Hampton Barnes, both of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case Miss Jane T. Hall had brought suit in a state court against the West Jersey & Seashore Railroad Company, to recover damages for personal injuries. The cause was thereafter duly removed to the court below on the ground of diversity of citizenship. On trial that court gave peremptory instructions for the defendant. On entry of judgment on such verdict, the plaintiff took this writ. The case turns on the alleged contributory negligence of the plaintiff. On the part of the defendant it is contended that the proof adduced by the plaintiff so clearly showed contributory negligence on her part that the court was bound, as a matter of law, to so hold. On the part of the plaintiff, it is contended that under the New Jersey statute of 1909 (P. L. p. 54), quoted in the margin,[1] the court had no power to determine that question itself, but was bound, under that statute, to submit the cause to the jury.

[1] We do not understand the New Jersey statutes have abolished the defense of contributory negligence, or relieved the court from deciding the question of law, where it arises, whether the undisputed facts show a plaintiff is guilty of contributory negligence. Shoemaker v. Central R. R. of N. J. (N. J. Sup.) 89 Atl. 517. In Erie Co. v. Schmidt, 225 Fed. 517, 140 C. C. A. 655, we had before us the New Jersey crossing act, chapter 96 of 1909, quoted in the margin.[2] We

[1] "Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad crossing in this state, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, * * * that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages."

[2] "1. Wherever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such cross-

there said, and the same was restated and followed in Delaware, etc., Co. v. Welshman, 229 Fed. 84, 143 C. C. A. 358, L. R. A. 1916E, 816:

"In our opinion, the railroad is mistaken in supposing that the act compels the trial judge to submit to the jury every case of injury or death at a protected grade crossing in New Jersey. The evidence may establish contributory negligence so clearly that the judge would be bound to give the jury binding instructions in favor of the railroad. The act does no more than declare as a rule of evidence that in certain situations the mere fact that the deceased did not stop, look, and listen shall not of itself defeat recovery; but it does not attempt to lay down a rule that every grade crossing case where contributory negligence is alleged must be submitted to a jury."

[2] Regarding, therefore, such statutes as rules of procedure, it is clear that such rule of procedure, enacted in New Jersey, could not affect the procedure of a case litigated in the court below, and therefore the District Court for the Eastern District of Pennsylvania had the right, and it was its duty, to hold that, if the facts clearly showed the plaintiff contributed to the accident, she could not recover. This duty it met, and the only question here involved is whether it erred in deciding that question as a matter of law and refusing to submit it to the jury.

[3] We have carefully examined the proofs. We find no disputed questions involved. Without reciting those proofs, it suffices to say they tend to show the plaintiff was injured when the auto in which she was riding ran into the side of an electric train which was passing over a grade crossing. The auto, a five-seated car, in which the plaintiff and six others were taking a pleasure ride, approached the grade crossing about 9 o'clock on a clear evening the latter part of May. Three women were on the front seat of the car; one the woman who was driving and was killed, the second a woman on the seat beside her, and the plaintiff on the latter's knee. The plaintiff knew they were approaching the crossing, and was in a position to observe and warn the driver of danger. We had occasion in Brommer v. Penna. R. R. Co., 179 Fed. 580, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, a case from New Jersey, to consider the pertinent decisions of that state, and referring to Brommer, the driver of the machine, and Henderson, the pleasure passenger, we there said:

"Henderson was not a passenger, and Brommer was not a quasi carrier; but the whole party were united for a common purpose and had a common object in view. Brommer had no greater duty or obligation toward the others than they toward him. It is true he was running the machine; but if anything threatening the general safety of the party came within the knowledge of any

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ing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gate or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of [the] failure of the person injured or killed to stop, look and listen before passing over said crossing."

of them, and he or she by timely warning was able to warn Brommer of such danger, and as a direct and proximate result of not doing so he or she suffered damage, how can it be said this was not negligence, and that thereby he or she did not contribute to causing the accident? * * * It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. * * * He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called on him to stop before attempting the passage. The machine was under control, by his own account, only moving at a two-mile rate. Under the circumstances he was called on to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident."

Tested by this rule, it is quite clear that this unfortunate plaintiff contributed her share toward this melancholy accident. She knew they were approaching this crossing,[3] and attempting to pass it when the track was shut off from view by a building which stood some 15 feet from it. Had they looked after they passed the building and for the next 15 feet, they could have had a view of 2,000 feet down the track. Indeed, had they looked when they were on the first and second tracks, they could have seen the track for half a mile. That they did not look at all, and only saw the train when they struck it, shows only too plainly that they simply attempted to cross the track without looking and ran into the car. Under such circumstances, there was no disputable issue. The evidence simply showed the plaintiff and the unfortunate person who was driving the car took no care or precaution whatever, and blindly went forward, the one to her death and the other to her distressing accident, in such a careless and negligent way that they contributed to the accident. Under such circumstances, the judge below was justified in giving binding instructions. Under such circumstances, testimony that one looked and said nothing cannot avail to create an issue; for, if one looked, she must have seen the train, which was then just on them. The fact that they went ahead, and that the auto ran into the train, simply shows that the persons on the front seat did not look, but went ahead without any precaution, and for an auto to attempt to pass, without precaution, a grade crossing, where a view of the track is obstructed, is chancing the crossing, and chancing danger is not due care.

The judgment below is affirmed.

[3] Miss Hall's testimony was: "Q. Just before this accident happened, did you know you were coming to a railroad crossing? A. I saw the railroad crossing; yes, sir. Q. What did the automobile do when you were getting to the railroad crossing? A. It slackened up. Q. What did you do? A. I looked both ways. Q. Did you see anything? A. Not a thing. Q. What was there, as the automobile slackened up first, to prevent your seeing down the track? A. There was a house on the corner. * * * Q. You started to go across the tracks, and what happened to you? A. I was hit by the train. Q. When did you first see the train? A. I did not see a thing. Q. I mean, when did you first see the train that struck you? A. Oh, when it was on us. Q. You mean on top of the automobile? A. Yes."

TURNER v. BOARD OF TRADE OF CITY OF CHICAGO.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1917.)

No. 2462

1. COURTS ⟸366(1)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE BY STATE COURT.
   Generally a federal court treats the construction of a state statute by the highest court of the state as part of it and read into it.
2. EXCHANGES ⟸5(2)—BY-LAWS—FORFEITURE OF MEMBERSHIP.
   A Board of Trade which, though incorporated, is a mere voluntary association, has power, the incorporating act not denying it, to provide by by-law for forfeiture of a membership for fraud of the member in securing his acceptance as a member; it being reasonable, and not contrary to public policy or the law of the land.
3. EXCHANGES ⟸5(2)—BY-LAWS.
   Provision of the charter of a board of trade authorizing it to inflict fines not exceeding $5 for breaches of by-laws is not inconsistent with right to provide by by-laws for forfeiture of membership for fraud in securing acceptance as a member.

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

Suit by John B. Turner against the Board of Trade of the City of Chicago. From an adverse order, plaintiff appeals. Affirmed.

Appeal from an order denying application for temporary injunction to restrain the Board of Trade of the City of Chicago from proceeding to examine a charge preferred against appellant, one of its members.

The respondent, a corporation organized under and by virtue of an act of the General Assembly of the state of Illinois approved February 18, 1859 (Priv. Laws 1859, p. 13), issued a membership certificate to appellant. Since appellant became a member, he has paid all assessments levied against him, and until shortly prior to the commencement of this action, has enjoyed all the privileges which belong to a member of the respondent corporation.

On November 6, 1916, appellant was served with notice that charges had been preferred against him, a copy of which was attached to the notice, and which charge read as follows: "The undersigned, chairman of the membership committee, hereby complains of John B. Turner * * * and charges him with a violation of section 4 of rule 10 of the rules of the Board, in that he did upon his oath willfully make misstatements and did suppress facts before said committee to secure his acceptance by the directory as a member of this association, and that he did become a member on June 9, 1914."

The notice fixed a date and place for hearing the charges thus preferred. Pending the hearing, application was made to the court to restrain the board of directors of the respondent corporation from examining the charges or acting thereon. From an order denying this application for an injunction this appeal is taken.

Five of the twelve sections of respondent's charter read as follows:

"Section 1. That the persons now composing the Board of Trade of the City of Chicago, are hereby created a body politic and corporate, under the name and style of the 'Board of Trade of the City of Chicago,' and by that name may sue and be sued, implead and be impleaded, receive and hold property and effects, real and personal, by gift, devise, or purchase, and dispose of the same by sale, lease, or otherwise (said property so held not to exceed at any time the sum of two hundred thousand dollars); may have a common seal and alter the same from time to time; and make such rules, regulations, and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land."

"Section 4. The said corporation is hereby authorized to establish such rules, regulations, and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper."

"Section 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations, and by-laws thereof."

"Section 11. Said corporation may inflict fines upon any of its members, and collect the same, for breach of its rules, regulations, or by-laws; but no fine shall exceed five dollars. Such fines may be collected by action of debt, before a justice of the peace, in the name of the corporation."

"Section 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce, or provided in the foregoing sections of this bill."

Respondent has adopted many rules and regulations for the conduct of its business and for its government. In proceeding to examine appellant, it was acting under section 4 of rule 10, in force when appellant became a member, and which is as follows: "If any applicant shall intentionally or willfully misstate or suppress any fact or be guilty of any other fraudulent or dishonest act to secure his acceptance as a member, and thereafter and thereby become a member, the membership committee shall upon the discovery of such misconduct, immediately report the same to the board of directors, which, after due notice to such member of the time and place of such hearing, shall investigate such charges, and if such member shall be found guilty, the board of directors shall declare such membership forfeited."

Jacob Ringer, of Chicago, Ill., for appellant.
Henry S. Robbins, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). Appellant's contention is that section 4 of rule 10 is ultra vires, and that a court of equity should interfere by injunction to prevent the enforcement of a rule of a corporation where the penalty prescribed for violation thereof deprives the offending member of a valuable property right. In other words, he challenges respondent's authority to forfeit the money value of a member's seat on the Board of Trade, although he concedes the power of the respondent to expel the member holding the certificate.

[1] Respondent is organized under the laws of the state of Illinois. As a general rule, the construction which the highest court of a state has given to a statute of a state becomes a part thereof and should be read into it. Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968.

The Supreme Court of Illinois has frequently construed the statutes under which the respondent is organized. People v. Board of Trade, 45 Ill. 112; People v. Board of Trade, 80 Ill. 134; Pitcher v. Board of Trade, 121 Ill. 412, 13 N. E. 187; Board of Trade v. Nelson, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312; Green v. Board of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; People ex rel. Doddson v. Board of Trade, 224 Ill. 370, 79 N. E. 611; Bostedo v. Board of Trade, 227 Ill. 90, 81 N. E. 42.

In the light of these decisions, the question presented by the appellant is hardly an open one. In Board of Trade v. Nelson, supra, the court said:

"The status of the Board of Trade has been determined by this court in numerous cases, and it has been held to be a mere voluntary organization, although incorporated under an act of the General Assembly."

This view of the status of respondent has since been approved in Bostedo v. Board of Trade, supra, and in People ex rel. Doddson v. Board of Trade, supra. In the latter case the court said:

"It is a mere voluntary organization, although incorporated under an act of the General Assembly. While it has rented out rooms as offices, from which it derives income insufficient, however, for its expenses, and while an assessment is required each year, and each membership has considerable money value, yet this does not change the character of the association. The corporation is not bound to admit any person into membership nor is any one obliged to join. When the relator became a member of the Board of Trade he voluntarily submitted himself to the operation of all laws enacted for its government, and agreed to be bound by them so far as within corporate authority."

While in all of the cases referred to, excepting People ex rel. Doddson v. Board of Trade, supra, the question at issue turned upon the authority of the respondent to expel a member, the reasons for the conclusion reached by the court well support respondent's contention in this case. But in the case of People ex rel. Doddson v. Board of Trade, supra, no such difference in the contention of the member existed. That action was to test the power of the Board of Trade to forfeit the membership of the relator, who instituted a mandamus proceeding to compel the secretary of the respondent to restore him to his rights and privileges of membership.

It will be thus seen that, while in the other cases the precise question was the authority of the Board of Trade to expel a member, in this last case the issue turned upon the authority of the respondent to forfeit all the rights of membership, including the money value of the membership certificate.

Section 3 of this same rule 10 provided then, as it provides now, that failure to pay dues for a stated period "shall of itself operate as a forfeiture and cancellation of the membership of such member and of all his rights and privileges thereunder." This rule was attacked as "unreasonable, unwarranted by the charter, contrary to public policy, and contrary to the law of the land." The court said:

"We do not think the rules and by-laws in this case infringed public policy or any rule of law, or are unreasonable; hence the court will not interfere to control their enforcement. Under such circumstances, corporations and associations such as the Board of Trade will be left to enforce their own rules and regulations in manner they have adopted for their own government and discipline."

Without repudiating the construction of the statute thus given to it by the Supreme Court of the state that enacted it, we must reject appellant's contention.

The case of In re Gaylord (D. C.) 111 Fed. 717, 7 Am. Bankr. Rep. 195, relied upon by the appellant, does not hold to the contrary. The question there, was not, as here, whether a rule of the St. Louis Stock Exchange was ultra vires, but whether any rule or by-law was in existence that provided for a forfeiture of all the member's rights in case the rule was violated. The court in that case, however, did refer to

the power of such an organization to pass such a rule as is here under consideration, and used this language:

"It was within the power of the association to make provision for the forfeiture of all rights based upon membership in case of expulsion."

[2] The status of the respondent having been determined by the Supreme Court of the state of Illinois, we find nothing in the incorporating act that would deny to the Board of Trade the power to enact rules or by-laws providing for forfeiture in case such rules or by-laws are not complied with.

The rule under consideration is reasonable, it is not contrary to public policy, nor contrary to the law of the land. People ex rel. Doddson v. Board of Trade, supra.

[3] Section 11, quoted above, is not inconsistent with this right to forfeit a member's seat. It was obviously intended as an additional grant of powers. It is inconceivable that a maximum fine of $5 should be the only punishment which the respondent could impose when the member's misconduct is so great as to justify expulsion.

The order is affirmed.

SPRINKLE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1515.

POST OFFICE ⇐49—USING MAIL TO DEFRAUD—FRAUDULENT SCHEME.

Where defendant opened a piano store, advertised prizes for solution of the simplest puzzle, mailed to each of many and planned to mail to the others of the 32,000 answering "as one of the contestants" in the prize puzzle contest a letter containing check of $125 applicable on "sale price" of $187 of instrument "regularly listed by factory to sell for $250," and in the nine days of business before arrest sold 119 instruments, a conviction under Pen. Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]) § 215, of using the mail to defraud was warranted; the evidence warranting finding that the price was marked up to meet discount, and that those purchasing thought they were getting a real discount, though price was maintained in absence of such a check.

In Error to the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

John W. Sprinkle was convicted of violation of the postal laws, and brings error. Affirmed.

William L. Marbury and Eugene O'Dunne, both of Baltimore, Md., for plaintiff in error.

Samuel K. Dennis, U. S. Atty., and James A. Latane, Asst. U. S. Atty., both of Baltimore, Md.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Plaintiff in error, hereinafter called defendant, was convicted with others of using the mails to defraud, in violation of section 215 of the Penal Code. There is little dispute as to what he did; the main question being whether it was enough to

warrant a verdict of guilty. Briefly described, his "plan of business," as he calls it, carried on in the name of the Grand Piano Company, was this: Coming to Baltimore early in 1916, after similar activities in a number of other cities, he secured the outstanding lease of a store for the unexpired term of some six months from February 9th of that year. He then inserted in the local papers a display advertisement of a free contest for ten grand prizes for the best answers to the "Great War Puzzle," which was shown in picture, the answers to be mailed or brought to the store before 10 a. m. of the 1st of March. The listed prizes ranged from a new $400 upright piano to a pair of roller skates. In addition to this there was also promised "to all other persons answering this advertisement" the gift "absolutely free" of a fountain pen, or a gold-plated locket, or a handsome penknife. These gifts, it may here be noted, were of only insignificant value; and the absurd simplicity of the "Puzzle," which any intelligent child could solve, is manifest from the fact that when the "contest" closed on the day named about 32,000 answers had been received. It is admitted by defendant that the sole purpose of this advertisement, with its puzzle and promises, was to obtain the names and addresses of persons to whom he might try to sell pianos, as will now be narrated.

It was evidently Sprinkle's intention, as a jury might well find, to have mailed to each of the 32,000 persons who had answered the advertisement, so far as their names could be deciphered, a sealed envelope containing: (1) A letter; (2) a "purchase check"; (3) a printed folder, and (4) an order for fountain pen, etc. At the time of his arrest on the 21st of March upwards of 23,000 such inclosures had been prepared for mailing and about 13,000 actually mailed. Omitting unimportant parts, the letter reads as follows:

"You have been awarded a purchase check of $125.00 as one of the contestants in our prize puzzle contest. Same is herewith enclosed.

"This check is your order to select any new piano or player piano of Cable & Sons or Clough & Warren make and a credit for $125.00 will be given you on account and the balance may be paid in small monthly payments. Should you decide on any other of the many makes of new pianos we sell, you will be credited on account by $102.50.

"Do not fail to see the beautiful new pianos we are offering for $187.00 during our big introductory sale, which is now going on. This piano is regularly listed by the factory to sell for $250.00, and all it will cost you with this purchase check is $84.50. Do not write, but call at our salesroom at 347 N. Charles street (corner Mulberry street), Baltimore, Maryland, to see this greatest piano offer ever made in the state of Maryland. A discount of 10% will be allowed for cash, and car-fare allowed to out-of-town customers.

"One check only will be accepted from a customer. Do not wait, for unless you advise us within ten days from the date hereof that you will claim this check, it will be canceled and become void.

"All pianos are marked in plain figures at the reduced selling price below the factory list price during the big sale, and it is not necessary to mention having the check until after you have selected the piano you desire to purchase. Store open every evening until 9:00.

"P. S.—This check may be transferred to a friend who wishes to purchase a piano or player, and in event a purchase is made as above stated, it will entitle you to a diamond ring or gold-filled watch. Prize winners' and judges' names and addresses can be seen at our store."

On the reverse side of the letter was a paragraph of comment on the great expense of advertising, paying commissions, and the like in the

ordinary conduct of the piano business, with a declaration in substance that defendant could afford to undersell other dealers because he incurred none of those expenses. To this was added the following statement, the last sentence in heavy type:

"We have a one-price system, and it makes no difference if the purchase check is $25.00 or twice that amount, there is no deviation from the marked prices. The prices of the pianos are exactly the same as listed by the factory, and a child can purchase as safely as the shrewdest buyer. We do not ask you to present your purchase check until you have selected the piano you want, to prove there is no opportunity to advance prices."

The "purchase check" inclosed in the letter was invariably for $125 payable to the order of the person to whom the letter was addressed, and signed, "Grand Piano Company, J. W. Sprinkle, President." In size, shape, and general appearance it closely resembled the bank check in customary use. At the left of the signature, under the line naming the amount, was the date after which it would be void, and beneath this in fine type the following:

"This check is not redeemable in cash, and can be applied only as part first payment on any new Cable & Sons or Clough & Warren piano or player piano or $102.50 on any other new piano or player piano in our wareroom if presented on or before date of expiration."

The checks were numbered in serial order for record purposes, but they bore different dates of expiration, probably to avoid the presentation of too many of them on the same day.

The "folder" inclosed contained cuts of an upright piano and of a piano player with descriptions of same and statement of prices. The fourth inclosure was an order, good if presented within ten days from date of letter, for one of the trinkets promised to every person who answered the advertisement.

In the store of defendant was an assortment of pianos and player pianos, all of the cheaper, if not cheapest, grades. They were mostly, perhaps all, of the class known as commercial pianos; that is, as we understand, pianos on which the manufacturer would stencil, as requested by the dealer, any name not protected by trademark or copyright as the purported maker of the instrument. Thus two pianos from the same factory, and precisely alike in finish and action, might and frequently were stenciled with the names of different makers, one purporting, for example, to be a "Haynes" and the other a "Wagner." On each instrument in stock was a card or tag showing the maker, number, style, and kind of wood, and also showing a certain "Price," with pen strokes through the figures, and a "Sale Price" of much lower amount written below, the former, for instance, being $450, and the latter, $327. The "Price" indicated was what is known as the "factory list price," a purely arbitrary and meaningless figure having no relation to cost or value and greatly in excess of the sum at which the dealer in nearly all cases would offer to sell the instrument. In a word, the list price is very much above what is expected or even asked except in rare instances. The "Sale Price" written on the tag was the price fixed by Sprinkle for the pianos he had on sale. In conjunction with the higher "list price," which had been partially crossed out, it looked like a reduced or "marked down" price, and

was doubtless designed to give that impression. On this "Sale Price" so fixed and displayed the defendant accepted "as part first payment" for each instrument sold one of the "purchase checks" above described, taking it for $125 if a Cable & Sons or Clough & Warren was purchased, or for $102.50 if some other make was selected. In all cases, however, some money had to be paid before delivery, namely, $15 on a piano and $25 on a player piano. The balance was payable in monthly installments, and for all cash a discount of 10 per cent. was allowed.

The scheme of defendant thus outlined would not be likely to mislead buyers of experience and wordly wisdom, but it is at once seen to be exceedingly well calculated to deceive the ignorant and gullible. To persons without knowledge of piano values, uninformed and unsuspecting, it would be sure to make an alluring appeal. And so it proved. In the nine days of business before the arrest a total of 119 instruments were sold, or an average of more than 13 a day. The purchasers were mostly nurses, housekeepers, machinists, plumbers, street car conductors, and other wage-earners, white and colored, of similar occupations. These facts speak for themselves, and it is quite unnecessary to enlarge upon the artistic shrewdness of defendant's enterprise. Enough to say that a jury would be amply justified in finding, from the testimony of numerous witnesses, that the instruments sold were represented to be worth the carded "Sale Price," that is, the sum actually paid by the buyer plus the "purchase check" turned in; that the 119 persons who bought, or at least the greater part of them, believed they got a discount from real worth of the amounts for which their purchase checks were accepted, and would not have bought otherwise; that defendant not only intended they should so believe, but knew that the sales in question were effected solely because of that belief, and further knew that such purchase checks were in fact worthless because the money payments made or agreed to be made in each case were fully equal to the prices at which the same instruments could be elsewhere procured. In short, the evidence of record clearly warrants the inference of fraudulent purpose.

Nevertheless it is earnestly contended that defendant's scheme was not unlawful, and therefore the government failed to make out a case. The argument is that no legal fraud was perpetrated by Sprinkle because his "Sale Price" was strictly adhered to in all cases, and no pianos sold except to customers entitled to the credits stated in their purchase checks. In other words, since an instrument could not be bought any cheaper without a purchase check than with one, the checks were not fictitious, but had a credit value precisely as represented for "part first payment" of the fixed and unvarying selling price. The argument is far from convincing. As a practical matter Sprinkle had to make good his assertion in that regard, because belief in the purchasing power of the checks would be destroyed and the whole scheme discredited if it became known that pianos could be bought with all cash for less than the sales prices at which they were offered. And he could well afford to take that position; for the chances of getting those prices in actual money were quite too remote to be taken into account. Moreover, it is not to be said that a dishonest method of doing business can be kept immune from attack by

scrupulously sticking to it under all circumstances. Surely the fact that defendant had but one selling price and invariably exacted that price, whether paid wholly in money or partly with a purchase check, could not serve to prevent the jury from finding that his plan of operations was deceitful and fraudulent.

The kindred contention is made that the scheme in question was not illegal because there is no "actual, usual, and customary retail price" for such pianos as Sprinkle sold, and therefore he could not have planned and intended, as the indictment charges, the arbitrary and designed fixing of his "Sale Price" sufficiently above such usual and customary retail price to cover the credit allowed to the holder of a purchase check, and thus enable him to make the credit allowance and still get for his pianos fully as much money as instruments of the same kind are ordinarily sold for by retail dealers. The sufficient answer to this contention is that in our judgment there was abundant evidence to warrant submission of the question to the jury. This was the decisive issue, as the jury well knew, for they were told by the learned trial judge, and the instruction was emphasized by repetition, that the defendants could not be convicted, "unless you believe that they fixed a price in their own minds which they expected to get, which was their usual and customary price, or one that they sought to get in other places and succeeded in there getting, and added the amount of this fictitious credit check to it for the purpose of taking it off again." That this is what the transaction amounted to seems to us an almost unavoidable conclusion. The price fixed in defendant's mind as the usual and customary price which he aimed and expected to get was the actual amount of money to be paid by the customer, and any pretense that it was otherwise is only an appeal to credulity. It is not difficult to look through this elaborate device for giving the purchase checks an apparent value and see that his obvious object was to sell pianos for the cash that buyers had to pay. That was the real price he realized in practically all cases, on "the overwhelming proportion of the pianos sold," as the trial judge told the jury they might find from the evidence, and it is but reasonable to hold that this price, accepted freely and habitually throughout the course of his extensive dealings in Baltimore and elsewhere, was in fact "the actual, usual, and customary retail price" at which he sold pianos. The arbitrary addition thereto of an amount just equal to the credit allowed to the holders of purchase checks produced the fiction of a "Sale Price," in part payment of which the checks were received, but this inflated figure was in no real or honest sense the actual retail price which defendant sought to obtain. The jury were justified in so finding, and the contention that the government failed to prove the offense charged in the indictment cannot be sustained.

The minor questions raised by the assignments of error are not of sufficient merit to require discussion. They involve no novel or unfamiliar principles, and nothing would be gained by their detailed review. The record discloses no ruling of which the defendant can justly complain, or for which the judgment against him should be set aside.

Affirmed.

W. & C. T. JONES S. S. CO. v. BARNES-AMES CO.

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

No. 248.

SHIPPING ⊂=38—CHARTERS—RIGHT TO CANCEL CHARTER.

Where a charter party gave the charterer an option to cancel if the vessel was not ready to receive cargo by a date specified, such readiness to be shown "by the master's notification accompanied by the underwriters' surveyor's pass to that effect," but provided that the option should be exercised "not later than the presentation of said surveyor's pass of readiness," time was of the essence of the right to cancel, and the charterer, not having exercised its option when the notice and surveyor's pass was presented, could not do so afterwards.

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

Suit in admiralty by the W. & C. T. Jones Steamship Company against the Barnes-Ames Company. Decree for defendant, and libelant appeals. Reversed.

This cause comes here on appeal from the United States District Court for the Southern District of New York.

The libelant, the W. & C. T. Jones Steamship Company, Limited, was, and still is, a corporation organized and existing under and pursuant to the laws of the United Kingdom of Great Britain and Ireland, and was and is the owner of the steamship Haulwen.

The respondent, the Barnes-Ames Company, was and is a corporation organized and existing under and pursuant to the laws of the state of Minnesota, with an office in the county and state of New York.

On March 3, 1915, the libelant and respondent entered into a charter party at New York City by which the respondent agreed to hire the said vessel for a voyage from Galveston or New Orleans to a port in Italy with a full and complete cargo of heavy grain, which the charterer agreed to furnish, and on which it agreed to pay a freight of 12 shillings per quarter of 480 pounds English weight delivered. The charterers had under the charter the privilege of ordering the vessel to load at New York, and in case the privilege was exercised the rate of freight was to be 11 shillings and no pence per quarter of 480 pounds.

The respondent exercised the privilege of ordering the vessel to load at New York, and the vessel arrived at that port on April 19th, about 2:30 p. m., and written notice was presented at the office of the charterer that the vessel was then lying at a dock specified, and that it was in every respect ready to receive cargo under the charter. This notice was accompanied by underwriters' surveyor's pass of readiness of all holds for cargo.

By the sixth clause of the charter party, if the ship was not ready to receive cargo on or before April 20, 1915, the charterers had the option of canceling.

On April 20th the charterer advised the libelant's broker that it declined to load the steamer, claiming that grain loaded in holds Nos. 2 and 3 would be impregnated with the odor of paint. The owners of the vessel protested against this, and notified the respondent that they would hold the latter liable for all damages, costs, and expenses resulting from breach of charter, and would also endeavor to charter the vessel against the charterers.

Thereupon, on April 22, 1915, the respondent made an offer to libelant to charter the same vessel on conditions substantially identical with those in the charter of March 3d, except that the rate was to be 9s. 6d. instead of 12 shillings a quarter of 480 pounds, and the loading port specified was Philadelphia instead of New York.

The offer, it is alleged, was the best that reasonably could be obtained, and was accepted on the agreement that it should be without prejudice, and not a waiver of libelant's claim against the respondent for the breach of the agreement of the charter party of March 3, 1915.

The refusal to load the first charter resulted it is alleged in damage to the libelant to the amount of $19,000, and the libel asked that a decree be entered in favor of libelant for that amount with interest and costs.

The District Judge dismissed the libel with costs, expressing himself as satisfied that the vessel could not carry grain on April 20, 1915, not being at that time in readiness to carry cargo.

Kirlin, Woolsey & Hickox, of New York City (Charles R. Hickox and Cletus Keating, both of New York City, of counsel), for appellant.

Haight, Sandford & Smith, of New York City (Charles S. Haight and Herbert K. Stockton, 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). The libelant seeks the recovery of damages for breach of a charter party. The respondent claims justification in refusing to accept and load the steamer in that it is asserted that the vessel was not ready to receive cargo on the stipulated day, inasmuch as two of the holds had been newly painted, and the odor of paint in the holds made them unfit to receive cargo, at least such cargo as the respondent was to load. The vessel was chartered for the purpose of carrying heavy grain, and the record discloses that wheat is heavy grain, and that respondent intended to load that grain upon her.

The libelant claims that the vessel was tight, staunch, and strong, and in every way fitted for the voyage, and was in all respects ready to receive cargo in all her holds in accordance with the provisions of the charter party. The libelant asserts that undoubtedly the real reason for the respondent's refusal to load was not the one assigned, but the fact that the respondent did not want to load, having no grain to ship at that time. It appears that at the time the charter was made respondent had a particular cargo to ship, but later on supposing that the Haulwen would not come out of the dry dock in time to take that particular cargo of grain within the dates specified in the grain contract, went ahead and loaded the cargo on another vessel. So that when libelant tendered the vessel the respondent, as shown by its own testimony, "had no grain of the grade going to the ports for which she was chartered left in New York." And the respondent also testified that if the ship had been entirely satisfactory it "didn't care to load."

At the argument counsel for respondent assumed that the case presented three questions for this court's consideration:

(1) Whether there was an odor of paint in the holds.

(2) If there was, whether such an odor injures wheat.

(3) And if it does whether the respondent was entitled to cancel the charter party.

The District Judge decided all three of these matters in favor of the respondent, and said:

"If it be true (1) that paint odor does injure and deteriorate grain, and (2) that such odor was present and dangerous on the steamship when she was tendered for the purpose of the charter party, then there was a breach of warranty of fitness when the vessel was tendered, and respondent was justified in rejecting the steamer and breaking the charter party on that ground."

The testimony was conflicting as to whether there was an odor of paint in the holds. The respondent produced two witnesses, and two only, who examined the vessel at New York. Neither of them went into the holds. They contented themselves by looking down into them. They testified that they got a smell of paint therefrom. One of these witnesses was the deputy grain inspector for the New York Produce Exchange, and the other was the general superintendent of the International Elevating Company. The first was asked why he did not go into the holds, and he replied that he did not think it necessary to do so, as he could smell the paint without going into them, and that he got a strong odor of paint in holds 2 and 3. The other witness testified that there was a very strong odor of paint from the two holds.

It does not appear whether those witnesses examined the vessel on April 19th or on April 20th. One of them said he could not remember the day, and the other was not inquired of upon this point. One of these witnesses was unquestionably wrong in a part of his testimony. He was asked whether he noticed the condition of the paint around the hatch coamings, and he said he did and felt it. He was then asked, "What did you find?" His reply was, "That it was sticky; it was not dry." The evidence, however, is perfectly clear that the coamings had not been repainted. In connection with this same witness' testimony that he found a strong odor of paint in the holds there is the testimony of the master of the steamer, who was with him at the time of the examination. His testimony was as follows:

"What did he do? He looked down No. 4 first and said, 'That hold is all right.' He looked down No. 3, and he said there was a slight smell of paint. And I asked him to go down the hold. He said he didn't want to go down the hold. Then he went along to No. 2. He asked me what we had been doing. I said we had been repairing; I had bad weather coming across. I asked him if he wanted to see the hold. He said 'No,' he didn't want to go down the hold; there was a slight smell of paint there. And I asked him was not the ship ready for grain. And he said that he couldn't say anything, but he would only say there was a slight smell of paint coming out from the hold."

The vessel inspected was at the time lying at a dry dock, a large repair works. A Norwegian steamer was lying at the time alongside and was being painted. And a number of witnesses who actually went into the holds of the inspected vessel testified that there was a smell of paint on deck, but that when one descended into the holds there was no smell of paint there. Thus a surveyor for the New York Board of Underwriters, who examined her on April 19th at noon, testified that while he was on the deck of the inspected vessel he noticed a smell of paint, and that it came from the ship lying alongside, and that the wind from the westward brought a strong smell of paint across the deck. He was asked whether when he got down into the holds he smelled paint there. His reply was:

"Not to any extent; of course, there was no strong smell of paint in the holds; all fresh painted places will have a peculiar smell of its own, but not a strong smell of paint by any means."

His inspection was a thorough one. He went around the bulkhead, around the frames and examined the rivets. He found the paint hard and the holds "sweet and in fine condition."

Another witness, a marine surveyor, testified that he examined the holds on April 19th and that he did not find any strong odor in the holds. That he examined the holds again on April 20th about 9:30 a. m., and testified that at that time he did not find any odor of paint in the holds. He states that he paid special attention as to whether there was any smell and he could not observe any. He had gone into the holds for the very purpose of examining to find whether there was any odor of paint present, having been asked between 4 and 5 o'clock on the previous day to find out that very thing. He was at that time informed that that criticism had been made. This would seem to indicate that the two witnesses who examined the vessel, and upon whom the respondent relies, had made their examination some time on April 19th. This witness when told of the criticism replied:

"That is very funny. I can't go now, but I will go in the morning."

It seemed "funny," no doubt, as he had previously examined the vessel and had noticed the strong odor of which complaint was made. The painter who did the painting examined the holds on the morning of the 19th, and testified that at that time the odor was "not much, but a very little bit."

The testimony shows the painting was finished on April 18th about 4:30 p. m. The paint was a quick-drying paint, a red oxide, and the manufacturer of the paint testified it took such paint from 4 to 4½ hours to dry.

A careful reading of the testimony satisfies me that on April 20th the paint in the holds was beyond doubt dry, and that, if there were any odor of paint in holds 2 and 3, it was slight, and that there is some reason for thinking there was no odor at all.

The testimony was also conflicting as to the effect of an odor of paint on a cargo of wheat. The master of the vessel testified that he had on several occasions loaded cargoes of grain the day after the holds had been painted, and that he had never had any claim for damages for grain so carried. He also testified that he had never seen a boat better suited for grain than this boat was. One of the managing owners of the company which owned the vessel in question, the vessel being one of 13 which the company owned, testified that it very frequently happened that a vessel was painted just before grain was loaded. The vessels were all of them practically used exclusively in the grain trade, and he testified that during his 25 years of experience he could not recall that a single claim for damage to grain by taint or odor from paint had ever been made. The vessel was classed at Lloyd's as 100A1.

Another witness, the captain of a cargo steamer, and who had had 7 years' experience in carrying grain cargoes, and who had carried about 50 of such cargoes, was asked:

"Captain assuming that red oxide paint was put on a ship's hold and that the hatches were left off, how long, in your opinion, would it be advisable to wait before grain was loaded into the hold?"

His answer was:

"I should say 24 hours after."

Another witness, a surveyor whose business it is to examine vessels as to their fitness to receive grain cargoes, testified that 24 hours after the holds of a vessel had been painted she would be in first-class condition so there would be no damage to the grain.

The respondent put on the stand as an expert the general manager of the American-Cuban Steamship Line for its stevedoring business, and he was asked the following question:

"From your experience would it be safe to load grain in bulk into the hold of the ship which had been so recently painted that around the rivets and at the butts of the plates and down the angle irons there was still raw paint, and the hold had a very strong odor of paint?"

To which he replied:

"Well, it would not be safe; positively wouldn't be safe."

Other witnesses testified that wheat is a very delicate grain and susceptible to odors of paint; wheat and barley being the most susceptible of the grains to such odors. The two witnesses who testified that there was a strong odor of paint in the holds 2 and 3 testified also that on account of that odor the ship was not fit to receive grain.

But, as I am not convinced that on April 20th there was any strong odor of paint in the holds, I am not persuaded that on the day named the ship was not fit to receive cargo. If, however, I am mistaken in this respect, it is a matter of no consequence, for the decision is not based on any such ground, and my Colleagues in this court express no opinion thereon. I have reviewed the testimony as to the odor of paint and its effects because of the stress placed upon the testimony at the argument and because the testimony impressed the District Judge differently, and led him to a dismissal of the libel. The issue involved lies in a narrow compass.

The respondent in its answer claimed the right to cancel by virtue of the sixth article of the charter party, which reads as follows:

"6. Charterers shall have the option of canceling this charter party if the vessel be not ready to receive cargo on or before the 20th day of April, 1915. Such readiness shall include the arrival of the vessel at the loading port, entry thereof at the custom house, and all compartments ready to receive cargo as shall be shown by the master's notification accompanied by the underwriter's pass to that effect, which must be presented at the office of the charterers or their agents at or before 4 p. m., or, if on Saturday, before 12 o'clock noon on said day. This option to cancel shall be exercised not later than the presentation of said surveyor's pass of readiness."

The article expressly gave the charterers the option of canceling "if the vessel be not ready to receive cargo on or before the 20th day of April, 1915." It is admitted that the notice was given on April 20th. But the clause which gave the option provided that:

"This option to cancel shall be exercised not later than the presentation of said surveyor's pass of readiness."

And the surveyor's pass of readiness was presented about 2:30 p. m. on April 19th. The respondent not having exercised the option until the day after the surveyor's pass was presented, the right of option

given under the charter was gone by the very terms of the clause which conferred it.

The option to cancel was made a matter of contract, and it could be exercised only by strict compliance with the terms on which it was given. Time was of the essence of the agreement. Inasmuch as respondent did not exercise its option to cancel within the time allowed it by the terms of the charter party, it was not allowable for it to exercise it thereafter; for, once a charterer lets the canceling day mentioned in the charter go by, he waives the right which the charter gives him to cancel, and abandons his right to cancel if the vessel is not ready to load by the day specified. Readiness to load includes fitness to receive cargo. And, as the notice of cancellation was given after the time for giving it had expired, it was without effect.

There is, moreover, an additional reason why the right to cancel did not exist. The sixth article of the charter party above set forth discloses that the parties agreed on the evidence which should establish the "readiness" contracted for. That readiness was to be "shown by the master's written notification, accompanied by underwriters' surveyor's pass to that effect," which had to be presented at a certain time and place, and which was so presented in strict compliance with the agreement. The obvious purpose of this provision as to what the proof should be of the fact of readiness was to prevent just such a dispute as has arisen in this case. The proof which the parties agreed upon had been furnished by the plaintiff, and the respondent was concluded thereby in the absence of any allegation of fraud, and no such allegation has been made.

Decree reversed.

CAMP et al. v. GRESS.

(Circuit Court of Appeals, Fourth Circuit. July 20, 1917.)

No. 1527.

1. COURTS ⇐308—JURISDICTION—PROPER DISTRICT—DIVERSITY OF CITIZENSHIP.

   Under Jud. Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1916, § 1032]) § 50, providing that, when there are several defendants and one or more are neither inhabitants of nor found within the district, the court may entertain jurisdiction and proceed to the trial between the parties who are properly before it, and section 51 (Comp. St. 1916, § 1033), providing that a civil suit between citizens of different states shall be brought only in the district of the residence of either the plaintiff or the defendant, where jurisdiction depends on diversity of citizenship alone, and there is only one defendant, suit against him must be brought in either the district of his residence or that of plaintiff, but where there are several defendants, the court has jurisdiction of all if one or more are residents of the district and the others are found there.

2. APPEAL AND ERROR ⇐173(1)—MATTERS NOT CONTROVERTED BELOW—MOTION.

   Where the averment of fact in a motion which the court granted was not controverted below, it cannot be drawn in question here.

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3. COURTS ⊜308—JURISDICTION—JOINT DEFENDANTS NOT RESIDING IN DISTRICT.

Even if a plea in abatement was good as to one of defendants, joint makers of the contract, it could not avail the others in view of Jud. Code, § 50, enabling a plaintiff to sue one or more joint makers in the district of their residence when the others could not be brought in because of their residence in another district.

4. LOGS AND LOGGING ⊜3(15)—FAILURE TO CONVEY TIMBER TO CORPORATION —ACTION.

Plaintiff, owning all the stock in a sawmill plant of a corporation, entered into a contract with defendants providing that a charter should be obtained for a company. Defendants were to convey timber to the company, and plaintiff the sawmill plant, and the stock of the corporation was to be issued in the proportion of thirteen-eighteenths to defendants and five-eighteenths to plaintiff. *Held*, that plaintiff alone could bring an action for defendants' breach; the contract being with him, and not with the company.

5. LOGS AND LOGGING ⊜3(15)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Plaintiff owned in connection with the mill plant a large body of timber which he intended to saw. After the contract with defendants he sold this timber on the strength of the contract. Defendants knew of the sale before they breached the contract. *Held*, that plaintiff was entitled to five-eighteenths of the net increase in the value of the timber which defendants retained and the whole of the loss in the value of his stock in the old corporation, which plaintiff alone had to bear.

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

Action by Morgan V. Gress against P. D. Camp and others. Judgment for plaintiff and defendants bring error. Affirmed.

T. D. Savage and Thomas H. Willcox, both of Norfolk, Va. (Willcox, Cooke & Willcox, of Norfolk, Va., on the brief), for plaintiffs in error.

William M. Toomer, of Jacksonville, Fla., and D. Lawrence Groner, of Norfolk, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action for breach of contract the plaintiff recovered judgment for $31,361.10. The contract dated August 18, 1913, between M. V. Gress, on the one part, and P. D. Camp, P. R. Camp, and John M. Camp jointly, on the other, provided that a charter should be obtained for a joint-stock company to be organized by December 1, 1913, to be called the Levy County Lumber Company. The Camps were to convey to the corporation a large body of timber in Levy County, Fla., at a valuation of $325,000, and Gress, a sawmill plant in the city of Jacksonville, at a valuation of $125,000. The stock of the corporation was to be issued in the proportion of thirteen-eighteenths to the Camps and five-eighteenths to Gress. On December 31, 1914, the contract was breached by the formal refusal of the Camps to carry it out. The grounds of the refusal, as expressed by P. D. Camp, were the failure of the health of his brothers and the fall in the price of lumber, making certain in his opinion the operation of the projected business at a loss.

The damages claimed at the trial were the losses by Gress by reason

of: (1) A large increase in the value of the timber between the date of the contract and the breach; and (2) a large decrease in the value of the mill by reason of the lack of timber to saw. The claims were for a much larger amount than that found by the jury.

[1] We consider first the point that the District Court should have sustained the pleas in abatement challenging the jurisdiction of the court. Gress is a resident of Florida. P. D. Camp and P. R. Camp are residents of the Eastern district of Virginia. John M. Camp is a resident of the Eastern district of North Carolina, and accepted service of the summons in the Eastern district of Virginia. His contention is that he can be sued only in the district of his own residence or in the district of the residence of the plaintiff. The other defendants contend that, since the obligation was joint, and not several, the action cannot be maintained against them without making John M. Camp a party, that he cannot be sued in the Eastern district of Virginia, and that therefore the action should be dismissed as to all. These jurisdictional questions depend on the construction of sections 50 and 51 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1916, §§ 1032, 1033]), taken in connection.

Section 50 provides:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Section 51 provides, among other things:

"* * * No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The act of 1875 (Act March 3, 1875, c. 137, 18 Stat. 470) provided that even a single defendant might be sued either in the district of his residence or the district where he was found. Section 51 of the Judicial Code, taking the place of the corresponding section of the act of 1875, leaves out the provision that a defendant may be sued in the district in which he is found. Therefore, where there is only one defendant, and the jurisdiction depends, as in this case, on diversity of citizenship alone, the suit must be brought in either the district of the residence of the defendant or of the plaintiff. Although the Judicial Code received great consideration, the act of 1839 (Act Feb. 28, 1839, c. 36, § 1, 5 Stat. 321 [Comp. St. 1916, § 1032]) was re-enacted as section 50, and by it the provision is made as to an action against two or more defendants, one or more of them being neither inhabitants of nor found within the district in which the suit is brought and not voluntarily appearing, that the court may entertain jurisdiction without prejudice to the rights of the party not regularly served nor volun-

tarily appearing. The words "found in the district," left out of one section and retained in the other, must have significance. If they have, the sections, construed together, must mean that for purposes of jurisdiction a single defendant must reside in the district in which the suit is brought, but where there are several defendants the court has jurisdiction of all if one or more are residents of the district and the others are found there. We find no controlling authority on the subject, but this construction, required as it seems to us by the letter of the statutes, is the more readily adopted because it facilitates the administration of justice, and obviates in a degree the necessity of a multiplicity of actions in different districts on the same cause of action.

[2] There is no foundation for the argument that the defendant John M. Camp was not "found" in the Eastern district of Virginia. The pleas to the jurisdiction alleged only that he was not a resident of that district. The ground of the motion to strike out the pleas to the jurisdiction was that, although not a resident, he was found in the district. This averment of fact in the motion on which the court granted it was not controverted in the court below, and cannot be drawn in question here. The pleas to the jurisdiction were properly overruled.

[3] Even if the plea in abatement were good as to John M. Camp, it could not avail the other defendants. One of the evident purposes of the enactment of the statute of 1839 (section 50 of the Judicial Code) was to enable a plaintiff to sue one or more joint makers of a contract in the district of their residence when other joint makers could not be brought into the action because of their residence in another district. Clearwater v. Meredith, 21 How. 489, 16 L. Ed. 201; Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825. If the court had had no jurisdiction of John M. Camp, the judgment as to him would be a nullity not affecting the judgment rendered against the other defendants. Gray v. Stuart, 33 Grat. (Va.) 351.

[4] On the merits, the first position taken is that Gress, the plaintiff, could not recover damages for depreciation in the value of the sawmill plant because the title to the plant was in the Morgan Lumber Company, and was never acquired by the plaintiff, although he was the owner of all the stock of the corporation. It is true, as has been decided in numberless cases, that an action for damages for breach of a contract made by a corporation must be brought in the name of the corporation itself, and cannot be maintained by the stockholders or even by one stockholder owning all the stock. But this contract was not made either nominally or actually by the Morgan Lumber Company or for its benefit. This being so, no action could be brought by the corporation for breach of the contract. The defendants knew that Gress was not the legal owner of the sawmill plant; for the ownership of the Morgan Lumber Company was recited in the contract. Gress undertook to procure the conveyance of the property direct to the Levy County Lumber Company. The defendants accepted this obligation on his part; and it is admitted that he was ready, willing, and able to carry out his agreement at all times. He was prevented from having the conveyance made solely by the express refusal of the defendants to allow him to do so. The promise of the

defendants was to Gress, and he alone could allege against the defendants damages for its breach.

Looking through the substance of the matter, what was the practical result to Gress of the defendants' breach? The defendants after default sold the timber for a net price much greater than $325,000. Gress was obviously entitled to receive his share of this net increase in price.

[5] The depreciation in the value of the mill plant came about in this way: Gress owned in connection with his mill plant a large body of timber which he intended to saw. After contracting with the defendants, he sold this timber on the faith of the contract. The defendants knew of his sale before they breached the contract. They cannot escape liability for the loss to Gress growing out of a condition which they knew would result from their default. Had the new corporation been formed, the plaintiff would have put in the sawmill plant at a valuation of $125,000, for which he would have received the equivalent in stock of the new corporation. The necessary result to Gress of the breach therefore was the loss of the difference between the value of the stock which would have been issued to him in the new corporation and the value of the stock in the Morgan Lumber Company as diminished by reason of the breach of contract by the defendants. This difference in value of stock was made by two facts: (1) The increase in the value of the timber retained by the defendants; and (2) the decrease in the value of the plant to be put in by Gress. The stock which would have been issued to him in the new corporation was worth five-eighteenths of the value of the timber to be contributed by the defendants and of the sawmill plant which the plaintiff was to contribute. There had been an increment in the value of the timber at the date of the breach, and the plaintiff was entitled to five-eighteenths of that increment, because, if the contract had been carried out, that fraction of the increment would have been added to the value of his stock.

The plaintiff's stock in the new corporation would have represented also five-eighteenths of the value of the mill plant, and had it been taken, gain or loss in its value would have been shared by the plaintiff and the defendants in the proportions of five-eighteenths and thirteen-eighteenths. But when the defendants breached their contract and brought about the diminution in the value of the mill property, they left the plaintiff to bear this entire loss in the diminished value of his stock in the Morgan Lumber Company. The defendants being solely responsible for this loss, all of which fell on the plaintiff, he is entitled to recover the whole from them. The District Court therefore correctly charged that the plaintiff was entitled to recover five-eighteenths of the net increase in the value of the timber which the defendants retained and the whole of the loss in the value of the plant which the plaintiff alone had to bear and which would not have occurred but for defendants' default.

Stating the matter differently and more succinctly, there was no loss on the timber by reason of the breach of the contract, but the defendants, having received the entire increase in its value, must account to the plaintiff for five-eighteenths, his share; the default of the defend-

ants brought loss in the value of the plant borne by the plaintiff alone, and for this entire loss the plaintiff must be compensated by the defendants who caused it.

No hard and fast rule as to the measure of damages or the method of ascertaining them for breach of contract can be laid down. Every case depends on its own facts. We have endeavored to show that the District Court adopted in this case the only measure and method by which the direct and proximate loss falling on the plaintiff from the defendants' breach could be ascertained; and the verdict of the jury under the instructions has abundant support in the evidence. It results from the views we have stated that none of the assignments of error are well founded.

Affirmed.

SALTER v. WILLIAMS et al.

(Circuit Court of Appeals, Third Circuit. August 13, 1917.)

No. 2207

1. BANKS AND BANKING ⟸262—LIABILITY OF BANK—REPRESENTATIONS OF PRESIDENT.

Regarding liability of a bank for fraudulent representations of its president in sale to plaintiff of stock of the bank owned by Y., requiring restoration of plaintiff to his prior situation, the president was acting for it, and not for Y., his acts, with the approval of its governing board, being for the purpose of complying with the direction given it by the comptroller of the currency to reduce Y.'s indebtedness to it, and Y., when approached, stating that, if the bank would advance money to redeem such stock which he had pledged, and would sell it and apply the proceeds on his indebtedness to it, he would sell other securities and reduce his indebtedness with the proceeds; and this though after such sale was made Y. failed to keep his agreement as to further sales and reduction of his debt.

2. BANKS AND BANKING ⟸243—NATIONAL BANK—RESCISSION OF STOCK PURCHASE—INSOLVENCY—DOUBLE LIABILITY.

Double liability under Rev. St. § 5151, of a holder of full-paid stock in a national bank, does not prevent the stockholder, after insolvency of the bank and appointment of a receiver, rescinding his purchase thereof for fraudulent representations of the bank's president acting for it in the sale of the stock; the stockholder paying his assessment under such statute, and disclaiming intention to sue for its recovery.

3. BANKS AND BANKING ⟸242—NATIONAL BANK—RESCISSION OF STOCK PURCHASE—INSOLVENCY—SUBSCRIBER TO STOCK.

A purchaser of fully paid stock of a national bank is not a subscriber to its stock, liable for an uncompleted contract of subscription, as regards his right to rescind, after insolvency of the bank, the purchase, for fraudulent representations of its president, acting for it, though it loaned him part of the money for the purchase, and he is still indebted to it therefor.

4. BANKS AND BANKING ⟸243—NATIONAL BANKS—RESCISSION OF STOCK PURCHASE—INSOLVENCY—PRIORITY OF CLAIMS.

No liability to creditors of a national bank preventing, a purchaser of stock therein may, after appointment of a receiver for it, rescind his purchase for prior fraud of the bank, with right to redress out of the funds in the receiver's hands like that of an ordinary creditor whose claim was contracted before the receivership.

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

Suit by William D. Salter against Christopher L. Williams, receiver, and another. From an adverse decree, plaintiff appeals. Reversed. See, also, 219 Fed. 1017.

A. A. Melniker, of Jersey City, N. J., for appellant.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree dismissing a bill in equity filed by William D. Salter against the First National Bank of Bayonne and its receiver. Salter seeks by his bill to enjoin an action at law brought by the receiver against him on a note, to compel the cancellation of the note and the nullification of the transaction in which the note was given, on the ground of fraud by the bank, and to obtain the restoration of all parties to the positions in which they were before the transaction was entered into.

The facts of the case are not in dispute. The First National Bank of Bayonne was organized in 1908 with stock fully subscribed and paid. In 1913 George W. Young was indebted to the bank in the sum of $12,000. The Comptroller of the Currency directed the bank to reduce the loan. The bank, through its president, called upon Young for a payment. Young had no money with which to meet the call, but represented that he had 30 shares of the bank's stock, and proposed that the bank sell them and apply the proceeds to the reduction of his indebtedness. This appealed to the president as a practicable way of complying with the Comptroller's order, so he set about to sell the shares. He approached Salter, offered them at $200 (par $100), made representations as to the bank's solvency and the amount of its resources, which were false, and induced Salter's serious consideration of the purchase. Pending negotiation with Salter it developed that Young had previously hypothecated the shares with the Commercial Trust Company, and did not have them to deliver. Young then proposed that, if the bank would advance to the trust company the sum of $5,700 (the amount demanded for the release of the shares), and then sell them for $6,000 (thereby swelling Young's indebtedness to the bank from $12,000 to $17,700), the bank could immediately reimburse itself for the advance, and he would sell certain other securities and with the proceeds make the reduction of his original indebtedness as required by the Comptroller. To this change from the first arrangement the president of the bank agreed, drew the bank's check for $5,700, delivered it to the trust company, and received the certificate of stock. A few days later the president renewed negotiations with Salter, in which there was an unimportant misunderstanding as to whether Salter had contracted to take the stock or was merely considering its purchase. However that may be, it is certain that at that time Salter, acting and relying upon the president's false representations, did con-

tract to purchase the stock, if the bank would finance him. Then the president went to the bank's discount committee, and informed it of the whole situation, and received its full authority to sell Salter the stock and loan him money enough to buy it. Whereupon certificates already made out in Salter's name were handed him, and in return he gave the bank his check for $500 and his note for $5,500. Young failed to keep his bargain as revised by selling other securities and reducing his loan. Salter, in ignorance of the bank's condition, received dividends on his stock, and reduced his indebtedness from time to time, until at the appointment of the receiver, the bank held his note for but $4,400.

Upon the bank's failure, and upon his discovery of what was the bank's real condition at the time of his purchase, Salter tendered the receiver the stock, together with the amount of dividends received, and requested the return of his $4,400 note and the $1,600 he had paid on account of the purchase. The receiver refused this demand, and brought the action on the note which Salter by the bill in this proceeding seeks to enjoin.

[1] The learned trial judge found all facts and legal inferences in favor of Salter, save one; that one he considered an insurmountable obstacle to his relief. It has to do with the question whether the president of the bank was acting for the bank throughout, or was acting only as the agent of Young in the sale of his stock.

To ascertain the true nature of the transaction in which the bank sold Young's stock to Salter, it must at all times be kept in mind that the transaction had its inception with the Comptroller of the Currency demanding the reduction of Young's indebtedness. The bank was satisfied with Young's loan, the collateral being in excess of its amount; but the Comptroller was not satisfied, and therefore ordered its reduction. In pursuance of that order, the bank, being without option in the matter, proceeded to procure its reduction. In this it was acting solely for itself. Its first attempt, as we have shown, was to secure payment by Young, but was met by the obstacle that Young had no money. It next turned to Young's property. Young owned stock of the bank. So Young and the bank agreed that the bank should sell the stock and apply the proceeds to the loan, and in that way enable the bank to reduce the loan as demanded by the Comptroller. Acting upon this agreement, the bank began negotiations with Salter. To this point certainly the transaction was the bank's (and so thought the learned trial judge), and all would have been well had Young been able to perform his part of the undertaking by producing the certificates. The certificates, it developed, were held elsewhere in pledge. This was still another obstacle to the bank's compliance with the Comptroller's order, and necessitated another change in its manner of reducing the loan. This change was made upon Young's proposition that, if the bank would procure the shares by advancing money for their release and then sell them (applying the proceeds to the advance), he would sell other securities and turn over the proceeds to the reduction of the loan as ordered. This the bank agreed to do, having in view as before, the one object of reducing the loan. It was just here that the learned trial judge thought that in carrying out this revised ar-

rangement to accomplish the same result the bank ceased to act for itself and began to act as the agent of Young for the sale of his stock. We are unable to follow him to this conclusion.

It appears to us that the transaction received its character from the incident of its inception. That was a matter solely affecting the bank. That character remained and persisted so long as the bank continued in one fashion or another in an endeavor to obey the command of the Comptroller. The president was acting for the bank throughout, with but a single object in view, and that was to accomplish a thing required not of Young, but of the bank. The one purpose of the bank in selling Young's stock was to benefit itself. Its object was never to help Young dispose of his stock, but was always to help itself by getting money from Young's property in some way or other. The president's acts to this end were within the full knowledge and met with the entire approval of the bank's governing board. If Young had kept his second bargain and sold other securities and applied the proceeds to the reduction of his indebtedness, there could have been no question that the sale of the stock to Salter (in effect a condition precedent to the sale of Young's other securities, imposed by Young and agreed to by the bank) would have been the indirect means by which the bank would have secured the reduction of Young's loan and by which it would have obeyed the Comptroller's order. Young, however, repudiated or failed to perform his promise to sell other securities, but Young's failure to do as he had promised did not change the character of the bank's acts in doing what it had promised. Therefore we are unable to agree that the bank ceased to act for itself and began to act for Young, when, confronted by Young's vacillation, it endeavored to meet the demand of the Comptroller in a way different from the first, but in a way which, like the first, included the sale of Young's stock. We are of the opinion that the president was acting for the bank at the completion of the transaction as well as at its inception, and that, as it is not disputed that the purchase was induced and made upon his false representations, the transaction is void, and the bank, having authorized and approved the acts of its president, and having accepted and retained their fruits, must restore the purchaser to the situation in which he was before (Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108), if not relieved by other considerations.

[2-4] It is maintained by the receiver that, whatever Salter's rights were as against the bank before its failure, they have been lost or are incapable of enforcement against the bank's receiver. This contention, as stated in the brief, "is based solely upon the proposition that after insolvency and the fixing of the rights of the creditors, a purchaser of stock in a national bank cannot rescind his purchase."

To this proposition, so broadly stated, we cannot subscribe; and of the same inclination was the trial judge. It is based upon the theory that the stock of a bank represents its capital; that creditors have a right to look to its capital for the payment of its debts; that their rights are fixed by the appointment of a receiver, which preserves the capital for them undisturbed by stockholders seeking to get from under the legal liability of their stock ownership. In support of this very gen-

eral proposition no authorities are cited. The argument in support of it is made by analogy to certain undisputed principles affecting the liability of stockholders and the rights of creditors upon insolvency of a national bank and the appointment of a receiver. These apply to the double liability of a stockholder of a national bank under section 5151, R. S., and to the liability of a subscriber to stock in a national bank to complete his contract of subscription. Scott v. Deweese, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822; Scott v. Abbott, 160 Fed. 573, 87 C. C. A. 475; Lyons v. Westwater, 181 Fed. 681, 104 C. C. A. 663; Westwater v. Lyons, 193 Fed. 817, 113 C. C. A. 617. It is to this double liability of the holder of full-paid shares and to the contractual liability of a subscriber to fully pay for his shares that creditors have a right to look for the payment of the bank's debts. But neither of these principles applies in favor of creditors and against Salter in this case, for Salter has met his liability under section 5151 by paying his assessment and disclaiming an intention to sue for its recovery, and he is not liable for an uncompleted contract of subscription, because the stock he purchased had previously been subscribed and fully paid. It is to that money which shares of stock produce as capital when they are subscribed and paid for that creditors have a right to look, not to the money which Salter thereafter paid the bank in buying its stock. If the purchase price of full-paid stock is treated, not as assets, but as capital, there would be a curious oversubscription of the bank's capital, in which each of Salter's shares would have contributed $300, $100 upon subscription, and $200 upon Salter's later purchase. This, of course, is impossible.

That Salter could have enforced a right of rescission against the bank (if such he had) before the appointment of a receiver is unquestioned. If so, it would be only because the rights of creditors were then no greater than his right of rescission. If creditors' rights in the capital were no greater than Salter's before the appointment of a receiver, they surely are no greater after. The rights of both with respect to capital are fixed by law, not by a change from solvency to insolvency of the bank, and by the consequent appointment of a receiver.

Salter's right to rescission was fixed by the fraud of the bank when the fraud was practiced. That was before receivership. He therefore approaches the receiver like an ordinary creditor whose claim was contracted before receivership, with a like right to redress out of the bank's funds in the hands of the receiver.

The decree below is reversed.

SIBLEY v. McCOY et al.

(Circuit Court of Appeals, Fourth Circuit. July 20, 1917.)

No. 1502

1. ADVERSE POSSESSION ⟸104—PRESUMPTION—TITLE OUT OF COMMONWEALTH.
Continuous, open, notorious, visible, peaceable, adverse possession of land in Virginia for 20 years by plaintiff in ejectment justifies presumption that the commonwealth has parted with title.

2. ADVERSE POSSESSION ⟸31—NOTICE TO OWNER.
To prove adverse possession, possession must be such as to charge the owner with notice, actual or presumptive, that the occupant is claiming to hold adversely.

3. ADVERSE POSSESSION ⟸44, 57—DURATION AND CONTINUITY—EVIDENCE.
Possession to give title by adverse possession must be continuous and uninterrupted for the full statutory period; and this must be clearly established.

4. ADVERSE POSSESSION ⟸33—NOTICE—UNDISCLOSED CONVERSATION.
Undisclosed conversation between one going into possession and one directing him to do so will not warrant inference that the owner was notified that the holding was adverse.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Hiram W. Sibley against John C. McCoy and others. Judgment for defendants, and plaintiff brings error. Reversed, and remanded for new trial.

W. J. Henson and Robert C. Jackson, both of Roanoke, Va. (M. O. Litz, of Welch, W. Va., on the brief), for plaintiff in error.

John W. Flannagan, Jr., of Grundy, Va. (Flannagan & Boyd, of Grundy, Va., on the brief), for defendants in error.

Before PRITCHARD and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. The plaintiff in error brought an action of ejectment against the defendants to recover a tract of land in the county of Buchanan in the state of Virginia. At the trial the jury under the instruction of the presiding judge returned a verdict in favor of plaintiff for all the land in dispute, with the exception of a tract of about 70 acres north of what was called the "King" line, and of several parcels of cleared land south of that line, the questions as to which were left to the jury, which as to those lands returned a verdict for the defendants for the 70 acres north of the King line and one of the cleared parcels south of that line containing about 25 acres. From the judgment on this verdict the present writ of error was sued out by the plaintiff.

The 70-acre tract was part of a tract of 1,235¼ acres the plaintiff had procured from one N. B. Dotson. Under the testimony this tract was first shown in the possession of one Abner R. Kerr, who on the 13th of June, 1889, conveyed to N. B. Dotson, who in turn on 20th July, 1889, conveyed to the plaintiff. The plaintiff offered testimony to prove actual continued adverse occupation by him, through his ten-

ants and lessees, of the tract of 1,235¼ acres from the date of his purchase on the 2d of July, 1889, to the commencement of the action.

There was produced in evidence a grant to Richard Smith and Henry Banks for 200,000 acres issued 1st of November, 1795, the northern line of which was referred to in the testimony and designated on the map introduced by plaintiff as the "King" line. This line showed as included in the 200,000 acres granted all of the 1,235¼ acres except about 70 acres, which lay north of the King line. The plaintiff introduced several other grants, but none of them covered this 70 acres. The plaintiff relied upon his long-proven possession of the 1,235¼ acres under color of title from the deed to him of the 20th of July, 1889, as justifying the presumption of a grant to all the 1,235¼ acres, including this 70 acres. The defendant introduced in evidence a deed from Archibald Justus to Armeda Justus, dated the 22d of January, 1912, covering 333 acres, which was included within the bounds of the 1,235¼-acre tract. The coal, oil, gases, and all minerals on and underlying this tract of 333 acres were the next day, the 23d of January, 1912, conveyed by Armeda Justus to Polly McCoy and Archibald Justus. The defendants set up the claim of adverse possession as to this tract of 333 acres. The presiding judge instructed the jury:

"That the plaintiff has failed to show that the commonwealth of Virginia has parted with title to that portion of the 333-acre tract north of the King line, and if they should believe from the evidence that the defendants claim title in good faith to that part of said land, they should find as to said part of said tract for the defendants."

The contention of the plaintiff is that he had shown an adverse possession of this 1,235¼ acres for 24 years, viz. from 1889 to 1913, and was entitled to presume from such long-continued possession a grant whereby the title had passed from the commonwealth to all the 1,235¼ acres. The presiding judge had instructed the jury that as to all the uncleared land within the 1,235¼-acre tract lying south of the King line as to which the plaintiff had shown color of title and sufficient adverse occupation the jury should find for the plaintiff; this apparently on the theory that under the Smith and Banks patent of 1795 the commonwealth had parted with the title to some one, although the plaintiff did not connect himself with that patent by any course of paper title. The plaintiff claims that he was entitled to the same instruction as to the 70 acres of the 1,235¼-acre tract lying north of the King line on the theory that a grant to that part of the 1,235¼-acre tract could be inferred from his long continued adverse possession. The only difference with regard to the plaintiff's title under adverse possession with color of title between this 70 acres and the remainder of the 1,235¼ acres is that, although his claim to title from possession was precisely the same over the whole 1,235¼ acres, yet he could not show by any recorded paper instrument any grant from the commonwealth to this 70 acres.

[1] In our opinion, the learned judge below was in error in instructing the jury that the plaintiff had failed to show that the commonwealth had parted with title to this 70 acres part of the 333 acres, and also part of the 1,235¼ acres, which 70 acres lay north of the

King line. Whether or not in Virginia possession for the statutory period is sufficient to justify the presumption of a grant is not necessary to be now determined. We do find that continuous, open, notorious, visible, peaceable, adverse possession of land for a period of 20 years or over will justify the presumption that the commonwealth has parted with the title, and that the instruction that the plaintiff has failed to show that the commonwealth had parted with the title was erroneous in view of the testimony introduced by the plaintiff and which he had the right at least to have submitted to the jury on that point.

South of the King line and within the bounds of the 1,235¼-acre tract were a number of small cleared parcels of land. As to these the presiding judge instructed the jury:

"That if they believe from the evidence that the defendants have been in uninterrupted, continuous, hostile, and actual possession of the cleared lands, indicated on the map as tracts Nos. 1, 2, 3, 4, 5, 6, and 7, claiming to own the same, for a period of ten years prior to the institution of this action, that they should find for defendants, although they may believe from the evidence that the defendants did not have color of title for said tracts."

Under these instructions of the court the jury found for the plaintiff all of the cleared lands except parcel or tract No. 4, containing about 25 acres, and as to this tract judgment was entered for the defendants. This cleared tract of 25 acres is within the bounds of the 1,235¼ acres south of the King line, but without the bounds of the 333-acre tract conveyed by Archibald Justus to Armeda Justus.

The contention of the plaintiff in error is that the learned judge should have instructed the jury peremptorily to find for the plaintiff as to this 25 acres.

Under the testimony the plaintiff claimed title to the entire 1,235¼ acres including therein this 25 acres by continuous, adverse, hostile, peaceable possession under color of title, the color of title being the deeds of conveyance from Abner R. Kerr to N. B. Dotson, dated 13th June, 1889, and from N. B. Dotson to the plaintiff dated the 20th of July, 1889.

From the evidence it appears that Abner R. Kerr was for many years prior to his conveyance to Dotson in possession of this cleared tract of 25 acres. In 1872 (or 1879, according to one witness) Kerr moved off leaving his land in possession of tenants. Archibald Justus was at one time one of his tenants. He was so in 1889, when Kerr came back and surveyed the land prior to his sale to Dotson, and Kerr then called Justus and told him he had sold the land, and that Justus would have to arrange with the new owner. In April, 1890, Archibald Justus leased the land, viz. the 1,235¼ acres from the plaintiff, Sibley, and continued on the property as the tenant of Sibley until June, 1903, when the lease was terminated, and Archibald Justus moved off and seems never to have returned to this 25 acres. A short time after Archibald Justus moved off, his son, Anderson Justus, "some four or five or six days, or maybe a little longer, afterwards, something like that, or maybe two weeks" moved into the house his father had just vacated. He stated:

"My father told me to move back into it. I lived there eight or nine years or some years right along there, after I moved in there. * * * When I took a notion to move to Hurley, and Clel. Jesse, my brother-in-law, wanted to move in, and I told my father about it, and he told me it would be all right to let him move in, and that he would collect the rent off of him. I couldn't tell you how long Clel. lived there, not very long, four, or five, or six months, or something like that."

[2, 3] This is practically the entire testimony to show an adverse occupation of this 25 acres by Archibald Justus after the expiration of his lease in June, 1903. Archibald Justus himself never moved upon or occupied this 25 acres after June, 1903. His claim to title by adverse occupation for ten years after that date is based upon the theory that he occupied through his tenants, his son, Anderson Justus, and his son-in-law, Clel. Jesse. To prove adverse possession, the possession must be such as to charge the owner with notice actual or presumptive that the occupant is claiming to hold adversely. It must also be continuous and uninterrupted for the full statutory period, and this must be clearly established.

[4] There seems no doubt under the testimony that Archibald Justus had been the tenant of the plaintiff. His written lease is an acknowledgment that binds him. In the most favorable aspect to Archibald Justus his lease terminated in June, 1903. If it did not then terminate, it continued under its terms to a later date. There is no testimony sufficient to show that the plaintiff was reasonably notified by any act of Archibald Justus that the plaintiff's former tenant, who had acknowledged his title, immediately upon the termination of his lease took hostile possession of the leased land. The character of the possession of Anderson Justus as the hostile possession of his father rests only upon the statement of Anderson Justus that his father told him to move in the house his father had just vacated. This undisclosed conversation would hardly warrant the inference that Sibley was notified that Archibald Justus was holding adversely.

The length of occupation proved by Anderson Justus is also far from complying with the rule. While the testimony shows, at most, an occupation for nine years and some five or six months, it cannot be construed to justify the inference that there was shown a clear continued occupation for ten years. The instruction prayed by the plaintiff on this point should have been granted. For these reasons it appears that the judgment below must be reversed, and the cause remanded to the court below for a new trial upon the questions brought up to this court by the assignment of error, viz. upon the right of the plaintiff to recover from the defendants the two tracts of 70 acres and 25 acres, respectively, by the verdict of the jury at the trial below, excepted from the land to which the plaintiff was found to be entitled.

Reversed.

FIRST NAT. BANK OF SUTTON, W. VA., et al. v. DROVERS' & MECHANICS' NAT. BANK OF BALTIMORE, MD.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1917.)

No. 1504.

1. BANKS AND BANKING ⟸105(½)—AUTHORITY OF VICE PRESIDENT—USUAL COURSE OF BUSINESS—ANTAGONISTIC INTEREST.
While the vice president of a bank intrusted with the general transaction of its business has authority to bind it in any matter which in due course of business falls under the authority of an executive officer of a bank, yet if the transaction with him is so out of the usual course of business as to put on notice the one dealing with him that he is using the bank's name and credit in his own business, or that he is representing his own or any antagonistic interest, he stands before the person dealing with him stripped of his representative capacity, and powerless to bind the bank.

2. BANKS AND BANKING ⟸105(½)—FRAUD OF VICE PRESIDENT—USUAL COURSE OF BUSINESS—ANTAGONISTIC INTERESTS.
D., treasurer of F., a bank, as such applied to B., a bank, for a loan to F., and on forged resolution of F.'s directors authorizing borrowing, B. discounted note of D. to F. indorsed by D. in name of F., taking as collateral a note indorsed by payee and another, then by D. individually, and thereafter by him in the name of F. After F. had merged in N., a bank which assumed certain of F.'s liabilities, but not the discounted note, of which it did not know, D., who had become vice president of N., on forged resolution of N.'s directors, authorizing payment in such manner, procured B. to take in payment of the note a note of D. to N. indorsed by him in its name, the discount being paid by check drawn by D. as vice president to himself individually, and by him indorsed. *Held*, as regards liability of N. on the substituted note, that the transaction was so out of the usual course and so showed the antagonistic interests of D. as an individual and as treasurer of F. and as vice president of N. as to put B. on notice.

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

Action by the Drovers' & Mechanics' National Bank of Baltimore, Md., against the First National Bank of Sutton, W. Va., and its receiver. Judgment for plaintiff, and defendants bring error. Reversed.

Connor Hall and D. C. T. Davis, Jr., both of Charleston, W. Va. (Davis, Davis & Hall, of Charleston, W. Va., on the brief), for plaintiffs in error.

Carlyle Barton, of Baltimore, Md., and V. L. Black, of Charleston, W. Va., for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. In January, 1914, H. H. Dean became vice president of the First National Bank of Sutton, W. Va. In fraud of the bank and for his own benefit he made his own note for $15,000 payable to the bank or order three months after date, and indorsed it in the name of the bank to the Drovers' & Mechanics' National Bank of Baltimore. The issue in this action brought by the Baltimore bank is whether the First National Bank is liable as indorser notwithstand-

ing Dean's fraud. By consent the case was tried without a jury, and therefore the finding of the district judge in favor of the plaintiff must be affirmed if it has reasonable support in the evidence.

The surrounding details are somewhat complex, but the decision depends on the application of the law to a few leading facts not in serious dispute. Prior to the year 1914 Dean had no connection with the First National Bank, but was treasurer of the Farmers' Bank & Trust Company of Sutton, W. Va. On or about October 24, 1913, as treasurer, he applied to the Drovers' & Mechanics' National Bank of Baltimore for a loan to the Trust Company of $15,000. The Baltimore bank required a resolution of the board of directors authorizing the loan. In response Dean sent a copy of a resolution authorizing the borrowing of $30,000, bearing on its face the date December 29, 1913. This was in reality a resolution signed by the president and vice president in 1911, Dean altering the date to suit his purposes. The Baltimore bank agreed to make the loan, and discounted a note for $15,000 signed by Dean individually and indorsed by him in the name of the Trust Company, taking as collateral a note for $22,000 of J. V. Thompson and J. R. Barnes, payable to S. W. Shrader and indorsed by Shrader, Showalter, and Dean, and by Dean in the name of the Trust Company. The Baltimore bank, after applying $6,000 of the proceeds to a note of the Trust Company for that amount, credited the Trust Company with the balance and paid it out in due course on checks of the Trust Company. That this transaction was really a discount of his own note by Dean for his own benefit was shown by a credit made by Dean on the Trust Company's books to himself of the net proceeds of the note, $14,775, at the same time that he made a charge for that amount on the Trust Company's books to the Baltimore bank.

On January 15, 1914, a contract was made between the Trust Company and the First National Bank which was manifestly intended as a transfer of the business and assets of the Trust Company to the National Bank. By this contract the Trust Company turned over to the National Bank cash, notes, and other assets to the amount of $198,506.31. The National Bank assumed liability for the Trust Company's deposits, balances due to other banks, and certain notes to other banks to the amount of $203,970.02. For the difference, $5,464.-01, between the liabilities assumed and the assets turned over, the Trust Company gave its note to the National Bank. The face of the contract shows that the intention was that the Trust Company should be merged into the National Bank, the bank taking over the assets of the Trust Company and assuming its known liabilities. But the liabilities of the Trust Company assumed were carefully specified. The $15,000 note indorsed by the Trust Company to the Baltimore bank, not having been entered by Dean on the books of the Trust Company, was not known, and was not assumed nor mentioned. The evidence requires the inference also that the Thompson note for $22,000, indorsed by Dean in the name of the Trust Company as collateral for the $15,000 note, never appeared on the books of the Trust Company as an asset, and was not embraced in the notes assigned to the National Bank. As the National Bank never assumed the payment of the $15,000 note and never received any benefit of that note in its contract with

the Trust Company, this action would have no support if it depended on the contract of merger.

After the merger Dean became vice president of the National Bank, and the management of the business was left almost, if not entirely, in the hands of the vice president and his inferior officer, Casto, the cashier. Before maturity of the $15,000 note of Dean indorsed by the Trust Company, Dean agreed on demand of the Baltimore bank to procure a resolution of the board of directors of the National Bank authorizing the payment of the note by substitution of a new note of Dean indorsed by the National Bank. Dean, on March 24, 1914, wrote the Baltimore bank that the merger had been completed, and sent forward the new note signed by him individually and indorsed by him in the name of the National Bank, with a pretended copy of a fictitious resolution of the board of directors of that bank signed by him as secretary and certified by him as vice president. Relying upon this resolution, the Baltimore bank marked the old note paid and returned it, but retained the Thompson note as collateral. This transaction was handled through the note tellers' department, and did not appear in statements of account made in due course to the National Bank. A check for $225 on a New York bank was drawn by Dean as vice president in favor of Dean as an individual, and by him indorsed in payment of the discount. On maturity of this note on June 22, 1914, it was renewed in like form, and again the transaction appeared only on the discount ledger. The discount $225 was again paid by a check on the Baltimore bank drawn by Dean as vice president in his favor as an individual and indorsed by him. This check was charged in the account of the National Bank with the Baltimore bank, and no objection was made to it. But the check indicates that Dean paid for it, and there is nothing in the record tending to show that he did not.

From this statement it will be observed that the National Bank had nothing to do with the making of the debt which is the foundation of the note in suit; that it received no part of the consideration; that neither in the contract of merger nor in any other way did it assume the payment of the note; that Dean in all the transactions concerning it was acting in his own interest, and in fraud first of the Trust Company and then of the National Bank.

[1] Nevertheless, since Dean was intrusted with the general transaction of the business as vice president of the National Bank, he had authority to borrow money and bind the bank therefor by making or indorsing notes in its name and assigning its bills receivable as security in the usual course of business, and to bind the bank in any other matter which in due course of business fell under the authority of an executive officer of a bank. Auten v. United States National Bank, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; Aldrich v. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611.

But, on the other hand, if the transactions here under review were so out of the usual course of business as to put the Baltimore bank on notice that Dean was using the bank's name and credit in his own interest, or that he was representing his own interest or any antagonistic interest, then he stood before the Baltimore bank stripped of

his representative capacity, and powerless to bind the National Bank. West St. L. S. Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; Lamson v. Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; 7 Corpus Juris, 541.

The scope of banking business is constantly enlarging, and the usual course of business becoming broader. The number and rapidity of banking transactions require banks to rely on the authority and good faith of the executive officer of correspondent banks. But, on the other hand, the stockholders and directors of banks, especially small banks, must rely on the honesty of their executive officers, and they have a right to demand that other banks shall not blindly disregard plain evidences that a president or cashier is acting for himself or some other person while using the bank's name and credit.

[2] Taking the most liberal view in favor of the Baltimore bank, every transaction it had with Dean in relation to the $15,000 note was unusual; and all the transactions taken in connection carried an alarm which none but the heedless would disregard.

It has been held that a note of an officer to his own bank is presumed to be for value, and if nothing more appears it may be discounted for the bank on its own indorsement without question by another bank. Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034. But here the Baltimore bank accepted Dean's note payable to the trust company, his own bank, and indorsed by him in the name of the bank, on the representation that he was thus making himself the primary obligor for the debt of the bank as a mere accommodation to the bank, though the bank itself was to become secondarily liable only as an indorser. The transaction was so out of the usual course that only the credulous would accept without inquiry Dean's false representation that the bank as indorser was to receive the entire benefit to the exclusion of himself as maker. The resolution of the board of directors, on which the date had been changed by Dean, authorizing a loan of $15,000, did not purport to sanction a transaction of this kind. Dean's personal interest in the loan was further evidenced by his individual indorsement of the Thompson note for $22,000 ahead of his indorsement of it in the name of the Trust Company.

Next, when the note fell due the Baltimore bank accepted Dean's statement without verification that the Trust Company had been merged into the National Bank, and inferred contrary to fact, without a direct statement to that effect even from Dean, that in the merger the National Bank had assumed the note of Dean indorsed by the trust company. But the bank itself recognized the necessity of having Dean's statements verified in a matter in which he was personally concerned, and it required a resolution of the board of directors of the National Bank as authority to protect it in renewal of the note with the indorsement of the National Bank. In sending his own note indorsed by him in the name of the National Bank to take up his old note, Dean wrote of his old note as "my note," and he inclosed a fictitious paper, in form a copy of a resolution of the board of directors of the National Bank authorizing him as vice president to borrow $15,000 from the Baltimore bank. This pretended authority to borrow,

even if it had been genuine, by no means conferred authority on Dean to assume for the bank the liability of Dean and the Trust Company, and thus it did not even in form meet the requirement which the Baltimore bank thought necessary to bind the National Bank. But aside from that it was a forged resolution, and the Baltimore bank was content to accept as sufficient proof of its authenticity the pretensive certificate of Dean alone as vice president and as secretary of the board of directors. In addition to this, the check sent to the Baltimore bank for $225, the discount, was issued by Dean as vice president to Dean individually, and indorsed by him. Indeed, in all of its dealings about a note upon which Dean was personally liable the bank accepted without verification of any kind Dean's own statements that primary liability for the note had been assumed by the National Bank.

The case comes to this: As to the debt of $15,000, Dean appeared before the Baltimore bank representing three separate interests. As an individual maker of the note, he was interested that he should not be called on to pay it at maturity; as treasurer of the Trust Company, he was interested in having the Trust Company relieved of the indorsement; and as vice president of the National Bank, his duty was to see that the National Bank should not assume the liability of another without consideration. When these interests were evidently involved in antagonistic relations, the Baltimore bank cannot hold the National Bank bound by Dean's attempt to assume for it a debt for which it held the obligation of other parties in interest whom Dean attempted to represent. True, the National Bank in the conduct of its general business held Dean out as its agent, but the implied authority fell from him as soon as his antagonistic interest appeared.

The evidence does not support the position that the National Bank acknowledged liability for the overdraft of the Trust Company; but, even if it did, the assumption of that debt and its collection by the National Bank from the Trust Company did not warrant the inference that it had assumed all the debts of the Trust Company. On the contrary, the evidence shows that neither the board of directors nor any other officer had any knowledge of any of the transactions of Dean with the Baltimore bank in reference to his note for $15,000 until after the failure of the bank in August, 1914. It follows that the National Bank is not liable on the $15,000 note.

The counterclaim for the balance on the account current due the First National Bank by the Baltimore bank can only be allowed for the amount remaining after crediting the Rawson notes. It does not seem to be seriously questioned that these notes were taken in the regular course of business, and upon failure of the maker to pay the First National Bank was liable as indorser.

In passing on the issue of the liability of the First National Bank to the Baltimore bank, it has been necessary to state and comment upon the transactions of Dean while he was treasurer of the Trust Company, but, of course, we express no opinion concerning the liability of the Trust Company.

Reversed.

HEITLER v. UNITED STATES.

SHAFFNER v. SAME.

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

Nos. 2414, 2415.

1. CRIMINAL LAW ⊂⊃508(3)—PERSONS JOINTLY INDICTED—COMPETENCY AS WITNESS.

Under Act March 16, 1878, c. 37, 20 Stat. 30 (Comp. St. 1916, § 1465), providing that in the trial of indictments and informations the person charged shall, at his own request and not otherwise, be a competent witness, any of the defendants jointly indicted and tried may, at his own request, testify on behalf of the government against his codefendants.

2. CRIMINAL LAW ⊂⊃700—DISCLOSURE OF WITNESSES—CODEFENDANTS.

While there is no impropriety in the government offering immunity to defendants for testifying against their codefendants, such agreement must not be employed for the purpose or with the probable effect of embarrassing other defendants in the conduct of their defense by leading them to believe that their codefendants are in good faith making a defense; and where the government had promised immunity to two of the defendants on trial, and from the first was intending to use them as witnesses, the prosecutor should have stated the facts, and might with propriety have asked a severance, and his failure to do so would require a setting aside of the judgment if any harm resulted.

3. CRIMINAL LAW ⊂⊃1166½(7)—HARMLESS ERROR—SUSTAINING CHALLENGES TO JURORS.

Where two of the defendants on trial had been promised immunity for testifying against their codefendants, and had no real interest in the defense, the sustaining of a peremptory challenge by their counsel to a juror was not prejudicial to their codefendants, as a defendant has no right to a trial by any particular jurors, and if the juror taking the place of the one excused was objectionable he might have been challenged for cause or peremptorily.

4. CRIMINAL LAW ⊂⊃1171(1)—HARMLESS ERROR—CONDUCT OF PROSECUTOR.

On the trial of four defendants, two had been promised immunity for testifying against their codefendants, but the prosecutor did not disclose this fact or ask for a severance. The attorney for the other defendants suspected from the start that the defendants promised immunity would testify for the government, and was not tricked into any harmful co-operation with them in making the defense. While one of the defendants promised immunity was permitted to remain in the courtroom while other witnesses were testifying, the witnesses who preceded him testified to nothing bearing on the conspiracy as to which he was a witness. *Held*, that the failure of the prosecutor to disclose that immunity had been promised to such defendants, and that they would be witnesses for the government, was not prejudicial.

5. PROSTITUTION ⊂⊃1—TRANSPORTATION FOR PURPOSE OF PROSTITUTION—ELEMENTS OF OFFENSE.

Where there was evidence that defendant, while seeking inmates for a house of prostitution in Gary, Ind., was told of two girls in Chicago, and requested his informant to send them to Gary, giving his informant $5 with which to pay their fare, and with the money so provided the girls were transported from Chicago to Gary, defendant was guilty under the White Slave Traffic Act, June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1916, §§ 8812–8819), if this evidence was true.

6. CRIMINAL LAW ⊂⊃510—TESTIMONY OF ACCOMPLICES—CORROBORATION—NECESSITY.

A conviction may rest on the evidence alone of a coconspirator or accomplice.

7. CRIMINAL LAW ⇐742(1)—QUESTION FOR JURY—CREDIBILITY OF WITNESSES.

Though the only witness who testified to defendant's complicity in the transportation of women for purposes of prostitution was a depraved and shameless trafficker in women for revenue, his testimony was not, as a matter of law, insufficient to sustain a conviction, where other witnesses testified that defendant was engaged in running bawdyhouses, and hence had the motive and interest to do the things the witness said he did.

8. PROSTITUTION ⇐1—TRANSPORTATION FOR PURPOSE OF PROSTITUTION—ELEMENTS OF OFFENSE.

Where girls were sent from Chicago to Gary, Ind., to enter a house of prostitution, a person advancing or giving them money to pay their taxi fare from the depot in Gary to the house of prostitution was not guilty of an offense under the White Slave Traffic Act, the taxi ride not being interstate commerce.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Michael Heitler and Dolly Shaffner were convicted of an offense, and they each bring error. Judgment against Shaffner reversed and remanded with directions, and judgment against Heitler affirmed.

Plaintiffs in error, Michael Heitler and Dolly Shaffner, together with Mollie Epstein and Dave Rosensweig, were indicted for conspiracy to transport Rosie Frameovitz, in interstate commerce, for purposes of prostitution, from Chicago, Ill., to Gary, Ind., in violation of the White Slave Traffic Act. All were tried together. Epstein and Rosensweig were called as witnesses for the government, testifying against plaintiffs in error, and admitting their own complicity. All were found guilty. By consent of the government, a new trial was granted to Epstein and Rosensweig, and the indictment was nolle prossed as to them. At the same time plaintiffs in error were each sentenced to imprisonment for a year and a day. It is contended for plaintiffs in error that their codefendants, being on trial at the same time with them, were not competent witnesses at the instance of the government; that under the circumstances appearing there should have been a severance as to the testifying defendants; that there was no evidence whatever tending to connect Dolly Shaffner with any conspiracy to transport Rosie Frameovitz in interstate commerce; and that there was no substantial evidence showing beyond reasonable doubt the guilt of Heitler.

Benjamin E. Bachrach, of Chicago, Ill., for plaintiffs in error.

Charles F. Clyne and John H. Lally, both of Chicago, Ill., for the United States.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1] 1. In general, defendants on trial, if testifying at their own request, are competent witnesses for the government against their codefendants on trial with them. The act of Congress of March 16, 1878, provides that in the trial of indictments, informations, etc., the person charged shall at his own request, and not otherwise, be a competent witness, and that his failure to make such request shall not create any presumption against him. This act renders any of a plurality of defendants on trial competent to testify either in his own behalf, or on behalf of any codefendant, or the government, provided only that he testifies at his own request. Wolfson v. United States, 101

Fed. 430, 41 C. C. A. 422; Wigmore on Evidence, § 580, supports this view.

2. It is insisted that in fairness to plaintiffs in error, under the circumstances appearing, the government, at the beginning of the trial, should have stated that Rosensweig and Epstein were to be called as witnesses, and should have asked severance as to them. When the jurors were about to be examined on their voir dire, Mr. Bachrach, counsel for plaintiffs in error, stated to the court he had been informed that certain of the defendants were to testify for the government, and that if this was so they ought not to be permitted through their lawyer to participate in the selection of a jury which was in fact to try only plaintiffs in error. Mr. Lally, the assistant district attorney in charge of the prosecution, being asked if all the defendants were on trial, stated they were, but he neither affirmed nor denied that any of them were to testify for the government. It transpired that Mollie Epstein had no counsel, and the court thereupon appointed Mr. Hulbert, who was representing Rosensweig, to represent her also. After eight of the jurors had been accepted by the government and Mr. Bachrach, Mr. Hulbert peremptorily challenged one of them, who was accordingly excused. The first witness called was Mollie Epstein, and thereupon Mr. Bachrach asked the government to request a severance as to the defendants intended to be used as witnesses. The court said that, the jury having been sworn, there could be no severance, and Bachrach asked that Rosensweig be excluded from the room while the witnesses preceding him testified. He was informed by the court that Rosensweig, being a defendant on trial, could not be excluded. In this discussion, after the jury was sworn, and Epstein had been called as a witness, Mr. Lally first admitted Rosensweig was to testify for the government, stating, however, he was willing Rosensweig should be excluded from the courtroom while others testified, but making no reply to Bachrach's assertion that Rosensweig was to have immunity for testifying.

[2] From the record it is clear that the government must have intended from the first to use these defendants as witnesses, since without them no possible case of conspiracy was undertaken to be made out. It is likewise clear that immunity for testifying was, before the trial, promised Rosensweig. Although he denied it, his attorney Hulbert, called as a witness for the defense, testified that he made such an arrangement for Rosensweig with the government, and had told Rosensweig if he testified that would be all there would be to it. There is of course no necessary impropriety in making such an arrangement, nor in offering immunity in proper cases. These are matters which usually on behalf of the government rest primarily in the sound discretion and good judgment of its prosecuting officers, acting in good faith for the public interest. But such agreements must not be employed for the purpose, or with the probable effect, of embarrassing other defendants in the conduct of their defense, through leading them to believe that their codefendants are in good faith defending against the same charge, when in truth and to the knowledge of the prosecutor they are not. Under the facts indicated, and particularly with the

attention of the prosecutor challenged thereto, the prosecutor should frankly have stated in the beginning that the government expected to call these defendants as witnesses, and that Rosensweig had been promised immunity for his testimony. He might further, with entire propriety, before the trial began, have asked severance (which under the circumstances would undoubtedly have been granted) as to the defendants who were to testify, and thus have avoided the possible unfairness to the other defendants in leaving the court without discretion to separate witnesses who remain only in name as defendants on trial. If from the situation disclosed, the record did not leave it clear that no harm came to plaintiff in error through the prosecutor's failure to so disclose and to ask severance, it would be the duty of this court to set aside the judgment.

[3] But it so happens that the record shows these parties were not thereby prejudiced. The peremptory challenge of the juror on behalf of defendants who had no real interest in the defense was not harmful. It is the right of a defendant, not to have certain jurors to try his case, but only to have a fair and impartial jury. If the juror who took the place of the one so excused by Mr. Hulbert was legally objectionable, he might have been challenged for cause, and in any event, if for any reason unsatisfactory, might have been peremptorily excused by plaintiffs in error. No objection was made to him, and presumably he was a fair and impartial juror. A defendant is not in situation to complain of the retention of a juror whom he had power peremptorily to excuse. Nor. Pac. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Pearce v. United States, 192 Fed. 561, 113 C. C. A. 33; So. Pac. Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416; People v. Gray, 251 Ill. 439, 96 N. E. 268; Hartshorn v. Ill. Valley R. R. Co., 216 Ill. 392; 75 N. E. 122.

[4] Mr. Bachrach's suspicion that the codefendants would testify for the government was voiced from the start; so it is not supposable that through reliance on the bona fides of their defense he was tricked into any harmful co-operation with them. Nor did their remaining as defendants on trial tend to mislead the jury as to the fact of promised immunity to Rosensweig, since, notwithstanding his denial of it, nevertheless it so clearly appeared that the jury could have entertained no doubt of it. As to the contention respecting Rosensweig's presence in court while the two government witnesses who preceded him testified, it appears that nothing to which these witnesses testified bore on the conspiracy itself, as to which Rosensweig was the only witness, and what he testified thereon could not have been suggested or influenced by what the two preceding him had testified.

[5] 3. It is earnestly urged for plaintiffs in error that the record shows no substantial evidence on which to base their conviction. It was testified that Heitler had long been interested in a house of prostitution in Gary, which his wife, Daisy Smith, was running, and of which Dolly Shaffner was for some months an inmate; that in March, 1916, Shaffner started another such house there, in which Heitler also had a proprietary interest; that Heitler had expressed a desire to procure girls as inmates for this new house, and that he was in-

formed at Chicago of Mollie Epstein and Rosie Frameovitz, both prostitutes, as available for such purpose; that he requested his informant to send them to the Shaffner house at Gary, but, being told that the informant had no money to pay their fare to Gary, he gave the informant $5 with which to pay their railroad fare to Gary, and that accordingly with the money so provided by Heitler they were transported by rail from Chicago to Gary. If this evidence is true, the charge against Heitler was unquestionably proved. Rosensweig was this informant, he alone testifying to this conversation with Heitler, and no witness corroborating or contradicting him in this respect.

[6] That conviction may rest on the evidence alone of a coconspirator or accomplice is now too well established to require discussion. Diggs and Caminetti v. United States, 220 Fed. 548, 136 C. C. A. 147; s. c., 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442; United States v. Giuliani (D. C.) 147 Fed. 598; Wigmore on Evidence, § 2056; Wharton, Crim. Ev. (10th Ed.) § 439; Hoyt v. People, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239. Indeed, in that part of the charge to the jury which, at the request of Heitler's counsel, the court gave, it is properly stated "that a person accused of a crime may be convicted on the uncorroborated testimony of a person who comes and testifies that he or she was his or her accomplice in the commission of the crime charged."

[7] 4. But the contention is that the uncontroverted evidence shows Rosensweig to be so absolutely bad that nothing he might say by way of testimony, standing alone, could properly be considered as substantial evidence from which a jury was warranted in finding beyond reasonable doubt that the alleged conspiracy was proved. Rosensweig's own testimony stamps him as the vilest of the vile—a trafficker in unfortunate females for the revenue he may derive from peddling them in public prostitution. Into business more infamously foul the male of the species never entered. Heitler was of that same despicable ilk with Rosensweig, proved so by evidence wholly aside from Rosensweig —ten witnesses, good, bad, and indifferent, from whose testimony the jury was well warranted in concluding that Heitler, staying in Chicago, was for profit to himself running these two bawdyhouses at Gary, going there frequently to get his share of the returns.

Rosensweig's story, depraved and shameless though it brands himself, is not inherently improbable or unreasonable as relating to one like Heitler, whom other evidence shows to be a person who had the motive, and to whose interest it was to do the very things which Rosensweig said he did. The story of the conspiracy was wholly uncontradicted. Of its truth or falsity the jury which heard and saw the witness was best judge. And since, if true, the evidence was sufficient to convict Heitler of the conspiracy charged, and by the verdict of guilty it is evident the jury believed it true, we cannot as a matter of law say there appears no substantial evidence on which to base the verdict against Heitler. In the case of Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205, which is urgently pressed upon us as strikingly parallel, the Court of Appeals of the Eighth Circuit reversed a judgment of conviction on the ground that there was no substantial

evidence showing guilt beyond reasonable doubt. The only witness there implicating the defendant Sykes was Mrs. Callahan, self-confessed participant in the crime. But from the opinion it appears that Sykes was theretofore a man of good repute, that she was contradicted in her implication of Sykes by Sykes himself and by two others who were confessed accomplices in the alleged robbery, and that at other times the witness had under oath given the details of the crime without in any way implicating Sykes. Nothing appears in that case which, when here applied, conflicts with the foregoing conclusion as to Heitler.

[8] Dolly Shaffner's case is quite unlike Heitler's. Rosensweig did not purport to connect her with any conspiracy to transport Rosie Frameovitz in interstate commerce. Rosie made two trips to Gary, about three weeks apart, the first time remaining only a day. But whatever evidence there is of a conspiracy to unlawfully transport her in interstate commerce applies to the first trip, and not the second. All the record shows with reference to Shaffner respecting the first trip is that after Rosie and Epstein reached Gary pursuant to the conspiracy to transport them there, they rode in a taxi from the railroad depot to Shaffner's place in Gary, where Shaffner advanced or gave them money to pay their taxi fare. Surely this taxi ride, wholly within the state of Indiana, did not of itself involve interstate commerce. Nothing whatever appears in the record to connect Shaffner with any plan or conspiracy to transport Rosie from Chicago to Gary, or to show that she had knowledge of any plan or intention on the part of anybody to so transport her in interstate commerce, or that she knew or had reason to believe that Rosie was coming to Gary. As to the second trip, there is evidence that Rosie phoned Shaffner from Chicago that she was coming to Gary, but there is no proof in the record to implicate Shaffner in any conspiracy to transport Rosie from Chicago to Gary at that time.

The judgment against Dolly Shaffner is reversed, and as to her the cause is remanded, with direction to grant a new trial. The judgment against Michael Heitler is affirmed.

CHESAPEAKE & O. RY. CO. v. NEEDHAM.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1510.

1. CARRIERS ⟸298(1)—INJURY TO PASSENGER—NEGLIGENCE—SWAYING CARS.
Swaying or lurching of cars necessarily incident to proper operation of fast passenger trains at curves and heavy grades in the track, necessary because of the nature of the country, whereby a passenger is injured, does not charge the carrier with negligence; but the risk thereof is assumed by the passenger.

2. TRIAL ⟸260(8)—INSTRUCTIONS—REQUEST COVERED BY CHARGE—PASSENGER'S ACTION.
Relative to error in refusal of requested instruction applicable to issue of fact in passenger's action for injury from fall in fast train, the statements of the general charge to find for defendant unless they believe the injury occurred by reason of negligent operation of the train, and unless they believe it was guilty of some negligence of act or omission, do not cover principle of passenger assuming risk of lurch or jolt which is an unavoidable incident of prudent and skillful operation.

3. CARRIERS ⟸321(1)—PASSENGER'S ACTION—INSTRUCTIONS—UNCERTAIN OR MISLEADING REQUEST.
A requested instruction in passenger's action for injury from fall on fast passenger train caused by lurch or jolt on road in rough country with necessary sharp curves and heavy grades that the jury should find for defendant unless they believe from the evidence that there was a negligent and extraordinary lurch in substance and purpose is not uncertain or misleading, so as to warrant its rejection for faulty expression.

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

Action by Abigail Needham against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Herbert Fitzpatrick, of Huntington, W. Va. (Enslow, Fitzpatrick & Baker, of Huntington, W. Va., on the brief), for plaintiff in error.

C. Beverley Broun, of Charleston, W. Va. (Malcolm Jackson, of Charleston, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In the brief of counsel for defendant in error, plaintiff below, the material facts are recited as follows:

"On September 3, 1910, Mrs. Needham and her sister-in-law, Mrs. Jackson, boarded the defendant's passenger train No. 3 at White Sulphur to travel to Charleston. They entered the train at the front end of the Richmond sleeper in charge of Conductor Rogers, and sat down on one of the seats of section 2, facing in the direction of the engine. Before the train reached Ronceverte, Mrs. Needham went from the sleeper to the dining car to get breakfast. While she was absent, Mrs. Byrne, of Charleston, and her family entered the same sleeper at Ronceverte. Miss Marie Byrne, a young lady of 18 years, and a little sister, also sat down in section 2, taking the seat opposite the one occupied by Mrs. Jackson, and facing the rear of the train. Mrs. Jackson was suffering severely from car sickness, and needed to lie down.

"When Mrs. Needham returned from breakfast she took her seat beside Mrs. Jackson, who was obliged to rise up to give her a place. Shortly afterwards the Pullman conductor, to whom she had previously spoken about the matter, came to Mrs. Needham and said she could have another seat in the rear of section 2. She arose and started towards the rear of the train, along the aisle of the car, to reach the seat indicated by the conductor. She had taken but a few steps, when a sudden and violent forward jerk of the car threw her headlong, face down, on the floor of the aisle. She fell the whole length of her body towards the rear end of the car. It was exactly as if the floor of the car had been jerked from under her. She was unable to rise, and had to be lifted and carried to a seat."

The only question of merit arises from the refusal of the court below to give the following instruction:

"The court instructs the jury that unless they believe from all the evidence, by a preponderance thereof, that on the train on which the plaintiff was on September 3, 1910, there was a negligent and extraordinary lurch, which threw the plaintiff to the floor, they should find for the defendant."

[1] For the purposes of this case it may be assumed that injury to a railroad passenger ordinarily creates a presumption that the carrier was negligent and casts upon the latter the burden of showing that the accident occurred without its fault. But a railroad company is not an insurer, and some risks of travel must be assumed by the passenger. In many parts of the country, of which the locality in question is an example, railroads can be built only in the narrow space between a range of mountains or hills on one side and a winding stream on the other. Under these conditions a road must have frequent curves, some of which will be "sharp," to say nothing of heavy grades which often characterize such a right of way. And it is manifest that high-speed trains cannot be run over a roadbed of this kind, however well constructed, without more or less tilting and swaying of the cars, and even something like jolting, as curves are rounded or brakes applied. So far as these motions, by whatever name called, are the necessary results or incidents of proper operation, they cannot charge the carrier with liability to a passenger thereby injured, because they are risks which the passenger assumes.

[2] This goes at once to the principal question litigated at the trial. The plaintiff testified to the accident substantially as set forth in the statement above quoted, and she was corroborated in the main by a young woman friend who was in the same car. Against this was the testimony of six witnesses, three of them passengers who saw the occurrence, to the effect that they did not observe any jolting of the car or other unusual motion. In a word, the plaintiff's proofs would sustain a verdict in her favor, while defendant's proofs show that she has no cause of action. This being the issue in dispute, we are of opinion that defendant was entitled to the rejected instruction; and the more so because the rule of exemption embodied in the request had not been stated or distinctly referred to in the general charge to the jury. True, the jury were told that:

"Unless they believe from the evidence in this case that the injury complained of occurred to the plaintiff by reason of the negligent operation of the train in which the plaintiff was at the time of the accident, they should find for the defendant."

And again:

"Unless you believe from the evidence in this case that the defendant was guilty of some negligence, either some act or some omission in care that was due under the circumstances, you cannot find against it."

But these statements, though unquestionably correct, failed to point out that there are certain risks which a passenger assumes; and nowhere in the charge were the jury told that plaintiff could not recover if the lurch or jolt that caused her fall was an unavoidable incident of prudent and skillful operation. The instruction asked by defendant was peculiarly applicable, as it seems to us, to the facts developed at the trial, and added significance was given to its refusal by the omission of any direct reference to this aspect of the case in the subsequent charge to the jury. We are unable to agree that the request was "covered in general charge."

[3] Some criticism is made of the form of the refused instruction, and its use of the word "extraordinary," but we are not concerned with mere refinements of phraseology. In substance and purpose the request was not uncertain or misleading, and its rejection for faulty expression would hardly be warranted. As we see the case, it was the right of defendant to have the jury instructed that negligence cannot be predicated upon the swaying and lurching movements of a car which necessarily attend the proper and careful operation of fast passenger trains, because such movements are risks which the passenger assumes. As was said in Ozanne v. Illinois Central (C. C.) 151 Fed. 900:

"But whilst the carrier must rigidly perform all of these duties, the natural laws of motion superadd risks which the carrier cannot always guard against, even by the use of the utmost care, and such risks as those the passenger must be supposed to assume. The railroad track cannot always be straight. The transit of trains must be rapid, and the swing of a car is inevitable when the train passes over a curve. This is unavoidable, and the consequences of it is one of the risks we have referred to."

In the circumstances here disclosed we are constrained to hold that it was reversible error to refuse the requested instruction.

Reversed.

THE ATKINS HUGHES.

THE FANNY C. BOWEN.

(Circuit Court of Appeals, Third Circuit. June 20, 1917.)

No. 2249.

COLLISION ⇐95(1)—MEETING TOWS—FAILURE OF TOW TO FOLLOW TUG.

A collision in Delaware river at night between a schooner in tow on a 70-fathom hawser and a meeting tug and her tow alongside *held* due solely to the fault of the schooner, which, instead of following her tug, took a wide sheer to port, apparently because her helmsman mistook the lights of the meeting tug for those of her own tug, although the steering light of the latter was burning brightly; it appearing without contradiction that the tugs passed at a safe distance of probably 250 feet.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; W. H. Seward Thomson, Judge.

Suit in admiralty for collision by Arthur W. Simmons, master of the tug Columbia and bailee of M. D. C. Scow No. 31, against the Atkins Hughes and the schooner Fanny C. Bowen. Decree against the Bowen alone, and her claimant appeals. Affirmed.

The following is the opinion below of Thomson, District Judge, of the Western District of Pennsylvania, specially assigned:

Arthur W. Simmons, master of the tug Columbia, files this libel on behalf of the owners of the tug and as bailee of M. D. C. Scow No. 31, and in behalf of the owner of the said scow, against the steam tug Atkins Hughes and the schooner Fanny C. Bowen, in a cause of collision in the Delaware river. From the evidence the following facts appear:

On the night of July 6, 1914, the tug Columbia was proceeding down the Delaware river, bound for Ft. Mifflin, Pa. She had in tow a square-bowed barge loaded with mud; the scow projecting some 50 feet ahead of the tug. The vessel was keeping to the westward of the channel and making against the tide about 2½ miles per hour. There was a light wind, and the weather was somewhat rainy and cloudy, but not enough to seriously interfere with the lights being seen. The tug and scow had up their regulation lights, all properly set and burning. The master was in the pilot house at the wheel. Near 11 o'clock, as she was approaching the 17-foot lamp buoy in what is known as the horseshoe, the tug Atkins Hughes was seen a considerable distance away, bound up the river. She had in tow, on a hawser about 70 fathoms long, the schooner Fanny C. Bowen, a four-masted sailing vessel without cargo, bound for Philadelphia. The regulation lights were up and burning on both the tug and the schooner. When the tugs were about a mile apart, the Hughes gave a one-blast signal whistle, which was heard and promptly answered by one blast from the Columbia. The Columbia was on the westerly side of the channel, and the Hughes on the easterly side, and when the signals were sounded each tug changed her course slightly to the right, which tended to increase the passing space between them. This position, with reference to the channel, was maintained as the tugs approached, and they passed each other at a safe distance of from 225 to 250 feet; the width of the channel at that point being about 500 feet. As the tugs were passing, the schooner in tow of the Hughes took a heavy sheer to the left towards the Columbia. The captain at the wheel of the Columbia, seeing that the schooner was showing both side lights, red and green, instead of the red only, and that there was danger of collision, blew three blasts of the whistle, being the danger signal, at the same time throwing the helm hard-aport, which swung her bow to the right. When it became apparent that a collision was

imminent, the Columbia's engines were stopped and reversed full speed astern. The schooner struck the mud scow toward the forward end, which projected ahead of the tug, sinking it, and passed ahead and to the right of the tug, her hawser tearing off the top of the pilot house and carrying away the smokestack and both flagpoles.

For the damage sustained by the sinking of the scow and the injury to the tug, these libels were filed against the tug Hughes and the schooner Bowen. I am satisfied, from all the evidence, that no blame is properly chargeable against the Atkins Hughes, and that the accident was due solely to the negligence on the part of the officers in the navigation of the Fanny C. Bowen. It seems reasonably clear that the usual and necessary lights on the Hughes were in place and burning brightly. These included the towing lights on the forward mast, her running lights, red and green, her steering light on a pole astern about 30 feet from the deck, fixed in a box so that the light would show directly astern, and a light fixed under the overhang just over the bits. The towing light on the pole astern was examined within five minutes after the collision by Capt. Goslee of the Hughes, and by Mr. Wolfe, the chief engineer. The captain testifies that he sent a man to take the light down and bring it to him; that this was done, and he found it burning brightly; that he showed the light to Capt. Chase, of the schooner, who was then standing about 6 feet from him, and that he then directed the deck hand to put it back in place, which was done. The captain's testimony as to the light is supported by Mr. Wolfe, the chief engineer, by the deck hand, Johnson, who took the light down, and by Mr. Hastings, the second engineer; the last two witnesses testifying that they saw the light burning in place. There is no testimony on the part of the schooner that there was any difficulty in seeing the towing light of the Hughes. On the contrary, it appears from the testimony of Capt. Chase, the navigating officer of the schooner, that he was on deck from 8 o'clock; that about five minutes before the danger signals were blown he went across to the starboard side to see how the schooner was going with respect to the tug's light; that he saw the steering light of the Hughes; that it was burning brightly, and that the schooner was following the course of the tug; that this was the last time he saw the light until the signal blasts were blown.

I do not think that it can fairly be found under the evidence that there was any negligence in the navigation of the Hughes. The master was in the pilot house, steering the vessel, and a lookout was maintained on the forward deck. The master appears to have been maintaining proper lookout supervision of the schooner, and testifies to looking back but a short time before the collision, and saw the schooner following directly after his tug. The approaching tugs saw each other's lights and sounded the proper passing signals. Considering the width of the channel, I think the distance at which the tugs passed each other furnished an ample margin of safety, assuming that the schooner was being steered with ordinary care. But herein lay the fault. The schooner was dependent on the Hughes for her motive power, and generally for her navigation. The officers of the tug were required to perform their towing service with caution and skill, avoiding dangers which those skilled in navigation should know and provide against; the degree of care demanded being commensurate with the dangers naturally incident to the service which they undertook to perform. On the other hand, the duty of the schooner was to follow after. When the passing signals were blown, there were three men on the schooner's deck, the master, the helmsman, and the lookout. The master stood aft of the house, and walked across the deck from one side to the other to see if the helmsman was following the tug. The captain had given the helmsman orders to follow the tug. He gave no other orders until the danger signals were blown. The lookout testifies that he had been on duty until 11:45; that he left his position as lookout to call the watch, came down from the forecastle head to the well deck, and was about to return, when the danger signals were given and he was thrown to the deck by the collision; that he reported no lights, and did not see the Columbia or her scow until after the collision. Neither the lookout nor Capt. Chase heard the passing signals given by the tugs, although there is no question that they were given. The helmsman of the schooner did not appear as a witness.

Under all the evidence, I am satisfied that the helmsman of the schooner mistook the Columbia's lights for those of the Hughes, suddenly changing her course across the bow of the Columbia, causing the accident which resulted. This is indicated in a conversation which Mr. Mears, engineer of the Columbia, says he had with Capt. Chase as to what caused the accident. This witness says: "He [Capt. Chase] told me the vessel had been following very nicely all night, and he could not account for such a sheer, unless the man at the wheel took her lights to be the Hughes'. He said he was on deck, but stood under the side of the house to keep from getting wet. It was raining."

In view of the facts herein set forth, the court is of opinion that the libelant is entitled to recover against the Fanny C. Bowen the damages sustained by the collision, together with the costs, and that the libel against the Atkins Hughes should be dismissed. A decree may be drawn accordingly.

Howard M. Long, of Philadelphia, Pa., for the Fanny C. Bowen.

Lewis, Adler & Laws and John F. Lewis, all of Philadelphia, Pa., for the Columbia.

Willard M. Harris, of Philadelphia, Pa., and Park & Mattison, of New York City, for the Atkins Hughes.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. It must be admitted that one rather perplexing circumstance in this case is the apparent lack of material injury to the schooner; but this cannot be allowed to outweigh the strong and positive testimony that she, and she alone, is the vessel that did the damage. We see no reason to add anything to Judge Thomson's satisfactory opinion, and therefore adopt it as our own.

The decree is affirmed.

DODD v. POCAHONTAS CONSOL. COLLIERIES CO.

(Circuit Court of Appeals, Fourth Circuit. July 25, 1917.)

No. 1531.

MASTER AND SERVANT ⊂=238(3)—INJURY TO EMPLOYÉ—NEGLIGENCE OF EMPLOYÉ.

Deceased, experienced as a worker in and about coal mines, killed in the work preliminary to installing a telephone line, involving the cutting of a groove for the wire along the side of a coal mine entry, and the taking down of all loose coal above it, that by falling or sinking would close the groove and break the wire, was guilty of negligence, which was the sole cause of the accident; the brow of coal which fell, while loose from the roof, being reasonably safe till he undermined it by cutting the groove, against warning and protest, and with knowledge from experience and direction of the foreman that all drummy coal had to be taken down and that to do so required the assistance of a number of men.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Action by W. R. Dodd, administrator of Joseph Gydosh, deceased, against the Pocahontas Consolidated Collieries Company. Judgment for defendant on a directed verdict, and plaintiff brings error. Affirmed.

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

William H. Werth, of Tazewell, Va. (Werth & Werth, of Norton, Va., on the brief), for plaintiff in error.

Hugh R. Hawthorne and S. C. Graham, both of Tazewell, Va. (Fulton & Vicars, of Wise, Va., and Graham & Hawthorne, of Tazewell, Va., on the brief), for defendant in error.

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

DAYTON, District Judge. This was an action for damages for the death of plaintiff's intestate in a coal mine of defendant.

The charge of negligence was that the defendant allowed a brow of coal overhanging the place where deceased was put to work to become unsafe and failed to exercise care in removing it and rendering the place a safe one to work.

Upon trial the court below directed a verdict and judgment for the defendant, from which action the plaintiff has sued out this writ of error.

The evidence is not conflicting, and clearly discloses the facts to be that Gydosh, while young in years, was old in experience, as a worker in and about coal mines. From the time he was a small boy of 12 years, working as a "back hand" for his father, until his death at the age of 23, he had so labored.

At and before the time of the accident the defendant was installing a telephone line along the main entry of what was known as its "Baby" mine. In order that the wire of this should not be broken or disturbed by cars or other objects passing along and through this entry, it was having a groove dug in the coal along the side of the entry about midway the rib, some four or four and a half feet from the bottom of the mine, the coal seam being from eight to nine feet in thickness. This groove, or "hitch" as it was called, was about eight or ten inches wide and some six inches deep. In this hitch the telephone line was to be placed. The work of its installation, under the direction of Henry, the mine foreman, was being done at odd intervals by company men when there was not more pressing work to do. The work involved, not only the digging of this hitch, but also the taking down of all loose coal above it that, by falling or sinking down, would close the hitch or groove and break the line. It is a well-known fact that by reason of exposure to air and from other causes the coal on the ribs of mine entries will become to an extent loose from the roof and liable to fall if undermined from any point beneath. The fact that such coal at any point along the rib is loose can ordinarily be determined by sounding it. In other words, if struck, it gives forth a dull, hollow sound different from that given by coal not loose. This loosened condition of coal the miners designate as "drummy."

At the point of the accident this condition existed, and in consequence the digging of the hitch or groove there had been passed over a few days before by Pauley until he could have men enough to take the brow down. Gydosh and Pauley, engaged in this work of taking down the loose coal, digging the hitch, and installing this telephone line, in passing along the side of the entry came to this point, and

Gydosh commenced digging the hitch through this overhanging brow of "drummy" coal. Pauley, who was some fifteen or eighteen feet in front of Gydosh when the latter commenced working at the point of accident, called back to him, saying, "I would not dig there; it looks dangerous; it might hop off," meaning, as he explains, that the overhanging brow of loose coal, if dug under, would fall. Gydosh answered him and said, "I believe I can knock out enough here to clear the line." Thereupon "he went ahead and dug a little more, maybe dug once, maybe two or three licks, for all I know, and when I saw it start I hollered, and it fell on him," quoting Pauley's language; he being the sole witness of the accident.

From this and other evidence adduced upon the trial, it is clearly apparent that plaintiff was not entitled to recover for these reasons: First. No negligence can be imputed to the defendant company in the premises. This brow of coal while loose from the roof was secure and reasonably safe until Gydosh undermined it from its bottom support, or, as the eyewitness expressed it, "cut off its leg," against warning and protest. Gydosh knew from experience, and from the directions of the mine foreman, that in the installation of this telephone line all such "drummy" coal had to be taken down, and that to do so required the assistance of a number of men. Second. Not only was the defendant not guilty of negligence, but, on the other hand, Gydosh was clearly negligent, and such negligence on his part was the sole cause of the accident. He was employed to remove this "drummy" coal so that the telephone line might not be interfered with or broken by any subsequent fall on it. He sought to avoid the full requirement of this duty by partially digging away a part of the lower supporting coal or "leg," enough to clear the line, in order to avoid having to take down the brow. Pauley warned him not to do so. While Pauley was not the mine foreman, he was the "leader" of the men engaged in this work when the mine foreman was absent. Gydosh should have heeded his warning. He preferred to trust his own judgment and run the risk, and did so at the cost of his life.

The court below was clearly right in directing the verdict to be rendered for defendant, and its judgment in the premises must be affirmed.

Affirmed.

Ex parte MASON.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1917.)

No. 191.

MANDAMUS ⇐46—REVIEW OF JUDICIAL ACTS.

Where a motion to transfer the case to the equity side of the court was granted, the court holding that the extensive accounting required brought the suit within jurisdiction of equity, mandamus to direct the judge to grant a jury trial will be denied. The writ issues to compel the performance of a plain duty. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision; but it may not command in what particular way that decision shall be rendered, or by what rules it shall be reached. When a question within his jurisdiction has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another.

Petition for writ of mandamus by Edward R. Mason. Petition dismissed.

Edward R. Mason, of Des Moines, Iowa, pro se.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

SANBORN, Circuit Judge. Mr. Edward R. Mason has presented to this court his petition for a writ of mandamus to direct Hon. Martin J. Wade, judge of the United States District Court for the Southern District of Iowa, to grant to him and his codefendants a trial by jury of the issues presented in an action which the United States has brought against him and his codefendants for damages for alleged breaches of his official bond as clerk of the United States Circuit Court for the Southern District of Iowa. His codefendants are the living sureties upon that bond and the executors of the estate and the owner of a large part of the estate of a deceased surety. These codefendants will henceforth be called the sureties.

Mr. Mason makes a motion for leave to file his petition and for a rule on Judge Wade to order the trial of the action on the bond by a jury, or that he show cause why he should not do so. The petition and the exhibits attached thereto and made a part thereof disclose these facts: In November, 1910, the United States brought an action at law against Mason and his sureties on his official bond as clerk for divers sums of money aggregating more than $10,000, which the United States alleged he had collected as clerk and had failed to pay over to litigants, attorneys, marshals, stenographers, witnesses, masters, and examiners, to whom these sums were due and to whom it alleged it was Mason's duty as clerk to pay them. In April, 1915, an amended and substituted petition was filed by the United States, a copy of which is one of the exhibits to the petition of Mr. Mason. This amended petition sets forth, among other things, more than 450 specific amounts varying from $1,265.75 to $.45, and aggregating $10,924.87, which the United States alleges Mr. Mason and his sureties are liable to pay under the bond. After this amended petition was filed the United States made a motion before Judge Wade to transfer the action to the equity side of the court

and to place it on the equity docket. This motion was argued by counsel, Judge Wade considered the issue it presented, prepared and filed a written memorandum in which he cited the Act of March 3, 1915, c. 90, 38 Stat. 956 (Comp. St. 1916, §§ 1251a–1251c), United States v. Harsha (C. C.) 188 Fed. 759, Kirby v. Lake Shore, etc., Railroad, 120 U. S. 130, 134, 7 Sup. Ct. 430, 30 L. Ed. 569, and McMullen Lumber Co. v. Strother, 136 Fed. 295, 302, 303, 304, 69 C. C. A. 433, and held that the extensive accounting which the petition of the United States demonstrated must be taken in order to reach a just judgment or decree in the suit upon the bond brought that suit within the equitable jurisdiction of the court, and convinced him that the plaintiff's remedy at law was not as complete or adequate as its remedy in equity. Thereupon he granted the motion and gave the parties permission to amend their pleadings to conform them to the practice in equity.

This review of the proceedings in the District Court discloses the fact that the relief which Mr. Mason seeks by his petition for a writ of mandamus is in reality a command from this court to Judge Wade to reverse his decision and order and to try the issues in the case between the United States and Mason with a jury as an action at law. He invokes article 7 of the amendments to the Constitution and section 566 of the Revised Statutes (3 Comp. St. 1916 Ann., p. 3140, § 1583), and insists that under them he is entitled to a trial by jury of the issues presented regarding the breaches of the bond. But that question, the question whether or not he is entitled to a jury trial at law of those issues, is the judicial question which Judge Wade was compelled to consider and decide, and which he did consider and decide when he granted the motion to transfer the case to the equity side of the court. If he was in error in his conclusion or action, that error may be corrected by an appeal from a final decree. But a consideration of the function of the writ of mandamus and an examination of the authorities upon this subject leave no doubt that the established rules for its use are these:

The writ issues to compel the performance of a plain duty. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decison, but it may not command in what particular way that decision shall be rendered, or by what rules it shall be reached. When a question within his jurisdiction has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decison, or to compel another. Ex parte Whitney, 13 Pet. 404, 406, 408, 10 L. Ed. 221; Kimberlin v. Commission to Five Civilized Tribes, 104 Fed. 653, 654, 44 C. C. A. 109, 110; United States v. Judges of United States Court of Appeals, 85 Fed. 177, 180, 29 C. C. A. 78, 81; Minnesota Moline Plow Co. v. Dowagiac Mfg. Co., 126 Fed. 746, 747, 748, 61 C. C. A. 352, 353, 354; Barber Asphalt Paving Co. v. Morris, 132 Fed. 945, 956, 66 C. C. A. 55, 66, 67 L. R. A. 761. Under these rules the facts stated in the petition of Mr. Mason forbid the issue of the writ of mandamus by this court.

Let the petition be filed, therefore, and let it be dismissed.

FORD MOTOR CO. v. UNION MOTOR SALES CO. et al.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2941.

1. MONOPOLIES ⟸17(1)—RESTRAINT ON TRADE—PRICE RESTRICTION—RESALE.
At least subject to limitations, a system of contracts between a manufacturer and retail dealers, whereby it, in connection with absolute sales of its product, attempts to control the resale prices for all sales, by all dealers, is a restraint on trade, invalid both at common law, and, so far as it affects interstate commerce, under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

2. PATENTS ⟸216—SALE OF PATENTED ARTICLES—ABSOLUTE OR CONDITIONAL.
There is an absolute as distinguished from a conditional sale of patented articles by the manufacturer, the dominant character of the dealing being one of sale with attempt to provide and enforce resale price, and title being reserved in the manufacturer only till full purchase price is paid, with right of repossession only in case of default in such payment, manifestly only to enforce payment, and the manufacturer being under no obligation to take back the articles, though the parties are styled manufacturer licensor and dealer licensee, and the contract in terms grants right and license to use and vend the articles within specified territory, the manufacturer agreeing to sell its products to the dealer, and he agreeing to purchase the articles at specified times, and it being provided that he is in no way the legal representative or agent of the manufacturer, and it being stipulated that he shall pay a certain amount as agreed damages for each failure to observe the agreement to maintain resale prices.

3. PATENTS ⟸216—RIGHTS OF PATENTEE—DICTATING RESALE PRICES.
A patent gives the patentee no right to dictate price at which patented articles absolutely sold by him shall be resold by the purchaser, and so no right to restrain sale at less than the price attempted to be fixed by the patentee by a third person buying from the purchaser from the patentee at less than such price, with knowledge of the contract between the patentee and such purchaser attempting to fix the resale price.

Appeal from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit by the Ford Motor Company against the Union Motor Sales Company and others. From a decree dismissing bill (225 Fed. 373), plaintiff appeals. Affirmed.

Alfred Lucking, of Detroit, Mich., for appellant.

Hon. Judson Harmon, of Cincinnati, Ohio, for appellees.

Before KNAPPEN, MACK, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff is a manufacturer, seller and distributor of automobiles, important and essential parts of which are patented. It marketed its product under a so-called "license system," by which dealers purchased the automobiles and were given definite and restricted territory, and in turn agreed to resell only at plaintiff's full list prices. Ford automobiles could thus be obtained at no less price except by inducing Ford dealers to break their agreement with plaintiff. Defendants obtained Ford machines from a dealer or dealers, and sold them and advertised to sell them at less than plaintiff's regular price list. Plaintiff filed its bill to restrain this interference with its

business. Upon final hearing on pleadings and proofs the bill was dismissed. (D. C.) 225 Fed. 373. The appeal is from the decree of dismissal. The ultimate questions concern the validity and enforceability of the price-restricting agreement involved.

[1] At least subject to certain limitations hereafter stated, it is the general and well-settled rule that a system of contracts between a manufacturer and retail dealers, by which the manufacturer, in connection with absolute sales of his product, attempts to control the resale prices for all sales, by all dealers, eliminating all competition and fixing the amount which the ultimate purchaser shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act (Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 400, 31 Sup. Ct. 376, 55 L. Ed. 502; John D. Park & Sons Co. v. Hartman [C. C. A. 6] 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. [N. S.] 135; Bauer v. O'Donnell, 229 U. S. 1 [The Sanatogen Case] 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150; United States v. Kellogg Toasted Corn Flake Co. [D. C.] 222 Fed. 725, 728, Ann. Cas. 1916A, 78, decided by three judges of this circuit, sitting under Expediting Act, Feb. 11, 1903, c. 544, 32 Stat. 823 [Comp. St. 1916, §§ 8824, 8825]; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086; Straus v. American Pub. Ass'n, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866; Motion Picture Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871), and that, at least as against a purchaser from such dealer, an attempt to enforce a reservation of right to fix the price at which resale shall be had by the vendee is equally futile, notwithstanding the article is patented, provided, as already said, the transfer to the vendee is full and complete (Bauer v. O'Donnell, supra; Straus v. Victor Co., supra).

There can be no doubt that if plaintiff's contracts with its dealers amounted to absolute sales of its automobiles, and if the case otherwise falls within the principles declared in the cases cited, plaintiff was properly denied relief. Plaintiff contends, however, that its case does not fall within the principles stated or the authorities cited; that under its contracts with its dealers a conditional sale only was effected, passing but a qualified or restricted title to the automobiles delivered thereunder; that the restrictions attempted to be imposed by the plaintiff, as patentee, on the purchaser's right to resell are valid, and having been agreed to by the purchaser are binding not only upon him, but upon those purchasing from the dealer with knowledge of the price restriction.

[2] The question of the nature of the contract between plaintiff and its dealers, whether one of absolute or conditional sales of automobiles, lies at the threshold of the controversy. From a consideration of all the terms of the contract, it is clear that it is essentially one of absolute sale. While the contract, which recites plaintiff's ownership of various patents and patent applications, styles plaintiff the "manufacturer licensor" and the purchaser the "dealer licensee," and in

terms grants the "full right and license to use and vend" within the licensed territory automobiles and parts of plaintiff's manufacture, the dominant character of the dealing is plainly one of sale, with attempt to provide and enforce resale price and territorial restrictions. For example: Plaintiff agrees to "sell its product to the dealer licensee" at certain discounts from list prices, and to allow certain additional rebates scaled on the "net amount of business" done, which plainly means the amount of the dealer's purchases from plaintiff; the dealer agrees to take deliveries and to "purchase the said Ford automobiles" in various months specified. The title to the articles sold is reserved in plaintiff only until the full purchase price is paid, with right of repossession only in case of default in such payment. The provision manifestly is designed only to enforce payment. Plaintiff is under no obligations to take back any of the goods purchased by the dealer, and it is expressly stated that the "dealer licensee is in no way the legal representative or agent of the manufacturer licensor." For each failure to observe the agreement to maintain resale prices, the dealer agrees to pay $250 as "agreed damages the manufacturer licensor will sustain," and is made subject to forfeiture of his contract at plaintiff's option. The other provisions of the contract are not sufficiently controlling or important to require mention.

Courts will look to the dominant intention of the parties, and in this view the case is one of absolute, as distinguished from conditional, sale, not only within our decisions generally (Mishawaka Woolen Mfg. Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109; John Deere Plow Co. v. Mowry, 222 Fed. 1, 137 C. C. A. 539; In re Stoughton Wagon Co., 231 Fed. 676, 145 C. C. A. 562; Wood Mowing, etc., Machine Co. v. Croll, 231 Fed. 679, 145 C. C. A. 565), but within the applicable decisions of the Supreme Court in the Miles, Sanatogen and Victor Cases, supra. As expressed in the Sanatogen Case (229 U. S. 16, 33 Sup. Ct. 619, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

> "The title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. * * * There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

See in this connection the Victor Case, supra, 243 U. S. at pages 497–501, 37 Sup. Ct. 412, 61 L. Ed. 866.

[3] Turning then to a consideration of plaintiff's rights as patentee: Its counsel states the broad proposition that "this is a case of patented articles, and it is absolutely lawful to create a monopoly in patented articles." In support of this proposition counsel cite the statement in Bement v. National Harrow Co., 186 U. S. 70, 91, 22 Sup. Ct. 747, 755 (46 L. Ed. 1058), that "the fact that the conditions in the contracts keep up the monopoly or fix prices [in patented articles] does not render them illegal," and the proposition in the Creamery Package Case, 227 U. S. 8, 32, 33 Sup. Ct. 202, 57 L. Ed. 393, to the effect that the owner of a patent has exclusive rights of making, using and selling, which he may keep or transfer, in whole or in part. Neither of

these cases lends support to the contention that the patent grant confers upon the patentee the right to dictate the price at which patented articles absolutely sold by him shall be resold by his purchaser. In the Bobbs-Merrill Case, supra, which involved the right of an owner of a copyright to restrict the price on resale, it was said (210 U. S. 345, 28 Sup. Ct. 724, 52 L. Ed. 1086) of the Bement Case that:

It was "between the owners of the letters patent as licensor and licensees, seeking to enforce a contract as to the price and terms on which the patented article might be dealt with by the licensee. The case did not involve facts such as in the case now before us, and concerned a contract of license sued upon in the state court, and, of course, does not dispose of the questions to be decided in this case."

The Creamery Package Case merely held, so far as material here, that a contract by which the manufacturer of a patented article appointed another and distinct manufacturer, selling like articles, his exclusive agent for the output of the factory does not violate the Sherman Act. Manifestly, neither of these decisions relates in any way to restrictions upon the right of resale of patented articles purchased absolutely. Not only has the Supreme Court not held that the right given by the patent law extends to a control of the price at which articles absolutely sold by the manufacturer patentee could be resold by his vendee, but that court has repeatedly held the contrary.

In the Sanatogen Case, supra, where it was held that an attempt to reserve the right to fix the price at which a patented article fully and completely transferred should be resold by the vendee is futile under the statute, it was said (229 U. S. 10, 33 Sup. Ct. 617, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"The right to make, use and sell an invented article is not derived from the patent law."

And again (229 U. S. 17, 33 Sup. Ct. 620, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act."

This proposition was recognized and applied in the Victor Case, supra; and see by analogy the Universal Film Case, supra, 243 U. S. at page 513, 37 Sup. Ct. 416, 61 L. Ed. 871.

Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, lends no support to the plaintiff's propositions. In that case contributory infringement was found in the direct sale (to the purchaser of a patented mimeograph) of a kind of ink suitable for use with the machine, with knowledge by the seller of a license restriction that the mimeograph be used only with ink made by the vendor, and with the expectation that the ink sold would be used with the machine. In the Sanatogen Case, supra, the Dick Case was distinguished by the consideration that in that case merely a qualified title passed to the purchaser, while in the Sanatogen Case the absolute title passed; and in the recent Universal Film Case, supra, 243 U. S. 518, 37 Sup. Ct. 416, 61 L. Ed. 871, the Dick Case was distinctly overruled.

Counsel cite several cases thought to be inconsistent with the views we have thus far expressed. Many of these cases were referred to in the Kellogg Case, supra. But it seems enough to say that we find in none of them anything opposed to the propositions we have stated, except so far as such cases are in conflict with the decisions of the Supreme Court, notably in the Sanatogen, Victor and Universal Film Cases, supra. We find nothing in either the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) or the federal Trade Commission Act (Act Sept. 26, 1914, c. 311, 38 Stat. 717 [Comp. St. 1916, §§ 8836a–8836k]) validating price restrictions by a vendor on resale of property sold absolutely by him.

But counsel contends, and with especial emphasis, that the decisions of the Supreme Court in both the Bobbs-Merrill and Sanatogen Cases were grounded "solely upon the principle that the owner of a patent or copyright cannot qualify the title passed by means of a *mere notice attached to the chattel,* so as to restrict third persons in the sale of such articles"; and it is argued that the instant case is distinguished from the cases mentioned by the existence of express contract between the manufacturer-patentee and the dealer. It is true that in the Bobbs-Merrill Case (which involved a copyrighted book) the wholesale dealers from whom defendants purchased copies of the book were under no agreement to enforce the terms of the notice by retail dealers, or to restrict their sales to such dealers as would agree to observe the terms stated in the notice, which were that no dealer is licensed to sell at a less price than $1, and that a sale at a less price would be treated as an infringement of the copyright; and there was thus no claim of contract limitation or license agreement controlling the subsequent sales of the book. The holding (210 U. S. 350, 28 Sup. Ct. 726, 52 L. Ed. 1086) was that the copyright statutes "do not create a right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, *with whom there is no privity of contract.*" In the Sanatogen Case it does not appear whether or not the jobber from whom appellee (a retailer) purchased the patented article was under contract relations with the patentee's selling agent not to sell below a given price. Upon the package was a "notice to the retailer" in effect similar to that in the Bobbs-Merrill Case. The case was in the Supreme Court on certificate from a Court of Appeals, and the sole question presented was whether the acts of the appellee, in retailing at less than the price fixed in the notice, constituted an infringement of appellant's patent.[1] While the ultimate decision was limited to a negative answer to the question propounded by the Court of Appeals, the principles declared in the opinion would equally deny relief in the case of actual contract between the manu-

[1] It is said in the brief of plaintiff's counsel here that the Waltham Watch Company filed a brief in the Sanatogen Case calling to the court's attention that it had certain litigation pending involving the validity of written contracts, and requested the Supreme Court not to decide "any such question." Manifestly, the only question to be passed upon was that propounded by the certificate of the court below.

facturer and the dealer. It was said (229 U. S. 16, 17, 33 Sup. Ct. 619, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"The packages were sold [by the jobber from whom appellee purchased] with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than $1. * * * The *right to vend* conferred by the patent law *has been exercised*, and the added restriction *is beyond the protection and purpose of the act.* This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser *has placed the article beyond the limits of the monopoly* secured by the patent act."

And again (quoting with approval from Adams v. Burke, 17 Wall. 453, 21 L. Ed. 700, 229 U. S. 18, 33 Sup. Ct. 620, 57 L. Ed. 1041, 50 L. R. A. [N. S.] 1185, Ann. Cas. 1915A, 150):

"When the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention, in that particular machine or instrument, it is open to the use of the purchaser *without further restriction* on account of the monopoly of the patentees."

All italics in quotations from opinions are ours.

We are unable to see any principle upon which the existence of a contract between the manufacturer and his vendee restricting the price on resale can give right of action against the purchaser from his vendee which is denied in the absence of such contract, but in the presence of a warning notice. In each case the purchaser from the manufacturer's vendee has knowledge of the attempted restriction; in neither case is there privity of contract, between the manufacturer and the purchaser from his vendee; and this feature of lack of privity is prominent in the decision of the Bobbs-Merrill Case, from which we have quoted. Moreover, in the Victor Case the reason given (243 U. S. 497, 37 Sup. Ct. 414, 61 L. Ed. 866) for the proposition that "whatever rights the plaintiff has against the defendants must be derived from the 'license notice' attached to each machine" is that "*no contract rights existed between them,* the defendants being only 'members of the unlicensed general public,' and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents, and by selling them at less than the price fixed by the plaintiff."

But the question we are considering is set at rest by the recent decision in the Victor Case, for it there expressly appears (243 U. S. 495, 496, 37 Sup. Ct. 412, 61 L. Ed. 866) that the plaintiff (who was denied relief) had with each of its licensed dealers "a written contract in which all the terms of 'the license notice' are in substance repeated," and that the dealer is authorized to dispose of machines only subject to the conditions expressed in that notice.

The instant case is not distinguished from the otherwise controlling decisions cited by the considerations that here the purchases from the retailers were covert and secret and at less than the restricted prices. While in the Sanatogen Case it does not appear whether the

price at which defendant purchased was below the restricted price, in the Victor Case it was expressly alleged that the dealers were "induced 'covertly and on various pretenses'" to violate their contracts with the plaintiff, and that the sales were at less than the restricted prices.

We see no merit in the contentions earnestly pressed that the plaintiff's price restrictions were incidental only to the building up of its business and procuring the widest possible stable market, and so were reasonable and proper, as being in the interest of the public, especially in that they tended to secure constant, uniform and convenient service (including garage and repair service), which could not be had unless dealers are protected against price-cutting competition. The law cannot "be evaded by good motives"; it is "its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 49, 33 Sup. Ct. 9, 57 L. Ed. 107; International Harvester Co. v. Missouri, 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525; Thomsen v. Cayser, 243 U. S. 66, 85, 37 Sup. Ct. 353, 61 L. Ed. 597; United States v. Gt. Lakes Towing Co. (D. C.) 208 Fed. 733, 744.

The earnestness with which the validity of plaintiff's price restrictions has been pressed upon us has seemed to justify the discussion we have made of recent authorities, reference to which, especially the Sanatogen, Victor and Universal Film Cases (the two latter were made since plaintiff's original brief was prepared), so far from showing a tendency to "go back to the firm ground of the right of a patentee to absolutely monopolize the vending, as well as the manufacture and use of the patented article" indicates to our minds a constantly progressive tendency in the opposite direction. The Victor and Universal Film Cases, the latest utterances of the Supreme Court on the questions here involved, have, to say the least, marked no backward step. The invalidity of plaintiff's price restrictions is clearly demonstrated by the decisions we have cited, and no room is thus left for the charge of unfair competition in invading these restrictions.

Of the territorial restrictions we need only say that they cannot make valid a price restriction otherwise invalid.

The decree of the District Court dismissing plaintiff's bill is affirmed.

SUNDH ELECTRIC CO. v. CUTLER-HAMMER MFG. CO.

SAME v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. May 25, 1917.)

Nos. 152, 179.

1. PATENTS ⊂=328—INFRINGEMENT.
The Lindquist patents, No. 744,773 and No. 764,608, each for an electromagnet having a plurality of coils "symmetrically disposed around a central axis, the individual axis of each of said coils being parallel to said central axis," must be construed to refer, and be limited, to physical or geometrical symmetry, and not to a theoretical magnetic symmetry. As so construed, *held* not infringed.

2. PATENTS ⊂=327—SUIT FOR INFRINGEMENT—OPENING INTERLOCUTORY DECREE AFTER APPEAL—CONSENT OF APPELLATE COURT.
Where an interlocutory decree in an infringement suit has been reviewed on appeal, the further action of the District Court is controlled by the mandate of the appellate court; and while the latter court cannot recall the mandate after the term, it may, on request of the District Court, before entry of final decree, permit that court to open the interlocutory decree and take further testimony.

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

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

Suits in equity by the Sundh Electric Company against the Cutler-Hammer Manufacturing Company and against the General Electric Company. From a decree for defendant in the first case, complainant appeals; and from the decree in the second, both parties appeal. Decree in the first suit affirmed, and in the second reversed on defendant's appeal.

For opinion below, see 235 Fed. 708.

The first of the causes above entitled is an appeal by plaintiff from the final decree of the District Court for the Southern District of New York, dismissing bill in equity for alleged infringement of patents Nos. 744,773 (claims 1, 2, 3, and 4) and 764,608 (claims 1, 2, and 3), issued to David L. Lindquist. The second cause is here upon cross-appeals from the District Court for the Northern District of New York. The action is upon the same claims of the same patents, and was originally brought to restrain an infringement consisting of the manufacture and sale of a device hereinafter called Magnet H. After trial, interlocutory decree declared infringement (198 Fed. 116), and such decree was affirmed in this court (204 Fed. 277, 122 C. C. A. 475). Subsequently, and before any final decree, the General Electric Company manufactured and sold seven other devices, hereinafter severally called Magnets A to G, inclusive. Thereupon plaintiff filed petition for supplementary injunction against such new infringements, which, pending further hearing, was granted (217 Fed. 583). Testimony was then taken, and much evidence introduced, which would have been material and relevant upon the original hearing. Upon the completion of this proceeding, the court modified the supplementary injunction (though still holding Magnets A to E, inclusive, to be infringements) by declaring that Magnets F and G did not infringe. From decree following this opinion (235 Fed. 708), both parties appealed.

The record as finally made in the suit against the General Electric Company does not greatly differ from that in the Cutler-Hammer Company Case, except in such respects as the varying structures of the different defendants render appropriate. The Cutler-Hammer magnet was held not to infringe, assuming validity in the patents; in the General Electric proceeding, validity was necessarily assumed, because of the decision of this court as to Magnet H. After appeal taken, however, the General Electric Company moved here to reopen the case, in order that the District Court might reconsider the whole cause, alleging that the new proofs, first shown upon the hearing for supplementary injunction, swept away the ground of decision as to Magnet H, and rendered unjust adherence to the judgments of this court and the court below in respect of said Magnet H. This application for reopening was heard with the appeals above specified.

Alfred Wilkinson, of New York City (Emerson R. Newell, of New York City, of counsel), for Sundh Electric Co.

W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill. (Everett N. Curtis, of Boston, Mass., of counsel), for Cutler-Hammer Co.

Frederick P. Fish and Charles Neave, both of New York City, and Albert G. Davis, of Schenectady, N. Y., for General Electric Co.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The claims in suit are printed in 198 Fed. 117, and 235 Fed. 710, and the opinions containing them fully describe the type of apparatus under consideration, its purpose and function. When (in 204 Fed. 277, 122 C. C. A. 475) the General Electric Case was here before, we felt it impossible to deal with the matters in issue, otherwise than to consider the apparent weight of evidence (largely opinion) relating to the very technical application of an abstruse science. Even without reference to the Cutler-Hammer record, it is now plain that the points then deemed obscure and difficult have been greatly elucidated by testimony now for the first time laid before us. Thus Ihlder, the patentee, whose application had been promoted contemporaneously with that of Lindquist and by the same solicitor, did not testify upon the original hearing, and we criticized his absence. 204 Fed. 278, 122 C. C. A. 475. This omission has been more than supplied by the evidence of Lindquist himself.

Again, it was held below (198 Fed. 123) that it would be "practically impossible to make an operative device" from the teachings of the Schuckert German patent, and we substantially accepted this finding upon the evidence as it then existed (204 Fed. 280, 122 C. C. A. 475). It now appears that one of plaintiff's own witnesses constructed a Schuckert magnet and testified concerning his handiwork that it did not chatter with no load, began to chatter at 45 pounds, and was released between 65 and 75.

The patent to Scott (No. 639,447) was in evidence on the first appeal, and was destructively criticized by plaintiff's witnesses and not referred to in any opinion rendered until 235 Fed. 712, where it is erroneously said to have been "fully considered" by both courts. As matter of fact it was viewed as a paper patent, and plaintiff's counsel greatly emphasized the statement (then undoubted) that de-

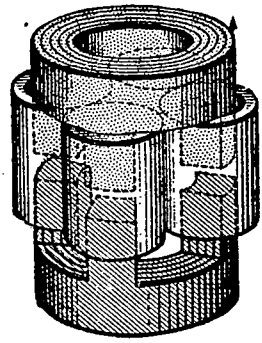
fendant had neither produced a Scott device, nor shown to the court that it covered a working and workable apparatus. It is now admitted that the so-called Scott-Lamme magnet went into extensive and successful use for years, and we have before us an actual apparatus which has practically demonstrated its value.

Research since the first appeal has also revealed a French patent (No. 322,254) antedating Lindquist and describing a magnet operated or actuated by a two-wire current; and finally it now appears what is the relation in the mind of the patentee himself between his own (so-called) senior and junior patents. Speculation is no longer necessary as to why two applications were filed.

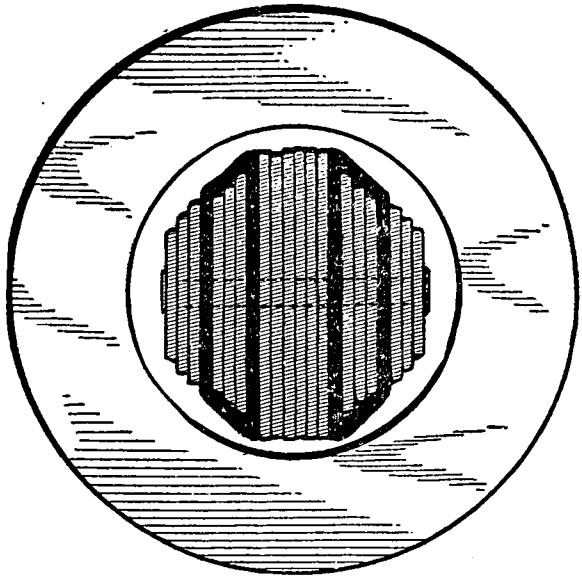
Considering the nature and extent of the foregoing new matter, of which a considerable part appears also in the Cutler-Hammer record, it seems advisable to restate the construction of the patent made upon an incomplete record, as preface to a statement of changes of view produced by new evidence, and to do this before consideration of the motion of General Electric Company to reopen the whole case.

The object of Mr. Lindquist's invention, as plainly stated in his specification, was to hold an armature in position with an alternating current by means of a "substantially constant pull" and (as a result) "without chattering." It being obviously unlawful to attempt to patent per se "a substantially constant pull," the applicant describes his patentable means, which are a "symmetrical" disposition of a "plurality of coils" around a "central axis"; the axis of each coil being "parallel to said central axis." This symmetrical disposition of coils is illustrated by numerous figures, all revealing coils in pairs except one (Fig. 5), which exhibits three coils only. The currents actuating said coils are shown in both two-wire and three-wire systems; in the former case dephasing of current being accomplished by a resistance for which the patentee asserts no invention in himself. Having disclosed these various embodiments of the means of attaining his result, Lindquist sums the matter up by calling attention to the fact that in all his various styles of apparatus "the axes of the coils are always parallel to, and symmetrically disposed around, the axes of the cylindrical magnet core." It is thus seen that what the patentee described as his invention, the things upon which he founded the claims descriptive and definitive of that invention, all consist in a symmetrical arrangement of coils, always parallel to and surrounding the axis of the cylindrical core.

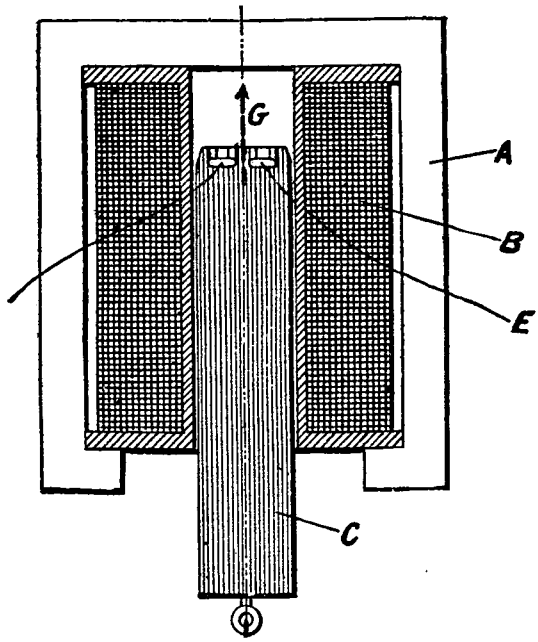
It has always been admitted that this description and the claims in suit accurately fit a core cylindrical in the ordinary geometrical sense and symmetrically (i. e., in a circumference) surrounded by coils also cylindrical and having axes parallel to that of the cylindrical core. But such a reading of the claim (it was said) would confine the patentee to a mechanical arrangement, capable of avoidance by infringers, without departing from a co-ordination of parts capable of producing the same electrical and mechanical results as those sought after and attained by Lindquist, and Magnet H was urged as an effort to accomplish exactly this result. The situation, and the nature of the argument is summarized by the subjoined drawings.



Lindquist 744,773, with 4 Pole Pieces.



Arrangement of Shade Coils on Magnet H—
Top of Plunger.



Vertical Section of Magnet H.

Construing the patent favorably, and believing (upon evidence then produced) that the patentee had accomplished a broadly novel result by new and ingenious means, this court affirmed a holding that the symmetrical or cylindrical arrangement covered by the claims and described in the specification, applied to magnetic symmetry rather than to physical or geometrical relation. No such phrase as "magnetic symmetry" is to be found in the patent. It is a creation of expert witnesses, and was adopted by the court as meaning that "the net pull of all the coils must be constant and in one and the same straight line; and this line must be coincident with the axis of symmetry of the core." 198 Fed. 118. The court below also said that any arrangement of a core with coils and pole pieces adjacent, which results in a "substantially uniform distribution of symmetrically balanced magnetic forces," would constitute magnetic symmetry and infringe. 198 Fed. 119. This emphasized the idea of equal forces "balanced" so as to produce a fixed point of application of force. Our view was correctly stated by Hand, J., in the Cutler-Hammer Case by saying that we held:

"That Lindquist was the inventor of a mechanism to hold the armature against the magnet without noise or vibration by means of magnetic forces constantly applied at the point of contact without shifting."

If the symmetrical arrangement prescribed by the claims was made referable to a "straight line [of pull] * * * coincident with the

axis of symmetry of the core," it is plain that by the use of Thomson's shade coils, equidistant from the axis of plunger, Magnet H obtained a fixed point of pull in the plunger axis line; that pull never shifted, but it did fluctuate in value, as does the form of Lindquist's device (Fig. 7) in which a two-phase current is derived, by an interposed resistance, from a single-phase.

These considerations produced the finding that Magnet H infringed. In reaching that success, plaintiff, through its expert, deliberately dropped as an immaterial error the construction shown in Fig. 5 of the patent, because that shows (without explanatory comment in the letter-press) a three-wire system with an arrangement of currents certainly productive of a shifting point of pull, with a constant force of pull. Such a resultant could never be "coincident with the axis of symmetry of the core," or of any reasonable equivalent to a core. To save the patent, this disregard of what seemed not vital at all events was allowed, though not discussed in any of the decisions enumerated. Such practical excision of Fig. 5 is obviously necessary, if the doctrine of "magnetic symmetry" (as recognized in 204 Fed. 277, 122 C. C. A. 475) is maintainable; for the only possible way of calling all the embodiments of invention pictured and described by Lindquist, "symmetrical" is to refer that word solely to the mechanical or geometrical arrangement of poles and coils around a central axis, which is the very thing sought to be avoided by "magnetic symmetry."

Upon reconsideration of the record in the General Electric Case as it stood prior to the petition for supplementary injunction, we are not disposed to depart from the decision then made; but if this were the first appeal, and all the testimony had been adduced on final hearing, we should unhesitatingly hold that Lindquist's invention was accurately described in the claim allowed him by the German Patent Office, which is definitely and unmistakably restricted to mechanical symmetry.

The additional evidence on which our present opinion rests, has been already summarized, except that given by Lindquist himself. From him we learn that Ihlder's magnet (patent No. 791,423) was not only prior in time, but that the problem set Lindquist (apparently by the common employer of both patentees) was to study Ihlder's actual mechanism, and improve it. The improvement consisted in changing the mode of construction, by producing pole pieces and contacts from a cylindrical ribbon roll of metal, a method which minimized or avoided what is called "humming," but treated "chattering" just as Ihlder did, except for such suggestions as those of Figs. 5 and 7.[1]

Upon these appeals we are confronted with the Cutler-Hammer magnet, and Magnets A to G of the General Electric Company, and we shall first consider them without regard to the new proofs above

[1] The second patent in suit (764,608) needs no separate mention. While it describes a polygonal, instead of cylindrical, arrangement of parts, the difference is functionally unimportant. The form was adopted solely to cover the ordinary and cheaper laminated construction; and since the patentee clearly contemplated a regular polygon, capable of inscription in a circle, "functional cylindricity" of arrangement was preserved.

adverted to and adduced on the petition for supplementary injunction.[2]

It is plain (and as much is shown by the opinions of the trial courts) that in order to bring the present alleged infringements within condemnation, we must considerably enlarge the definition or meaning of "magnetic symmetry," deemed sufficient (if not final) when the patent was here before; and we are now introduced to other phrases thought to picturesquely describe or characterize Lindquist's apparatus, to wit, "functional cylindricity" and the "business end" of any given magnet.

The conduct of this litigation emphasizes the danger of a sort of exposition or argument by no means uncommon in patent causes. We have said that the phrase "magnetic symmetry" cannot be discovered in the patent; nor can either of the other argumentative expressions above set forth. "Functional cylindricity" appears to mean any physical arrangement of parts even approximately productive of a result most conveniently arrived at through or by means of a cylindrical disposition of the same; while the "business end" of a magnet is "the one which determines whether chattering will occur or not." Phrases such as these, if used or accepted without great reservation, are apt to be treated, not only as convenient descriptions of operation or method, but as being the very patent itself; and it is scarcely figurative to say that plaintiff measures infringement in this case, not by the language of the patent nor even the language of the courts, but by the asserted applicability of phrases invented by experts. Thus we are informed on this hearing that:

"Magnetic symmetry may be defined as such a distribution of the magnetic fluxes in the polar faces which are in contact when the magnet is energized as will provide out-of-step pulls, the resultant of which never disappears and is substantially constant in direction and point of application."

No such definition of magnetic symmetry has ever been admitted by this court; nor (even upon the evidence formerly before us) can it be discovered in the patent. It requires that the resultant of out-of-step pulls of successively acting alternating currents "shall never disappear"; but, if entire disappearance is meant, that was old. It further requires constancy in direction and point of application. This is found in the Lindquist device only by discarding Fig. 5; but the present definition deliberately explodes the theory of the case against Magnet H by introducing the word "substantially," which, when interpreted in the light of the instruments now alleged to infringe, must mean any arrangement of dephased or out-of-step alternating currents which will produce a commercially successful article. Under such an interpretation as this the Lindquist claims would read directly upon substantially all the magnets of prior art referred to in the original record; e. g., Scott's and most of Schuckert's.

Even if the meaning and scope of the claims in suit were measured solely by the former opinion of this court, all the devices now called

[2] The shape, arrangement, and general appearance of these alleged infringements are sufficiently shown in 235 Fed. 711 et seq.

infringements[3] are lacking in what we substantially held to be one test of infringement under the Lindquist patent, to wit, a central pull; that is, a pull along the line of the axis of mechanism. It was because Scott did not have such central pull that his patent was held no anticipation. The present devices have no central pull, for the same magnetic reason that Scott had none; and to hold (as has been done in the General Electric Case on supplementary petition) that a patent did not anticipate, and yet declare infringement in respect of a device built along the lines of the nonanticipating patent, is clearly erroneous.

But, when all the testimony in both these appeals is considered, the propriety of rejecting the proposed definition of magnetic symmetry is much emphasized, for plaintiff now relies upon the disclosure of Fig. 5 as enough to cover a constant pull with a shifting direction, on Fig. 7 as disclosing a pull of fixed direction, but fluctuating in strength, and on the rest of the specification as covering a pull fluctuating neither in strength nor direction, and fixed at the mechanical center of the apparatus described and diagrammed. It was this last form of magnet of which Schuckert disclosed the theory, Ihlder reduced it to practice, Lindquist improved on Ihlder's construction, and our present opinion is that he did nothing more.

All the disclosures of the specifications can be reconciled or harmonized only upon the theory of physical or geometrical symmetry. This was what Lindquist intended when (ut supra) he pointed out that in all of his described apparatus "the axes of the coils are always parallel to and symmetrically disposed around the axes of the cylindrical magnet core." This statement is consonant with a mechanically cylindrical, circular, or regularly polygonal form of apparatus, and with no other sort; if the claims are referred to this kind of symmetry they are consistent with the specification; construed in any other way they are not.

This conclusion covers the case, except for the motion to reopen the General Electric Case.

[2] This application is made at a time long after the expiration of the term at which our decision in 204 Fed. 277, 122 C. C. A. 475, was rendered. It is therefore now beyond our power to recall the mandate. Reynolds v. Manhattan Trust Co., 109 Fed. 97, 48 C. C. A. 249; Waskey v. Hammer, 179 Fed. 273, 102 C. C. A. 629; Watts v. Unione Austriaca, 239 Fed. 1023, — C. C. A. —. Since the lower court has entered no final decree, the case is there pending; but the action of that court is controlled by the mandate issued by us on appeal from interlocutory decree. The lower court can now do nothing but execute the mandate. In re Potts, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994.[4]

It follows that in this court there is nothing to reopen—no pending cause in which the newly discovered evidence could be introduced.

[3] I. e., the Cutler-Hammer magnet and General Electric Magnets A to G, inclusive.

[4] This decision resulted from and disapproved Potts v. Creager (C. C.) 71 Fed. 574, and is inconsistent with the language of Shipman, J. in Re Marquand, 57 Fed. 189. 6 C. C. A. 309. Therefore the latter case can no longer be held authoritative.

There is such a cause in the District Court, and all that prevents application to the discretion of that court for leave to introduce said evidence is our mandate. Where a case was actually pending on appeal in this court, and similar motion was made, we held that the suit would not be remitted to the lower court for such purpose, except upon the request of that court. Cimiotti, etc., Co. v. American, etc., Co., 99 Fed. 1003, 39 C. C. A. 677, following Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267. Even though no cause is now pending here, we think that substantially similar procedure is permissible and preferable. The District Court cannot open the interlocutory decree affirmed by our mandate; but it can exercise its discretion and form its own judgment as to whether such reopening and taking of additional testimony ought to be permitted, and if and when it requests leave so to do we can grant such request.

This practice attains the same result as that of In re Gamewell Co., 73 Fed. 908, 20 C. C. A. 111, and Wagner v. Meccano, 235 Fed. 890, 149 C. C. A. 202, and is consistent with the reported practice of the Supreme Court. Whether, if the General Electric Case proceed to final decree (without reopening) and an appeal from that decree be taken, the interlocutory decree (although heretofore affirmed) should be regarded as still interlocutory so far as this court is concerned, is a matter upon which no opinion need be now expressed. This application may be now made in the lower court, where in some shape it must always be made; for the motion to reopen is in effect an application for leave to file a supplemental bill in the nature of a bill of review. It is enough for present purposes to enter an order authorizing the District Court to entertain and act upon the application, should defendant prefer the same, notwithstanding the issuance and filing of the mandate hereinbefore referred to.

Contemporaneously with the entry of such order mandates may issue respectively affirming, with costs, the decree of the Southern district, and reversing, with costs, so much of the decree entered in the Northern district upon petition for supplementary injunction as declared Magnets A to E to be infringements. The appeal of the plaintiff, from the decree of the Northern district, will be dismissed, without costs.

EXCELSIOR STEEL FURNACE CO. v. F. MEYER & BRO. CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1917. Rehearing Denied May 17, 1917.)

No. 2419.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—HOT-AIR PIPES.

The Scherer patent, No. 724,210, for hot-air pipes having double walls, claims 1 and 2, covering the telescopic adjustment of the sections, are void for prior public use by another. Claims 3, 4, and 5 disclose invention and are valid; also *held* infringed.

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

Suit in equity by the Excelsior Steel Furnace Company against the F. Meyer & Bro. Company. Decree for defendant, and complainant appeals. Reversed.

Benjamin T. Roodhouse, of Chicago, Ill., for appellant.

Winslow Evans, of Peoria, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from the decree of the District Court dismissing, for want of equity, a bill brought to restrain the alleged infringement of all the claims of letters patent No. 724,210, for hot-air pipes, issued March 31, 1903, to appellant, as assignee of Albert G. Scherer, upon an application filed April 19, 1900.

The patent relates to the construction of double wall hot-air pipes used to conduct and distribute hot air from the furnace to various parts of the house or building. Double wall pipes held in spaced relation, so as to provide between the outer and inner wall a narrow air chamber serving as an insulator to prevent both radiation of the heat as it is conveyed and its direct transmission to and overheating of the outer pipe, with the consequent danger of fire, are found in the art prior to the patent in suit. What is claimed as new and useful in the invention is: First, the means of telescopically adjusting the sections of the pipe to conform to any of the manifold lengths that may be required in the installation of such pipe, without the expense and the trouble of having sections manufactured or cut to the exact size desired; second, an inwardly turned bend or crimp in the corners, which makes it possible for the walls of the inner pipes to be pressed bodily inwards by reason of their yielding character while the fitting is effected.

Claims 1 and 2 cover the telescopic adjustment; claims 3, 4, and 5, the inwardly turned corner or crimp. These latter claims read as follows:

3. A flat-sided sheet-metal pipe-section, having its corners formed with inwardly turned compressible bends, whereby the flat sides of the pipe are inwardly yielding.

4. As a means for jointing telescopically sheet-metal pipe-sections, the combination of two such sections composed of flat walls meeting each other at

angles, the inner pipe having its corners formed with inwardly-turned compressible bends.

5. A flat-sided section for hot-air stacks, consisting of inner and outer walls or pipes and a connecting diaphragm, the corners of said pipes being formed with inwardly-turned compressible bends.

Claims 1 and 2 must be held void, because the evidence clearly and satisfactorily shows that pipes embodying the invention claimed therein were sold by the defendant prior to the filing of the application for the patent in suit. The defendant's manager, superintendent, foreman, and salesman all testify to the use prior to 1898 of a double wall, telescopically adjustable pipe; and there was introduced in evidence a section of pipe which was testified to by them to be the original one made in 1896–97 by the superintendent and preserved by him. Two of the witnesses, the manager and the foreman, recalled that some of the first work given to an apprentice who came to the firm in 1898 was upon sections of this style of pipe, and that this sort of work had been done at the factory at least one year before that time. Their testimony is strengthened and corroborated by that of the apprentice. The superintendent remembered that he made and designed the device offered in evidence in the winter of 1896–97, after an order for pipe with a slip joint—that is, a pipe telescopically adjustable—had been taken by defendant's salesman, who was identified as having sent in the first order by both the superintendent and foreman. He testified that at least three years before 1900, when he left the employ of the defendant company, he took an order for a slip joint pipe from a dealer who was trying to please a lady; that he had talked with her, and she had impressed herself upon his memory by reason of her extraordinary meticulosity.

Intrinsically, there is nothing in this evidence that is improbable or open to suspicion or doubt. Although naturally, as to these matters, which occurred over 18 years ago, the evidence in some respects is lacking in detail and explicitness, it is on the whole cumulative, corroborative, and consistent. The two devastating fires that destroyed the defendant's factory satisfactorily account for the failure of the defendant to produce the records of the occasional sales of such pipe alleged to have been made by it prior to 1900, and the preservation of the original pipe sections is satisfactorily explained by the testimony that the fires did not reach the place where they were kept. The trial judge found the witnesses to be men of character and standing, and their testimony entirely credible. We cannot say that he erred in expressly finding that the proof established the prior use beyond a reasonable doubt.

The evidence does not, however, establish the prior public use of inwardly-turned compressible bends, whereby the sides of the pipe are inwardly yielding. Although the defendant's manager, superintendent, foreman, and apprentice all testified that it was about 1898 when the defendant first began to make this pipe with a short crimp in the upper corners of the pipe section, it does not appear that such a crimp could perform the peculiar function of the longer crimp in the patented structure. None of the defendant's witnesses were able to fix definitely

the date of the first use by that company of inwardly-turned bends extending down practically the whole length of the section.

The use of the inwardly-turned bend or crimp in the patented structure is more than an ordinary mechanical expedient to reduce the size of the inner telescopic member, and thus to enable the same size pipe to be used for both the entering and the entered telescopic walls. A crimp for that purpose is found in prior patents in the closely allied art of stovepipes. In Scherer's device, however, the crimp also enables the telescopic fitting to be more readily effected, by making the walls of the inner pipe yielding, and thus capable of being temporarily pressed bodily inwards without injury to the walls or change in the spaced relation of the outer and inner walls.

This function of the crimp is of peculiar significance and value in the art to which Scherer contributed. Double wall hot-air pipe is uniformly made rectangular in shape in order that it may be installed between the studding in the walls of buildings. While round pipe, such as stovepipe, by reason of its form, can resist considerable compression, rectangular pipe is weaker and more liable to lose the regularity of its form, and to become permanently bent in when subjected to compressive force. For this reason spacers are usually employed, if not required, with flat pipe, when the crimp or inwardly-turned corner is not utilized in order to insure effective insulation.

In view of the peculiar utility of the crimp on Scherer's structure, the Patent Office was fully warranted in allowing claims 3, 4, and 5. Defendant's device has the same crimp, with the same purpose and effect. Infringement is clearly established.

The decree must be reversed as to claims 3, 4, and 5, and the cause remanded for further proceedings in accordance with the views herein expressed.

UNIVERSAL DRAFT GEAR ATTACHMENT CO. v. BUCKEYE STEEL CASTINGS CO.

(Circuit Court of Appeals, Sixth Circuit. August 1, 1917.)

No. 2921.

1. PATENTS ⊂=328—INFRINGEMENT—CAR COUPLER.
The Brown patent, No. 781,127, for a car coupler, *held* not infringed.

2. PATENTS ⊂=328—VALIDITY AND INVENTION—CAR COUPLER.
The Jackson patent, No. 946,603, for a car coupler, *held* void for lack of invention in view of the prior art.

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 Universal Draft Gear Attachment Company against the Buckeye Steel Castings Company. Decree for defendant, and complainant appeals. Affirmed.

Louis K. Gillson, of Chicago, Ill., for appellant.

A. W. Bright, of Washington, D. C., and John P. Bartlett, of New York City, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. This is a suit for infringement of two patents upon car coupling apparatus. The appellant alleged infringement of claim 3 of the Brown patent, No. 781,127, of January 31, 1905, and claim 2 of the Jackson patent, No. 946,603, of January 18, 1910. These claims are in the margin.[1] The district court found no infringement, and dismissed the bill.

[1] A car coupler is a familiar apparatus. Every structure involved in this case is simple and clear. The art is extremely crowded, and the steps taken by the patentees were, at the best, limited. The case involves no new or doubtful questions of law, but only the application of common rules. We see no object in elaborated descriptions or extensive discussion, and we think a mere statement of our conclusions will be sufficient. Claim 3 of the Brown patent calls, among others, for two distinct and independent elements. It specifies that the coupler-head and the spring-casing shall be "detachably connected," and that the bar or key which connects the casing and the draft-irons shall "also lock" this detachable connection. Here are two distinct functions, engaging two parts and locking the engagement. The connection between coupler and casing is by a bayonet joint, and when this engagement has been completed by partial rotation of the inserted member, the joint resists a blow or a pull. The only trouble is that there may be accidental turning of one in the other, whereby the effective engagement will be broken. The bar, by passing through slots in both parts, locks against inadvertent rotation. The bar cannot be the contemplated means of connection, because one of the slots is open-ended, and if it were not for the bayonet joint, the coupler and casing would pull apart. In the defendant's form, there is no detachable engagement, save as any two parts which are bolted together are detachably engaged while the bolt is in position. Neither is there any lock, save as parts capable of detachable engagement may be considered locked together while they are engaged. Defendant has a single bolt passing through those parts of the draft-irons and the coupler-head and the casing which lie in the same transverse plane. We are satisfied that this bolt cannot be considered both the detachable connection and the lock of the Brown patent. We might find the

[1] Claim 3 of the Brown patent: In a combined coupling and draft mechanism, the combination of a shell or casing containing the spring or tension mechanism, a coupling-head detachably connected with said shell, and a bar connecting the said shell with the draft-irons, the said bar also locking the coupling-head to said shell, substantially as described.

Claim 2 of the Jackson patent: In combination with a draft rigging having transverse follower plates, of a coupler yoke in the form of an elongated loop with parallel sides that embraces and rests on the follower plates and with transverse stops adapted to contact with the several follower plates, a pair of side wings parallel to the plane of the loop extending from the forward end of the yoke having transversely crowned inner faces, a coupler having an inner end lying between and rocking on the side walls, and a horizontal key passing through the wings and loosely engaging a slot through the inner end of the coupler.

detachable connection or we might find the lock, but we cannot find both, except in the sense that one is always the other; and the claim is not entitled to a breadth of construction reaching that situation.

[2] It is practically conceded—at least, it is clear—that claim 2 of the Jackson patent recites a combination which is identical with earlier combinations, unless for the provision that the side wings should have "transversely crowned inner faces." The coupler shank passed back between the sides of a yoke or inclosing structure. It could not be closely held therein because it must rock laterally when the train went around a curve. Accordingly, the side faces of this yoke were provided with inwardly and laterally projecting crowns or convexities which made contact with the sides of the coupler shank opposite to each other. The result was that the coupler shank would rock one way or the other, resting upon one of these points, and space was thereby provided for the forward part and the rear part of the shank to move laterally and oppositely. We see no possibility of attributing to this expedient the merit of invention. The old corresponding open-ended frames or casings had always been provided with flaring mouths to allow for this rocking by all kinds of coupler shanks, and even by the old style links. Of course, if the shank was so hung that its rear part moved laterally in the opposite direction from the lateral motion of its forward part, space must be given in which the rear part could move; and to provide this space was what Jackson did. The involved language of the claim does not raise to a higher power that ordinary degree of mechanical skill which alone is involved.

The decree below is affirmed.

HOBBS PATENT CO. v. ATLAS SPECIALTY MFG. CO.

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

No. 2440.

PATENTS ⊂=328—VALIDITY—PRIOR USE—COVER FOR RADIATOR.

The Hobbs patent, No. 901,616, for an insulating cover for automobile radiator and hood, *held* void for prior public use by others.

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

Suit in equity by the Hobbs Patent Company against the Atlas Specialty Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

George L. Wilkinson, of Chicago, Ill., for appellant.

Frank T. Brown and Arthur L. Sprinkle, both of Chicago, Ill., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. This appeal is taken from the decree of the District Court, holding Hobbs patent, No. 901,616, granted October 20,

1908, upon an application filed February 14, 1908, void for want of patentable novelty.

The patent in suit is for a heat-insulating cover for the hood and radiator of an automobile. The cover has flaps extending across the outer front surface of the radiator. These may be fastened together when the engine is not running. They may also be flung back when the machine is in motion, to allow the heat to radiate, and to prevent the boiling of the water in the radiator.

A careful reading of the record but confirms the view, expressed at the oral argument, that the evidence clearly and convincingly establishes the defense of prior use. Covers substantially like the patented devices and made by others are shown to have been in use at least a year prior to Hobbs' reduction to practice. His earliest established date is that of the filing of the application.

A brief statement of some of the evidence will suffice. C. P. Kimball & Co., of Chicago, at one time made a radiator cover for J. M. Harris, then of Chicago. A book kept by the repair department of the Kimball Company, in which the labor cost of various items was recorded, shows, under the account of J. M. Harris, "Cover for radiator, $2.50." From the number of the account and the dates appearing in the book, it is clear that this work was done in 1905. The entry was identified by the carriage trimmer who made the cover, and who has now become the superintendent of the repair department, by the foreman who made the entry, and by the then superintendent of the repair department, who placed at the time a notation thereon. The only possible question is whether this Harris cover was merely a plain piece of material fitting over the front of the radiator and attached thereto by cotter pins, or whether it extended over the entire radiator and had an adjustable curtain in front. A price list book kept by the trimmer gives the labor cost for a cover, which is there termed "a cooler cover with roll-up curtains," as $2.50. The labor involved in making a cover with an adjustable front curtain was greater, and the cost appreciably higher, than that of a cover consisting of a plain piece of pantasote fitted over and attached to the front of the radiator. Both the trimmer and the foreman unhesitatingly testified, from the labor charge made, that the Harris cover was such a radiator cover with an adjustable front curtain, similar to one made up for the purposes of the trial and introduced as an exhibit. Nothing in their testimony or in the record tends to cast doubt on the reliability of the inferences which these witnesses, having personal knowledge of the business, drew from this cost item.

Their independent recollection, so far as they had any, is that Kimball & Co. manufactured these accessories before 1908. The carriage trimmer was almost positive that he had made a radiator cover with an adjustable front curtain in 1904. Another employé testified that the company was making covers of this type when he entered its employ in March, 1907. The testimony of all four of the witnesses is straightforward and unimpeached. They are old, respectable, and trustworthy employés of the Kimball Company, and on the record are entirely disinterested.

While search might have been instituted in New York, whither Harris had moved, for him or for the cover, yet in view of the undisputed testimony that the life of such a cover is four or five years, the failure to produce the original cover or to account for its absence does not materially weaken this defense. The destruction of Kimball's office books in a disastrous fire a few years before the hearing prevented the offering of any additional evidence that they might have furnished as to the character or selling price of the Harris cover.

The only feature of the patented cover that this Harris cover does not anticipate is that part which extends over the hood. There is some evidence that the Kimball Company was also making hood covers before 1908. But, rejecting that evidence as insufficient, and assuming that some invention over the use of lap robes is involved in Hobbs' "tailored to fit" hood cover, the Hobbs' patent is invalidated by reason of the prior use of such a cover by the Chicago Carriage & Trimming Company. The books of that company conclusively establish that such a cover for an automobile hood was made for a customer on November 13, 1907. There is other evidence in the record of a prior use, which, however, we deem it unnecessary to comment upon.

Decree affirmed.

TIFFANY v. PAPER PRODUCTS CO., Inc.

SAME v. NOBLE MFG. CO.

(District Court, N. D. Georgia. July 27, 1917.)

Nos. 30, 36.

PATENTS ⇐328—VALIDITY—WINDING CONE.

The Gess patent, No. 986,379, for a winding cone, is void for lack of patentable invention and anticipation, the alleged improvement shown by inturning the apex end of the cone and smoothing and rounding the same to prevent the cutting or breaking of the yarn or thread being something which would naturally occur to any skilled mechanic familiar with the art, and which had previously been used and described in prior patents.

In Equity. Suit by Henry L. Tiffany against the Paper Products Company, Incorporated, and by same complainant against the Noble Manufacturing Company. On final hearing. Decrees for defendant.

Emery, Booth, Janney & Varney, of Boston, Mass., and Irwin & Tison, of Cedartown, Ga., for plaintiff.

John M. Coit, of Washington, D. C., and Bunn & Trawick, of Cedartown, Ga., for defendant.

NEWMAN, District Judge. This is a suit brought by the plaintiff against the defendant for infringement of letters patent No. 986,379 of the United States granted to one Charles Gess on March 7, 1911, upon application filed January 3, 1911, which was duly assigned by said patentee to the plaintiff by an instrument in writing, dated December 29, 1910, and recorded in the Patent Office of the United States on February 8, 1911.

The invention claimed, and for which letters patent No. 986,379 were issued, covers an improvement in cone-tubes adapted to receive or to have wound thereon yarn, thread, or the like, of the commonly known cone winding form, and from which the yarn, etc., is drawn off axially or substantially so. Such cone tubes are customarily formed of paper rolled in one or more layers or coils in conical form, and are adapted to be mounted for winding upon tapering arbors of the general shape of the tubes. Owing to the marked taper of the conical tubes, and the liability to slipping or displacement of the yarn or thread wound thereon, and particularly of the first laid layers, said cone tubes are superficially roughened throughout their entire length. In the process of unwinding the yarn or thread from such tubes, it was found that the tip of the cone tube so constructed offered obstruction thereto, causing the yarn to pull, thus changing the tension, or even breaking the same.

The patent in questions covers such a device, having a roughened exterior, as described, but with the roughening ridges removed from the top portion of the tube, so that they will offer no obstruction to the yarn or thread as the latter and especially the first laid layers are being unwound from the tube, and also the tip end of said cone being inturned and smooth and softer and more yielding than the body of the tube, the material of said tip end being circumferentially displaced; the apex portion to extend beyond the arbor or winding member.

The plaintiff claims that the rights and privileges granted by said letters patent are of great value, that he and his assigns and predecessor in interest have invested and expended large sums of money, and have been to great trouble and expense in and about said invention and improvements and in carrying on the business of manufacturing and selling cone tubes containing said invention and making same profitable to themselves and useful to the public, and that a very large number of same have been sold with great profit to plaintiff and advantage to the public.

Plaintiff then alleges that but for the wrongful acts and doings of the defendant and others acting in concert with it he would now be in undisturbed possession and enjoyment of said invention and improvements and would now be making large gains, profits, and advantages from the manufacture, use, and sale of said invention, but that he has been prevented and hindered from making said gains, profits, and advantages by the wrongful acts and doings of the defendant and others acting in concert with it.

Plaintiff further alleged that the defendant, well knowing the premises and the rights and privileges secured to the plaintiff, did, after the grant of said letters patent, and before the commencement of this suit, at the city of Cedartown, Ga., and elsewhere in the United States, without the license or allowance and against the will of the defendant, and in infringement of said letters patent, make or cause to be made, and sell or cause to be sold, cone tubes containing the invention and improvements described in said letters patent, and that said defendant intends and threatens to continue to make and sell more of such cone tubes, all in defiance of the rights acquired by and secured to

the plaintiff, by which plaintiff has sustained, and will sustain, great and irreparable loss and injury.

It is further alleged that the defendant has made and realized, and is still making and realizing, large gains, profits, and advantages from the manufacture, use, and sale of cone tubes embodying the said invention and improvement.

The plaintiff then prays for an injunction, and for an accounting, and costs.

Defendant admits that letters patent of the United States for an alleged improvement in cone tubes were issued on March 7, 1911, to Henry L. Tiffany, as alleged assignee of Charles Gess, but denies, on information and belief, that the said Charles Gess was the true, original, and first inventor of Cone tubes as alleged. Defendant further denied that Charles Gess was, before the 3d day of January, 1911, the true, original, and first inventor of any new and useful improvement in cone tubes, and described in the patent in suit which had not been known or used by others in this country or patented or described in any printed publication in this or any foreign country before his alleged invention or discovery thereof, or which was not for more than two years prior to the filing by him of an application for letters patent therefor in public use or on sale in this country, or which had not been abandoned by him prior to the filing of any such application.

Defendant denies that any rights and privileges granted and secured by the patent in suit are of great value to the plaintiff, but, on the contrary, alleges that the said patent covers no invention or improvement whatever, denies, on information and belief, that the public generally has acknowledged or acquiesced in the claimed rights of the plaintiff and his alleged assignor, and denies that it has been guilty of any wrongful acts or doings, or that any acts on its part have tended to prevent the undisturbed possession and enjoyment by the plaintiff of any rights, gains, profits, or advantages to which he was entitled under the law, and denies that any acts on its part have hindered plaintiff from making any gains, profits, or advantages to which he was entitled under the law. Defendant then denies that the complainant is entitled to the exclusive use of the alleged invention and improvements.

Defendant further denies that it well knew the alleged premises and any rights and privileges secured to the plaintiff, and denies that it did anything to injure plaintiff and deprive him of any benefits and advantages secured to him by said letters patent, and denies that it did, after the grant of said letters patent and before the commencement of this suit, at Cedartown, Ga., or elsewhere in the United States, in infringement of said letters patent, make or cause to be made, and sell or cause to be sold, cone tubes containing the alleged inventions and improvements described in said letters patent and recited in the claims thereof. It denies, further, that it intends or threatens to make and sell cone tubes in infringement of said letters patent, and further denies that plaintiff has sustained or will sustain any loss or injury, or that the complainant has been deprived of any

gains or profits which it otherwise would have obtained by any wrongful act on the part of the defendant.

Defendant then avers, on information and belief, that said letters patent No. 986,379 is and always has been invalid and void and of no force and effect, because: (1) In view of the state of the art there is nothing described, shown, or claimed in said patent involving any invention or discovery whatever; (2) that prior to his supposed invention or discovery the thing alleged to be patented by said patent and all material and substantial parts thereof had been patented, shown, and described in certain letters patent set out, and in the applications therefor; (3) that prior to any supposed invention or discovery by said Charles Gess the thing alleged to be patented by said letters patent and all material and substantial parts thereof had, within the United States, been used by and known to each of certain persons whose names and addresses are then set out, and to many others not known or specifically named.

Much testimony has been offered by both parties, some of it by depositions and some by witnesses in open court, and by exhibits.

The question is whether or not the patent which is sought to be set up in this proceeding, or rather the precise thing set up by the plaintiff as the thing which he invented and discovered, is a patentable invention, or whether what he did is a thing which persons with mechanical knowledge and familiar with the trade in which these tubes are used would have brought about such an improvement or change by the exercise of mere mechanical knowledge or the knowledge of one familiar with this particular art or trade. Or, stated more simply, perhaps, the question is whether or not the inturning of the small end of these cone tubes, to prevent them from catching the thread passing over them, is a matter of invention.

It will be understood that there is no claim here for a process patent; that is, for the machine by which this inturning was done or for the manner in which it was done. The claims are for the thing itself, for the discovery of the inturned end tube, or round-nosed tube, as distinguished from the square-nosed tube without the inturned edges.

Much of the discussion here has been given to this question. In order to hold that this inturned cone tube was a patentable device, it must appear that the exercise of the inventive faculty was necessary to its production. The claims made by the patentee in his application for patent are as follows:

"1. As an article of manufacture, a winding cone having a roughened yarn retaining surface markedly conical in shape to permit the yarn to free itself from said roughened surface when drawn from the end of said cone, the latter having an inturned yielding apex end.

"2. As an article of manufacture, a markedly conical winding cone, hard and self-sustaining to receive support from an internal rotating driver or arbor, said cone having an inturned, yielding apex end, to extend beyond said interior driver or arbor.

"3. As an article of manufacture, a markedly conical winding cone having stiff, cone supporting side walls adapted to seat upon a rotating driver, said cone having an inturned apex end to extend beyond said driver.

"4. As an article of manufacture, a markedly conical winding cone having cone supporting conical walls adapted to seat upon a rotating driver and also

having an inturned end to extend beyond said driver and indifferently centered internally with respect to the axis of said cone.

"5. As a new article of manufacture, a winding cone having a rough yarn retaining surface markedly conical in shape to permit the yarn to free itself from said roughened surface when drawn from the end thereof, said cone having its smaller end inturned and the roughened conical surface coincidently blending into a smooth inturned end surface.

"6. As an article of manufacture, a markedly conical winding cone having conical supporting walls adapted for continuous seating contact with and upon a driving member or arbor, thereby to adapt said cone for sustaining a large and heavy mass of yarn, said cone having a conical apex portion to extend beyond said member or arbor and with its end inturned to prevent deflective obstruction of the yarn traverse arising from conformation of said supporting walls to said driver.

"7. As an article of manufacture, a markedly conical winding cone hard and self-sustaining to receive support from an internal rotating driver or arbor, the tip of said cone being inturned and smooth and softer and more yielding than the body of the tube, the material of said tip end being circumferentially displaced."

As I understand it, claims 3, 4, 5, and 6 are the ones especially insisted upon here.

In determining whether this inturning of the apex end of the cone tube is a patentable invention, let us look at the law governing this matter. In 30 Cyc. 828, on the subject of patentability, this is said:

"The subject-matter of patents must not only come within the statutory classes, but must be new and useful. It must further be of such a character as to have called for an exercise of the inventive or creative faculties of the mind, as distinguished from the mere exercise of the knowledge and judgment expected of those skilled in the particular art."

In Muller v. Ellison (C. C.) 27 Fed. 456, Judge Shipman, in a brief opinion disposing of a patent case with reference to chains for bracelets, says this:

"The improved method of manufacture commences after the spirals have been wound and interwoven together in the customary way. The first step is to clip the ends of the spirals evenly, by one transverse cut, by a pair of shears. Then the end of each spiral is cut by a pair of cutting pliers, to bring the ends in the right shape for bending in. All the ends of the spirals are then bent. The edge is finished by pressing or flattening. The entire invention consists in bending inward the ends of the spiral. In this there is no inventive genius. The idea of bending in, rather than of soldering, the ends, or of closing the ends of the spirals, was an idea which would naturally suggest itself to the worker in wire, and did not partake of invention, and the steps by which the bending was accomplished were the ordinary work of the skilled artisan (citing Pearce v. Mulford, 102 U. S. 112 [26 L. Ed. 93]; Hollister v. Benedict Manuf'g Co., 113 U. S. 59 [5 Sup. Ct. 717, 28 L. Ed. 901])."

Of course the thing claimed to be an invention there is somewhat different from here, but it is in line, I think, with what is contended for here. It is a mere turning in of the ends of the spiral there, and it is the mere turning in of the ends of the cone tubes here.

In Pearce v. Mulford, 102 U. S 112, 26 L. Ed. 93, cited by Judge Shipman, the first headnote is as follows:

"To entitle an improvement to protection under the patent laws, it must be the product of the exercise of the inventive faculties, and involve something beyond what is obvious to persons skilled in the art to which it relates."

In Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, the first two headnotes are as follows:

"Novelty and increased utility in an improvement upon previous devices do not necessarily make it an invention. A device which displays only the expected skill of the maker's calling, and involves only the exercise of ordinary faculties of reasoning upon materials supplied by special knowledge and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of inventive faculty, such as the Constitution and the patent laws aim to encourage and reward."

In Thompson v. Boisselier, 114 U. S. 1, pages 11, 12, 5 Sup. Ct. 1042, 1048 [29 L. Ed. 76], in the opinion by Mr. Justice Blatchford, the rule being discussed here is stated in this way:

"To refer only to some more recent cases, adjudged since these suits were decided below, this principle was applied in Vinton v. Hamilton, 104 U. S. 485 [26 L. Ed. 807], where, a cupola-furnace being old, and a cinder-notch being old, and the use of a cinder-notch to draw off cinders from a blast-furnace being old, and the cinder-notch, in drawing off the cinder from a cupola-furnace, performing the same function as in the blast-furnace, it was held that the application of the cinder-notch to the cupola-furnace would occur to any practical man, and that there was nothing patentable in such application.

"In Hall v. Macneale, 107 U. S. 90 [2 Sup. Ct. 73, 27 L. Ed. 367], a cored conical bolt, in a safe, with a screw-thread on it, having existed before, and also a solid conical bolt, it was held to be no invention to add the screw-thread to the solid conical bolt.

"In Atlantic Works v. Brady, 107 U. S. 192, 200 [2 Sup. Ct. 225, 27 L. Ed. 438], it was said that it is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufactures; and this doctrine was applied in Slawson v. Grand Street Railroad Co., 107 U. S. 649 [2 Sup. Ct. 663, 27 L. Ed. 576]; in King v. Gallum, 109 U. S. 99 [3 Sup. Ct. 85, 27 L. Ed. 870]; in Double-Pointed Tack Co. v. Two Rivers Manufacturing Co., 109 U. S. 117 [3 Sup. Ct. 105, 27 L. Ed. 877]; in Estey v. Burdett, 109 U. S. 633 [3 Sup. Ct. 531, 27 L. Ed. 1058]; in Bussey v. Excelsior Manufacturing Company, 110 U. S. 131 [4 Sup. Ct. 38, 28 L. Ed. 95]; in Pennsylvania Railroad Co. v. Locomotive Truck Co., 110 U. S. 490 [4 Sup. Ct. 220, 28 L. Ed. 222]; in Phillips v. Detroit, 111 U. S. 604 [4 Sup. Ct. 580, 28 L. Ed. 532]; in Morris v. McMillin, 112 U. S. 244 [5 Sup. Ct. 218, 28 L. Ed. 702]; and in Hollister v. Benedict Manufacturing Co., 113 U. S. 59 [5 Sup. Ct. 717, 28 L. Ed. 901].

"In the case last cited the thing claimed was new, in the sense that it had not been anticipated by any previous invention, and it was shown to have superior utility, yet it was held not to be such an improvement as was entitled to be regarded, in the patent law, as an invention."

Even assuming then, that this round-nosed cone had not been anticipated in the prior art, if it is a thing which "would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures," it is not a patentable invention.

The distinction between mere mechanical knowledge or the knowledge of one familiar with the particular art or trade, on the one hand, and the exercise of the creative faculty or the faculty of invention, on the other hand, is at times quite difficult. There may be some difficulty about it here, but it seems to me that the mere inturning of the edges of the square-nosed cone which had been in use for many years, and turning it in so that the ragged edges of the square-nosed cone would not be there to intercept the movement of the yarn or thread, is a thing which would occur readily to any one skilled in the art or even reasonably familiar with the business of spinning yarn

and adapting the same to be used readily in knitting mills. It is not right to the public to class it as having been such an invention or discovery as is patentable.

These same cone tubes with the rounded or inturned apex end were used by others before the Gess patent was applied for. Witness for the plaintiff, A. J. McCausland, who was the son of Wm. J. McCausland, whose patent will be referred to hereafter, testified in reference to the business of his father as follows:

"Q. Did he have on hand at any time any machinery for rounding over or turning in the ends of cone tubes? A. There is now on the second floor of our factory a machine, formerly a cone cutter, which has been used for rounding the ends of cone tubes. Q. When was that machine first used for rounding or turning in the ends of cone tubes? A. Why, I should say in August, 1909. Q. Was it necessary to make any change in the machine to adapt it to turn in ends of the cone tubes? A. Yes. It was necessary to make a socket, heated by gas, to fit over the end of the cone tube which rotating in the socket turned in the ends. Q. Who built that machine and who made the change in it to which you have just referred? A. It was built by John Eppler, of Philadelphia, upon drawings submitted by my father. When the machine was delivered to us it would not work properly, and our machinist, Mr. John Kaiser, made the necessary changes and alterations in same and completed it. John Kaiser, at my father's orders, made a socket and placed same on the cone cutter for turning in or rounding the ends. Q. Is that socket still in the machine as it stands up on the second floor? A. The original socket is not in the machine. These sockets have been so worn at various times that it was necessary to remove same from the machine and replace with another socket. During the time that this machine has been used for inturning ends of cones, there have probably been six or seven different sockets in the machine; of the number of sockets used I am not positive. As soon as one socket would become so worn as to be unfit to do the work properly, another socket was made and placed in the machine. There is, however, a socket on the machine at the present time. Q. Does the W. J. McCausland estate use that machine now for inturning the ends of cone tubes? A. Yes, when we have any orders for them. Q. It has been used for inturning the ends of cone tubes whenever the W. J. McCausland estate had orders for them ever since it was first adapted for that work, has it not? A. Yes. Q. Does the machine mentioned by you, in which Kaiser placed the socket, turn in and round over the tip ends of cone tubes in substantially the same way as is illustrated in these cone tubes to which I call your attention, Exhibit No. 6 in the present case? A. Yes; but not as much. The reason for that is that my father had the socket made for use in his business of the resale of secondhand cone tubes. He had a socket to round over the ends of spoiled or mashed cones. We used the one socket to fit all cones. We did not have separate sockets to fit each different taper of cone tube. Q. I assume that, even where the cone tubes varied in size, or taper, the tip ends of all of them were near enough the same size to permit you to use the single socket to turn them all in, is that right? A. Yes. Q. This machine, when it was first used, to turn in the ends of cone tubes, as you have testified, turned them in in substantially the same way that you have testified that it now turns them in, did it not? A. It turned them in, but not as much as shown in the samples. Q. It did, however, in the beginning, and when first used round over, or turn in, and smooth off, the tip of the cones did it not? A. Yes. * * * Q. The turning in of the ends of the cone tubes, as it was first done, on this machine, made the tip end of the cone tube less liable to break the thread in unwinding than those same cone tubes would have been if the ends had not been turned in, did it not? A. Yes. Q. To what extent did your father inturn the tip ends of defective, secondhand cone tubes in 1909 and 1910, I am referring to the number? A. Probably about on the average 20,000 a month. * * * Q. You have testified that some time in 1909 or 1910 your father treated the ends of cone tubes by presenting them to a socket; what shape did this operation give to the end of the cone? A. Rounded, beveled, or turned in the ends of the cone. Q. To make the record clear, was the result more of

a turning in or was it more of a mere bevel? A. It was not turned in as much as the samples, because for reasons already given I have stated that we did not have a separate socket for each different kind of cone. On the Broadbent cone it is necessary to have the end open large enough for a pin to extend through. There are no polished point or rounded cones made to my knowledge for Broadbent winders. Q. You have stated that customers had not ordered round-nosed tubes when your father first beveled the ends thereof; that is in 1909 or 1910. Please state whether or not customers did specify these beveled tubes after that time. A. They ordered them later on, when they came in general use."

It seems perfectly clear from this evidence that McCausland made practically and substantially the same thing for which Gess is now claiming a patent, and that he did this as early as 1909. He was, as will be understood from the testimony, taking secondhand square-nosed cones and inturning and rounding the tips.

The reply of the plaintiff to the foregoing testimony, or his counsel's contention with reference thereto, seems to me to be wholly insufficient in view of the positive statement of the witness A. J. McCausland that his father was making secondhand tubes with inturned, rounded ends, which, from his description, were substantially like those here made. The effort to distinguish it as having a hole for the mandrel to pass through in the tip of the rounded end seems to me to be without merit as against this showing of a former use of the same contrivance.

In addition to the foregoing, there have been introduced in evidence patent No. 171,577, issued to J. McCausland, December 28, 1875, and patent No. 227,281, issued to Wm. J. McCausland, May 4, 1880. These patents are both for what are called paper cop-tubes. In the first patent, No. 171,577, in his specifications, the patentee says:

"The objects of my improvements are to render paper cop-tubes as serviceable in wool-spinning as in cotton, to afford a positive frictional contact with the spindle at the tip of the tube, and to prevent the tip from readily becoming burred or ragged."

He also says:

"My invention partially consists in a paper cop-tube tapered to correspond with its spindle, and provided with a solid flanged base. Another feature of my invention consists in a tapered paper cop-tube with an interior contracted tip, whereby a firm frictional contact is attained with the spindle at the tip of the tube, and said tip prevented from readily becoming ragged or burred."

His claims on this patent are:

"1. A tapered paper cop-tube, provided with a solid flanged base built up from or attached to the tube, substantially as described.

"2. A tapered paper cop-tube, having an internally-contracted tip, substantially as described."

In the patent to Wm. J. McCausland, the patentee says:

"I am aware that a paper cop-tube has been contracted at the tip, whereby a firm frictional contact of the top of the tube with the spindle is assured; but this was effected without such solidifying and compressing of the paper as to result in the hard polished end, which is the characteristic of my improved cop-tube."

His claim is for "a paper cop-tube condensed, hardened, polished, and rounded at one or both ends, as set forth." He also states this about his invention:

"These tubes are made by rolling and pasting strips of paper, the upper and lower ends of the tubes being left in a ragged condition, which is objectionable, especially on the upper end of the tube, as the sharp and thin projecting edges of the paper frequently cut the threads and otherwise interfere with the proper spinning of the same."

The patentee had been speaking of the ordinary paper cop-tube which had this defect, among others, of cutting the threads and otherwise interfering with the proper spinning of the same. What he claimed to do was to condense, harden, and polish the end so as to prevent this difficulty. His brother had previously, as I have stated, in his patent No. 171,577, claimed a paper cop-tube having an internally contracted tip. What the latter patentee sought to do, as I understand it, was to condense, harden, and polish what had been previously claimed in the first patent by his brother.

It may be stated in addition that W. J. McCausland, in his specifications, after stating the objections that existed to the usual cop-tubes, which I have mentioned above, says:

"In order to overcome this defect, I push the upper end of an ordinary cop-tube against a rotating die, of the shape shown in Fig. 7, this die having a circular recess, from which projects a central pin, *a*, into the tube. The effect of this rapidly revolving die on the tube is to condense the paper and reduce the ragged edge to the smooth rounded termination shown in Fig. 5, the rounded surface being hard and uniform, so that it cannot have any injurious effect on the thread in spinning. The die has also the effect of compressing the end of the tube inward to the extent determined by the central projection, *a*, which is of such a diameter that the tube will fit on the end of the spindle in the manner shown in Fig. 5."

There are differences, of course, but what I wish to say is that W. J. McCausland, in making his round-nosed, inturned cone tubes, which he did in 1909, obtained the idea from his own and his brother's specifications as shown in their patents with reference to these paper cop-tubes. Both inturned the tip end of the cop-tubes, and W. J. McCausland "hardened, condensed, and polished" the inturned end.

This shows, I think, that the idea of inturning and smoothing the tip ends of supports for yarn to be drawn off for spinning purposes was in existence and in considerable use before Gess' application for patent was filed. W. J. McCausland's effort, both in his patent and in his remodeling of secondhand cone tubes, in 1909, was to so construct the thread support that the thread could be drawn off without catching or breaking. It seems to me too clear for argument that he had the same idea which Gess eventually put into his patent for rounded end cone tubes.

A number of patents and many devices have been put in evidence here to illustrate the prior state of the art, which show, in different ways, that the idea that Gess claims he evolved was in existence and put into use many years before the patent in question here was applied for. And it is perfectly manifest from these that, even if Gess did have an idea or mental conception in reference to inturning and rounding the ends of these cone tubes, the same idea had long been entertained by others; that is the same idea of smoothing and rounding the ends of cone tubes or cop-tubes so as to prevent the thread from catching and breaking.

Among these suggestions are the frequently used button, or ball, or acorn, as it was called, an article made of wood, and sometimes of iron or other material, smooth and rounded, to be placed in the end of the square-nosed cone tubes and extending far enough above the tip to prevent the yarn from catching on any rough or ragged edges there might be on the apex of the cone tube. A device similar to this is shown in patent to Stone, No. 534,768, dated February 26, 1895. Another suggestion, which is very old in the art, is the so-called "Bottle Bobbin," a device used for the support of thread for spinning under certain conditions, and also the cop-tubes with inturned, rounded ends, such as are covered by the McCausland patents above discussed, all of which were introduced in evidence.

In addition to the above are the suggestion in the patent to Gillespie, No. 269,662, dated December 26, 1882, which was an invention to "produce paper tubes with a cylindrical bore and a tapered end without the cutting, shearing, or removal of any of the material," and the English patent No. 4360, to Keene, dated March 23, 1887, for an improvement in spools or bobbins, the object of which was to overcome certain disadvantages mentioned by—

"producing an enameled spool or bobbin having the yarn retaining portion thereof slightly roughened or 'dull' finished, by means of which the yarn is prevented from slipping off faster than is required, the end portion, or tip of said spool at the same time having a smooth finished surface, so that the yarn will not catch thereon in unwinding from the spool."

There is another interesting and peculiar feature of this case which should have brief mention at least. In the testimony of Lewis T. Shurtleff, who was a clerk and had been with the Pairpont Corporation of New Bedford, Mass., for 24 years, is the following:

"Q. 21. Were the knitall or round-nosed cones manufactured and sold by the Pairpont Corporation in 1909? A. They were. Q. 26. Please state when the round-nosed cone was first brought to your attention and by whom, stating the circumstances in detail? A. To my best knowledge and belief, it was in April, 1909, that Mr. Henry L. Tiffany applied to us to make the knitall cone. It was a new and different operation, and necessary for us to prepare machinery and to experiment to quite an extent to perfectly round the points, in a satisfactory way. After considerable experiment in regard to the method, we obtained satisfactory results, and made our first shipment to the Kilburn Mills of New Bedford on July 24, 1909, and we billed to them on that date one case of 1,204 of the knitall cones, and the second case of shipment on July 30, 1909, 1,560, as shown by exhibit, which are leaves or pages from the Pairpont Corporation sales book. Q. 31. You say in answer to Q. 26 that he applied to you in April, 1909, to make the knitall cone. Please describe that cone, particularly with reference to the tip thereof? A. There were objections to the old style square point or tip cone, because the yarn in rendering would draw across the sharp edge and cut or break the yarn and cause damage, not only to the knitted garment, but often to the machines. Mr. Tiffany discovered that a round-pointed smooth-finished cone that was closed at the top would be a great improvement, and applied to us to fit special machinery to smoothly polish the point, leaving no wrinkles or seams, completely closing them at the top, and we fitted for doing this work and named them the knitall cones. Q. 35. Were the cones which were shipped as testified by you in answer to question 26, on July 24, 1909 and July 30, 1909, cones having a rounded substantially closed end, like that of the patent in suit, 986,379? A. They were. Q. 36. Please compare the cones which were shipped as testified by you in answer to question 26, on July 24, 1909, and July 30, 1909, as to the tips thereof with the il-

lustration in the drawing of the patent in suit No. 986,379? A. They are the same. Q. 34. State whether or not the Pairpont Corporation readily undertook the manufacture of these cones? A. We did not consider it as a matter of importance sufficient to specially fit machinery and prepare for doing the work. We did not consider it worth bothering with, as it required considerable time and expense, but Mr. Tiffany insisted that we proceed with it at his expense, and after considerable experimenting and trying, we submitted samples which were approved by Mr. Tiffany."

Later in his testimony Mr. Shurtleff testified:

"Q. 85. I call your attention to your answer to question 31, reading as follows: 'Mr. Tiffany discovered that a round-pointed, smooth-finished cone that was closed at the tip end would be a great improvement,' and ask you in what sense you used the word 'discovered.' A. He, Mr. Tiffany, first brought it to our attention, though I understand that the discovery was made by a Mr. Gess."

It is contended by the defendant that this shows prior use of the very improvement claimed by the patentee here as early as 1909, when the patent was not applied for until January, 1911. On the other hand, the contention for the plaintiff is that the inference properly to be drawn from all the testimony is that Mr. Tiffany, although he became the assignee of the patentee, Gess, at the time the patent was applied for in 1911, knew of Gess' discovery when he had the cones made by the Pairpont Corporation in 1909. On the other hand, the defendant contends that there is nothing whatever in the record from which any such inference can be drawn, but, on the contrary, it shows that Tiffany himself had discovered this improvement, if it be a discovery, and had himself carried out the idea of having the cones inturned and smoothed at the tips. I attach no great importance to this one way or the other, but I simply state what the record shows, and that is what has been mentioned above, that Tiffany went to Shurtleff, an employé of the Pairpont Corporation, to have these cones made in April, 1909, and said nothing then, so far as the record shows, that left any impression that he was using or putting into effect a discovery made by Gess.

I have omitted to state in what has been said that the "winding cone having a roughened yarn retaining surface markedly conical in shape to permit the yarn to free itself from said roughened surface when drawn from the end thereof," as it is expressed in the claim of the patent, is not claimed to be covered by this patent, and there is no issue and no contention in the case about this. This roughened surface is simply a device for holding the thread or yarn on the cone and keeping it from slipping, and such cones have been long in use. The only point in question and to be considered here is the rounded or inturned tip.

After fully considering this matter and all of the evidence in the case, and the very able briefs of counsel on both sides, my conclusions are:

First. That this inturning of the apex end of the cone tube, and smoothing and rounding the same, does not involve invention, and that therefore it was not patentable.

Second. That even if it would be a patentable invention if new, it had been long anticipated in the art in various patents which have been

referred to above, and more particularly by W. J. McCausland's cop-tube patent and his subsequent manufacture of the round-nosed cone tubes, his discovery of the inturned cop-tube, as I have stated, entering into his knowledge which enabled him to have the round-nosed cone tubes made in 1909.

The bill, I think, for the reasons given, is without merit, and must be dismissed.

There is a case of Henry L. Tiffany v. Noble Manufacturing Company (No. 36, in Equity), which, as a result of what has been decided above, is without merit, and should also be dismissed.

JOHNSTON v. TVEDT.

(District Court, S. D. Maine. August 1, 1917.)

No. 771.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BUILDING MATERIAL.
The Cottom patent, No. 650,824, for an improvement in building material, was not anticipated, discloses invention and is valid; also *held* infringed.

2. PATENTS ⟸56—ANTICIPATION—POSSIBLE FUNCTIONS OF PRIOR DEVICE.
In order to constitute anticipation of a patented invention it is not sufficient that the device relied upon might with some change be made to accomplish the functions performed by that invention if it were not designed by its maker to accomplish it or actually used for its accomplishment.

In Equity. Suit by Walter D. Johnston against Samuel M. Tvedt. On final hearing. Decree for complainant.

McGillicuddy & Morey, of Lewiston, Me., for plaintiff.
Harold H. Bourne, of Kennebunk, Me., for defendant.

HALE, District Judge. [1] This suit in equity alleges infringement of letters patent of the United States, No. 650,824, issued to James B. Cottom, of which, by assignment, the plaintiff is the owner. The patent relates to improvements in building material. In the specification the patentee thus briefly describes the purposes of his invention:

"My invention relates to new and useful improvements in building material, and comprises a specially-constructed building-block and means for cementing or uniting such blocks to form one continuous solid wall, which may or may not be provided throughout with ventilating-openings.

"The object of the invention is to provide a building-block which closely resembles free-stone in appearance and approximates or equals granite in point of durability."

The complainant alleges infringement of claim 1 of the patent, which is as follows:

"1. The herein-described building-block, consisting of a cement block having recesses formed in the ends thereof adapted to receive semiliquid cement by means of which the adjacent ends of said blocks are doweled, and the bodies of said blocks having one or more openings therein of a funnel-shaped struc-

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

ture which are adapted to receive semiliquid cement, the said funnel-shaped openings forming continuous openings extending from the top to the bottom of a wall and by means of which a continuous body of cement may be placed to rigidly secure said blocks from top to bottom of a wall, and air-spaces formed in said cement bodies, substantially as described."

The defendant says that the claim in suit is invalid by reason of anticipation, and that, in view of the state of the prior art, such claim does not disclose invention. Three patents are cited as anticipatory, namely: Patent to Josef Julius Hesz, No. 497,959, dated May 23, 1893, relating to the manufacture of bricks for building and other purposes; patent to Julia E. Meyenberg, No. 543,582, dated July 30, 1895, relating to building-blocks and improvements in same of the character employed in the construction of floor arches, ceilings, and roofs; patent to James T. Wilson, No. 635,906, dated October 31, 1899, for improvements in the construction of harbor work, docks, wharves, breakwaters, sea walls, bulkheads, and other submarine work.

From an examination of the patentee's specification, it appears that his inventive idea was to make a cement building-block pressed in suitable moulds and given an ornamental surface to resemble free-stone, or other building stone. The patentee thus describes his method of constructing the blocks and putting them together:

"In each of said blocks there is one or more openings, extending through said blocks, and the upper and lower ends of which are flaring or enlarged in funnel shape, and the central part of which is narrow or contracted, so that a suitable entrance-space is provided for the cement to pass in and through said openings. When the blocks are placed, one upon the other, in constructing a wall, these openings are in a vertical line with each other; and in laying the blocks cement of a thin or semiliquid consistency is poured therein as each block is laid, as above set forth. In pouring the cement in these openings it may be agitated by means of a suitable implement, and this enables the cement to gravitate through said openings and enter the space between the adjacent upper and lower blocks and fill said space and openings, thus firmly uniting the blocks from top to bottom of the wall. The ends of said blocks are provided with vertical openings which may be constructed in a variety of ways; or the adjacent ends of the blocks may be constructed in any way that embodies the principle of a male and female joint. These end openings do not extend in a vertical line through the entire wall; but, on the contrary, the ends thereof are closed by upper and lower blocks. The semiliquid cement is poured between the adjacent ends of the blocks and allowed to enter and fill these openings, and when said cement sets or becomes hardened there is formed a series of dowels which firmly unite the ends of the blocks against any possible lateral movement. When the blocks are thus laid in the construction of a wall, it will be observed that each block does not depend for its security on the mortar or cement as usually applied between the faces of bricks, but, on the contrary, have 'cement bars,' so to speak, which extend through them at two points in the body of each block and also which securely unites the ends of said blocks to form one continuous horizontal row of blocks, which practically become in point of rigidity one continuous sill and which have all the advantages in point of durability of the costly stone that is used in the construction of the more expensive buildings."

The claim presents two distinct elements. The block must have: First, recesses in the ends, adapted to receive semiliquid cement, by means of which the adjacent ends of the blocks are doweled together, so that, when the blocks are assembled, they will make a firm and rigid wall, the hardened cement constituting a rigid bar extending through them to make a firm wall; second, the other element consisting of

one or more openings in each block, of a funnel shape, these openings making a continuous passage extending from the top to the bottom of a wall, and making an air space, to provide ventilation and to receive, at the top and bottom of each block, the semiliquid cement which holds, or helps to hold, the blocks together, but which does not fill up the air space or prevent ventilation.

Now, looking at the patents which are cited in the prior art, I find that the Hesz patent relates to the manufacture of bricks for building. The inventor thus describes the object of his invention:

"The principal objects of my invention are: First, to provide an ornamental neat, durable, and efficient brick for building and other purposes; second, to provide a brick having openings in the body thereof, and with recesses or channels in the peripheral surface for the reception of tie-rods and distance-pieces at the union of the edges of the bricks with each other, and to provide a brick with openings extending through the body thereof and with peripheral recesses or channels and tie-rods or pieces adapted for insertion through the openings and recesses or channels of the united bricks, and perforated sheets, or plates, adapted to the surface or face of the brick for resisting sidewise strain or pressure, and for maintaining the tie-rods in proper position in respect to the bricks."

In this patent the openings in the body of the block are not for the purpose of admitting air, but for the purpose of inserting rigid pins or cores to make the blocks solid. These holes or openings do not present the same purpose as the funnel-shaped openings in the plaintiff's block. They represent an entirely different inventive thought. When the bricks of Hesz's patent are put together, they make a rigid wall by means of the openings which are filled with pins or cores. In the plaintiff's structure this rigidity is made by the dowels at the ends of each block, and the openings in the body of the block are for a distinctly different purpose. I am of the opinion that the Hesz inventive thought is not anticipatory of the inventive thought of the Cottom patent. The openings in the body of the block are for a different purpose from those of Cottom. The patent presents also a different combination from that found in the specification and claim of the Cottom patent.

The Meyenberg patent is for ceilings, floor arches, and similar constructions. The leading feature in this patent is the use of tongues and grooves extending the full width of the building-block, from the top to the bottom, and interlocking with the adjacent tongues and grooves of the block, fitted alongside the same when the blocks are assembled. The patentee says:

"These interlocking tongues and grooves serve to securely lock the assembled blocks together, and act in the capacity of keys, wedging fast, under any strain unevenly distributed on the blocks."

[2] Meyenberg also provides beveled ends, one of which is provided with an inclined end, locking the groove, and with a projected, inclined end, locking the tongue. This presents different means of uniting the blocks from the rigid cement bars at the ends of the plaintiff's blocks. The Meyenberg method of producing rigidity is distinctly different from that of the Cottom patent; so different, it seems to me, that it would not suggest to the ordinary mechanic any device found in that patent. The fact that rigidity is achieved by a prior patent, as

well as by the Cottom patent, is not enough to constitute anticipation. In order to constitute anticipation of a patented invention, it is not sufficient that the device relied upon might, with some change, be made to accomplish the functions performed by that invention, if it were not designed by its maker to accomplish it, nor actually used for its accomplishment. Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658.

The Wilson patent is for submarine work. Here the openings in the blocks are filled with cinders to give them solidity. No air-spaces are provided, as in the plaintiff's blocks. The Cottom method of providing rigidity by his doweled cement ends is entirely absent from the Wilson device, and is not anticipatory of it.

The invention of Cottom was not intended to be a broad invention. It related simply to certain improvements in means of making building-blocks. So far as anything appears in the record, Cottom was entitled to the means which he employed to effect the ends which he proposed; the patentees in the patents cited were also entitled to the means which they severally employed to effect their ends. Walker on Patents (4th Ed.) § 117A.

From an examination of all the patents brought before me in the prior art, I am of the opinion that the Cottom patent must be held to present an inventive thought not before presented in any other patent brought to my attention.

So far as anything appears in the record, I find the plaintiff's patent has not been anticipated, and that claim 1 of the patent discloses invention.

It is admitted, and the whole case proceeds upon the assumption, that the defendant has infringed the plaintiff's patent, unless such patent is anticipated by the patents cited in the prior art.

I therefore find that the plaintiff's patent is valid; that it discloses invention; and that it has been infringed by the defendant.

It is admitted by counsel that, if the court comes to the question of damages, such damages may be fixed at the sum of $500; and thus further expenses may be avoided.

Let the plaintiff file a draft decree on or before August 11, 1917, not inconsistent with this opinion. Defendant may present corrections, if any, not later than August 15, 1917. The decree may be passed August 18, 1917.

The plaintiff recovers costs.

PARAMOUNT HOSIERY FORM DRYING CO. v. WALTER SNYDER CO. et al.

(District Court, E. D. Pennsylvania. August 6, 1917.)

No. 1705.

COURTS ⊜347—FEDERAL COURTS—PRACTICE—COUNTERCLAIM.

Equity rule 30 (201 Fed. v, 118 C. C. A. v) declares that the answer must set forth 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 plaintiff which might be the subject of

an independent suit in equity, and such set-off or counterclaim shall have the same effect as a cross-suit. Rule 26 (201 Fed. v, 118 C. C. A. v) declares that the plaintiff may in one bill join as many causes of action cognizable in equity as he may have against the defendant; but, when there are more than one plaintiff, the causes of action joined must be joint. *Held* that, as it was obviously intended to allow defendants in pleading counterclaims the same latitude allowed plaintiffs in joining causes of action, a defendant may plead a counterclaim cognizable in equity, though it is entirely independent of plaintiff's suit.

In Equity. Suit by the Paramount Hosiery Form Drying Company against the Walter Snyder Company and others. Sur motion to strike out counterclaim. Motion denied.

Edmund H. Parry, of Washington, D. C., and Charles H. Howson, of Philadelphia, Pa., for plaintiff.

Joseph C. Fraley, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The question involved in this case is the scope and meaning of equity rule No. 30 (201 Fed. v, 118 C. C. A. v). There is a sharply contested controversial field which this rule covers. The controversy may be said to have begun over the practice of special pleading and the question of the abolition of that system of practice. The advocates of the one system dwell upon the advantages of the logical development of the law as a science; the advocates of the other keep in mind the doing of justice in each particular case under all its special facts and circumstances. In every jurisdiction, the government in which partakes to any extent of the popular form, the general course of the administration of the law is influenced by the general opinion of what should be done. The drift of late years has been strongly in the direction of the open door, and toward hearing everything which is thought to bear upon the merits of the particular case. Statutes and rules of court have reflected this view. Rule 30 is one of such rules. In chancery proceedings it might be clear that not only was a complainant not entitled to a decree against the respondent, but also that the respondent should have affirmative relief against the complainant. This latter relief, the court, for obvious reasons, could not grant under the pleadings. To obviate the difficulty, a cross-bill could be filed. This in effect brought two cases before the court, in each of which the parties were aligned in reverse. Much learning, labor, and time was devoted to having determined the limits of the operation of cross-bills. An obvious distinction between defenses which a defendant might have is that in which the defendant's claim was one arising out of the very thing which the plaintiff had made the subject-matter of his complaint and one which was entirely independent of anything which the plaintiff had brought into the case. A difference of view of what should be done at once arose between those who thought the controversy should be restricted to the case which the plaintiff had brought into court and those who thought the court, having the parties before it, should settle all the controversies between them which either side wished to have adjudicated. After a rule on the subject was formulated the same dispute was transferred to one over its meaning.

There is a natural predilection on the part of every lawyer to align himself on one side or the other of the controversy. Just as naturally he is inclined to that construction of rule 30 which advances his views of the practice as it should be. The state of professional opinion is reflected in the rulings of the courts. This has developed a difference of opinion which only a commanding voice can bring into accord. Judicial opinion would seem to be at an exact equipoise, as counsel agree that the reported cases show five rulings in accord with one view and five the other. The discussion in some of the cases has taken a broader range than the situation would seem to warrant. The question of what the practice should be obviously does not concern us, except to the extent to which the preferred practice bears upon what the equity rules have declared the practice to be. Aside, therefore, from any individual views of the better practice, what does rule 30 mean? Some light is, we think, thrown upon its meaning by rule 26 (201 Fed. v, 118 C. C. A. v). The plaintiff by that rule is at liberty to introduce into his bill as many different and wholly unrelated causes of action as he may have. The only limitations are that these different rights of action shall each be cognizable in equity and belong to the plaintiffs jointly (if there be more than one plaintiff), and (if there be more than one defendant) the liability shall be joint, and no person shall be joined as a defendant unless good grounds for joining him be made to appear. This opens the door wide. A like broad right is, we think, given to the defendant by rule 30.

Full expression has already been given to each of the two views to which we have referred. A reference to the cases cited below adequately presents all which can be said. There is undeniable force in what is said in the cases which we have not followed. Much of it is presented with an appealing power to the mind of a lawyer. All of this, however, and all which could be said in support of the opposite view, was before the minds and duly weighed by those who framed our present equity rules. The whole force of it is therefore destroyed by the adoption of the rule. The present defendants assert themselves to be within the rule, whichever interpretation is followed. It is unnecessary to go into this subsidiary question, as the answer to the broader one is found to be with the defendants. It is, of course, not meant that the right of the defendant does not have its limitations. The rights of the plaintiff are expressly limited by rule 26 and there are likewise limitations imposed by rule 30, both express and by implication, as has been suggested in some of the cited cases. What is meant is that in this case it is conceded that the defendants are within the rule as interpreted in the cases, the decisions in which we have followed.

The motion to strike out the counterclaim is disallowed and denied. The cases to which reference has been made can be found by looking up the following citations: Marconi Co. v. National Co. (D. C.) 206 Fed. 296; Vacuum Cleaner Co. v. Am. Co. (D. C.) 208 Fed. 419; Salt's Co. v. Tingue Co. (D. C.) 208 Fed. 156; Electric Boat Co. v. Lake Co. (D. C.) 215 Fed. 377; Buffalo Spec. Co. v. Vancleef (D. C.) 217 Fed. 91; Terry Co. v. Sturtevant Co. (D. C.) 204 Fed. 103; Williams Co. v. Kinsey Co. (D. C.) 205 Fed. 375; Adamson v. Shaler (D. C.) 208

Fed. 566; Klauder-Weldon Co. v. Giles (D. C.) 212 Fed. 452; Sydney v. Mugford Co. (D. C.) 214 Fed. 841; Christensen v. Westinghouse Co. (D. C.) 235 Fed. 898.

KINGDOM OF ROUMANIA v. GUARANTY TRUST CO. OF NEW YORK.

(District Court, S. D. New York. August 18, 1917.)

No. 135.

1. INTERNATIONAL LAW ⟸10—SUIT—IMMUNITY FROM.
   Immunity from suit is a privilege which an independent government may waive by its voluntary appearance in the courts of the United States, and when a foreign government voluntarily becomes party to a suit involving its interest by commencement of an action, it waives such immunity, and cannot complain that its adversary in such litigation seeks to protect itself by exercising the right to interplead another.
2. INTERNATIONAL LAW ⟸10—POWERS OF GOVERNMENT—SOVEREIGN CHARACTER.
   Where a foreign government becomes a party in any trading company, it divests itself of its sovereign character, and takes on that of a private citizen.
3. INTERPLEADER ⟸8(2)—RIGHT TO INTERPLEAD—SOVEREIGNTY.
   Code Civ. Proc. N. Y. § 820, provides for the remedy of interpleader for defendants, where there are rightful claims to part or all of the sums due from them. A New York trust company, which held as a banking institution moneys to the credit of a foreign government, was sued by an individual, who sought to impose a trust on such funds. Thereafter the government brought an action to recover the amount to its credit. *Held* that, under the circumstances, the trust company could implead the individual suitor, for it admitted that it had no beneficial interest in the funds, and there were two rival claimants, between whom it could not be decided without hazard, and the government, by instituting the action, had waived its immunity from suit.

At Law. Action by the Kingdom of Roumania against the Guaranty Trust Company of New York. Defendant moved for an order interpleading Morris Arditti. Motion to interplead granted.

White & Case, of New York City, for plaintiff.
Frank M. Patterson, of New York City, for defendant.
Samuel Meyers and Morse Sable Hirsch, both of New York City, for interpleaded defendant.

MANTON, District Judge. The Kingdom of Roumania, a sovereign power immuned from suit in this country, has submitted itself to the jurisdiction of this court in instituting a suit against the Guaranty Trust Company, seeking to recover $73,433.55.

Morris Arditti has instituted a suit against the Kingdom of Roumania and the Guaranty Trust Company in the Supreme Court of the state of New York, making claim to a part of a fund now held by the Guaranty Trust Company as the agent of the Kingdom of Roumania. He alleges in paragraph 13:

"Upon information and belief, that the Kingdom of Roumania, in violation of its agreement to hold and retain the said fund separate and apart from its general funds and as a trust fund, wrongfully withdrew the said fund from its said treasury into which it had been deposited as aforesaid, and wrongfully transferred and delivered the said fund in such a manner that the said

fund after passing without consideration through the hands of several intermediaries, duly came into the hands of the defendant Guaranty Trust Company of New York, without consideration therefor having been paid by the said Guaranty Trust Company of New York, and that the said fund is now in the possession of the defendant Guaranty Trust Company of New York, and in its control."

He seeks to recover damages for breach of contract and asks, as further relief, that this money, held by the Guaranty Trust Company, be held subject to his interest therein, by reason of a trust sought to be imposed.

The Guaranty Trust Company of New York has moved for an order interpleading Morris Arditti. Arditti not only consents to be interpleaded, but urges that the motion be granted. The plaintiff opposes.

[1] The suit of the plaintiff against the Guaranty Trust Company of New York alleges, in substance, that a sum of $175,000 was turned over by the Empire Trust Company to the Guaranty Trust Company of New York as payment to the Roumanian government. In other words, this fund is held by the Guaranty Trust Company of New York, as the agent of the Roumanian government. It has been depleted until the balance left is the amount above mentioned. Arditti could not successfully sue the Kingdom of Roumania here, and he has not effected service. The immunity from suit is a privilege which a government may waive by its voluntary appearance in a court of the United States. However, since it voluntarily becomes a party to a suit involving its interest by the commencement of this action, and thereby waives such immunity by the institution of this action in the federal court of the United States, it cannot complain now that its adversary in that litigation seeks to protect itself by the exercise of its right to interplead another claimant. Porto Rico v. Ramos, 232 U. S. 627, 34 Sup. Ct. 461, 58 L. Ed. 763; Richardson, Treasurer, v. Fajardo Co., 241 U. S. 44, 36 Sup. Ct. 476, 60 L. Ed. 879; Veitia v. Fortuna Estate, 240 Fed. 262, — C. C. A. —.

[2, 3] Counsel urges that the plaintiff's suit is for money had and received, or a debtor's action against a creditor, and not an action involving any particular fund, and that, therefore, an order of interpleader should not be granted. The difficulty with this position, however, is that the Guaranty Trust Company of New York admits its indebtedness by stating that the money is held by it as a banking institution for the credit of the plaintiff, and it is as against this fund so held that Arditti seeks to impose the trust. Clark v. Barnard, 108 U. S. 447, 2 Sup. Ct. 878, 27 L. Ed. 780. It has been held that, where a government becomes a partner in any trading company, it divests itself of its sovereign character, and takes on that of a private citizen. U. S. Bank v. Planters' Bank, 9 Wheat. 904, 6 L. Ed. 244. Where a sovereign state has engaged in the liquor business, it may be sued for revenue. South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737.

Before the Guaranty Trust Company of New York is entitled to interplead Arditti, it must show, first, that two or more persons have preferred a claim against the petitioner; second, that claim is made

to the same thing; third, that the petitioner has no beneficial interest in the same thing; and, fourth, that it cannot determine, without hazard to itself, to which of the claimants the moneys belong.

The first three essential elements are conceded to exist. The last is questioned. There is sufficient shown to indicate a real hazard or danger to the Guaranty Trust Company of New York, if Arditti's alleged claim to the fund is not disposed of before the money is paid over to the Roumanian government. The Code of Civil Procedure in the state of New York (section 820) provides this remedy for the Guaranty Trust Company of New York. This section does not require the trust company to establish the validity of the adverse claim of Arditti, but simply that the whole or part of the debt is claimed adversely by two litigants without any collusion on the part of the plaintiff. Western Commercial Travelers' Asso. v. Langeheineken, 139 App. Div. 592, 124 N. Y. Supp. 182; Natowitz v. Independent Order, 149 App. Div. 607, 133 N. Y. Supp. 1065. It is not necessary for the trust company to decide, at its peril, either close questions of fact or nice questions of law arising by reason of the conflicting claims; but it is sufficient if there is a reasonable doubt as to which claimant the money belongs. Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991.

I will therefore grant the motion to interplead.

In re GROVES.

(District Court, S. D. Florida. August 4, 1917.)

1. BANKRUPTCY ⊂=417(4)—DISCHARGE—APPLICATION TO VACATE ORDER.
An order discharging a bankrupt will not be set aside on application of a creditor who filed objections after the expiration of the time allowed, which had been enlarged for his benefit, and who had taken no evidence, although twice the time prescribed by the rules of court had elapsed when the discharge was granted, on the ground merely that his attorney was ignorant of the rules.
2. BANKRUPTCY ⊂=418(1)—DISCHARGE—EFFECT ON RIGHTS OF TRUSTEE.
The discharge of a bankrupt does not affect the right of his trustee to recover property fraudulently conveyed.

In Bankruptcy. In the matter of W. C. Groves. On petition to set aside order of discharge. Denied.

I. A. Zacharias, of Jacksonville, Fla., and Atkinson & Burdine, of Miami, Fla., for bankrupt.

Robert W. Barnes, of Macon, Ga., and Price & Eyles, of Miami, Fla., for petitioning creditor.

CALL, District Judge. On November 20, 1916, the bankrupt filed his petition to be adjudicated a bankrupt. The adjudication was duly made thereon, and referred to the referee.

On December 26, 1916, the bankrupt filed his petition for discharge, to which petition the Acme Ice & Bottling Company entered its appearance on January 19, 1917. On January 27, 1917, the creditor filed

its petition, asking that the time for filing specifications of objections to such discharge, and on the same day the time for filing such objections was enlarged, for the term of 30 days from January 30, 1917.

On March 10, 1917, such specifications of objection were filed. On April 30, 1917, a traverse was filed by the bankrupt. On July 3, 1917, an order was made by the court dismissing the specifications of objection to the discharge filed by the Acme Ice & Bottling Company and the Standard Distilling Company, on the ground that 90 days elapsed since the filing of the specifications, and no evidence was offered in support thereof, and on the same day an order of discharge was entered. On July 17, 1917, a petition was filed by the Acme Ice & Bottling Company praying that the two orders made July 3, 1917, be vacated, and petitioners be allowed to come in and produce testimony in support of its specifications. Upon this petition a rule nisi was issued, returnable August 2, 1917, upon which day the bankrupt made his return. The case was heard upon the petition to vacate and the return thereto.

Rule 110 of the District Court Rules provides that:

"Upon specifications of objection to a discharge in bankruptcy being filed, the bankrupt shall by the next rule day being more than twenty days from the date of the filing of said specifications, plead thereto, and upon issue being joined, said matter will stand referred to the referee in bankruptcy for the division of the district in which said cause is pending, as a special master to take the testimony and report the same to the judge, together with his findings of fact and law. That the objecting creditors have thirty days in which to take their testimony in chief, and the bankrupt have forty-five days in which to take testimony in reply, and the objecting creditors have fifteen days thereafter to take testimony in rebuttal. That no other or further time shall be allowed, except upon the written stipulation of the parties filed in said cause."

In the instant case the matter stood referred to the referee in bankruptcy upon the filing of the traverse, on April 30, 1917, and the time for the creditor to take its testimony commenced from that day, and more than 60 days had expired before the order sought to be vacated was made. The petition relies principally upon the fact that the attorney of the creditor having the matter of opposing the discharge particularly in charge resides in Macon, Ga., and was ignorant of the requirements of such rule above referred to, which automatically on filing the traverse sent the matter to the referee to take the testimony and report the findings of fact thereon.

[1] A bankrupt is entitled to a discharge unless one or more of the six grounds set out in section 14 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 550 [Comp. St. 1916, § 9598]) are pleaded and sustained by proof, and the burden to do this rests upon the objecting creditor. The rule of pleading, as I understand it, requires the same certainty in the specifications of objections as in other pleadings; such certainty as will put the bankrupt on notice of what he is to meet. The specifications filed by the creditor in this case are divided into 21 heads, none of which meet the requirement, except possibly the twentieth ground, which does state an objection under section 14b (2). The ignorance of counsel of the rules of procedure of the court in which the case is pending cannot, except in extraordinary cases, be ground to vacate orders properly made in the case, and especially should this

not be done after time has been enlarged to the creditor to file such specifications, and those specifications filed after the expiration of the time allowed, and nothing done except the writing of one letter to the clerk of this court to ascertain the condition of the pleadings, and having associate counsel residing in this district. It would set a precedent that the court would not be willing to do that a litigant with counsel residing out of the district, having a resident associate counsel, should take entire charge of a phase of the litigation, and, when orders were duly made, come in by petition and have them vacated on showing that he had assumed charge of that phase, and through ignorance of the rules of court had allowed the time for maintaining the burden cast upon him to expire. This precedent would be too dangerous for this court to establish.

[2] Something was said in argument to the effect that the creditor would be deprived of the opportunity to collect his debt; but a little consideration will show the fallacy of this contention. No right of the trustee to recover any property of the bankrupt unlawfully or fraudulently conveyed is affected in the least by the discharge of the bankrupt. Subdivision 4 of section 14b of the act requires that in order to prevent the discharge the bankrupt must have done the inhibited act within four months, and the specifications nowhere allege the acts were done within four months of bankruptcy.

For the reasons above set forth, the petition to vacate will be denied.

WING v. McCALLUM.

SAME v. SEDGWICK.

(District Court, D. Massachusetts. July 6, 1916.)

Nos. 483, 484.

CORPORATIONS ⇐77—SUBSCRIPTION TO STOCK—CONSTRUCTION OF CONTRACT—RIGHTS AND LIABILITIES OF PARTIES.

Defendants and others, members of a syndicate to underwrite the stock of a new corporation, who had subscribed and paid for at par a part of the stock, entered into a contract with others, designated as managers, by which they transferred to the managers the stock purchased, and severally agreed to take in the aggregate all the remaining stock and pay for the same on call not earlier than a future date named. The managers were authorized to borrow money to make immediate payment for such stock, to give their note or notes therefor, which should be binding on the members of the syndicate, and to pledge as collateral therefor the subscribers' contracts to buy the stock and to pay loans made by the managers on their accounts and all the stock of the corporation. On payment of their subscriptions the members of the syndicate were to receive stock at par equal to their total subscriptions, including that previously paid for. Being unable to secure a loan for the amount required, the managers subscribed for and received the remaining stock, and paid for it with their own nonnegotiable note to the corporation. At the same time they transferred all of the stock and the syndicate contract to a trustee as security for payment of the note, which was also assigned to the trustee by the corporation, but was three years later reassigned and sold by the corporation subject to certain participation certificates which had been sold by the

trustee. To these transactions the members of the syndicate were not parties, nor did they ratify the same. The note not having been paid, the trustee brought suits against defendants on their subscription agreements to recover the full amount of their subscriptions for the benefit of the holders of the note. There were no allegations as to the amounts received by the trustee from the sale of participation certificates nor what was done with the money, nor as to the amount actually realized by the corporation from the note. *Held*, that the execution by the managers of their own note in payment for the stock issued to them and the sale of such note by the corporation was not a borrowing of money by the managers, nor within the authority given them by the syndicate contract, one purpose of which was to secure for the corporation at once its entire capital for use in its contemplated business; that on payment of their subscriptions defendants were entitled to receive therefor shares of stock of the corporation with its capital fully paid in at par, and that, in the absence of a tender of such stock or allegations showing that it could and would be delivered, the actions could not be maintained.

At Law. Action by Thomas E. Wing, trustee, against Alexander McCallum, and same against Alexander Sedgwick. On demurrers to declarations. Demurrers sustained.

Coolidge & Hight, of Boston, Mass., and Wing & Russell, of New York City, for plaintiff. Whipple, Sears & Ogden, of Boston, Mass., for defendants.

MORTON, District Judge. These two actions were heard together upon demurrer, and the question in each case is whether the declaration states a good cause of action. The declarations are the same mutatis mutandis.

The defendants and others, hereinafter called interchangeably the "subscribers" or "underwriters," entered into a written agreement bearing date September 1, 1907, for the purpose of promoting a corporation known as the Refugio Syndicate, referred to in this opinion as the "corporation." This agreement (hereinafter called the "syndicate agreement" or "agreement"), was by the underwriters with each other, and by them as parties of the second part, with certain other persons, parties of the first part, appointed by them to act as their agents, and called in the agreement the "syndicate managers," or "managers." The present actions are based upon this agreement. Copies of it, and of two other later agreements growing out of it, to which the defendants are not parties, entitled respectively the "trust agreement" and the "depositors' agreement," are annexed to and made a part of the declarations.

The corporation was organized under the laws of New Jersey with a capital of $1,000,000, divided into 10,000 shares of the par value of $100 each. By whom it was organized, or for what purpose, if material, does not appear. That it was, to some extent at least, a speculative venture, seems evident from certain provisions in the syndicate agreement relating to the sale or exchange of the stock. To start the enterprise 2,000 shares were taken and paid for in cash at par by the underwriters. They were desirous, as the syndicate agreement recites, of providing for the purchase of 8,000 additional shares, in other words, of the remaining shares as the capital then stood; but they did not wish to take and pay for them at once, as they had done

with the 2,000 shares. At the same time they understood (as agreed at this hearing) that the corporation must have money to do business with. This money would naturally be obtained by paying in the capital. Part of it had been so obtained, as already noted, from the sale of the 2,000 shares. It was evidently contemplated that the remaining 8,000 shares should be taken and paid for, and that money for that purpose should be borrowed by the managers and repaid from the underwriting subscriptions.

Pursuant to the scheme thus outlined, the syndicate managers subscribed for the 8,000 shares, and agreed to pay cash for them at par; and the underwriters severally, and not jointly, agreed to take proportionate parts of the 8,000 shares, and to pay cash for the same at par on call by the managers, not, however, before January 1, 1909, unless otherwise agreed to by 75 per cent. in interest. The underwriters transferred to the managers the 2,000 shares they had taken and paid for in cash, and authorized the managers to borrow for each underwriter, on their (the managers') note or other obligation, which was to be binding on the underwriter, a sum not exceeding his cash subscription, to become due not before March 1, 1909. The managers were also authorized to pledge as security for the loan or loans so obtained the 2,000 shares transferred to them as above, the agreements of the underwriters to buy the stock, and the underwritten capital stock. I construe this last clause as meaning the stock issued to the managers upon payment therefor with the money borrowed by them. The 2,000 paid-up shares were intended to furnish a margin of security for the money so borrowed.

The managers were not required to make a separate loan for each subscriber, but were at liberty to make a single large loan if it could be done. Upon payment in cash at par at any time of his full subscription an underwriter was entitled (whether the money borrowed by the managers was in one large loan or otherwise) to the stock which he had agreed to take, and also to stock for that which he had transferred to the managers; in other words, in the language of the syndicate agreement, "to $1,000 face value in said capital stock of said Refugio Syndicate for each $800 of his cash subscription." The managers were given the "sole direction, management, and conduct of the syndicate." "The enumeration of particular and specific powers," it is said, is not to be "considered as in any way limiting or abridging the general power or direction intended to be conferred upon and reserved to the syndicate managers." The corporation itself was not a party to the agreement, which was wholly between the underwriters and the syndicate managers. The agreement was to become operative and binding only upon certain conditions, as to which it is enough to say that, according to the allegations of the declaration, they must be taken to have been met.

The gist of the scheme was, as I construe the syndicate agreement, that eventually the whole capital stock should be divided among the underwriters in certain proportions, unless previously sold or exchanged, and that they should pay cash at par for the same, that they were to take and pay cash at par at once for 2,000 shares, and transfer them

to the managers (which they did), and bind themselves to the managers to take and pay for in cash at par on call, not before January 1, 1909, the remaining 8,000 shares, unless otherwise agreed before then, and that in the meantime, in order to provide the rest of the capital promptly, the managers should subscribe for the 8,000 shares and borrow the money to pay for them, pledging as security for the loan the 8,000 shares so paid for, the 2,000 shares, and the subscription agreements of the underwriters.

I do not construe the agreement as authorizing the managers to borrow money generally for commercial purposes to carry on the business of the corporation. Neither, as I understand him, does the plaintiff. The scheme was a promoters' scheme, not one for carrying on the business of the corporation; and the authority of the managers was limited to borrowing money to pay for the 8,000 shares of stock which the underwriters desired to purchase. Nothing is said in the agreement about the managers subscribing for the 8,000 shares. But, as counsel for the petitioners said, "They had to subscribe for the stock;" otherwise (the conclusion is mine) they would not have been in a position to deliver the shares to which the underwriters were entitled upon payment of their subscriptions. There is no express provision that the money borrowed shall be applied to the payment of the 8,000 shares. But that is the plain import of the agreement; and it is agreed by counsel for the petitioner that that is what was to be done. Indeed, unless the money was so applied, the underwriters would, or might, be liable not only for their subscriptions, but also for money borrowed by the managers; in other words, would run the risk of a double liability, which cannot for a moment be supposed to have been intended.

The syndicate agreement had hardly taken effect when, as all parties agree, the panic of 1907 came on, and it was impossible for the managers to raise in one large loan the money required to pay for the 8,000 shares. The situation then was that the underwriters had individually bought and paid for 2,000 shares of the Refugio stock and had deposited them with the managers, with the expectation that the remaining shares would be subscribed for by the managers and promptly paid for by a loan, and the business of the corporation begun. The underwriters had agreed to take their pro rata parts of the 8,000 shares and to pay the managers for them, but not before January 1, 1909, without the further assent above referred to; and it had become impossible for the managers to obtain the money to pay for the 8,000 shares and complete the capitalization of the syndicate so that it could begin business.

The situation was undoubtedly one of much difficulty. It remained in abeyance until March 2, 1908, on which date, nothing so far as appears having been done in the meantime, and the agreement continuing in force, the following course was adopted: The managers made their nonnegotiable note for $800,000, payable to bearer without grace on the 1st day of March, 1909, and delivered the same, as I understand what was done, to the Refugio Syndicate; and that corporation turned over to them the 8,000 shares of stock. Under the same date, and as part of the same transaction, the managers en-

tered into an agreement with the Guardian Trust Company of New York by which they transferred to it the "syndicate agreement" and the 10,000 shares of Refugio stock (i. e., the 8,000 shares so received and the 2,000 previously bought by the underwriters), to be held by it in trust for the benefit of the holder or holders of the note and "of all persons who shall or may have an interest therein." Also as part of the same transaction the Refugio Syndicate made an agreement with the same trust company by which it transferred the note to the trust company, with authority to sell and issue upon its (the Refugio Syndicate's) order participation certificates therein.

These agreements are called respectively the "trust agreement" and the "depositors' agreement," and copies of them are annexed as aforesaid to the declaration. The "trust agreement" is a lengthy instrument with numerous provisions relating to various matters into which it is not necessary to go in detail. The "depositors' agreement" is a simpler document. The "trust agreement" provides, among other things, that if any subscriber to the "syndicate agreement" pays to the trustee the full amount unpaid upon his subscription, the trustee shall, in accordance with paragraphs II and V of said "syndicate agreement," transfer and deliver to him his proportionate share of the capital stock of the Refugio Syndicate, or the voting trust certificates representing the same, then held by the trustee. This plainly was intended to provide for the delivery to such subscriber of the stock to which he was entitled upon payment in full in cash of his subscription. Whether a subscriber could be compelled to accept voting trust certificates in lieu of stock may be doubted, but that question does not arise; non constat that any subscriber would ever be asked to do so. The money received by the trustee from underwriters was to be applied by it, after deducting its own charges and expenses, to the payment of the note. See Trust Agreement, cls. VII and IX.

The "trust agreement" also provides for the filling of any vacancy caused by resignation or otherwise in the office of trustee, and for the vesting in the new trustee upon his appointment, without any further act, deed, or conveyance—in other words, automatically—of the property and securities then held by the trustee under the "trust agreement" and "all of the estates, trusts, rights, powers, and duties" of said trustee. The declaration alleges that the Guardian Trust Company resigned as trustee, and that the plaintiff was duly appointed and qualified in its place.

The result of this whole arrangement was that the Refugio Syndicate issued to the managers the 8,000 shares which the underwriting agreement contemplated should be purchased by them for cash, and received therefor no cash at all, but only the $800,000 note. It lodged this note with the trust company, and authorized participations therein to be sold on its account; and the managers deposited with the trust company the 2,000 shares originally purchased by the underwriters, the 8,000 shares received in exchange for the note, and the underwriting agreements of the several underwriters, as collateral security, not for such amounts as might in fact be received by the Refugio Syndicate from lenders, but for the payment of the note itself. In considering the complicated and difficult situation which has

arisen, it must be clearly borne in mind that the foundation of the new arrangement was the note, that the defendants' agreements are avowedly held by the plaintiff only as security on the note, and that this action is admittedly for the purpose of enforcing the collateral in order that the note itself may be paid.

Participation certificates in the note were sold and issued by the trust company; to what amount does not appear. It is said in one of the opinions, of which copies are attached to the plaintiff's brief, that certificates were issued to the amount of several hundred thousand dollars. But there is no allegation to that effect in either declaration.

The Guardian Trust Company resigned as trustee in September, 1910, two years or more after the execution of the trust agreement, and the petitioner was, as above noted, duly appointed in its place. At the same time the trust company redelivered the $800,000 note to the corporation, and the holders of participation certificates issued by the trust company surrendered them to the corporation and received in lieu thereof participation certificates from the corporation. The depositors' agreement entered into between the corporation and the trust company was abrogated. Later, in October, 1911, the corporation sold and delivered the note, subject to outstanding participation certificates therein, to one McDougall, who purchased the same for account of the Consolidated Gold Fields of South Africa, Limited. The note was not paid when it fell due, and is still outstanding and unpaid. Calls were made on the defendants by the syndicate managers for the payment of their subscriptions, and demand was made upon them by the plaintiff. The defendant McCallum has made two payments, but has refused to make any further ones. The defendant Sedgwick has paid nothing.

The plaintiff brings this action as substituted trustee to recover the entire balance of the defendants' subscriptions, not their proportional parts of the amounts actually borrowed, "for the holders of the aforesaid note and for the syndicate managers." Decl. par. 13. The last clause might imply that the object was simply to collect on the underwriting, regardless of any loan; in other words, to enforce a call thereon. But counsel for the plaintiff stated at the argument that the action is not pressed on that ground. The plaintiff's position is that he is acting as trustee under the trust agreement, and is attempting to realize upon the security which he holds as such trustee for the payment of the note. The plaintiff contends that "the trustee is now doing the very thing for which he was appointed trustee, to wit, attempting to collect from these underwriters what they owe in order that the *note* may be paid." Plaintiff's Argument, p. 27. Italics mine. See, too, Plaintiff's Brief, p. 15. This is a correct statement of the duties of the trustee, and of the only purpose for which he holds the defendants' subscription agreements under fifth, sixth, seventh, and ninth clauses of the trust indenture of March 2, 1908 (Exhibit B). No ratification by the defendants of unauthorized action by the managers is alleged in the declaration; and no such contention was made on behalf of the plaintiff at the arguments on the demurrer.

I assume in the plaintiff's favor, though it is nowhere distinctly al-

leged, that the actions are brought not only for the benefit of McDougall, but also for the benefit of the holders of participation certificates.

It seems clear that the note is enforceable against these defendants, if at all, only to the extent that it represents money borrowed by the syndicate managers for the purpose for which they had the right to borrow money on account of the underwriters, viz. for the purpose of purchasing for the underwriters the 8,000 shares. The first question, and one which lies at the threshold of the case, is whether (waiving for a moment all questions as to the validity of the note, the legality of the issue of the 8,000 shares, and the right of the managers to enter into the trust agreement) the sale of the note by the corporation to, and its purchase by, McDougall under the circumstances shown, and the sales of certificates of participation in the note, constituted borrowings by the syndicate managers.

So far as the McDougall transaction is concerned, it seems to me that the question answers itself, and that in no just sense was it such a borrowing. The sale to him took place three years after the trust agreement was entered into, and more than a year after the trust company had resigned as trustee and the plaintiff had been appointed. The syndicate managers do not seem to have had anything to do with it. It was a transaction between the corporation and McDougall, and is, in substance, so alleged. I do not think that it can be said that a sale of the note by the corporation to a third party constituted under any and all circumstances a borrowing by the syndicate managers of the amount received by the corporation. But that is the result to which, as matters stand, we must come in order to say that there was a borrowing by the syndicate managers in the sale of the note by the corporation to McDougall. It may be that the corporation could sell the note as it could a bond secured by mortgage, though I do not think the analogy is quite correct. But the question here is not of the right of the corporation to sell the note. It is whether a sale of it under the circumstances described constituted a borrowing by the managers. As I have said, I do not think it did.

As to the participation certificates, the managers had authority to borrow money and bind the underwriters therefor, as already observed, only for the purpose of paying for the 8,000 shares for which they had subscribed, and the purchase of which, in the interest of the underwriters, was the principal, if not the sole, object of the syndicate agreement. The scheme contemplated that the money borrowed by the managers, or by their authority, should be applied to the payment of those shares; so that, when the underwriters paid up their subscriptions, they would receive stock in a corporation whose capital of $1,000,000 had been paid in full, and the shares in which each represented $100 paid in cash. Any scheme not calculated to secure that result was not within the managers' authority.

Not only is there no allegation that the money received from the sale of participation certificates was applied by the corporation in payment for the stock, but it affirmatively appears, I think, that the 8,000 shares, which apparently are to be turned over to the underwriters as pay-

ment of their subscriptions, were issued in violation of law. The New Jersey statute, of which this court takes judicial notice, provides that:

"Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act." N. J. Corporation Act (2 Comp. St. 1910, p. 1630) § 48.

See Dill on N. J. Corporations (3d Ed.) p. 73.

The only thing given in payment, if payment it can be called, by the syndicate managers for the 8,000 shares issued to them, was, so far as appears, the note for $800,000. This was in plain violation, I think, of the statute. See Maine v. Butler, 130 Mass. 196; Pierce v. Bryant, 5 Allen (Mass.) 91.

The plaintiff contends that there was no issue of stock within the meaning of the statute:

"We again urge upon this court the suggestion that there was no issue of stock in the sense in which that term is used in the statute. * * * It was plainly the intent of the parties that the stock should be fully paid for in cash before it became outstanding." Plaintiff's Supp. Brief, p. 4.

It is enough to say that the syndicate managers, the corporation, and the trust company all treated it as an issue. If the stock was not issued, the plaintiff's case is certainly no better. Money received in this action will be paid by the trustee to persons interested in the note, and the stock will apparently be turned over as it is to the underwriters, or not turned over at all, and the defendants will get nothing for their money. If so, the scheme adopted by the managers differs essentially from that authorized by the underwriting agreement.

The plaintiff's position is, as I understand it, that, as soon as any participation was sold, the underwriters' liability became fixed for the full amount of their subscriptions as collateral on the note, that the trustee can enforce the agreement to the full extent of the subscription, and that, if the defendants are not liable for more than their proportionate parts of the amounts actually received by the Refugio Syndicate for sales of participations and of the note, which the plaintiff does not admit, the surplus is to be returned to the underwriters as excess collateral; in other words, that the sale of a $1,000 participation fixed the underwriters with liability for the full amount of the $800,000 note.[1]

I do not think that this position is sound. The underwriters never agreed to guarantee all commercial paper or all obligations which the managers might think it wise to put out or assume. They authorized

[1] The plaintiff's counsel thus stated its contention: "Now, assume that as a matter of defense these defendants can show, if it be a fact, that our cestuis qui trustent of this trust are not entitled to a full return and that their obligations may, perhaps, have to be scaled down pro rata. I do not concede that, but I say that such a contention might possibly be made. If it be a proper contention, it is a contention by way of defense. The underwriting agreement was collateral. The collateral can be enforced for the full amount. I know of no rule of law which forbids the holder of collateral exceeding the amount of the obligation for which it is collateral from enforcing and collecting the full amount of the collateral, so he will have to account to somebody for the excess, and it may be that we will have to account later for some excess to these underwriters. I don't know. But whether that is so or not, that is a matter of defense. That is a matter on the evidence, not on the demurrer."

the managers, as has already been said, to borrow on their account money to pay for the 8,000 shares which they wished to acquire, and which they expected to come to them, on payment of their subscriptions, as stock on which $100 a share had been paid, and also, it would follow, as stock in a company whose capital of $1,000,000 had been paid in full. There are no allegations as to the amounts actually received from the sale of the note or from the sales of participations in it nor as to what was done with the money. For aught that appears, the note and participations may have been sold by the corporation at large discounts, or the money received may have been paid to or received by the trust company, and may be held by it against the note, as the trust agreement provides shall be the case with moneys paid upon the subscription agreement. In either case the situation would be one not contemplated by the underwriters, and in regard to which the syndicate managers had no authority to bind them.

While the sale of participation certificates in the note made and issued by the syndicate managers was, if done with their procurement and assent, not open to objection as a mode of borrowing, the sales of such certificates and of the note in the market by the corporation for any price that it or they would bring, which, for aught that appears, is what was done, was, I think, outside the scope of the authority conferred upon the syndicate managers, and created no binding obligation on the underwriters. The general power and discretion given to the managers in the direction and management of the syndicate cannot be construed as enlarging a limited agency into a general one, but must be construed as relating to the exercise of powers within the scope of the authority conferred. Whatever may be the meaning of the provision in the syndicate agreement that the note or other obligation of the managers shall be binding on the subscribers without any duty on the part of the lender to inquire into the performance by the managers of their obligations, it cannot relieve the lender from the effect of knowledge of the character of the undertaking on the part of the underwriters and of the relation of the managers thereto, as shown in the syndicate agreement, of which the lender is bound to take notice by reason of the reference thereto contained in the note.

There is a still further difficulty with the cases as they stand. As I have said, each subscriber or underwriter is certainly entitled upon payment in full at par in cash of his subscription to the stock for which he subscribed, fully paid, and to stock for that which he transferred to the managers, requoting the syndicate agreement, "to $1,000 face value in said capital stock of said Refugio Syndicate for each $800 of his cash subscription." These provisions are incorporated by express reference into the trust agreement. The result is, it seems to me, that the plaintiff cannot compel performance by the defendants of their subscription agreements unless he is ready and willing to deliver to them on payment of their subscriptions the stock to which they are entitled. There is no allegation in either declaration of readiness to deliver such stock upon payment by the defendants of their subscriptions; and it is not alleged that there has been any offer or tender of it. Such an allegation would not be necessary if the plaintiff's theory that the defendants became absolutely liable on their subscriptions as

collateral to the note upon the sale of participations in the note, or absolutely bound by any note made by the managers, is correct. I have already said in another connection that this theory does not seem to me sound. It may well be doubted whether the plaintiff is in a position to deliver the stock if the issue of the 8,000 shares is illegal. The defendants cannot be compelled to take stock about the legality of whose issue there is a question, any more than a purchaser of real estate can be compelled to accept a doubtful title. But that question is not before me.

The defendants contend that the plaintiff cannot sue in his own name. The declaration alleges that the Guardian Trust Company recognized that the plaintiff was duly appointed trustee in the place of the Guardian Trust Company, and that he duly qualified as such trustee, and has since been acting as such. The trust agreement provides, as observed above, for the filling of vacancies in the office of trustee, whether caused by resignation or otherwise, and that the new trustee shall succeed to all the rights, property, powers, and privileges of the former trustee. It seems to be clear that, under the law of New York, which the trust agreement provides shall be the law by which it and the notes shall be construed and the rights of the parties determined, as well as under the laws of Massachusetts, the plaintiff has a locus standi.

If the questions presented by this demurrer were raised for the first time, I should feel obliged, for the reasons indicated, to sustain these demurrers. This underwriting has, however, been the subject of much litigation in the federal and state courts in New York, and the decisions there have been adverse to the subscribers; but no opinion has come to my notice showing satisfactorily the reasoning by which that result was reached. So far as I am informed, no state court of last resort has yet passed upon the matter, and it has not been decided by any Circuit Court of Appeals.

If the demurrer be overruled, the defendants will be put to the trouble and expense of a jury trial, which will go for nothing if what seems to me to be the correct view of the law should ultimately prevail. There is no way under the defective federal practice in which the questions raised by this demurrer can be presented to an appellate court without a trial on the merits, unless the demurrer be sustained. It seems to me, therefore, that notwithstanding the great respect which is due to the decisions on this matter of the New York courts, federal and state, the defendants are entitled to have me follow my own view and sustain the demurrer.

It should not, however, be lost sight of that to the extent to which participations were sold at par and the money realized therefrom reached the corporation and was applied in payment of the stock the result was in substance what the underwriters contemplated should be done. I express no opinion whether, consistently with the facts, the declaration can be so amended as to state a good cause of action in reference thereto.

Demurrers sustained.

UNITED STATES v. GINSBERG.

(District Court, W. D. Missouri, W. D. July 13, 1914.)

No. 11.

1. ALIENS ⟸68—NATURALIZATION PROCEEDINGS.
A proceeding for naturalization in judge's chambers adjoining the courtroom, upon due announcement and notice, sufficiently complied with Naturalization Act June 29, 1906, c. 3592, § 9, 34 Stat. 599 (Comp. St. 1916, § 4368), requiring final hearing to be had in open court, and section 11 (Comp. St. 1916, § 4370), providing that the United States shall have the right to appear.

2. ALIENS ⟸71½—NATURALIZATION—QUALIFICATIONS.
In a proceeding under Naturalization Act 1906, § 15 (Comp. St. 1916, § 4374), to cancel a naturalization certificate, respondent's affidavits *held* to show that he did not possess the qualifications required by section 4, subd. 4, providing that "it shall be made to appear to the satisfaction of the court admitting an alien to citizenship that immediately preceding the date of this application he has resided continuously within the United States five years at least and within the state * * * where such court is at the time held one year at least."

3. ALIENS ⟸71½—NATURALIZATION—QUALIFICATION OF WITNESSES.
In a proceeding under Naturalization Act 1906, § 15, to cancel a naturalization certificate, respondent's affidavits *held* to show that his witnesses did not possess the qualifications prescribed by section 4, subd. 2, providing that the petition shall be verified by the affidavits of two credible witnesses who are citizens of the United States.

4. ALIENS ⟸62—NATURALIZATION—QUALIFICATIONS.
Naturalization Act 1906, § 4, subd. 2 (Comp. St. 1916, § 4352), providing that an alien must have resided continuously within the United States five years and within the state at least one year, contemplates actual and substantial residence which must be coincident with intent.

5. ALIENS ⟸68—NATURALIZATION—STATUTE—COMPLIANCE.
In a naturalization proceeding the application and proofs must conform to the clear mandate of the law.

In Equity. Bill by the United States of America against Solomon Louis Ginsberg to cancel his naturalization certificate. Bill dismissed.

Francis M. Wilson, U. S. Atty., of Kansas City, Mo., and M. R. Bevington, Chief Naturalization Examiner, of St. Louis, Mo., for the United States.

George N. Elliott, of Kansas City, Mo., for respondent.

VAN VALKENBURGH, District Judge. The respondent was admitted to citizenship in this court on the 18th day of December, 1912. April 29th the government filed its bill to cancel the certificate under section 15 of the act of 1906, which provides:

That "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

The affidavits filed are annexed to the bill as exhibits. They were tendered and accepted upon the hearing as the evidence upon which

a decree of cancellation should be granted or denied. Respondent in his answer admits the truth of the statements in the affidavits of himself and his two witnesses, Casey and Kirtley, but counsel differ as to the legal effect thereof. Respondent denies the jurisdiction of this court in this proceeding to cancel and set aside the decree originally rendered and the certificate issued pursuant thereto, and further contends that he was entitled to be received as a citizen, and that the bill should be dismissed. The government bases its prayer for cancellation upon three grounds:

"That hearing was not had upon the petition in open court as prescribed by the statute, but the case was disposed of in chambers, a place not an 'open court' within the meaning of the statute, and without the United States being given an opportunity to be heard in opposition thereto.

"(2) That the applicant did not have the continuous United States and state residence, immediately preceding the date of petitioning, required by the statute to confer naturalization jurisdiction upon the court, and to entitle Ginsberg to citizenship.

"(3) That the verifying witnesses, who were permanent residents of Missouri, were incompetent to act in this case, inasmuch as the applicant did not possess the United States and state residence demanded by the statute, and which it was necessary for them to swear to to give the court naturalization jurisdiction in said case, he being an actual physical resident of Brazil for practically all such period of time."

[1] With respect to the first of these contentions the court record of December 17th shows that it was ordered "that court do now adjourn until tomorrow morning at 9:30 o'clock." The affidavit of Ginsberg on this point is as follows:

"That said petition for naturalization 505 was first called for hearing at a night session of the aforesaid court held December 16, 1912 (evidently meant for December 17th), that objection was raised to said petition at that time, and that, after a brief questioning on the part of the court, said petition was passed over with instructions for said affiant and his witnesses to appear at chambers, that is, the judge's room behind the courtroom, the following Wednesday morning, to wit, December 18, 1912, at some time after eight o'clock, when the hearing on said petition 505 would be had;

"That said affiant, together with his witnesses, appeared in the room indicated, to wit, the judge's chambers or room behind the courtroom, about half past 8 in the morning of said December 18, 1912, when all parties were examined by the judge, and order of admission to citizenship made."

In his answer respondent alleges:

"That on said 18th day of December, 1912, at a time fixed by the judge of the court by public announcement, and at the room in the federal court building in Kansas City, Mo., as publicly directed by the judge of the court, he appeared with his two witnesses named in the petition filed herein, and before Hon. Smith McPherson, presiding and acting as the judge of said court, with a clerk and a marshal present and duly acting as such officers, respectively, of said court, as shown by the records of said court, and by a public hearing in such open court."

Then follows a recital of the subsequent proceedings.

Mr. Bevington, chief naturalization examiner for this district, in his affidavit quotes and adopts the foregoing statements of Ginsberg as correctly setting forth what occurred. He concludes therefrom:

"That said naturalization was contrary to the plain and specific terms of the statute, in that final hearing was not had 'in open court,' and was therefore illegal."

The bill upon this point refers to section 9 of said act, which provides as follows:

That "every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court."

The District Attorney in the bill then concludes:

"That the hearing on the application and petition of respondent for naturalization was held in the judge's chambers adjoining the courtroom, and not in open court as by law required."

Upon the record, as thus presented, this court must determine whether, in this respect, the procedure was so irregular and so far in contravention of the statute as to constitute an illegal procurement of the certificate of citizenship.

In conjunction with section 9, supra, section 11 should be read and considered:

That "the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

If this court, without due announcement and notice to the government, should take up a naturalization case at an unseasonable hour, and an unusual place, and should grant a certificate upon the ex parte showing of petitioner, I have no doubt that such action would be so irregular as to import illegality in the procurement of that certificate; but a court may sit as a court in chambers adjoining the regular courtroom, and may adjourn and hear any proceeding there upon proper announcement and notice; and this may be done, at some reasonable hour fixed, for the purpose of expediting business and avoiding delay and interference with the regular call in the courtroom at the conventional hour. If the government has been advised of this arrangement, in order that it may exercise its right to appear and take such action as it may see fit concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, the entire spirit and purpose of the law has been satisfied. I am unable to say from this record that these requirements were not observed. On the contrary, it seems to be sufficiently established that they were substantially observed.

[2, 3] Grounds 2 and 3 may properly be discussed in the same connection. With respect to his residence, the respondent in his affidavit has the following, among other things, to say:

"That in said petition for naturalization said affiant is made to say that he has been a continuous resident within the United States since August 15, 1904, and in the state of Missouri since August 23, 1904.

"That at no time has said affiant made any such claim, and the claim thus made is a result of the action of the clerk of the aforesaid court in framing said petition.

"That as he then explained to the said clerk of court, and to the court itself afterwards this affiant had been an actual physical resident of Brazil, South America, from August 5, 1905, until February 24, 1912, during all of which time he was employed in said country as a missionary by the Baptist Board of Foreign Missions.

"That from August 15, 1904, until June 15, 1905, this affiant had been in the United States, on leave of absence; that for a period of some seven years prior to said August 15, 1904, he had been living continuously in said republic of Brazil.

"That during the period of five years immediately preceding the date on which his application for naturalization was filed, or from June 7, 1907, to June 7, 1912, this affiant had been actually and physically resident within the United States only from April 10, 1912, to June 7, 1912.

"That during all of said period of employment by the said Baptist Board of Foreign Missions, as a missionary, in Brazil, the said affiant has at the end of each seven years been given a vacation of some 14 months.

"That it has been the affiant's practice to spend such vacations in the United States, visiting with his wife's relatives, following which he would return to his home in Brazil.

"That in the year 1893, this affiant was married in Brazil to Miss Emma Morton, a native of Missouri, and that as a result of this union there have been born and raised in Brazil seven children.

"That this affiant finished his school studies in the year 1890 in England, and thereafter departed for the republic of Brazil, where he served, independent of any denomination, as a missionary until 1893, when he identified himself with the Foreign Mission Board of the Southern Baptist Convention, with whom he has since continuously served.

"That at the time he, the said affiant, declared his intention to become a citizen of the United States, on September 14, 1904, he fully intended to sever his connection with the aforesaid Mission Board, and remain in the United States, but the condition of the work he had been engaged upon in Brazil made it necessary for him to return and again take up his residence in that country.

"That this affiant, during the periods of his residence in Brazil, that is, from the year 1890 on, did not see the gentlemen who acted as verifying witnesses in his said petition for naturalization, they being during said period of time residents of the United States and of the state of Missouri.

"That this affiant at the time of petitioning, and at all times thereafter, had disclaimed any intention of alleging continuous United States residence, stating, whenever asked the actual facts concerning his residence in Brazil, as above recited."

The affidavits of the witnesses as to their acquaintance with and knowledge of the petitioner confirm this statement. The respondent, a native and citizen of Russia, was educated in England, and since 1890 has resided in Brazil, as stated in his affidavit.

Paragraph 3 of the second subdivision of section 4 of the Naturalization Act of June 29, 1906, under the provisions of which Ginsberg's petition was filed, provides that:

The petition shall "* * * be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, * * * in which the application is made for a period of at least one year, immediately preceding the date of the filing of his petition," etc.

The fourth subdivision of said section 4 provides:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he

has resided continuously within the United States five years at least, and within the state * * * where such court is at the time held one year at least."

[4] While intention is one of the determining elements of residence, nevertheless intention alone is not sufficient, but must be coincident with the physical act. A citizen and resident of a foreign country may form the intention of becoming a resident of Missouri, but if he never comes to Missouri to take up such residence, his intention is inoperative; nor is a fleeting visit, without purpose or effect to establish a domicile, more effective. True, it has been held that the words "resided continuously" do not mean that the applicant must not have been outside of the territory of the United States during the five years preceding naturalization, but has reference to changes of domicile only. United States v. Cantini (D. C.) 199 Fed. 857; In re Schneider (C. C.) 164 Fed. 335. But these cases presuppose an actual residence; the absences being mere casual visits for such periods and under such circumstances and conditions as not to be inconsistent with that domicile. The act, however, contemplates actual and substantial residence within the United States (it will be noted that the statute uses the word "within," which is significant) not only as tangible evidence of intent, but in order that the petitioner may absorb the spirit of our institutions and do his part in the discharge of reciprocal obligations. This idea is very clearly advanced by Mr. Justice Van Deventer, speaking for the Supreme Court, in Luria v. United States, 231 U. S. 9, 22–24, 34 Sup. Ct. 10, 13 (58 L. Ed. 101):

"But it is said that it was not essential to naturalization under prior laws (Rev. Statutes, §§ 2165–2170) that the applicant should intend thereafter to reside in the United States; that, if he otherwise met the statutory requirements, it was no objection that he intended presently to take up a permanent residence in a foreign country; that the act of 1906, differing from prior laws, requires the applicant to declare 'that it is his intention to reside permanently within the United States'; and therefore that Congress, when enacting the second paragraph of section 15, must have intended that it should apply to certificates issued under that act, and not to those issued under prior laws. It is true that section 4 of the act of 1906 exacts from the applicant a declaration of his intention to reside in the United States, and it is also true that the prior laws did not expressly call for such a declaration. But we think it is not true that under the prior laws it was immaterial whether the applicant intended to reside in this country or presently to take up a permanent residence in a foreign country. On the contrary, by necessary implication, as we think, the prior laws conferred the right to naturalization upon such aliens only as contemplated the continuance of a residence already established in the United States.

"Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. Under our Constitution a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the presidency. Minor v. Happersett, 21 Wall. 162, 165 [22 L. Ed. 627]; Elk v. Wilkins, 112 U. S. 94, 101 [5 Sup. Ct. 41, 28 L. Ed. 643]; Osborn v. Bank, 9 Wheat. 738, 827 [6 L. Ed. 204]. Turning to the naturalization laws preceding the act of 1906, being those under which Luria obtained his certificate, we find that they required: First, that the alien, after coming to this country, should declare on oath, before a court or its clerk, that it was bona fide his intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign sovereignty; second, that at least two years should

elapse between the making of that declaration and his application for admission to citizenship; third, that as a condition to his admission the court should be satisfied, through the testimony of citizens, that he has resided within the United States five years at least, and that during that time he had behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; and, fourth, that at the time of his admission he should declare on oath that he would support the Constitution of the United States, and that he absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign sovereignty. These requirements plainly contemplated that the applicant, if admitted, should be a citizen in fact as well as in name; that he should assume and bear the obligations and duties of that status as well as enjoy its rights and privileges. In other words, it was contemplated that his admission should be mutually beneficial to the government and himself, the proof in respect of his established residence, moral character, and attachment to the principles of the Constitution being exacted because of what they promised for the future, rather than for what they told of the past.

"By the clearest implications those laws show that it was not intended that naturalization could be secured thereunder by an alien whose purpose was to escape the duties of his native allegiance without taking upon himself those of citizenship here, or by one whose purpose was to reside permanently in a foreign country and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here. Naturalization secured with such a purpose was wanting in one of its most essential elements—good faith on the part of the applicant. It involved a wrongful use of a beneficent law. True, it was not expressly forbidden; neither was it authorized. But, being contrary to the plain implication of the statute, it was unlawful, for what is clearly implied is as much a part of a law as what is expressed. United States v. Babbit, 1 Black 55, 61 [17 L. Ed. 94]; McHenry v. Alford, 168 U. S. 651, 672 [18 Sup. Ct. 242, 42 L. Ed. 614]; South Carolina v. United States, 199 U. S. 437, 451 [26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737]."

The spirit of the law excludes constructive residence.

[5] In view of these considerations and of statements and admissions of the respondent, there can be no doubt, in my mind, that Ginsberg did not possess the qualifications prescribed by law, and that his witnesses were likewise disqualified. He was, and had been throughout the required period, a resident of Brazil. The application and the proofs offered must conform to the clear mandate of the law. United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353; Ex parte Lange (D. C.) 197 Fed. 769.

There remains to be considered whether the act clothes the court with authority to set aside the former decree in this action and in the situation disclosed by the record. It has been held that the term "illegally procured," as used in section 15 of the act, imports a certificate issued by a court without jurisdiction or in violation of the law's procedure; without a petition or witnesses, or notice, or hearing, for example. United States v. Albertini (D. C.) 206 Fed. 133. But, on the other hand, the act has been construed to mean that an admission to citizenship through an erroneous construction of the act is an illegal procurement thereof. United States v. Plaistow (D. C.) 189 Fed. 1006; United States v. Simon (C. C.) 170 Fed. 680; and perhaps inferentially, in United States v. Kolodner, 204 Fed. 240, 124 C. C. A. 1.

The validity of section 15 of the act has been judicially established, and the remedy by independent suit to cancel has been upheld. United States v. Mansour (D. C.) 170 Fed. 680, affirmed 226 U. S. 604, 33

Sup. Ct. 217, 57 L. Ed. 378; United States v. Plaistow (D. C.) 189 Fed. 1007; United States v. Simon, supra; United States v. Kolodner, supra; United States v. Spohrer (C. C.) 175 Fed. 440; Johannessen v. United States, 225 U. S. 227, 32 Sup. Ct. 613, 56 L. Ed. 1066. In the majority of these cases fraud was specifically alleged and proved. In United States v. Spohrer, supra, the court stated that the Supreme Court has drawn a sharp distinction between cases where, as in Throckmorton's, 98 U. S. 61, 25 L. Ed. 93, the proceeding was not ex parte, but there has been a sharp controversy pending for years between parties represented by counsel, and in which the finding of the land commissioners had been affirmed by the judgment of a federal court, and cases where, as in Minor's, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, and in naturalization cases, they are ex parte. In United States v. Simon, supra, Judge Lowell found it unnecessary to dispose of the contention that the court has jurisdiction to cancel a certificate because the court of naturalization erred in its findings of fact. In Johannessen v. United States, supra, it was held:

"Prior decisions of this court holding that a judgment of a competent court admitting a person to citizenship is, like every other judgment, competent evidence of its own validity, go no further than protecting the judgment from collateral attack.

"Congress may authorize direct proceedings to attack certificates of citizenship on the ground of fraud and illegality; and section 15 of Act June 29, 1906, 34 Stat. 596, 601, c. 3592, providing for such cases, is a valid exercise of the power of Congress under article 1, § 8, of the Constitution of the United States.

"The foundation of the doctrine of res judicata or estoppel by judgment is that both parties have had their day in court (Southern Pacific R. R. Co. v. United States, 168 U. S. 148 [18 Sup. Ct. 18, 42 L. Ed. 355]); and where a certificate of naturalization was issued without the government appearing there is no estoppel against it, nor is such a certificate conclusive against the public.

"Certificates of naturalization, like patents for land or inventions, when issued ex parte can be annulled for fraud."

It may be noted that the court in that case had no occasion to resolve the question whether error of law or fact amount to illegal procurement. It submits a query as to the conclusive effect of the certificate of naturalization issued after appearance and cross-examination by the government in the following language:

"What may be the effect of a judgment allowing naturalization in a case where the government has appeared and litigated the matter does not now concern us."

It would seem that the answer to this query should apply as well to a case where the government had been advised of the setting of a hearing in naturalization, and had thus been given opportunity to appear and litigate the matter, but had for some reason failed to exercise this privilege. The desirability that errors in naturalization proceedings, whether arising from fraud or otherwise, should be revised and corrected, is apparent. In United States v. Dolla, 177 Fed. 101, 100 C. C. A. 521, the Circuit Court of Appeals for the Fifth Circuit held that a proceeding for naturalization is not a case within the meaning of the act conferring appellate jurisdiction upon Circuit Courts of Ap-

peal, and therefore not appealable. Other courts have assumed jurisdiction in such cases, as in United States v. Brelin, 166 Fed. 104, 92 C. C. A. 88. But in such cases it does not appear that the right of review or the jurisdiction of the appellate court was challenged. Again, where citizenship was granted by a state court, the right of appeal has been denied on the ground that state courts, when acting in naturalization cases, are merely agencies of the national government; that naturalization of aliens is an act of grace, not right, and is not necessarily a business of the courts. These proceedings are conducted in many jurisdictions, state and national; records of such proceedings are not preserved, and in many instances supervision by officers of the government is impracticable. Therefore direct appeals, even if permissible, must generally prove unsatisfactory and ineffective. I therefore incline to the judgment of those courts that have accorded to the fifteenth section its broadest and most comprehensive construction as authorizing cancellation proceedings.

However, the national courts are not fully in accord. Some serious questions, to which I have adverted, have not been authoritatively settled. The Supreme Court itself, in Johannessen v. United States, supra, has expressly reserved its ruling upon a matter of weighty importance in the case at bar. Inasmuch, therefore, as the certificate has been granted, as no fraud is charged, but error of law on the part of the court in a hearing when the matters here complained of were submitted, and in which, as must be presumed from this record, the government had a right to appear and be heard, I feel constrained to leave the decree of naturalization undisturbed. It is extremely desirable, in the administration of this law, that the questions presented should be finally and authoritatively settled. As freely conceded, the government is in a far better position to prosecute the appeal than respondent.

For the reasons stated, the bill will be dismissed, and decree may be entered accordingly.

HARRIMAN NAT. BANK v. HUIET et al.

(District Court, E. D. South Carolina. December 23, 1916.)

1. FRAUDULENT CONVEYANCES ⟸39—LIFE INSURANCE BY INSOLVENT.
Under equitable principles a man on becoming insolvent does not become such a trustee for his creditors of his remaining assets that any disposition thereof, though without fraud, must be for their benefit, with the result that, taking out insurance on his life for the benefit of his family, the creditors are entitled to the entire proceeds thereof; but the true rule is that he must not make donations to the prejudice of existing creditors, so that they are entitled to the proceeds only to the extent that assets were lessened by payment of premiums.

2. EXEMPTIONS ⟸50(1)—LIFE INSURANCE—EXCESSIVE PREMIUMS.
Under Civ. Code S. C. 1912, § 2721, providing that a life policy for benefit of insured's wife and children shall inure to their benefit, free of claim of his creditors, provided that, if the premium paid in any one year out of his funds exceed $500, exemption from the claim of his creditors shall not apply to so much of the premium so paid as is in excess of $500, but

such excess, with interest, shall inure to the benefit of the creditors, it is the amount of the excess of premium, and not the proportional part of the insurance bought therewith, to which creditors are entitled from the proceeds.

In Equity. Suit by the Harriman National Bank against Lucy C. Huiet and others. Decree for complainant in part.

Buist & Buist, of Charleston, S. C., for plaintiff.

Huger, Wilbur & Guerard and J. P. K. Bryan, all of Charleston, S. C., for defendants.

SMITH, District Judge. The bill of complaint in this case was filed on July 1, 1916. All parties defendant have been duly served with process and have appeared and answered. The case, being at issue, came on to be heard. The testimony has been taken. Counsel for all parties interested have been heard. The facts of the case appear to be that Caleb B. Huiet, a citizen of the state of South Carolina, residing in the city of Charleston, and carrying on business therein, on the 31st day of March, 1914, made a statement in writing of his business affairs to the plaintiff, the Harriman National Bank. From the testimony put in in the cause the court is satisfied that on that day, the 31st March, 1914, Caleb B. Huiet was insolvent and largely insolvent, and that the statement made by him to the Harriman National Bank on that day for the purpose of procuring credit for loans to be made by the Harriman National Bank was wholly erroneous and untrue, and displayed a state of solvency on the part of Caleb B. Huiet which was as a fact untrue; he being at that date insolvent. Subsequent thereto, in July and August of the year 1914, Caleb B. Huiet on the basis of this statement procured loans from the complainant, that is, two different loans for $15,000 each, aggregating $30,000 which loans were at their maturity renewed, and still remain wholly unpaid, with interest from the maturity of the last renewal, viz. for $15,000 with interest from June 8, 1915, and for $15,000 with interest from May 17, 1915. It further appears from the testimony that John H. Huiet, the father of Caleb B. Huiet, was a broker of the Franklin Sugar Refining Company, one of the defendants, and carried on business as such broker for them in the city of Charleston, but that his business seems to have been largely turned over to his son, Caleb B. Huiet, who was the party actively carrying it on. In December, 1914, the defendant Franklin Sugar Refining Company seems then or thereabouts to have ascertained that Caleb B. Huiet was very largely indebted to it for the proceeds of sugar belonging to the defendant the Franklin Sugar Refining Company which he had sold, but appropriated the proceeds to his own use. It appears from the testimony that this debt aggregated some $298,000. Thereupon the Franklin Sugar Refining Company proceeded to protect itself by securing from Huiet an assignment of all the available securities of Huiet which apparently it could compel him to assign to it, including therein four policies of insurance, one in the Equitable Life Assurance Society for $50,000, one in the Atlantic Life Insurance Company for $50,000, and two in the Southeastern Life Insurance Company for $30,000 each. These two in the South-

eastern Life Insurance Company were each payable on the death of the said Caleb B. Huiet to Lucy C. Huiet, his wife, if living, otherwise to Katherine R. Huiet, his daughter, if living, otherwise to the executors, administrators, and assigns of the insured. From the testimony it appears that the Franklin Sugar Refining Company concluded that it did not care to continue to pay the future accruing premiums upon the two policies in the Southeastern Life Insurance Company, and thereafter, on the 24th of December, 1915, it executed an assignment or reassignment upon each of them to Caleb B. Huiet, the insured, and the beneficiaries originally named in the policies. The court finds as a conclusion of law upon the construction of this assignment that the effect of the assignment was to return the policies back to the insured or the beneficiaries thereunder in like manner as if no assignment to the Franklin Sugar Refining Company had ever been made. Thereafter, on the 8th day of April, 1916, Caleb B. Huiet departed this life, and it is found as a conclusion of fact that at the date of his death on the 8th day of April, 1916, and at all periods between the 31st day of March, 1914, and the date of his death, the said Caleb B. Huiet was insolvent. At the time of his death there were insurance policies on his life additional to the ones mentioned as having been assigned to the Franklin Sugar Refining Company, namely, two in the Equitable Life Assurance Society for $10,000 each, and one in the New York Life Insurance Company for $25,000, all of these three insurance policies being payable to Lucy C. Huiet, the wife of Caleb B. Huiet, and another policy in the New York Life Insurance Company for $10,000, which was payable to Katherine R. Huiet, his daughter. This bill of complaint has been filed to have the proceeds of these insurance policies subjected to the payment of the creditors of Caleb B. Huiet, he having died insolvent and largely indebted, and the bill of complaint alleges that there was a fraudulent conspiracy between the Franklin Sugar Refining Company and Caleb B. Huiet and Lucy C. Huiet whereby the reassignment of the two policies reassigned by the Franklin Sugar Refining Company was procured for the purpose of enabling the defendant Lucy C. Huiet to receive the proceeds of those policies under color of this reassignment and in fraud of the creditors of Caleb B. Huiet. As to the other insurance policies the bill alleges, in effect, that Caleb B. Huiet being at the time insolvent, the procurement of those policies by the payment of the premiums thereon out of the funds of an insolvent debtor was an act in fraud of his creditors, and that the proceeds of the policies should be subjected to their claims. As to the charges against the Franklin Sugar Refining Company under the testimony the court finds that they are wholly unsustained. The Franklin Sugar Refining Company is shown to have been a large creditor of Caleb B. Huiet and a creditor standing in the position of a creditor for proceeds of its own property diverted by its broker or representative or one acting as such to his own benefit. It was entirely proper for the Franklin Sugar Refining Company to protect itself by securing its debt in any way it legally could. It is not shown to have been aware of the statement made by Caleb B. Huiet to the complainant, the Harriman National Bank, nor even to have been aware that the Harriman National Bank at the time of the assignment

of these securities to the Franklin Sugar Refining Company was a creditor of Caleb B. Huiet. There are no evidences of fraud whatsoever in the matter, and there is no rule under proceedings in equity of the character of this bill of complaint which would prevent the Franklin Sugar Refining Company from receiving the proceeds of such securities as it could procure from this debtor for the securing of its debt. Nor is there any rule of law which would prevent it from reassigning these policies which it did not care to assume the burden of continuing. If anything had been shown to warrant the inference that the Franklin Sugar Refining Company was not a bona fide creditor of Caleb B. Huiet, or had attempted in co-operation with Caleb B. Huiet to divert the estate really of Caleb B. Huiet from his other lawful creditors, for the ulterior purpose of donating it to his wife, the case would be otherwise, but from the testimony the Franklin Sugar Refining Company appears to be in the position of a bona fide creditor of Caleb B. Huiet, simply attempting to secure its own debt, and the reassignments made by it upon these policies seem to have been entirely bona fide and made for the reason that it did not care to undertake the continuing burden of paying the future accruing premiums upon these policies for the uncertain duration of the life of Caleb B. Huiet.

It is found, therefore, that all charges of fraud against the Franklin Sugar Refining Company and the defendant Lucy C. Huiet on this point are unsustained, and the bill of complaint herein as against the Franklin Sugar Refining Company is ordered, adjudged and decreed to be dismissed, with costs to the defendant the Franklin Sugar Refining Company.

With regard to the defendant Katherine R. Huiet it is admitted that the premiums upon the policy in the New York Life Insurance Company, which is payable to her, were paid by her grandfather, John H. Huiet, and were not paid by the deceased, Caleb B. Huiet. It is therefore ordered, adjudged, and decreed that the defendant Katherine R. Huiet is shown to be lawfully entitled to the insurance policy referred to payable to her upon the death of her father, Caleb B. Huiet, and no evidence of fraud or intended fraud on her part has been introduced, and the bill of complaint herein is dismissed as to her with costs to her.

This leaves the question of the right of the defendant Lucy C. Huiet to receive the proceeds of the five policies of insurance, the proceeds of which she claims, that is to say, the three policies before referred to payable to her direct, and the two policies payable to her if living at the death of Caleb B. Huiet and which were reassigned by the Franklin Sugar Refining Company. Whenever a person dies heavily indebted (and more strongly so when he dies totally insolvent, with practically no assets to apply to the payment of his creditors, and many of these creditors standing in the position of creditors who have been misled and deceived by the statements of the deceased in procuring loans from them), the spectacle presented of the creditors going unpaid and the wife and children of the deceased being amply provided for from the proceeds of life insurance policies procured and apparently paid for by the deceased out of funds procured by him from these very creditors is apt at first sight to shock equitable sensibilities,

but an analysis of the facts and the inspection of the circumstances may show that, although there might arise under fortuitous circumstances the case where the man died in time to realize this for his family, yet, as a general rule, it would be wholly unsafe to presume that a man was willing to die in order that those dependent on him might be enriched by his death by this means.

[1] To hold that the moment a man became insolvent he became such a trustee for his creditors of his remaining assets that all dispositions of his funds, whether fraudulent or not, must be for their benefit, would be to upset all methods of business. It would be going too far to hold that such was the result, and that a man who once became insolvent must be presumed after that occurrence to make all his dealings and transactions simply as the agent of the creditors for whom he was trustee. The true rule in cases such as the present would be to apply the general doctrine that a man must not make donations without consideration out of his assets to the prejudice of creditors for value at the time existing. If that be the rule, the question would be: To what extent was any donation made in the procuring of policies by payments of money where no fraud is shown to exist as in the case of a fraudulent transfer of property? And the logical answer to that would seem to be that the extent of the donation was the extent to which the assets were actually diminished or lessened by the application of the funds to the purchase of the insurance whereby the donation was made. In the view the court takes of the matter, no court of any controlling authority decreeing equitable relief upon equitable principles has ever gone farther.

[2] Independent of these principles, however, the complainants rely upon the statute of the state of South Carolina embodied in the Code of Laws of South Carolina 1912 as section 2721, which provides that a policy of insurance taken out by a person for the benefit of any married woman or of herself and her children, or of herself and the children of her husband, inured to the use and benefit of the persons for whose use and benefit it is expressly taken out, with a proviso, however, that if the premiums paid in any one year out of the property or funds of the insured should exceed the sum of $500, exemption from the claims of the creditors of the insured shall not apply to so much of said premiums so paid as shall be in excess of $500, but such excess, with the interest thereon, shall inure to the benefit of the creditors if the same be necessary for their payment. This statute of the state of South Carolina, in the opinion of the court, is a statute in the same category as statutes in the nature of homestead statutes, providing for a reservation or protection for the support either of the individual or those dependent on him, so that they may not at his death or in case of his insolvency through business misfortune be left as charges upon the community, but that any married man shall be at liberty to make provision for those who are dependent on him by the procurement of insurance policies upon his life for their benefit, provided that he shall not to the prejudice of his creditors in any one year pay more than $500 out of his funds for that purpose, and that any excess paid by him, with interest thereon, shall inure to the benefit of his creditors. It might be more equitable to suppose that the statute should

direct what should inure to the creditors should not be limited to the excess over the $500, but should extend to the proceeds of the policies, so as to include so much of the policies as would be purchased for the amount paid over the sum of $500. The clear reading, however, of the statute is to the contrary, and the statute appears to be within the power of the state to pass, certainly as against all subsequent creditors, and all creditors proven in this case are creditors subsequent to the date of the statute. The creditors of Caleb B. Huiet under this construction of the statute are not entitled to the proceeds of the life insurance policies in question beyond an amount sufficient to pay back to his estate any excess over the sum of $500 paid in each year, with interest thereon from the time of payment. The court finds as a conclusion of fact that the only individual creditor with a debt proved as existing at the time of the payment of the premiums proven in this case is the debt of the Harriman National Bank, the complainant. It has been proved by his books and the admissions of Caleb B. Huiet himself that he owed creditors to an amount sufficient to render him insolvent as hereinbefore adjudged, but no other particular debt has been proven except the debt of the Franklin Sugar Refining Company.

It further appears from the testimony in this case that the total amount of premiums in the life insurance policies in question, the proceeds of which are claimed by the defendant, Lucy C. Huiet, and which premiums were paid subsequent to the accrual of the debt of the Harriman National Bank, the complainant herein, amount to the sum of $2,287.16 paid in the year 1914; the premiums which became due in the year 1915 appearing to have been settled either by loans which were deducted out of the proceeds of the life insurance policies before payment or by Mrs. Lucy C. Huiet herself. It is therefore ordered, adjudged, and decreed that the creditors of Caleb B. Huiet are entitled to receive out of the proceeds of these policies claimed by Lucy C. Huiet the sum of $2,287.16, less $500, leaving a balance of $1,787.16, with interest to be calculated from the average date of payment of the different premiums in the year 1914. A claim has been made on behalf of Mrs. Lucy C. Huiet that she, being a creditor of Caleb B. Huiet, is entitled to have these premiums paid in the year 1914 charged to her as a set-off against the balance of the indebtedness due her at that time. In the first place, there has been no sufficient proof of the debt of Lucy C. Huiet at that time to rank as an individual creditor. The books of Caleb B. Huiet are evidence against him and as against any one claiming under him to establish his insolvency, but his books would not be evidence in his own behalf, nor in behalf of any one in the same interest with him, although they might be evidence upon proper proceedings to establish the debt of Mrs. Lucy C. Huiet by the admission of that debt; but the evidence of the mere existing balance due her on his books as shown as part of the general aggregate of debt under the shape of the proceedings in this case is not a sufficient establishment of her claim for her to rank as an individual creditor. Furthermore, it appears to the court, in view of the statute, as a statute intended for the benefit of all existing creditors, she should not be entitled to the set-off claimed unless shown to be a creditor existing at the time.

It is further ordered, adjudged, and decreed that out of the proceeds of the two policies in the Southeastern Life Insurance Company now in the People's National Bank there be first deducted and paid into this court the amount of the full premiums and interest hereinbefore decreed to be paid thereout to the creditors of Caleb B. Huiet and the costs of these proceedings, and that the balance be paid to the defendant Lucy C. Huiet. Inasmuch as the provisions of the statute appear to be for the benefit of all creditors, and the very bill of complaint in this case is brought on behalf of all creditors, it is necessary to call in every creditor who may be entitled to share in the fund.

It is therefore ordered that it be referred to D. B. Billiland, Esq., one of the standing masters of this court, to advertise for all creditors of Caleb B. Huiet to come in and prove their claims before him on or before a day named not more than six weeks after the date of this decree, and that he make such advertisement once a week for three successive weeks in any paper of general circulation in the city and county of Charleston.

It is further ordered that nothing herein contained shall be construed to prejudice any right the defendant Lucy C. Huiet may have to come in and establish her right to her pro rata payment as a creditor of Caleb B. Huiet.

It is further ordered that the said standing master do further send by mail a printed notice to each creditor appearing upon the books of Caleb B. Huiet produced in this case by mailing the same to such creditor if his address can be ascertained from the said books to come in and prove his debt.

NAVASSA GUANO CO. v. COCKFIELD et al.

(District Court, E. D. South Carolina. July 23, 1917.)

1. INSURANCE ⟸587—LIFE INSURANCE—CHANGE OF BENEFICIARY.
   In a life insurance policy providing that the insured may at any time while it is in force change the beneficiary by written notice to the company, a provision that the change shall take effect only upon its indorsement on the policy is for the protection of the company, and where the policy prescribes no particular form of notice, a sufficient written notice will be deemed by a court of equity to have become effective on its receipt by the company.

2. EXEMPTIONS ⟸50(1)—INSOLVENT ESTATES—REMEDIES OF CREDITORS—LIFE INSURANCE—PREMIUMS PAID.
   Premiums paid by the insured on a life policy not payable to his estate when insolvent on his death while still insolvent are recoverable out of the proceeds of the policy for the benefit of his creditors, but the remainder of the proceeds are not subject to the claims of creditors.

In Equity. Suit by the Navassa Guano Company against Ellen Nixon Cockfield and George Dickson, as executors of the will of S. R. Cockfield, deceased, Reamer L. Cockfield, and the Volunteer State Life Insurance Company. Decree for complainant in part.

Philip H. Arrowsmith, of Lake City, S. C., and Willcox & Willcox, of Florence, S. C., for complainant.

Le Roy Lee, of Kingstree, S. C., for defendants executors.

Kelley & Hinds, of Kingstree, S. C., for defendant Reamer L. Cockfield.

Miller & Miller, of Chattanooga, Tenn., for defendant Volunteer State Life Ins. Co.

SMITH, District Judge. The bill of complaint in this case was filed on the 30th of March, 1917. All parties defendant have been duly served with process and have appeared and answered. The cause, being at issue, came on to be heard. The testimony has been taken, and counsel for all parties interested have been heard. The facts of the case appear to be that one S. R. Cockfield on the 5th February, 1916, took out a policy of insurance in the Volunteer State Life Insurance Company for $6,000, for which he was to pay the annual premium of $185.70. The policy was payable unto the executors, administrators, or assigns of the insured, and contained a provision that the insured might at any time while the policy was in force by written notice to the company at its home office change the beneficiary or beneficiaries under the policy, such change to take effect only upon the indorsement of the same on the policy by the company. The first premium of $185.-70 was paid by S. R. Cockfield, and the next premium which became due on February 5, 1917, was also paid by him. From the evidence it appears that during the year 1916 S. R. Cockfield became indebted to the plaintiff, the Navassa Guano Company, herein, and also to a large number of other creditors, and was on the 5th day of February, 1917, when the second premium became due and was paid, wholly insolvent. Subsequent to the payment of the premium, a few days later only, that is to say, on the 9th day of February, 1917, S. R. Cockfield became very ill, and from that time was confined to his bed, his illness increasing in its desperate character until the 16th day of February, 1917, when he died. Prior to his death he had executed a change of beneficiary under the policy by a written notice to the company at its home office. On the 13th of February, 1917, three days before the death of S. R. Cockfield, the Volunteer State Life Insurance Company received from S. R. Cockfield a written notice inclosing his policy and notifying them to change the beneficiary and make the policy payable to Reamer L. Cockfield, related to him as brother. On the next day, the 14th, the company seems to have answered him acknowledging the receipt of his notice, but requesting him to make the change upon certain printed forms of the company, which were inclosed to him for that purpose. This notice to the company of the change of beneficiary bears the date of February 9th. Whether or not it was really executed on February 9th from the testimony appears to be doubtful. If it had been executed on the 9th and mailed the same day, it should have been received by the company before the 13th, but at any rate the weight of the testimony satisfies the court that whenever it was executed S. R. Cockfield had reason to believe that his disease was most likely to have but one termination—that is, death. The complainant now has brought this bill to subject the proceeds of this insurance policy, which the insurance com-

pany admits to be due and payable, to the party who may be lawfully entitled, to the payment of the creditors of S. R. Cockfield, upon the ground: First, that the transfer was invalid, null, and void as to creditors; and, next, that in any event the transfer was insufficiently executed, so as to pass the title of the policy, and it still remains the property of the estate of S. R. Cockfield, and should be administered as such and applied to the payment of his creditors.

[1] With regard to the last ground, that the transfer was insufficiently executed, the objection appears to be not well taken. The provision in the policy requiring or stipulating that the change of beneficiary should only take effect upon the indorsement of the change upon the policy by the company was intended for the benefit and protection of the company. The stipulation in the policy is that the insured may at any time while the policy is in force by written notice to the company at its home office change the beneficiary or beneficiaries under the policy. The policy mentions or requires no form or specific form for this notice; it simply requires written notice. This stipulation had been duly complied with by S. R. Cockfield, who had given written notice to the company of the change of beneficiary, and the company had received it. It was the duty of the company upon its receipt at once to indorse the change of beneficiary on the policy. Their delay in so doing was due to their desire to have the notice of change of beneficiary made a little more formal upon the blanks customarily used by it. This may have been a convenience to the company, but was no part of the contract, and as a court of equity in such cases as this would hold that to have been done which ought to have been done, it will now hold that the change of beneficiary was, so far as this stipulation in the policy was concerned, sufficiently made as against all third parties, as against whom, if the question depended upon this alone, the defendant Reamer L. Cockfield would be entitled to hold the policy and its proceeds.

[2] The next question, however, is more far-reaching. That is as to the right of an insolvent party to divert from his estate funds which ought to go to the payment of his creditors sufficient to pay the premium upon insurance which he proceeds to donate to his relations or other persons. This court in its decree filed December 23, 1916, in the case of Harriman National Bank v. Huiet, 244 Fed. 216, has adverted to the shock that it is likely to occasion to equitable sensibilities when a person dies heavily indebted or totally insolvent as to his creditors, many of whom may stand in the position of creditors who have been misled and deceived by the statements of the deceased in procuring loans; and the creditors then go unpaid, whilst the wife and children or other relatives of the deceased are amply provided for from the proceeds of life insurance policies procured and their premiums paid for by the deceased out of funds procured by him from these very creditors. The change of beneficiary in this case to his brother from the testimony appears to have been wholly without valuable consideration, in the sense of financially valuable consideration. Whatever good considerations might attach to it, it was not a consideration which as against creditors would be recognized as valuable. As against them it was a pure donation. There does not appear any testimony in the case

from which an inference may be drawn of any direct fraud intended of any criminal character. The invalidity of the transfer to his brother and the change of the beneficiary by appointing the brother such, if invalid, must be so upon the ground that in equity it is a fraud against creditors for a person indebted to make a voluntary donation of his property. By the law of the state of South Carolina the rule is that slight indebtedness such as for current expenses for a family or debts inconsiderable to the value of the donor's estate will not generally avoid a voluntary conveyance, but subject to this qualification it seems to be a settled rule of law that one who is in debt cannot make a voluntary conveyance which will prevail against his existing debts. This was so decided by this court in its decree filed February 25, 1916, in the case of Lane v. Hursey, and confirmed by the Circuit Court of Appeals for the Fourth Circuit by its decison filed on the 14th of December, 1916, in the case of Hursey v. Lane, 238 Fed. 913, — C. C. A. —. Under the facts of this case S. R. Cockfield, having been wholly insolvent at the time, was incapable of making such a donation as that of the amount involved in this insurance policy without consideration to his brother. But an insurance policy is a peculiar kind of property. It may represent value or it may not. It is simply a promise of the insurance company to pay upon the death of the insured. Unless it has a cash value, there would be nothing upon which any process of the court could go so as to convert it into money and subject that money to the payment of creditors. Under the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 544) there is statutory recognition of this position of an insurance policy, for section 70, subd. "a," of the Bankrupt Act (Comp. St. 1916, § 9654) provides that, when any bankrupt has any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may within 30 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. Several decisions have been made that, where an insurance policy on the life of a bankrupt has no cash surrender value, it does not pass to the trustee by operation of law as assets of the bankrupt estate. This present proceeding is in equity. The question before the court is whether under the principles administered in a court of equity the transfer is valid, and this section of the Bankrupt Act is pertinent only as showing a legislative recognition of the character of property of a life insurance policy. The transaction is to be considered as of the character and value of the property at the date of the transaction. S. R. Cockfield died, and upon his death the policy had an instant large value. If, contrary to his expectation, he had lived, the possession of the policy might have been a liability, and not an asset; for it is admitted that it had no cash surrender value. There are two strong arguments pro and con in this matter. The one in favor of the transfer is that a man usually takes out insurance to protect some one to whom he has moral or natural duties, and to protect them from the risks of busi-

ness. Now, if the rule were that in cases of financial disaster this insurance became the property of his creditors because it was originally payable to his estate, or in fact any policy of insurance taken out by him while insolvent, no matter who is named as a beneficiary, became the property of his creditors, what then would be the utility to a man of taking out insurance? The payment of every annual premium in most policies is a renewal of the policy. A man can take out a policy of insurance for the benefit of his wife while solvent, and then become insolvent and continue so for a number of years, say four or five, each year renewing the policy by the payment of the annual premium. Now, if he held his property only as trustee for his creditors when he was insolvent, and any investment or diversion from the fund was for their benefit, then, whilst he may have been paying for four or five years under the impression that he was doing it for the protection of his wife, he would really have been simply carrying the policy for his creditors, which would lead to a practical nullification of the main motives which induce men to take out insurance for the benefit of others to whom they have natural ties. On the other hand, the general rule is that, where an insolvent party diverts his assets to the acquisition of other property, he is treated as acquiring it for the benefit of his creditors, viz. if an insolvent man took $1,000 out of his assets and bought a piece of land for $1,000, and had the land placed in the name of his wife, that transfer would be set aside as being invalid and in fraud of creditors, and the wife would be decreed to hold the property simply in trust for the creditors. The same thing would be the case even if he pursued the circumlocution of taking the $1,000 and first investing it in property in his own name and then transferring that property directly to his wife. The test would be, Was he insolvent at the time of his transfer? or, Was he indebted and making a voluntary donation which will be treated as in fraud of his creditors? If so, then the usual decree of the court would be that the transfer be set aside and the whole property be assets of his estate for the payment of his creditors, and not simply the amount he expended in its acquisition. On the other hand, it may be said the true rule would seem to be (especially in the case of an insurance policy) that a man should not be allowed to divert assets which belong properly to his creditors for the acquisition of property for or to make gifts to others. Any premium that he pays to purchase insurance would reasonably and logically therefore be returned to his estate, with interest; but why should the uncertain speculative value, which depends upon his death, of the difference between the premium and the face of the policy, be paid to his estate? The policy had no present surrender value. It was a wholly speculative and uncertain asset; it could never have been subjected by the creditors by any process to the payment of their claims while he was alive, and its donation was not a donation of anything of value at the time for the payment of his creditors that they could have subjected to the payment of their debts. There is a consideration that a man must not speculate with the funds of another taking the chance if he succeeds of making a large profit and of being compelled to return only the amount he unlawfully diverted, and not his gains. If an express trustee unlawfully makes speculative invest-

ments with the trust funds in his hands, then the whole investment, if it can be traced, belongs to the beneficiary of the fund; for a man is not permitted to misuse his position to take the chances of gain to himself if he is successful and of loss to his cestuis que trustent if he fails. But an insolvent man is not in that class of trustees. Whilst a man who is insolvent may be said in one sense to hold his funds in trust for his creditors, he is not an active trustee in the sense that everything he does is for their benefit, or that he carries on business for them, and with their funds. The direct trusteeship only becomes established when proceedings are taken to divest him of his property and apply it to his debts. This court has had occasion to consider the question in the case above referred to of Harriman National Bank v. Huiet, 244 Fed. 216, filed December 23, 1916, where it held as follows:

"To hold that the moment a man became insolvent he became such a trustee for his creditors of his remaining assets that all dispositions of his funds, whether fraudulent or not, must be for their benefit, would be to upset all methods of business. It would be going too far to hold that such was the result, and that a man who once became insolvent must be presumed after that occurrence to make all his dealings and transactions simply as the agent for the creditors for whom he was trustee. The true rule in cases such as the present would be to apply the general doctrine that a man must not make donations without consideration out of his assets to the prejudice of his creditors for value at the time existing. If that be the rule, the question would be: To what extent was any donation made in the procuring of policies by payments of money, where no fraud is shown to exist, as in the case of a fraudulent transfer of property? And the logical answer to that would seem to be that the extent of the donation was the extent to which the assets were actually diminished or lessened by the application of the funds to the purchase of the insurance whereby the donation was made. In the view the court takes of the matter, no court of any controlling authority decreeing equitable relief upon equitable principles has ever gone farther."

That is the extent of the rule as this court understands it decided by the Supreme Court of the United States in the case of Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. There would seem to be a distinction between the cases where the fraud which constitutes the basis for declaring a transfer null and void against creditors is only the inferential fraud arising from the transfer being a donation without consideration and the cases of actual fraud where the attempt has been made collusively, covertly, or otherwise to intentionally defraud creditors by transferring property so as to put it beyond their reach for the benefit of the debtor or his relatives. Many of the cases holding that the entire property purchased out of the debtor's funds the transfer of which may be so annulled must be subjected to the claims of creditors are cases in which the transactions were tainted so to say by this element of intentional fraud. Equity does not regard favorably the action of unclean hands. Additional to this consideration is that of the peculiar character of the property embodied in a life insurance policy as to which the donation to be of any value must be followed by the death of the donor and the unlikelihood of any man intending a fraud which can only be made effective by his death. The true rule would seem to be that in the case of a life insurance policy transferred under the circumstances of the present case the only diversion of funds of which creditors have a right to

complain and which should be returned to them, is the premiums paid, with interest. As there is uncertainty existing as to the time when Cockfield's insolvency first occurred, and as the premiums paid constituted something of value paid for the acquisition of the policy which the deceased had no right to divert from his creditors, the creditors would therefore be entitled to receive the two premiums paid, with interest from the date of the payments.

It is therefore ordered, adjudged, and decreed that the defendant the Volunteer State Life Insurance Company do within 20 days from the date of this decree pay into the registry of this court the sum of $6,000, with interest from the date of the receipt of the proofs of loss to wit, the 16th of March, 1917, as due upon the life insurance policy referred to in the bill of complaint and in answer of the said Volunteer State Life Insurance Company, and that upon such payment the said Volunteer State Life Insurance Company be relieved and discharged from any further liability or payment under the said policy, and that upon the conclusion of this cause the said Volunteer State Life Insurance Company may apply to this court to have delivered to them duly canceled the original insurance policy filed herein as part of the testimony.

It is further ordered, adjudged, and decreed that out of the proceeds of the said policy there shall be paid the costs and expenses of these proceedings, and there shall then be deducted therefrom the sum of $185.70, with interest from the 5th day of February, 1916, and $185.70, with interest from the 5th day of February, 1917, and the balance remaining after the said payments to be paid over to the defendant Reamer L. Cockfield.

It is further ordered, adjudged, and decreed that the said two amounts of $185.70, and interest, be paid to the defendants Ellen Nixon Cockfield and G. W. Dickson, as executors of the last will and testament of S. R. Cockfield, deceased, to be administered by them as assets of the said estate.

OSTROM v. EDISON.

(District Court, D. New Jersey. July 27, 1917.)

1. REMOVAL OF CAUSES ⇐14—COURT TO WHICH CAUSE MAY BE REMOVED—"PROPER DISTRICT."

In Judicial Code, § 28 (Act March 3, 1911, c. 231, 36 Stat. 1094 [Comp. St. 1916, § 1010]), providing for the removal of suits from a state court "into the District Court of the United States for the proper district" the words "proper district" must be construed in connection with other provisions of the Code, section 29 of which (Comp. St. 1916, § 1011) provides for the filing of the petition "for the removal of such suit into the District Court to be held in the district where such suit is pending," while sections 36 and 39 (Comp. St. 1916, §§ 1018, 1021) respectively provide for the retention of any attachment or sequestration of the defendant's estate obtained in the state court and for the issuance of a writ of certiorari to the state court commanding a return of the record in the suit and its proper enforcement. As so construed, section 28 does not authorize the

removal of a cause into a federal District Court other than that in whose territory the suit is pending.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Proper District.]

2. REMOVAL OF CAUSES ⟸16—GROUNDS FOR REMOVAL.
The right to remove a suit from a state into a federal court is purely statutory, and the right must be clear. If doubtful, the cause should for that reason alone be remanded.

8. REMOVAL OF CAUSES ⟸16—COURT TO WHICH CAUSE MAY BE REMOVED—RECIPROCAL RIGHTS OF PARTIES.
The rights of a plaintiff to bring and of defendant to remove a suit over which the federal and state courts have concurrent jurisdiction are not reciprocal; the fact that the plaintiff might have brought the suit in the federal court of a particular district does not give the defendant the right to remove it into that court.

At Law. Action by Archibald M. Ostrom against Thomas A. Edison. On motion to remand to state court. Motion granted.

Dos Passos Bros. and Chas. T. Cowenhoven, all of New York City (Cyril F. Dos Passos, of New York City, of counsel), for plaintiff.

Seibert, Paddock & Cochran, of New York City (Arthur F. Egner, of Newark, N. J., of counsel), for defendant.

RELLSTAB, District Judge. This suit is founded upon an assigned claim for commissions, exceeding in amount the sum of $3,000, and was begun in the Supreme Court of the state of New York held in the county of New York. The plaintiff is a citizen of said state and a resident of said county. The suit was removed to this court by the defendant, a citizen and resident of the state of New Jersey, after the state court refused to order such transfer. The plaintiff moves to remand the suit to the New York court "upon the ground that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the United States District Court for the District of New Jersey."

The claim was twice assigned. The original assignor is an alien residing in New York City, and the plaintiff's immediate assignor is a corporation of the state of New York, and a citizen and resident of that state. The state court refused to transfer the suit to this court upon the ground that it was not pending in the district of New Jersey.

The ground for removal, as stated by the defendant, is:

"That the controversy is (within the meaning of the federal statutes) between an alien and a citizen, a resident of the state of New Jersey, * * * that the right to remove * * * is given by section 28 of the Judicial Code, and that, as the case is not removable to the district where the action was pending in the state court, the right to remove the case to this district exists, even though no process for removal to this district is in terms provided by the Judicial Code."

By the Constitution of the United States (article 3, § 2) the judicial power extends, inter alia, to controversies between citizens of different states and between citizens of a state and foreign states, citizens, or subjects. Congress, however, determines how and to what extent this power is to be exercised. Stevenson v. Fain, 195 U. S. 165, 167, 25

Sup. Ct. 6, 49 L. Ed. 142; Mahopoulus v. Chicago, R. I. & P. Ry. Co. (C. C.) 167 Fed. 165, 168. Its last enactment on this subject—a codification—is embodied in the act entitled "An act to codify, revise, and amend the laws relating to the Judiciary," approved March 3, 1911 (36 Stat. 1087, c. 231), designated the "Judicial Code" (1 U. S. Comp. Stat. 1916, Ann., p. 532). Sections 24, 28, 29, and 51 of this Code are controlling, and they, so far as pertinent, provide:

Section 24 that:

"The District Courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * (b) is between citizens of different states or (c) is between citizens of a state and foreign states, citizens, or subjects. No District Court shall have cognizance of any suit * * * to recover upon any * * * chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said * * * chose in action if no assignment had been made." Comp. St. 1916, § 991(1).

Section 28 that:

Any "suit of a civil nature, at law or in equity, * * * of which the District Courts of the United States are given * * * jurisdiction by this title, and which * * * may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

Section 29 that:

"Whenever any party entitled to remove any suit mentioned in the last preceding section * * * may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court * * * for the removal of such suit into the District Court to be held in the district where such suit is pending."

Section 51 that:

"No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Comp. St. 1916, § 1033.

[1] Whether this suit shall remain here or be remanded to the state court depends upon the legislative meaning of the words "proper district" in section 28. The cases are in conflict. Of those holding that the suit is improperly removed to a District Court whose territory does not embrace the place where the suit brought in the state court is pending are Murdock v. Martin (C. C.) 178 Fed. 307; St. John v. United States Fidelity & Guaranty Co. (D. C.) 213 Fed. 685; St. John v. Taintor (D. C.) 220 Fed. 457; Pavick v. Chicago, M. & St. P. Ry. Co. (D. C.) 225 Fed. 395; Eddy v. Chicago & N. W. Ry. Co., (D. C.) 226 Fed. 120. Of those holding that the removal may be made to the District Court of the district where the defendant resides, even though the suit was brought in another state or district, are Mattison v. Boston & M. R. R. (D. C.) 205 Fed. 821; Stewart v. Cybur Lumber Co. (D. C.) 211 Fed. 343; Park Square Automobile Station v. Amer-

ican Locomotive Co. (D. C.) 222 Fed. 979. This holding in the Mattison Case is dictum, but it was accepted in the Stewart Case as embodying the true doctrine. The opinion in the Park Square Automobile Case is by the learned judge who decided the Mattison Case, and is directly in point. For other cases showing the division on this question see citations by Judge Sanborn in Eddy v. Chicago & N. W. Ry. Co. (D. C.) 226 Fed. 120, 126, 127. In my judgment, the cases which deny the right of removal to a district other than that in whose territory the suit is pending pronounce the correct rule.

The suit removed here is one over which a United States District Court would have cognizance. It is for more than $3,000, and as the plaintiff's original assignor is an alien and the defendant is a citizen and resident of New Jersey, it could have been brought in a United States District Court in the first instance. Section 24, supra. If, however, the original assignor had sought to institute the suit in a federal court, he would have been constrained to bring it in this district unless the defendant waived his privilege of being sued in the district of his residence—New Jersey. Sections 24, 51, supra; Galveston, etc., Ry. Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; Hall v. Great Northern Ry. Co. (D. C.) 197 Fed. 488. As the original assignor could have brought the suit in this court, the plaintiff likewise could have done so, and, like that assignor, would have been under the same constraint to come here, if he had desired to invoke the jurisdiction of a United States court.

[2] The right to remove a suit from a state to a federal court is purely statutory. Gumbel v. Pitkin, 124 U. S. 131, 153, 8 Sup. Ct. 379, 31 L. Ed. 374; Mahopoulus v. Chicago, R. I. & P. R. Co. (C. C.) 167 Fed. 165, 168; Park Square Automobile Station v. American Locomotive Co. (D. C.) 222 Fed. 979. And where suits of the character now considered—a class over which the United States courts have but concurrent jurisdiction with the state courts—are brought in a state court, the right to remove must be clear. It cannot rest upon a doubtful basis. If doubtful, it should for that reason alone be remanded. Fitzgerald v. Missouri Pac. Ry. Co. (C. C.) 45 Fed. 812; Fishblatt v. Atlantic City (C. C.) 174 Fed. 196; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C.) 175 Fed. 456; Odhner v. Northern Pac. Ry. Co. (C. C.) 188 Fed. 507, 508; Jackson v. Hooper (C. C.) 188 Fed. 509; Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932, 945; Eddy v. Chicago & N. W. Ry. Co. (D. C.) 226 Fed. 120, 125. The idea that appears to have been largely influential, if not controlling, in the Park Square Automobile Station Case, mainly relied upon here to sustain the removal, is that any other conclusion would leave it within the power of the plaintiffs to prevent any United States court from taking cognizance, through removal proceedings, of suits over which a federal court was given general jurisdiction, and that it could not have been the purpose of Congress to permit such a result. On application of the plaintiff in that case the Supreme Court refused to mandamus the District Court to remand the cause to the state court. Ex parte Park Square Automobile Station, 244 U. S. 412, 37 Sup. Ct. 732, 61 L. Ed. 1231, decided June 11,

1917. This is not an indication, however, that the District Court was right in maintaining jurisdiction. The Supreme Court merely followed its previous decisions in Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, and Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217, that no extraordinary relief was necessary, and that the question of jurisdiction should be determined on a writ of error to final judgment. Consolidated Rubber Tire Co. v. Ferguson, 183 Fed. 756, 106 C. C. A. 330; Sagara v. Chicago, R. I. & P. Ry. Co. (C. C.) 189 Fed. 220, 223; Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.) 201 Fed. 932, 941.

[3] In regard to suits over which the United States and state courts have concurrent jurisdiction, the rights of a plaintiff to bring and of a defendant to remove such a suit into a federal court are not reciprocal. In the beginning Congress made a distinction between the right to bring a civil suit in the first instance in the federal court and the right to remove it into such a court if originally brought in the state court. With the passage of the first judiciary act, the plaintiff could invoke the jurisdiction of a federal court where one of the parties was an alien or the suit was between a citizen of the state where it was brought and a citizen of another state, but, if he chose a federal court instead of a state court, he was confined to the district whereof the defendant was an inhabitant or in which he should be found at the time of serving the writ.

This alternative, in the case of diversity of citizenship, though broad in its terms, in effect was limited to the district of a state where the plaintiff or defendant had his citizenship; for, as noted, the federal jurisdiction was confined to cases where one of the parties was a citizen of the state where suit was brought. The defendant alone could remove, and he, if a citizen, was permitted to remove a suit from a state to a federal court only if it was brought against him in a court of a state whereof he was not a citizen, by one who was a citizen of that state; and in that case the suit was removable only to the federal court of the district where said suit was pending. Act Sept. 24, 1789, c. 20, §§ 11 and 12, 1 Stat. 73, 78, 79. So that while the plaintiff, having such a suit against a citizen, could bring it in the federal court of the district where the defendant was an inhabitant, yet, if he exercised his choice of jurisdiction and brought it in a court of the state wherein said defendant was a citizen, or in a court of a state other than that of which the plaintiff was a citizen, the defendant could not remove it to any federal court, but was constrained to let it remain in the court of the plaintiff's selection.

By the act of 1875 the rights of both litigants in controversies cognizable in the United States court were enlarged. In suits founded on diversity of citizenship the plaintiff was not confined in his choice of a federal court to one whose district was in the state whereof one of the parties was a citizen, as in the act of 1789, but could bring the defendant into any in whose district he could be served with process. The right to remove such causes from a state court was extended to the plaintiff, and the removal was not confined, as in the act of 1789, to cases where the plaintiff was a citizen of the state where the suit was commenced.

The right of the defendant to remove was not conditioned on his being nonresident of the state where he was sued, but the removal, whether brought about by the plaintiff or defendant, was confined to the federal court to be held in the district where the suit was pending. However, under this act the particular federal court into which the suit could be removed was largely in the control of the plaintiff, limited only by his ability to serve the defendant with process. Act March 3, 1875, c. 137, §§ 1–3, 18 Stat. 470. Under this Act the rights of the litigants to have their controversies determined in the federal court were practically reciprocal.

By the acts of 1887 and 1888 (March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433) sections 1, 2, and 3 of the act of 1875 were amended, and the rights of both litigants were greatly restricted. The plaintiff was confined to bringing his suit in the district where the defendant was an inhabitant, save that, where the federal jurisdiction was only that the action was between citizens of different states, he could also sue in the district where the plaintiff resided, if he could there serve the defendant with process.

In the matter of removing suits from a state court, that was confined to the defendant, and he could do so only in case he was sued in a state whereof he was nonresident. This limitation to nonresidents of the right to remove suits of the kind now in question, while it appeared for the first time in express terms in the act of 1887, is in effect the same as was imposed in the act of 1789. These acts—1887 and 1888—also contained the requirement that a removable suit was to be transferred into the federal court to be held in the district where such suit was pending.

A reading of sections 24 and 28 (without reference to section 29) of the Code of 1911, which, as to the matters now considered, are substantially the same as the acts of 1887 and 1888, clearly evinces that the lack of reciprocity in the right of the litigants to have the federal courts determine their controversies, shown to exist in the act of 1789 and the acts of 1887 and 1888, is a feature of said Code. Not all suits of which the United States courts are given original cognizance can be removed into said courts. If the present suit had been instituted in a court of New Jersey, whether by the original assignor or either of said assignees, it could not have been removed into this court without the plaintiff's consent, as the defendant is a resident of this state. Section 28, supra; Sagara v. Chicago, R. I. & P. Ry. Co. (C. C.) 189 Fed. 220, 222; H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C.) 189 Fed. 224, 227; Hall v. Great Northern Ry. Co. (D. C.) 197 Fed. 488; Eddy v. Chicago & N. W. Ry. Co. (D. C.) 226 Fed. 120, 124. Yet the plaintiff could have begun suit in this court in the first instance. Section 24, supra.

The words "proper district," mentioned in section 28, if they have any effect, are words of limitation. They condition the right of removal. That section does not define what is the "proper" district. It does, however, exclude districts covering the state wherein suits of the character now considered are pending, if the defendant is a resident of that state. Is this exclusion the only restriction upon the right of removal? If so, then the inclusion of the words "for the proper

district," in this class of cases, is mere surplusage. The section immediately following (29) shows that these words are not surplusage. It provides "for the removal of such suit into the district court to be held in the district where such suit is pending." There is nothing ambiguous or doubtful about that language, and, in the absence of an equally clear legislative indication that the suits in question may be removed into a district other than that in which they are pending, this proviso must be taken as furnishing the meaning of the word "proper" found in the preceding section. Such was the judicial view of the meaning of that word as used in the earlier acts. Knowlton v. Congress & Empire Spring Co., 13 Blatchf. 170, Fed. Cas. No. 7,902; Hess v. Reynolds, Admr., 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927.

The defendant contends, however (citing cases of which the Park Square Automobile Station Case is the most directly in point) that section 29 relates merely to the process whereby the removal is effected, and that the words quoted therefrom should not be construed to operate as a limitation upon the right to remove expressly granted by section 28. However, neither section 28 nor any of its predecessors granted an unlimited right of removal, and said quoted words, in substance, are found in all the enactments granting and regulating the right to remove.

The words "proper district" do not appear in the Judiciary Act of 1789 for the obvious reason that both the right to remove and its regulation were joined in one section—section 12, 1 Stat. 79. These words were first introduced in the act of 1875 (chapter 137, 18 Stat. 470), where the right to remove was granted in one section (2), and the steps whereby the removal was to be effected were made the subject of another section (3).

This method of treating this subject was adhered to in the amendatory acts of 1887 (chapter 373, 24 Stat. 552) and of 1888 (chapter 866, 25 Stat. 433), and in the codification of 1911 (Act March 3, 1911, 36 Stat. 1087). In the act of 1789 the designation of the court to which the removal was to be made, coupled as it was with the grant of power to remove, cannot be considered as anything less than a limitation upon the exercise of said power, and something more than a mere change in paragraphing in subsequent amendatory legislation which admittedly is more restrictive upon the right to remove (Shaw v. Quincy Min. Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768) is necessary to justify the conclusion that such limitation has been withdrawn.

The question raised by the words "proper district" found in section 2 of the acts of 1875, 1887, and 1888 and section 28 of the Judicial Code, which primarily grant the right to remove, is answered by section 3 of the Acts of 1875, 1887, and 1888 and section 29 of the act of 1911, and the designation of the United States court into which a suit may be removed is as much a limitation upon the right to remove as if such requirement were coupled with the grant of said right, as it was in the first judiciary act.

In the case of the authorized removals of all other suits or proceedings from the state to the federal courts (see section 30, 31, 33, and 34 of said Code [Comp. St. 1916, §§ 1012, 1013, 1015, 1016]), the suits

are to be removed to the federal court of the district wherein they were begun or are pending. Where a United States District Court contains more than one division, the removal of a cause from a state court by section 53 is to that division in which is situate the court whence the removal is made.

Sections 36 and 39, respectively derived from sections 4 and 7 of the act of 1875 (Comp. St. 1916, §§ 1018, 1021), contemplate results and judicial action in certain contingencies that can be had only if the cause is removed to a federal court having jurisdiction over the territory where the suit was pending when removed. Section 36 provides for the retention of any attachment or sequestration of the defendant's estate obtained in the suit while in the state court to answer any final judgment rendered in the federal court. Section 39 authorizes the federal court into which a cause is removable to issue a writ of certiorari to the state court, on refusal of its clerk to furnish a copy of the record of said cause, commanding it to make return of said record and to enforce said writ according to law. How could an attachment or sequestration of the defendant's property, secured while the suit was pending in the state court, be enforced by a federal court whose district did not cover any part of said state, or how could the federal court enforce its writ, if issued to compel a court of a state to furnish a copy of the record of a removable suit, in case it refused to do so where the district of the federal court was not in said state?

The statutes do not authorize the running of the federal court's attaching or sequestering writs into a state other than that in which its own district is; yet sections 36 and 39 of the Code contemplate that the federal court into which the cause is removed or removable, and not another court, shall by its writs in one instance appropriate property to satisfy its final decree, and in the other compel recalcitrant officers of a state court to obey the mandatory writs of the federal court into which the cause is to be removed.

There is nothing in any other section of the Code that warrants an interpretation of the words "proper district" contained in section 28, other than "where such suit is pending," as mentioned in section 29.

That such a construction prevents the defendant from removing to a federal court some suits which the plaintiff could have brought in such court can make no difference; nor does the fact, that, under the following cases decided by the United States District Court for the Southern District of New York: Consolidated Rubber Tire Co. v. Ferguson, 183 Fed. 756, 106 C. C. A. 330; Kamenicky v. Catterall Printing Co. (C. C.) 188 Fed. 400; Odhner v. Northern Pac. Ry. Co. (C. C.) 188 Fed. 507; Jackson v. William Kenefick Co. (D. C.) 233 Fed. 130; Doherty v. Smith (D. C.) 233 Fed. 132—this particular suit cannot be removed into said court, though it was pending in a state court within said district.

Those cases, and some in other districts, including Waterman v. Chesapeake & O. Ry. Co. (D. C.) 199 Fed. 667, of this district, but follow Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, which held that no suit over which the federal courts were given jurisdiction could be removed into a selected federal court unless that court could originally have taken cognizance thereof. This case, while

modified by later decisions of the Supreme Court in other particulars, is still an authority for that doctrine (see the Waterman Case and cases there cited), and, though its soundness has been questioned (Louisville & N. R. Co. v. Western Union Tel. Co. [D. C.] 218 Fed. 91), it still stands as a flat-footed declaration that the rights of plaintiffs and defendants to have their controversies brought into a federal court are not reciprocal.

Congress is the only power that can make the rights of the litigants reciprocal in this respect, and the argument advanced that this reciprocity ought to exist should be addressed to that branch of the government. While the courts at times are required to read into legislation matters not expressly appearing, in order that the manifest legislative purpose may not fail of enforcement, yet that power is never properly exercised to change what has been clearly expressed.

The motion to remand is granted, with costs.

DUTTON v. FIRST NAT. BANK OF WAYCROSS, GA., et al.

(District Court, S. D. Florida. August 2, 1917.)

1. COURTS ⟸12(1)—JURISDICTION OF FEDERAL COURTS—SUIT IN DISTRICT OF PLAINTIFF'S RESIDENCE.

While Jud. Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [Comp. St. 1916, § 1033]) § 51, permits a suit to be brought in the district of plaintiff's residence where jurisdiction is founded on diversity of citizenship only, the court is without jurisdiction to render a judgment in personam without personal service on defendants within the district.

2. JUDGMENT ⟸460(4)—RELIEF AGAINST IN EQUITY—FRAUD OR MISTAKE.

Allegations of an ancillary bill to enjoin enforcement of a judgment at law on a note *held* insufficient to show that the note was procured through fraud or mutual mistake.

In Equity. Suit by J. M. Dutton against the First National Bank of Waycross and others. On motion for preliminary injunction. Denied.

Davant & Davant, of Brooksville, Fla., for complainant.

Reynolds & Rogers, of Jacksonville, Fla., for defendants.

CALL, District Judge. The complainant filed his bill against L. J. Cooper, Waycross Savings & Trust Company, and the First National Bank of Waycross, the last two corporations, and each of the defendants residents of Waycross, in the state of Georgia, and alleged that in 1911 the defendant Cooper, in whom the complainant placed trust and confidence, and while president of the two defendant corporations, through an agent approached the complainant and induced him to purchase certain shares of stock in the Waycross Savings & Trust Company, paying therefor $1,100, and giving his note for $4,400 upon the express understanding and agreement that said note should be renewed from time to time until fully paid, principal and interest, by the dividends accruing on said stock; that this course of

procedure was followed until the principal sum of said note was reduced to $4,000; that said Cooper, as such president of said corporation, so managed their affairs as to bankrupt the Waycross Savings & Trust Company, and enrich the First National Bank of Waycross with all the valuable assets of the first-mentioned company; that among the assets of the first-mentioned company transferred to the bank was the note of complainant with the stock as collateral attached; that in March, 1915, said Cooper met complainant in Jacksonville, Fla., and procured the renewal of said note made payable to the First National Bank of Waycross, the complainant not knowing that the payee had been changed, but supposed it was payable to the Waycross Savings & Trust Company, as had theretofore been the case; that such change of the payee was by the oversight of complainant, and by the procurement of said Cooper with intent to defraud the complainant by depriving him of the defenses he otherwise would have had against the Waycross Savings & Trust Company; that he would not have signed said last-mentioned note had he known of the change in the payee, and upon demand being made upon him refused payment of the same; that thereupon suit was brought against him by the said First National Bank of Waycross upon said note, which resulted in a judgment of this court on the common-law side for the sum of $5,040.17 against the complainant in favor of the First National Bank of Waycross; that each of said corporation defendants had full knowledge of the representations and agreements entered into at the time of the purchase of said stock, and giving the first promissory note.

The bill also alleges that by some proceeding in the state of Georgia the bank sold said stock for the sum of $90, and purchased the same and now holds it, and gave credit upon the last-mentioned note for said sum.

The bill further alleges that the complainant is the owner of certain real estate and certain personal property, described in an amendment to the bill, situated in the Southern district of Florida, and that said judgment is a lien thereon and clouds complainant's title.

The bill then prays for an accounting between the complainant and the different defendants; that the last-mentioned note be delivered up, the sale of the stock be rescinded, and said stock delivered back to the Waycross Savings & Trust Company; that said last-named company be required to accept the note of complainant for said stock, and carry out the agreement made at the time of giving the first note, and that the bank be restrained from proceeding under or enforcing its judgment against complainant, both temporary and permanent; that said judgment be cancelled as a lien, or cloud.

Upon these allegations a temporary restraining order is asked against the bank; notice having been given the attorney of record for the First National Bank of Waycross.

The first question to be decided is the jurisdiction of this court; the defendants being citizens of Georgia. There seems to me no question of the jurisdiction of the court over the defendant First National Bank of Waycross in so far as exercising injunctional power over the enforcement of the judgment obtained by it in this court. As to

that defendant the bill is ancillary to the suit brought by it against the complainant, and the service of notice of the suit upon its attorney of record seems all that is necessary to bind it. As to the other defendants against whom specific relief is prayed, it is of graver import.

[1] Justice McLean, in Dunn v. Clarke et al., 33 U. S. (8 Pet.) 1, 8 L. Ed. 845, after upholding the jurisdiction of the court over the plaintiff in the common-law suit, says:

"In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised, by this or the Circuit Court."

The difficulty in that case was the citizenship of the parties referred to. In the instant case the defendants are nonresidents, and none of them found within this district. Section 51 of the Judicial Code (Comp. St. 1916, § 1033) provides that:

"No civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This applies to a suit in equity. Butterworth v. Hill, 114 U. S. 128, 5 Sup. Ct. 796, 29 L. Ed. 119. But does not give jurisdiction to render a judgment in personam without personal service of process in the district. Relief in the nature of a judgment in personam is the only relief sought against Cooper and the Waycross Savings & Trust Company; section 57 (Comp. St. 1916, § 1039) providing for suits to enforce liens upon or remove clouds from real or personal property emphasizes this fact. In such cases judgments affecting the particular property only may be entered, unless the defendants are served with process in the district or voluntarily submit themselves to the jurisdiction of the court.

This proceeding, while ancillary as between the parties to the common-law action, is original as between the complainant and Cooper and the Waycross Savings & Trust Company. The motion to stay the execution of the judgment affects the interest of the First National Bank of Waycross, and as to it the jurisdiction of the court is undoubted. And the question is therefore whether under the sworn allegations of the bill the complainant is entitled to this order against that particular defendant.

[2] Do the facts set up in the bill entitle the complainant to have the judgment vacated by a court of equity, taking those allegations as true?

The facts relied upon by the complainant may be briefly summarized as follows: Cooper, while president of the two corporations, procured the complainant to purchase stock in the Waycross Savings & Trust Company for the consideration of $1,100 in cash, and his promissory note payable in 90 days for $4,400, upon the parol agreement of the parties that the payee, the Waycross Savings & Trust Company, would renew this note on maturity, and the renewals of same from time to time and apply the dividends payable on the stock to

payment of the interest and principal until it was entirely paid, and thereupon the stock which had been issued and hypothecated to secure the note should be delivered to the complainant, and that this agreement had been carried out until March, 1915, when the note sued on was given, the complainant supposing the payee to be the Waycross Savings & Trust Company, as in the case of the former renewals.

It is too well settled to need citation that in the absence of fraud, accident or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement made at the time of the giving of a promissory note, cannot be permitted to vary, qualify or contradict or add to or subtract from the absolute terms of the written contract. Therefore unless the allegations of fact show either fraud, accident or mistake in procuring of the note, of which the one sued on was the renewal, this Court could not relieve the complainant of the effect of his act. There are no allegations of fact tending to show any fraudulent intent in the inception of the contract. On the other hand the allegations show that the renewals of the note and crediting dividends continued for almost four years, and until the principal of the note was reduced from $4,400 to $4,000. This would negative any fraud practiced upon the complainant in the inception. Had the note sued on been payable to the Waycross Savings & Trust Company as the complainant believed it was, he would have been in no better condition than he is now. He would be confronted by the same barrier. Nor do I think that his allegations that Cooper juggled the assets of the two corporations so that one absorbed all the valuable assets of the other help him to defeat the collection of the note and the judgment entered thereon. If Cooper has by his improper acts caused him damage he must look to Cooper, or Cooper and the bank, for recoupment.

That there was no accident or mistake in the making of the contract seems to me to be too plain to require argument. The only allegations bearing upon mistake is that he supposed the payee was the same, and had he known that the bank was the payee he would have refused to sign it. This, at best, was a mistake by the complainant, and for one to be relieved from his contract the mistake must have been mutual.

There are so many authorities bearing upon these questions that it would be a useless consumption of time to make even a partial list, and, as I understand their import, they are uniform.

The motion for a temporary restraining order will therefore be denied.

FEDERAL WALL PAPER CO. v. KEMPNER.

(District Court, N. D. New York. August 23, 1917.)

1. COURTS ⟸330—FEDERAL COURT—JURISDICTION—AMOUNT IN CONTROVERSY—AFFIDAVITS.
   The complaint and answer may be supplemented by affidavits as to the real value or amount in controversy on motion to dismiss on the ground that the amount is insufficient to give jurisdiction.

2. COURTS ⟸330—JURISDICTION—AMOUNT IN CONTROVERSY—PLEADING—PRESUMPTION.
   Where the papers, on motion to dismiss on the ground that the amount in controversy is insufficient to give jurisdiction, fail to disclose what sum plaintiff received for property, which, having been bought of defendant, and rejected as not according to contract, it sold on refusal of defendant to accept return of same, it is fair to assume that it received what it says it was worth.

3. DAMAGES ⟸117—ELECTION BETWEEN RULES OF DAMAGES.
   Where there are two rules of damages which may be made applicable to a given case, plaintiff must adopt one or the other, and cannot have the benefit of both, taking so much of each as is most favorable to him.

4. DAMAGES ⟸120(1)—BREACH OF CONTRACT.
   The damages for breach of contract are such as will, as near as may be, place the injured party in the situation he would have occupied had the breach not occurred; what he would have received if the contract had been kept.

5. DAMAGES ⟸40(2)—PROFITS.
   Profits lost by breach of contract, if not speculative and remote, are recoverable.

6. SALES ⟸418(9)—BREACH OF CONTRACT—DAMAGES.
   Plaintiff having bought merchandise of defendant and paid therefor, and resold it and had it shipped to J., who rejected and returned it to plaintiff because not in accordance with defendant's contract, and plaintiff, on defendant refusing an offer of its return, having sold it on defendant's account, for its value, the measure of damages is the difference between the price paid and the value, plus profits lost on resale, together with the amount of charges for freight, loading and unloading, and cartage, which plaintiff was required by reason of the breach to pay.

7. COURTS ⟸330—JURISDICTION—AMOUNT IN CONTROVERSY.
   The amount recoverable, and therefore the amount in controversy, is limited to the damages alleged and claimed in the complaint, which alleges no facts showing the damages to be greater, though figuring from the affidavits for plaintiff on the motion to dismiss, on the ground that the amount in controversy is insufficient to give the court jurisdiction, such damages exceed such amount.

8. COURTS ⟸329—FEDERAL COURT—JURISDICTION—AMOUNT IN CONTROVERSY—ALLEGATION OF PLEADING.
   Aside from $500 paid plaintiff on contract of defendant to sell paper to plaintiff, the complaint for breach of contract by refusal to deliver, and the affidavit for plaintiff on motion to dismiss on the ground that the amount in controversy is insufficient to give jurisdiction, alleging only the contract price, what the paper would have been worth if delivered and as warranted, and that by reason of defendant's failure to perform plaintiff was deprived of the profits which it reasonably would have earned, show recoverable damages and an amount in controversy only to the amount of the difference between the contract price and such alleged value, though the complaint alleges damages in a greater sum.

9. COURTS ⟸329—FEDERAL COURT—JURISDICTION—AMOUNT IN CONTROVERSY —DAMAGES—PLEADING.

Relative to jurisdiction of the federal court, when the damages recoverable on a given state of facts may be more than $3,000, or less, as the jury shall find, the amount alleged, claimed, and demanded will be deemed the amount in controversy, if the facts will justify a verdict of that amount; but when on the state of facts alleged the law fixes the damages at a certain sum, that sum is controlling on motion to dismiss on the ground that the amount in controversy is insufficient to give the court jurisdiction.

10. COURTS ⟸329—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—PLEADING.

The complaint alleging contract of defendant to sell 112 tons of paper at $38 a ton, payment of $500 on the making of the contract, as provided thereby, delivery of 51 tons, and payment of $1,975 therefor, failure of that delivered to satisfy the contract, damages on account thereof, refusal of defendant to deliver the balance, and damages on account thereof, the $500, recoverable under the allegations, will not be considered included in the $1,975, relative to the amount in controversy, on the question of jurisdiction of the federal court.

At Law. Action by the Federal Wall Paper Company against Solomon S. Kempner. Motion by defendant to dismiss on the ground it appears on the face of the complaint and other papers submitted on this motion that the court has no jurisdiction of the cause, the real amount in controversy, exclusive of interest and costs, being less than $3,000, and that there is no diversity of citizenship, as plaintiff does not own the alleged cause of action. Motion denied.

Garten, Friesner & Shenfeld, of New York City, for plaintiff.
Wm. L. Pattisson, of Plattsburgh, N. Y., for defendant.

RAY, District Judge. [1] On this motion the complaint and answer have been supplemented by affidavits as to the real value or amount in controversy. This may be done.

The complaint alleges that about May 3, 1916, the plaintiff and defendant entered into an agreement whereby the defendant agreed to sell to the plaintiff and the plaintiff agreed to purchase from the defendant certain goods, etc., "consisting of approximately 112 tons of wall paper hangings at $38 per ton"; that a sample was exhibited to plaintiff's representative, and it was agreed that the bulk of such merchandise should correspond in quality and color with said samples, and defendant warranted that the wall paper hangings so agreed to be sold would be free from any and all defects and imperfections; that plaintiff should pay and did pay defendant $500 on such contract on entering into the contract, and it was agreed the balance should be paid when the paper hangings were delivered free on board to a common carrier at Plattsburgh, N. Y., for shipment to the consignee designated by the plaintiff, not later than June 1, 1916. In the first cause of action it is also alleged that plaintiff directed the defendant to deliver 51 tons of such hangings to Joliet Wall Paper Mills, at Joliet, Ill., and same was shipped accordingly, and plaintiff paid defendant $1,975.79 for same; that said Joliet Company rejected all of such goods shipped to it and returned same to plaintiff; that on examination it

was found that such merchandise did not conform to the samples, either in color or quality, but same were streaky and spotted and unmerchantable, and could not be used for manufacture into wall paper; that at the time of the making of such contract defendant was notified the paper was wanted for such purpose and defendant warranted it could be so used; that defendant was duly notified of the rejection and return of such wall paper, and of the fact that it did not answer to the contract, and plaintiff also offered to return such merchandise, and tendered same, but defendant refused to accept same; that the plaintiff fully performed such contract on its part.

As to damages resulting from the return, etc., of such 51 tons of such wall paper hangings, the plaintiff alleges that it was compelled to pay and did pay the freight for carrying said goods to and from Plattsburgh, N. Y., to Joliet, Ill., and the expense of loading and unloading same, and was deprived of the profit on such merchandise, referring to the 51 tons, that it would reasonably have earned had the goods been in accordance with the contract, and sustained *other damage,* all in the sum of $2,000. This is supplemented in the affidavits filed by the plaintiff in which it is stated that the 51 tons of paper shipped to Joliet, Ill., was worth only $20 per ton in fact; that it sold same by contract to Montgomery Ward & Co. for $2,560.25; that it paid freight to Joliet, $346.37; for loading and unloading at Joliet, $23.80; return freight, $336; and for unloading and cartage, $22.

Assuming this statement of damage made by plaintiff to be correct and true, inasmuch as it had the property or its proceeds, having sold same on defendant's account, and it was worth $20 per ton only, or $1,020, the plaintiff lost the difference between what it paid, viz., $1,975.79, and its true value, $1,020, or $955.79. It also lost the profit it would have made on the sale to Montgomery Ward & Co. if the merchandise has been as represented, $584.46. Also the freight paid both ways and cartage and loading and unloading charges at both points, in all $728.17. Total damage, first cause of action, $2,268.42.

[2] The papers fail to disclose what sum plaintiff received for the property on the sale, but it is fair to assume it received what it says it was in fact worth. This is the transaction complained of in the first cause of action, and this fully measures the plaintiff's loss and damage growing out of the purchase and sale and return to plaintiff of the 51 tons sent to Montgomery Ward & Co. If this merchandise had been such as the contract called for, the goods would have been accepted and retained by that company. The plaintiff presents the affidavit of Mr. Goldfarb, in which it is stated the 51 tons would have been worth $50 per ton if as represented, and the plaintiff would have had property worth $2,550, when it was worth only $20 per ton, or $1,020, making a loss of $1,530 in addition to the freight both ways and costs of loading and unloading and cartage, $728.17, and also what it paid for the 51 tons, $1,975.79, in all $4,253.96, less the actual value of the merchandise, $1,020.

[3] But when there are two rules of damage which may be made applicable to a given case, I understand the plaintiff must adopt the one or the other. He cannot have the benefit of both, taking so much of each as is most favorable to himself.

[4, 5] "In the case of a breach of contract, the damages awarded should be such as will, as nearly as may be, place the injured party in the situation he would have occupied if the breach had not occurred." Wicker v. Hoppock, 6 Wall. 94, 18 L. Ed. 752; 5 Encyclopedia of U. S. Reports, 169. "The amount which would have been received, if the contract had been kept, is the measure of damages if the contract is broken." Pierce v. Tennessee, etc., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; Benjamin v. Hillard, 23 How. 149, 16 L. Ed. 518. Profits are recoverable if not speculative and remote.

[6, 7] In the instant case, as to these 51 tons of paper, if the merchandise had been according to the contract the plaintiff would have received on the sale to Montgomery Ward & Co. the sum of $2,560.25, which would have reimbursed plaintiff the amount paid for same, with a profit of $584.46, and it would not have been compelled to pay the freight, loading and unloading, and cartage charges, $728.17. The amount paid defendant for the merchandise was $1,975.79, which, added to the profit and freight, loading, and cartage charges paid, makes $3,288.42. The plaintiff sold the goods on defendant's account presumably for $1,020, which it is entitled to retain, and which sum defendant is entitled to have deducted in arriving at plaintiff's damages. Deducting same, and we have the plaintiff's damages, shown by affidavit, $2,268.42, growing out of the first cause of action. But the plaintiff itself places its damage growing out of the first cause of action at $2,000, and after alleging the facts, not items, says:

"That by reason of the aforesaid breach of the said agreement by the defendant, plaintiff was compelled to and did pay the freight for carrying said goods to and from Plattsburgh, New York, to Joliet, Illinois, and the expense of loading and unloading the same, and was deprived of the profit on said merchandise that it would reasonably have earned had the defendant performed the said agreement on his part and delivered merchandise in conformity with the samples and colors ordered by the plaintiff, and sustained other damage, all in the sum of two thousand ($2,000) dollars."

I do not see that a greater sum or amount can be in controversy than the plaintiff claims in the pleading.

[8] When we come to the second cause of action, we have a different proposition. In this cause of action plaintiff refers to, and by reference reiterates, the paragraphs of the first cause of action numbered 1 to 6, inclusive. It then alleges a demand for the balance of such wall paper hangings agreed to be sold by defendant, aggregating 61 tons, an offer, readiness and willingness to accept, receive, and pay for same, and a neglect and refusal to deliver, and that plaintiff fully performed all the terms of the contract relating thereto. Then, "that by reason of the failure of the defendant to perform the said agreement, plaintiff was deprived of the profits which it reasonably would have earned if the defendant had performed the said agreement, and sustained damage in the sum of one thousand one hundred ($1,100) dollars." No facts are stated in the complaint or in the affidavit alleging or indicating that plaintiff would have earned any profits, except as it is stated the 61 tons of wall paper hangings would have been worth $50 per ton, or $3,050, if delivered and as warranted and

represented, and for which it was to pay $38 per ton, or $2,318. The difference, or profit, if the hangings had been delivered, is $732. On the allegation of the complaint and the plaintiff's affidavits by no possibility can plaintiff's damage, aside from the $500 paid down, growing out of the second cause of action, exceed $732. Adding this to the $2,000 damages claimed and demanded under the first cause of action, and the sum or amount in controversy is $2,732, or less than $3,000. If, however, we should add the $732 to the $2,268.42, figuring up the items of the first cause of action as shown in the affidavits, we would have a total of $3,000.42.

What are the legal principles applicable, and which fix the recovery of the plaintiff, on the allegations made in the complaint and the facts shown in the affidavits?

[9] When the damages recoverable on a given state of facts may be more than $3,000, or less, as the jury shall find, the amount alleged, claimed, and demanded will be deemed the amount or value in controversy if the facts will justify a verdict of that amount; but when, on a state of facts alleged, the law fixes the damages at a certain sum, that sum is controlling on such a motion as this. In such case it appears that the amount in controversy cannot be more than that fixed by the law.

As to the second cause of action set out in the complaint under consideration, the law fixes the damages at $732, not considering the $500 paid down. As to the first cause of action the plaintiff in its complaint demands only $2,000, and no facts are alleged in such complaint which show the damages to be greater. Figuring from the affidavits filed in behalf of the plaintiff, and such damages exceed $2,000, making the total $3,000.42, as stated.

I think this allegation of the complaint controls in fixing the damages recoverable under the first cause of action; that while the items given in the affidavits aggregate a greater sum, the plaintiff, without amending his allegation of damage in the first cause of action, would be limited to a recovery of $2,000 under the first cause of action, and is limited by the law on the facts alleged in the second cause of action, supplemented by the affidavits, to a recovery of $732, under such second cause of action, aside from the $500 paid down, making a total of $2,732.

[10] These figures do not take into account the $500 paid down on the contract, unless we assume such $500 formed part of the $1,975.79 paid for the 51 tons sent to Joliet, Ill. The complaint does not so state, but does state the 51 tons were paid for by the plaintiff. Then, as to the recovery, the plaintiff, if entitled to recover, may recover the $500 paid down in addition to the other damage, profit he would have made if the wall paper hangings had been delivered as per contract. Therefore the plaintiff, while limited by its statement of damages sustained and by the demand for judgment, may recover $3,100, exclusive of interest and costs, depending on the evidence. There has been no application for an order making the complaint more definite and certain as to damages, or for a bill of particulars as to damages sustained.

An action was brought by one Louis G. Hart in the Supreme Court of the state to recover damages for the breach of this contract. The venue was laid in New York county, but on motion the venue was changed to Clinton county, where this plaintiff resides. Thereupon that action was discontinued. Then the said Hart assigned the alleged cause of action back to said Federal Wall Paper Company, this plaintiff, and such assignment is in evidence here and this action was brought. In that action the damages were laid at $3,000. We may well *suspect* that this plaintiff is seeking to avoid a trial in Clinton county, and that the damages alleged are enhanced for the purpose of giving the United States District Court jurisdiction, but I cannot say that this is proved or that a question of fact is presented for decision here.

I think the motion to dismiss must be denied. There will be an order accordingly.

In re HEWIT.

(District Court, N. D. Ohio, E. D. August 27, 1917.)

No. 6278.

1. BANKRUPTCY ⊜396(5)—EXEMPTIONS—STATE LAW.
   Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544, does not create any personal or homestead exemptions in favor of bankrupt, but by sections 6, 7a(8), 47a(11), and 70a (Comp. St. 1916, §§ 9590, 9591, 9631 and 9654), merely preserves to him the full benefit of such exemptions as at the time of the adjudication he is entitled to under the state law.
2. HOMESTEAD ⊜5—EXEMPTION—CONSTRUCTION OF STATUTES.
   Gen. Code Ohio, §§ 11730–11740, conferring a homestead exemption or an allowance in lieu thereof, are to be liberally construed to accomplish their humane purpose.
3. BANKRUPTCY ⊜396(5)—EXEMPTION IN LIEU OF HOMESTEAD—"OWNER OF HOMESTEAD."
   The adjudication in bankruptcy transferring all the debtor's property to the trustee subject to the debtor's right or claim of an exemption, he is not thereafter the owner of the homestead, theretofore owned by and still occupied by him, within Gen. Code Ohio. § 11738, providing that the head of a family not the "owner of a homestead" may, in lieu thereof, hold exempt property not exceeding $500 in value.
4. BANKRUPTCY ⊜396(5)—CLAIM OF EXEMPTION—AMENDMENT.
   If bankrupt's claim of exemption in lieu of homestead be objected to because for $500, instead of for specific property not exceeding that value, as contemplated by Gen. Code Ohio, § 11738, amendment should be allowed.

In Bankruptcy. In the matter of B. F. Hewit, bankrupt. On petition to review order of referee. Reversed, with instructions.

Paul Howland, of Cleveland, Ohio, and Chas. Lawyer, of Jefferson, Ohio, for petitioner.

Chas. R. Sargent, of Jefferson, Ohio, for trustee.

WESTENHAVER, District Judge. This cause is now before me on a petition of the bankrupt to review an order of the referee in the matter of the bankrupt's exemption in lieu of a homestead.

The facts are agreed, and will be briefly stated. The bankrupt is married and living with his wife and entitled to claim a family homestead, under section 11730, Gen. Code, or an allowance in lieu thereof, under sections 11737 and 11738, Gen. Code. He was adjudicated a bankrupt March 21, 1917.

At and prior to the time of this adjudication he had a house and lot which was occupied by him and his family as a homestead, and which he continued to occupy up to the 23d day of May, 1917, when this house and lot were set aside to him by the trustee as a homestead. He was not then, nor was his wife, the owner of any other homestead or of any other real estate which could be used as a homestead. This house and lot, it is agreed, is of the value of $4,000, and is subject to mortgages and taxes prior to any homestead right of the husband and wife in the sum of $3,800, leaving an apparent equity therein of the value of $200. Neither at the time of the adjudication nor since has any proceeding been begun by the mortgagees or by the trustee in bankruptcy to foreclose these mortgages, or to sell the equity for the benefit of the estate.

On May 23, 1917, the trustee set apart to the bankrupt such articles of personal property as are exempt from execution and sale under the Ohio law, and also set apart to him this house and lot, subject to said mortgages and taxes, as a homestead.

To this report the bankrupt excepted, claiming an allowance of $500 in lieu of the homestead so set aside. The referee overruled the exceptions, and the bankrupt brings this petition for a review of the referee's finding and judgment.

A kindred question was considered and decided by me in the matter of D. W. Radcliffe, bankrupt, at a former day of this term. See 243 Fed. 716. In that case the homestead owned and occupied by the bankrupt at the date of the adjudication had been, on application of the trustee, and on order of the referee, surrendered to the mortgagees before the bankrupt's claim for an allowance of $500 out of other property was heard and determined. It is contended that the fact, present in this case, that the homestead had not been sold and no proceedings begun to subject it to prior liens, is a distinguishing and controlling consideration, and brings this case within the rule of Bartram v. McCracken, 41 Ohio St. 377, in which it was held that an execution debtor whose personal property had been levied on cannot claim as against the execution out of this personal property the $500 allowance when he is in fact the owner and occupant of a homestead encumbered by mortgages in excess of its real value. This distinction between the present case and the Radcliffe Case, it must be admitted, rests on a very narrow ground. While it is true that neither the mortgagee nor the trustee in bankruptcy have taken any steps prior to the referee's order to sell the incumbered homestead, either of them may begin such proceedings the next day, thereby destroying the homestead thus set aside. In view, however, of the claimed distinction, I have again re-examined at length the questions involved. and have reached the conclusion that the judgment of the referee is erroneous and must be reversed. My reasons for this conclusion will be briefly stated.

[1] The Bankruptcy Act does not create any personal or homestead exemptions in favor of the bankrupt. It merely preserves to the bankrupt the full benefit of such exemptions as at the time of the adjudication he is entitled to under the state law. Bankruptcy Act, §§ 6, 7a (8), 47a (11), 70a; Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018. The determination, therefore, of this question depends on the state of the Ohio law respecting homestead exemptions.

[2] The Ohio laws conferring a homestead exemption, or an allowance in lieu thereof, are found in the General Code, §§ 11730 to 11740, inclusive. The policy of the law and the rules for construing and applying the same are stated in numerous Ohio cases. See Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378; McConville v. Lee, 31 Ohio St. 447; In re Assignment of Kraus, 79 Ohio St. 314, 87 N. E. 176; Carter v. Ross, 8 Ohio Cir. Ct. R. 139, affirmed by Supreme Court for reasons stated in opinion of Circuit Court, 54 Ohio St. 664, 47 N. E. 1116.

In brief, these exemption sections are to be liberally construed with a view of accomplishing the humane purpose for which they were enacted. The homestead exemption, it is said, is not given for the benefit of the debtor, but for the protection of his family, and in part for the protection of the public who might otherwise be burdened with the partial support of an insolvent debtor's family. In construing and applying these sections the Ohio Supreme Court has extended their protection, whenever the law or the facts brought a case within the policy and reason thereof.

The present case would seem to be clearly within the reason of the law, and if the bankrupt is to be denied the benefit thereof, it must be because the present facts put him without the language of the statute.

Section 11730 in substance provides that a husband answering the description of a person entitled to a homestead may hold exempt from sale on judgment or order a family homestead not exceeding $1,000 in value. Sections 11734 to 11736 prescribed how this homestead may be set aside and deals also with special situations, such as a homestead in land the title to which is in another, the homestead of a deceased husband who has left a widow, etc. In brief, on proper application and before sale, the officer, executing the writ shall set off to the debtor by metes and bounds a homestead not exceeding $1,000 in value, and if exception is taken the court may order a reappraisement and reassignment of the homestead. The remainder of the debtor's lands and tenements may be sold on execution. If the homestead is, in the opinion of the appraisers, indivisible, without manifest injury or inconvenience, the debtor may occupy it by paying the reasonable rental value thereof in excess of $100, which is treated in that case as his homestead. The homestead thus set aside by metes and bounds may be reappraised every two years thereafter.

Obviously in applying these provisions it is necessary to set aside for the debtor a homestead which he may occupy and hold as against the right of any creditor to sell the same, and such is the procedure approved in Ohio. Kelly v. Duffy, 31 Ohio St. 437. Manifestly this procedure cannot be followed if the premises are burdened with a mortgage or other lien against which neither the debtor nor his wife

can claim a homestead exemption; for instance, a mortgage in which the husband and wife have joined. A part of the premises cannot be withdrawn from the mortgage without impairing the contract with the mortgagee. In that situation the homestead is charged with liens which preclude the allowance of a homestead, and a different rule is applied to meet the different condition. The homestead premises, it is provided, may be sold and the residue of the proceeds, not exceeding $500, shall be paid to the person entitled to the homestead. Sections 11733, 11737.

In the present case the premises are subject to liens which preclude the setting apart of the same or any part thereof as a homestead, pursuant to these provisions. The mortgages cover the entire premises, and no part of them could be assigned by metes and bounds to the debtor, and he be given the right to continue in the occupancy thereof prior to the mortgagee's right to sell the same. Yet this is precisely what was attempted, and the result must of necessity prove ineffecutal and deprive eventually the debtor of the protection given by the homestead exemption law.

In this situation, that is, when the premises are charged with liens which preclude the assignment to the debtor of a homestead by metes and bounds, section 11737 provides that after sale is had of the premises, and the prior liens are paid, the balance, if any, not exceeding $500, shall be paid to the debtor in lieu of a homestead. This course was not followed. If it had been followed, the apparent equity of $200 might have been wiped out, or it might have been increased to $500. It is proper in a court of bankruptcy to sell premises thus incumbered. Collier, p. 1040. This procedure would determine exactly and definitely the extent of the debtor's homestead exemption. It does not seem to me that the protection accorded by the law and claimed by the debtor can be made to depend on the willingness or unwillingness of the mortgagees, or of the trustee in bankruptcy to exercise their legal right, and especially not upon the neglect or failure of the trustee to perform his whole duty in administering the bankrupt's property.

[3] Section 11738 provides that a husband answering the description of a person entitled to claim a homestead exemption, but who is not the owner of a homestead, may, in lieu thereof, hold exempt from levy and sale, real or personal property, not exceeding $500 in value. It is on the strict letter of the expression "not the owner of a homestead" that Bartram v. McCracken, supra, was decided, and on which the judgment of the referee in the present case was rested. It is agreed that the debtor's right to a homestead exemption must be determined on conditions existing at the time of the adjudication; and it is contended that, inasmuch as he was then occupying the premises as a homestead, the title to which prior to the adjudication was in him, he is the owner of a homestead, and therefore not within the language of section 11738.

This reasoning does not commend itself to me. In my opinion, it is unsound and in conflict with the reasoning, if not the ruling, of the Supreme Court of Ohio in numerous cases. In Bartram v. McCracken, supra, the sheriff had levied on personal property. The debtor made a claim for an allowance from this property of $500 in lieu of a home-

stead. It appeared that he was then owing and occupying a homestead, but that it was incumbered by mortgages in excess of its value. The Supreme Court says that the law makes no provision in that situation whereby the sheriff may proceed to inquire respecting the value of the real estate and the validity and amount of the mortgages thereon, and, as a result of his findings thus made, determine whether or not the allowance should be made. Section 11734 supports this reasoning. But, as stated by me in the Radcliffe Case, a different situation exists when title to all the debtor's property has been transferred by a general assignment or by operation of the Bankruptcy Law, upon an adjudication, to an assignee or to a trustee in bankruptcy. The bankrupt cannot then be said to be the owner of the homestead which he had previously owned, and which he may still be occupying. He is the owner of nothing except a right to claim a homestead in the premises or an allowance in lieu thereof under the sections above cited of the Ohio statutes. The bankrupt in this case exercised this right. His claim, however, has not been allowed, but instead premises charged with liens which preclude the allowance to him of a homestead therefrom by metes and bounds have been set aside to him burdened with these liens; and this, it is said, is giving him the benefit and protection of the humane provision of the Ohio exemption law. I do not agree with this conclusion.

I am of opinion that, when all the real and personal property of an insolvent debtor has been, either by a general assignment made by himself, or as a result of an adjudication in bankruptcy, transferred to an assignee or trustee, subject only to the debtor's reserved right or claim of an exemption, he cannot be said to be the owner thereafter of a homestead, and that neither the reasoning nor the decision in Bartram v. McCracken has any application.

As stated by me in Re Radcliffe, a contrary holding is required by cerfain decisions of the Supreme Court of Ohio, among others the following: Carter v. Ross, 8 Ohio Cir. Ct. R. 139, affirmed for reasons stated by the Circuit Court, 54 Ohio St. 664, 47 N. E. 1116; Niehaus v. Faul, 43 Ohio St. 64, 1 N. E. 87; Fry v. Smith, 61 Ohio St. 276, 55 N. E. 826; In re Kraus, 79 Ohio St. 314, 87 N. E. 176; Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378; McConville v. Lee, 31 Ohio St. 447; Moody v. Whitaker, unreported decision by Ohio Supreme Court, 22 W. L. B. 168. See, also, In re Buckingham (D. C.) 102 Fed. 972; In re Davies, 10 Ohio N. P. (N. S.) 205. An examination of these decisions will show that in every case of a general assignment, not containing an express waiver of exemptions, the Supreme Court of Ohio has saved to the debtor the full amount of his homestead exemption. It has done this regardless of whether the claim is made before or after the sale, or whether made informally or with technical exactness. If it be true, as is contended, that the time of making the claim or the manner of setting aside the exemption is controlled by the Bankruptcy Act, and not by the state law, rules of procedure cannot be permitted to destroy substantial rights. The procedure in the bankruptcy courts is flexible enough to permit the liquidation of a bankrupt estate so as to preserve and protect all the bankrupt's rights of personal and homestead exemptions and of al-

lowances in lieu thereof. If it were not, then the debtor's exemptions given by the state law and admittedly preserved by the Bankruptcy Act would be destroyed.

[4] No point was made in argument touching the informal manner in which the debtor made his claim or specified the property to be set aside to him. Section 11738 does not contemplate a blanket claim for $500 in lieu of homestead exemption, but rather requires a specification of the real estate or articles of personal property thus claimed. If any point is made, it would be the duty of the referee to permit a proper amended claim to be filed. In re Berman (D. C.) 140 Fed. 761; In re Radcliffe, Ohio Law Rep. July 23, 1917; In re Kraus, 79 Ohio St. 314, 87 N. E. 176.

In my opinion, the proper procedure in this case would have been to order the premises charged with the liens, precluding the setting apart of the homestead by metes and bounds, to have been sold, and if a surplus resulted to pay the same, not exceeding $500, to the debtor. If the surplus did not amount to $500, then the deficiency should have been allowed from the personal property. It would not be improper, however, in this situation to allow the debtor $500 at once from the personal property and subrogate the trustee to the debtor's right against the surplus, if any, produced by a sale of the homestead premises. This course might result in a more expeditious and convenient administration of the estate.

The judgment of the referee will therefore be reversed, with instructions to proceed further in conformity to the conclusions stated herein.

An exception may be noted on behalf of the trustee to this ruling.

STANDARD SILK DYEING CO. v. ROESSLER & HASSLACHER CHEMICAL CO.

(District Court, S. D. New York. July 23, 1917.)

No. 123.

1. CONTRACTS ⊜303(1)—PERFORMANCE—EXCUSES FOR NONPERFORMANCE.
   If what is agreed to be done is possible and lawful, the obligation to perform is not excused by difficulty or improbability of performing, or by the hardship, expense, or loss to the party performing, or by anything short of impossibility to perform.

2. SALES ⊜172—PERFORMANCE BY SELLER—EXCUSES.
   Where a contract of sale of prussiate of soda, a German product, providing that the sellers should not be liable for causes beyond their control, including war or insurrection, was made after war was declared between Germany and Great Britain, performance was not excused by the British orders in council which in effect placed an embargo on shipments from Germany, as, in view of the then existence of war, the parties must have intended relief only in case the United States became involved in the war, especially where the seller had on hand sufficient prussiate of soda to fill the buyer's contract if it had not sold its product to other buyers before time for delivery under the contract.

At Law. Action by the Standard Silk Dyeing Company against the Roessler & Hasslacher Chemical Company. On motion to confirm a referee's report. Exceptions sustained, and motion denied.

Hugh Gordon Miller, of New York City, for plaintiff.

Creevey & Rogers, of New York City (Garrard Glenn, William B. Walsh, and William S. Creevey, all of New York City, of counsel), for defendant.

MANTON, District Judge. The plaintiff sues for breach of contract. A reference was ordered to a referee, and he has reported practically against the plaintiff, giving it a judgment for the sum of $175.60. The plaintiff, feeling aggrieved thereby, opposed a motion to confirm the referee's report. The contract in question was entered into on January 13, 1915, by the terms of which the defendant agreed to furnish the plaintiff 35,000 pounds of prussiate of soda. Under the terms of the contract they delivered about 5,912 pounds. The balance was not delivered. Both counsel are in accord in saying that the principal question involved is the question of the sufficiency of the defense interposed to the failure of delivery. Claim is for damages for the nondelivery of the balance. The contract provides, among other things:

"Sellers not liable for nonarrival of any shipment lost in transit at sea or on land or for losses or damages or delays due to causes beyond their control, including in such cases strikes, lockouts, floods, fire, accidents to work where the goods are manufactured, war or insurrection. In addition to these causes, should sellers be delayed or cut off in whole or in part from their supply of raw materials by any other cause or reason, they shall not be liable to buyers for failure to deliver, or delay in delivery of the whole or any part of said merchandise."

Prussiate of soda is a German product, and the importation was to be had from Germany. The contract was entered into after Germany had declared war on Great Britain and at the time when a state of war existed between Germany and other countries. At the time of entering into the contract the defendant had 130,140 pounds of this product on hand in this country, which had been previously imported from Germany. It thereafter received other quantities to the extent of 31,936 pounds. Under 12 contracts it was obligated to deliver 366,872 pounds. Thereafter Great Britain promulgated orders "in council" which in effect were an embargo on this product as well as other products of Germany, and the defendant says it was unable to secure prussiate of soda in Germany thereafter, and asks to be relieved from the contract by reason thereof, invoking the aid of the above-quoted clause of the contract. The defendant, after this embargo, apportioned the prussiate of soda which it was able to secure among its customers to whom it was under contract at the time proportionately, and asks to have its contract construed so as to be relieved from the obligations thereof by reason of this conduct.

The referee has found that the apportionment was not fair as to this plaintiff, and has awarded a small judgment to the plaintiff by reason thereof. In my opinion, the referee has erred in his conclusions of law, and the plaintiff's exceptions to it should be sustained.

[1] The abstract rule of law for performance of contract has been well stated in Cameron Hawn Realty Co. v. Albany, 207 N. Y. 381, 101 N. E. 162, 49 L. R. A. (N. S.) 922, when it was said:

"If what is agreed to be done is possible and lawful, the obligation of performance must be met. Difficulty or improbability of accomplishing the stipu-

lated undertaking will not avail the obligor. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance. The courts will not consider the hardship or the expense or the loss to the one party or the meagerness or the uselessness of the result to the other."

In the recent case of Thaddeus Davids Co. v. Hoffman Co., 97 Misc. Rep. 33, 160 N. Y. Supp. 973, before Judge Lehman in the state Supreme Court, where the clause was found in the contract, "Contingencies beyond your control, fire, strikes, accidents to your work or to your stock or change in the tariff will allow you to cancel this contract or any part of the same," and where it was sought to be relieved of the obligations of the contract by the fact that war broke out in August, 1914, between Germany and Great Britain, the learned court said:

"If the words 'contingencies beyond your control' stood alone, there could be little, if any, doubt that they covered the conditions arising from the state of war beginning on August 1, 1914. It is true that probably these parties did not contemplate the probability or possibility of a world war arising which would interfere with the importation of the products of foreign nations, but the question in this case is not what contingencies did the parties contemplate might arise, but what meaning did they intend to give to the words 'contingencies beyond your control'? And if these words stood alone, they would cover all contingencies arising thereafter beyond the defendant's control which became the proximate cause of the inability of the defendant to comply with its contract."

Judge Whitaker in the same case said:

"I think the use of the phrase 'contingencies beyond your control' was intended to cover all causes which no care, foresight, or acts of the defendant could have controlled or prevented. The mere inclusion of contingencies which were potentially within the power of the defendant to prevent, such as fire, strikes, etc., was not intended by the parties to limit and confine the uncontrollable contingencies simply to a change in the tariff."

In this case the contract was made before the commencement of the war. The same is true of Ducas v. Bayer, 163 N. Y. Supp. 32.

[2] The two clauses in the contract here considered: The first, delays or losses due to causes beyond the seller's control; second, relief because of war or insurrection. Endeavoring to find the intent of the parties by examination of the contract itself it must mean, the parties having entered into the contract after the existence of war between Germany and Great Britain, that the parties intended relief only in case the United States became involved in the war, for if the existence of the war was a relief of the performance of the contract, it was foolhardy to enter into the contract at all. Here both parties deliberately entered into the contract knowing of the dangers arising from the war some months after its existence. They must have recognized —at least they should be held to have recognized—that each belligerent country would endeavor to prevent merchant ships leaving the ports of the respective countries with cargoes of merchandise of any and all character. There was likewise the danger even that Germany itself might forbid the exportation of this product and require it for home consumption. Judge Lehman recently said in the Ducas Case (supra):

"It seems now established that the existence of a state of war between two foreign nations, and interruption of commerce by the belligerents, can constitute no defense to an action upon a contract to be performed in this country."

And Judge Weeks, in Richards & Co. v. Wreschner, 174 App. Div. 484, 156 N. Y. Supp. 1054, said:

"The claim of the defendants that they are excused from performance because of the interference with the source of supply or with the opportunity for shipment by reason of the existence of a state of war between Germany and Belgium, and also because of the subsequent illegality of shipment by reason of the proclamation of the German government prohibiting the exportation of merchandise contracted for, cannot be sustained. It is well settled that impossibility due to a foreign war is no excuse."

But in addition the defendant at the time of entering into this contract had on hand more than sufficient to supply the demands of this plaintiff. Having entered into the contract creating its obligation to perform and with an ability to perform if deliveries were made then, it cannot now be heard to complain that it has sold its product to other buyers and finds itself short of supplies to meet the demands of this plaintiff, even though the demands of this plaintiff might require delivery in installments at subsequent periods during the life of the contract; otherwise the fundamental law governing the performance of all contracts, "the difficulty or improbability of accomplishing the stipulated undertaking will not avail the obligor," would be dispensed with.

If the defendant so wished, it might enter into a contract to supply this product even in the face of an embargo set against the country of its production by a warring nation. It might do so with the hope that in some way ships might pass successfully the detection and confiscation of the cargo by Great Britain. Indeed, it appears from the evidence, and is found by the referee, that some 53,000 pounds were imported during the period of the existence of the war up to the time of the breach of this contract.

Judge Wolverton, in Balfour v. Portland Co. (D. C.) 167 Fed. 1010, where a provision of the carrier's contract exempted it from "loss of damage occasioned by arrest or restraint of princes, rulers or people," had a somewhat similar question before him, and he used this language:

"It can hardly be disputed that the respondent entered into the contract with full knowledge of the existence of war conditions, and with the intention of carrying the flour notwithstanding these conditions. * * * Now, having entered into such a contract with that intent and purpose in view, what is the significance and intendment of the clause referred to? It can hardly be contended that such intendment and signification should be the same as where the contract was made prior to the time that any such war conditions arose, or not in anticipation thereof. If it can bear such a construction, the contract has made it optional with the respondent to carry or not as it might see fit from motives of its own, regardless of the fact that its purpose and intent was to carry, notwithstanding the dangers incident to the traffic or on account of the war. * * *

"Had the charter party been entered into prior to the prevalence of any war conditions affecting Japan and her ports of entry, there could be but little question that the respondent could have legitimately declined to carry the flour."

This contract was breached prior to the United States entering into the war, so questions which might arise by reason thereof under the clause of the contract need not be considered, nor need we consider a situation where there has been an actual confiscation, arrest, or seizure

which might afford a ground of defense for failure to perform the contract because a situation would be created which would be "contingencies beyond the seller's control."

Therefore, finding, as I do, that the defendant has breached the contract and is liable therefor, I shall not consider the question of apportionment as made by the defendant and its claim to be relieved from its nonperformance by reason thereof.

The exceptions to the referee's report will be sustained, and the motion to confirm will be denied.

O'NEIL, Ins. Com'r, v. BIRDSEYE et al.

(District Court, S. D. New York. July 6, 1917.)

No. 113.

1. REMOVAL OF CAUSES ⊂=102—GROUND FOR REMAND—NONRESIDENCE OF PARTIES.
   A suit removed from a state court should be remanded on motion of plaintiff where neither party is a resident of the state.
2. REMOVAL OF CAUSES ⊂=102—GROUNDS FOR REMAND—WANT OF JURISDICTION.
   To sustain jurisdiction of a suit on removal in a district of which neither party is a resident under Judicial Code (Act March 3, 1911, c. 231, § 57, 36 Stat. 1102 [Comp. St. 1916, § 1039]) § 57, on the ground that it is one of a local nature to enforce a claim or lien on property in the district, the bill must be considered as a whole, and if any substantial part of the relief sought could not be afforded in a suit in rem, without personal service on the defendant, a motion to remand must be granted.
3. REMOVAL OF CAUSES ⊂=49(3)—DIVERSITY OF CITIZENSHIP—SEPARABLE CONTROVERSY.
   A suit in equity in which it is alleged that the property sought to be recovered, although held in severalty by the defendants, was obtained through a fraudulent conspiracy between them, does not involve a separable controversy, and is not removable by one defendant alone.

In Equity. Suit by J. Denny O'Neil, Insurance Commissioner of the Commonwealth of Pennsylvania, as receiver of the Pittsburgh Life & Trust Company, against Clarence F. Birdseye and others. On motion to remand to state court. Motion granted.

Sullivan & Cromwell, of New York City, for plaintiff.

Jerome, Rand & Kresel, of New York City, for defendant Birdseye.

MANTON, District Judge. This case was originally started in the state court by a citizen of Pennsylvania, as insurance commissioner of the commonwealth of Pennsylvania, and as receiver of the Pittsburgh Life & Trust Company, against Clarence F. Birdseye, a citizen of New Jersey, and other defendants, some of whom are residents and citizens of New York. Birdseye alone moves the cause here.

The plaintiff objects, and asks to remand to the state court on the grounds: First, that neither plaintiff nor defendant Birdseye reside in the Southern district of New York; second, that, the re-

moval being sought on the ground of diversity of citizenship, all the defendants should have joined in the application to remove; and, third, that there is no diversity of citizenship, inasmuch as the defendants Washington Life Insurance Company and Jesse S. Phillips, insurance commissioner of the state of New York, both citizens of New York, are united in interest in this controversy with the plaintiff as against all the other defendants, some or most of whom are citizens of New York, and there are therefore citizens of New York on both sides of the controversy.

[1, 2] Neither the plaintiff nor the removing defendant reside within this district, and under the rule laid down in Doherty v. Smith (D. C.) 233 Fed. 132, this court is committed to the rule of law that a motion to remand should be granted because of the nonresidence within this district of the plaintiff or defendant. Judge Hand, in the authority above cited, reviewed the authorities with considerable care, and I cannot find that the rule laid down in the case of Doherty v. Smith has been departed from in this district. But the defendant Birdseye claims that there is another equally valid reason for exercising federal jurisdiction, to wit, that the suit, among other things, was brought to enforce a claim to or to remove an incumbrance or cloud upon the title to real and personal property within the Southern district of New York.

Section 57 of the Judicial Code (Comp. St. 1916, § 1039) provides:

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur. * * * In case such absent defendant shall not appear, plead, answer or demur within the time so limited. * * * it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. * * *"

The defendant says that in this suit is the charge that the defendants Birdseye and Montgomery fraudulently conspired to and did divert from the defendant Pittsburgh Life & Trust Company two parcels of real property, both situated within this district, to wit, the St. James Building, 1129–1137 Broadway, and the Washington Life Building, 139 Broadway, and thereafter diverted from said Pittsburgh Life & Trust Company, as consideration for a mortgage given upon said property, about $1,900,000, representing the proceeds and securities of said Pittsburgh Life & Trust Company deposited in the vaults of the Standard Safe Deposit Company in the city of New York. Among the forms of relief demanded one is that the $1,900,000 alleged to be diverted be impressed with a trust in favor of the plaintiff, and that the defendants, other than the defendant Phillips, be directed to transfer and deliver over to the plaintiff the same and to deliver in connec-

tion therewith such bills of sale, deeds, releases, and assignments and other instruments as may be necessary or proper in the premises; that the buildings, both within the district, be impressed with a trust in favor of the plaintiff; and that the defendants, other than Phillips and the Washington Life Insurance Company, be directed to transfer and convey the same to the plaintiff and to execute and deliver to plaintiff all deeds, releases, assignments, or other instruments which may be necessary or proper to convey and transfer the same to the plaintiff free and clear of liens thereon or outstanding interest thereon, as far as may be.

Looking solely to the complaint, it is claimed that it appears upon the face thereof that this is a claim to, and to remove an incumbrance or cloud upon the title of both real and personal property within this district, and that therefore the case is within section 57 of the Judicial Code. In support of this position counsel cites Consolidated Interstate Mining Co. v. Calahan Mining Co. (D. C.) 228 Fed. 528. There stockholders brought suit in a state court against a foreign mining corporation whose property was situated within the state and federal district, alleging that the acting directors of the corporation had been improperly elected, and seeking to take the property of the company out of their control through the appointment of a receiver. After removal to the federal court, plaintiff persisted in prosecuting it in the state court, and an ancillary proceeding was brought for an injunction against its further prosecution in the state court. The injunction was granted, the court saying:

"If, therefore, the issues between the plaintiffs and the defendant affects real or personal property within this district, and involves the status thereof in such a manner that, if the defendant could not be found in the district, it could be proceeded against upon constructive service, then the objection to the venue was without merit."

Therefore could the plaintiff obtain complete relief without obtaining actual service upon the defendant Birdseye? Reading the complaint as a whole, what the plaintiff really seeks is to recover $1,900,000, which recovery might be independent of the property within this district, upon the ground that this money was obtained through fraud and conspiracy upon the Pittsburgh Life & Insurance Company. Could the plaintiff do this without actual service upon the defendant Birdseye, who lives in New Jersey? What constructive service would be sufficient? The plaintiff could not obtain the relief which he seeks without getting actual service upon the defendant Birdseye; so therefore his judgment, if he obtained one, so far as the property is concerned, would be in rem, and not in personam. The complaint alleged, in seeking relief, that Montgomery and his wife have on deposit to their credit $100,000 at the Commercial Trust Company in New York, Birdseye $7,500 in the Lawyers' Title & Trust Company, and $165,500 is alleged to have been withdrawn by Birdseye and to be held by him or unknown persons for his benefit. $180,000 is represented by a certified check to Birdseye's order, which he now holds, and it is urged that as to these sums this court would not have been able to grant relief without obtaining personal jurisdiction of Birdseye, and so, if the suit was brought originally in this court, Birdseye

could not have been compelled to appear and disclose what he had done with this money or compelled, by a personal decree, to account for it. In other words, there can be no relief in rem where property is not within the reach of the court, and if the plaintiff is not afforded the relief sought in the forum where he first sues, he should not be deprived of a part of that relief because section 57 of the Judicial Code permits the removal of the case when the title to real property is involved. Further, the complaint alleged that $120,000 spent went to the Commercial Trust Company, a New York corporation, and the court could order the return of this sum for this defendant in the district, and a personal judgment could be rendered against him; but it is alleged $313,360 of the money went to Pittsburgh to make a payment of $30 per share to the stockholders of the Pittsburgh Life & Trust Company. This stock is not located in the district, and if the action had been commenced originally in this court and constructive service obtained against Birdseye, there could be no decree for the return of that money, nor could that stock be subjected to a trust in plaintiff's favor to the extent of the moneys so applied. The same is true of the $1,100,000 money taken and paid for bonds of the Dare Lumber Company. In other words, the New York real estate is not the only property involved, and while the relief as to that property might be complete, still what the plaintiff set out to recover as alleged in its complaint, when it instituted the action in the state court, he is being deprived of by removal of the action to the federal court in the absence of actual service upon Birdseye.

The court is obliged to look at the complaint as a whole, and there to determine whether the court can grant complete relief in this one action in considering the right of removal under section 57 of the Judicial Code. While the court might have the power to dispose of any question of title in the Washington Life and the St. James Buildings, without the actual presence of Birdseye, it could not grant full and complete relief without rendering a personal judgment or decree against Birdseye. Therefore the action, taken as a whole, is not one which could be determined by this court in the absence of Birdseye, even though he might have been served by publication under section 57, and it follows that the action, therefore, is not one which could have been brought in this district, and cannot be removed to this district against plaintiff's objection. The following authorities support this view: Arkansas v. K. & T. Coal Co., 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; Joy v. St. Louis, 201 U. S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776; Wabash Ry. Co. v. Westside Belt Ry. Co. (D. C.) 235 Fed. 645.

[3] Plaintiff objects further to the removal of the cause upon the ground that the defendant Birdseye has failed to have other defendants join in this application. This is a valid objection unless it can be said that the cause of action is separable. McNaul v. West Indian Securities Corp. (C. C.) 178 Fed. 308; Miller v. Clifford, 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49; Westside Ry. Co. v. California (D. C.) 202 Fed. 331.

Counsel for the defendant Birdseye says it is a separable controversy. The issue in this action seems to be whether Clarence Birdseye,

Kellogg Birdseye, and George F. Montgomery unlawfully conspired to loot the Pittsburgh Life & Trust Company, and did carry such conspiracy into effect; did obtain from the treasurer of that company the sum of $1,900,000.

The action is in equity, in which it became necessary to bring in other defendants so as to obtain the equitable relief sought. I cannot distinguish this case from Baillie v. Backus (D. C.) 230 Fed. 711, where it is held that one conspirator alone could not remove claiming a separable controversy. I think this objection to the removal is valid.

I shall not consider the fourth objection urged by plaintiff, that there is no real diversity of citizenship in this case, in view of the fact that the defendants Phillips and the Washington Life Insurance Company are, or should in point of fact be, plaintiffs. My disposition of the first point made by the plaintiff disposes of this.

The motion to remand will therefore be granted.

DUNCAN v. UNITED STEEL CO.

(District Court, N. D. Ohio, E. D. August 24, 1917.)

No. 25.

CARRIERS ⊂⊃196—FREIGHT—LIABILITY OF CONSIGNEE.

Under an arrangement between them by which a railroad company delivered all cars of goods consigned to a manufacturing company on the latter's tracks and presented bills monthly for freight due thereon, such delivery and acceptance of a car raises an implied promise on the part of the consignee to pay the freight thereon if unpaid, and it is not released from such liability as matter of law by the fact that the consignor is also liable for the freight either under the law or by express promise to pay it.

At Law. Action by W. M. Duncan, as receiver of the Wheeling & Lake Erie Railroad Company, against the United Steel Company. On demurrer to petition. Overruled.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for plaintiff.

Lynch, Day, Fimple & Lynch, of Canton, Ohio, for defendant.

WESTENHAVER, District Judge. This cause is before me on a general demurrer based on the ground that the petition does not state facts sufficient to constitute a cause of action.

The controlling facts are as follows:

On or about October 27, 1911, the Chicago Scrap Iron Company delivered to the Belt Railway Company of Chicago, a common carrier doing business in that city, a carload of scrap iron consigned to the defendant at Canton, Ohio. A bill of lading was issued by the Belt Railway Company and signed by it and the consignor. This bill of lading was in form approved by the Interstate Commerce Commission by Order No. 787, of date of June 27, 1908. The Chicago Scrap Iron Company appears therein as the consignor and the defendant as the consignee. One of the conditions therein contained is as follows:

"The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required shall pay the same before delivery."

On the face of this bill of lading was also printed these words:

"If charges are to be prepaid write or stamp here to be prepaid."

The bill of lading in the blank space left following these words contained written thereon the word "Prepaid." The bill of lading also had printed upon it the words:

"Received $——— to apply in prepayment of the charges on the property described hereon. ———, Agent or Cashier, per ———. [The signature here acknowledges only the amount prepaid.]"

No amount was filled in the blank space, and no signature of agent or cashier or any other person was signed thereto.

The freight charges were not in fact prepaid. The Belt Railway Company, being a terminal switching railway, delivered the car to the Wabash Railway Company at Chicago. The latter company, according to custom, upon receipt of the car was to collect the freight, but when received the scrap iron company had become insolvent, and collection of the freight from it was not possible. The Wabash Railway Company thereupon changed the waybilling so as to make the shipment a collect one, and forwarded the car by the line of railway company of which the plaintiff is receiver to the defendant. The Wabash Railway Company failed to notify either the plaintiff or the defendant that it had not collected the freight from the consignor, or of this change in the waybilling. The plaintiff received the car with a waybill showing that the freight was not to be prepaid, but was to be collected upon delivery, and transported the car to Canton, Ohio, and there delivered it to the defendant without collecting the freight charges before making delivery.

A credit arrangement between the plaintiff and defendant was then in existence whereby plaintiff delivered on an industrial side track maintained by defendant all incoming freight without requiring payment of charges before delivery. This applied uniformly to prepaid shipments as well as to shipments upon which freight was to be collected before delivery. The practice was to present in due course of business bills to defendant for all freight charges on shipments thus delivered; whereupon defendant would make payment.

In this case this course was pursued, and, the car having been delivered to defendant, a statement of freight charges was sent to defendant on or about November 13, 1911. The latter by letter dated November 13, 1911, notified the plaintiff that the car of scrap iron had been purchased by the defendant and had been shipped to it under a bill of lading showing the freight charges were prepaid or to be prepaid. The petition avers that thereupon the defendant refused to pay the freight charges, and paid its indebtedness to the seller upon the basis that the freight charges had been prepaid.

Upon the foregoing facts I am of opinion that this demurrer should be overruled.

It is settled law that the shipper or consignor is, on the facts above stated, under a contract obligation to pay the freight charges, and that this obligation may be enforced regardless of any promise contained in the bill of lading requiring the consignee to pay, or regardless of any new obligation assumed by the consignee to pay the same, no

amounting to an actual payment. 10 Corpus Juris, 445, 446; Portland Flouring Mills Co. v. British & Marine Insurance Co., 130 Fed. 860, 65 C. C. A. 344; Coal & Coke Railway Co. v. Buckhannon River Coal & Coke Co. (W. Va.) 87 S. E. 376, L. R. A. 1917A, 663; Wooster v. Tarr, 8 Allen (Mass.) 278, 85 Am. Dec. 707; Atlas S. S. Co. v. Colombian Land Co., 102 Fed. 358, 42 C. C. A. 398 (2 C. C. A.); 2 Hutch. on Carriers, § 810.

The law also undoubtedly is that on the facts above pleaded (eliminating for the present the facts as to the agreement for prepayment) a promise is implied against the consignee to pay the freight charges. The consignee is presumptively the owner of the goods while in transit, and is responsible as between the consignee and consignor for any loss or damage that may be sustained during transportation. The acceptance by the consignee of goods shipped on a bill of lading containing a provision that the owner or consignee is to pay the freight raises against the consignee an implied promise on his part to pay the freight. If a bill of lading is silent as to the person to make payment of freight, a delivery to and an acceptance by the consignee is sufficient under some conditions to warrant a finding that the carrier was looking to the consignee for payment, and will also raise an implied promise as against the consignee for the payment thereof.

In the present case the credit arrangement between the plaintiff and defendant under which freight was delivered and the freight charges were thereafter billed and paid creates a situation from which a finding would be justified of an implied promise to pay such freight charges. 10 Corpus Juris, 445, 446; 2 Hutch. on Carriers, 799, 806–810; Union Pac. Ry. Co. v. Am. Smelting Co., 202 Fed. 720, 121 C. C. A. 182 (9 C. C. A.); Penn. Ry. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127; Elwell v. Skiddy, 77 N. Y. 282; Central Ry. Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575; Old Colony Ry. Co. v. Wilder, 137 Mass. 536.

If I am right in holding that an implied promise of the consignee to pay freight is stated in the petition, then I cannot say as a matter of law that this promise is extinguished, or that such a promise does not arise because of the facts stated touching the shippers' agreement to prepay freight. The facts pleaded and appearing on the bill of lading show, at most, only a promise on the part of the consignor to pay the freight. The consignor's express promise, it seems to me, can have no greater force and effect than the consignor's legal liability to pay the freight, which liability is always present in a shipping contract, unless expressly waived. In all such cases the consignee's promise is implied, and may be enforced notwithstanding the primary liability of the consignor still exists. The two promises are independent of each other, and the carrier may obtain both and sue on either, as is most convenient to it. Such is the ordinary rule, and I cannot on the facts pleaded hold as a proposition of law that the addition thereto of an express promise to prepay by the consignor calls for a different conclusion.

Payment by the consignor would, of course, extinguish all liability for the freight charges. The giving, however, of a note or of a check therefor, which is afterwards dishonored, may or may not be a pay-

ment, depending upon the express understanding of the parties at the time the note or check was given or accepted. If nothing is agreed to in that respect, the acceptance of a note or check will not be regarded as a payment and will not extinguish the debtor's original obligation. Atlas S. S. Co. v. Columbian Land Co., 102 Fed. 358, 42 C. C. A. 398 (2 C. C. A.); The Kimball, 3 Wall. 37, 18 L. Ed. 50; Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125; 3 Page on Contracts, §§ 1397, 1398. Nor on the facts pleaded can it be said as a proposition of law that an estoppel arises against the plaintiff under the principles announced in Central Ry. Co. v. MacCartney, 68 N. J. Law, 165, 52 Atl. 575.

If the bill of lading had recited that all freight charges had been prepaid, and the defendant had made payment in full to the seller relying on this recital, and without knowing or having knowledge of the facts imputing to it notice that the recital of payment was erroneous, the plaintiff might then be estopped to assert the contrary; for undoubtedly the plaintiff must accept responsibility for the act both of the Belt Railway Company and of the Wabash Railway Company. The bill of lading, however, shows at most an agreement only to pay the freight, not that it had been paid. It may even be true that a jury would be justified in finding that the bill of lading, considered in connection with the other facts, shows that the freight was not paid, and that defendant was thereby charged with knowledge that it was not paid. Nor can it be said, as a proposition of law, that on the facts pleaded the defendant made payment to the seller in ignorance of the fact that the freight was still owing to the carrier. The facts are not sufficiently developed to justify at this time a conclusive finding either way, but a finding by a jury against the defendant on this point should not, it seems to me, be disturbed by the court.

The demurrer will be overruled. Leave will be given defendant to answer within two weeks. Any exception may be noted to this ruling.

THE SIF. THE COLERAINE. THE NELLIE TRACY.

(District Court, E. D. New York. August 1, 1917.)

COLLISION ⇐95(4)—STEAMSHIP AND MEETING TOW.

A collision in the Bay Ridge Channel at night between an outgoing steamship and barges in a meeting tow in which two barges were sunk and others injured *held*, on the evidence, due solely to the fault of steamship in continuing at too great speed after the presence of vessels ahead whose positions could not be made out was known, requiring careful navigation, and also in failing to have a competent lookout at the time. The facts that some of the barges did not carry forward lights as required by the rules or that the tow was on the wrong side of the narrow channel *held* not to have contributed to the collision.

In Admiralty. Suit for collision by Charles E. McWilliams against the steamer Sif and the tugs Coleraine and Nellie Tracy, Thomas Tracy, claimant, impleaded. Decree for libelants against the Sif.

Macklin, Brown & Purdy, of New York City, for George M. Morrell Co. and others, owners of the Grace & Edith, A. J. & J. J. McCollum, Inc., and others, owners of the J. J. McAllister, Peter Aldrich, and others, owners of the Mamie Aldrich.

Park & Mattison, of New York City, for John Wilson, owner of the Arthur H.

Foley & Martin, of New York City, for Charles E. McWilliams, owner of the Hudson, and for Thomas Tracy, owner of the Nellie Tracy.

William C. Foster, of New York City, for M. & J. Tracy, owners of the Kirby.

George V. A. McCloskey, of New York City, for tug Coleraine.

Haight, Sandford & Smith, of New York City, for the Sif.

CHATFIELD, District Judge. This action has been brought for injuries to the various barges of a tow coming up the Bay Ridge Channel on the evening of February 3, 1915, in a collision with the single-screw ocean-going steamer Sif. The Sif in turn brought into the case the tug Coleraine, which had the boats in tow, and the tug Nellie Tracy, which was present as a helper. The day had been snowy, and the Coleraine left St. George before 5 p. m., with six barges on two hawsers at least 250 feet long. The ebb tide was strong, and the captain decided to cross from Robbins Reef to the Bay Ridge Channel. In so doing the boats were carried down around the Owl's Head buoy, and then started up, along the shoal anchorage ground below Governors Island, on the west side of the deep water channel. No snow had fallen since the boats left St. George, but it had become dark when at about slack tide and opposite Sixtieth street the steamer Sif struck the boat Aldrich, running over her, cutting her sides in, and causing her to sink at once. The steamer continued into the next boat, the McAllister, sinking her, and shoving the other boats together so that they received injuries for which they filed libels which were consolidated in this action.

Before the tow rounded the Owl's Head buoy at the lower end of the Bay Ridge Channel a seventh boat had been brought from St. George by the tug Nellie Tracy and put at the right of the second tier of the tow.

The port hawser of the Coleraine ran to the Hudson and the starboard hawser to the McAllister. These barges were connected by breast lines. On the right or starboard side of the McAllister was the boat Mamie Aldrich, with a load of hard coal destined for the East River. This boat was longer than the others, and was fastened by breast lines and by a spring tow line to the McAllister. The captain of the Aldrich at some time on the trip up the bay lengthened out this spring line so that his boat could sag back and be drawn in at the bow closer to the McAllister. She was a Schuylkill model, and her bow could not be drawn in close to the barge alongside, without carrying the stern away at the same time.

In the second tier on the port side (with lines to the Hudson in front) was the barge Kirby. Back of the McAllister, and on the star-

board side of the Kirby, was the barge Grace & Edith. In the third tier, back of the Grace & Edith, was the barge Arthur H.

The hawser boats and the barges Kirby and Grace & Edith were destined for points up the North River, while the barges Aldrich and Arthur H. were to be taken out of the tow, at a convenient point, to go through the Buttermilk Channel. The Nellie Tracy helped with the towing while crossing the Bay between Robbins Reef Light and the southern limit of the anchorage ground below Governors Island.

A third tug, the Walter Tracy, started from St. George after the others with a barge destined for 43d street, South Brooklyn.

The tow was proceeding directly up the channel and apparently about 800 feet from the Brooklyn shore, as shown by the place where the sunken boats were found. Just before the collision, the tug Conway had gone ahead up the channel and met the Sif, starboard to starboard, although none of the witnesses upon the Sif remember passing this vessel. The Sif was on a general course down the channel, to the west of the middle. Her engines had been running at full speed for a period of five minutes. They then ran at half speed for three minutes, and after being reversed for two minutes, the boat still had momentum sufficient to send her through the two canal boats in the manner which has been described. While running at slow speed she covered from half to three-quarters of a mile, according to her own witnesses, in three minutes. She could not, therefore, have been moving as slowly as four miles an hour, as is estimated by the pilot. She passed the Coleraine sufficiently to starboard so that neither boat exchanged signals. The captain and pilot of the Sif observed the green light of the Coleraine with the towing lights, but were not certain whether the tow was alongside or behind. They did not notice that the Coleraine had three white lights, indicating a tow of more than 600 feet in length. The portion of the tow which affected the navigation of the Sif was less than 600 feet in length, however, allowing 85 feet for the Coleraine, 250 feet for the hawsers, and 110 feet for each tier of boats except for the single boat tailing on behind. The green light of the Coleraine bore about two points on the starboard bow of the Sif, and the captain and the pilot of the Sif made out with difficulty the white towing lights of the Coleraine. This furnishes some evidence as to the sufficiency of the lantern lights upon the barges. They are not to be condemned as insufficient if the towing lights of the tug were not plainly visible at that distance and under the conditions which existed.

At about this time, according to the witnesses on the Sif, a vessel showing a red light, with two white towing lights, was also observed further away and bearing off from the port bow of the Sif. Dark objects were then observed from two points on the port bow to four points on the starboard bow. As the Sif passed the Coleraine, the engines were reversed, which swung the bow to starboard, and the vessel swung around seven points so as to go nearly broadside into the Aldrich, which was being towed at a slight angle. The Aldrich and the McAllister sank 300 feet apart, while the Hudson and Kirby continued after the Coleraine, the breast lines between them and the other boats parting. The Arthur H. and the Grace & Edith were damaged,

but were freed from the sinking boats and remained fastened to the Lehigh and Wilkes-Barre boat, while the Nellie Tracy, which had blown an alarm and shouted to the captains of the barges, when the Sif made the turn directly toward the Aldrich, cast off its lines, and went around behind the Arthur H. coming up against its port side. Thus the Nellie Tracy with these three barges swung alongside the Sif, and, according to the witnesses upon the Sif, these barges had no lights in view. The witnesses upon the Sif testify that the Hudson and the Kirby, then proceeding up the river with the Coleraine, showed small white lights, and these witnesses identify these lights as the small lights which they had seen just before the collision on the dark objects which they then assumed constituted the tow.

The Sif testifies that it blew a one-whistle signal to the tug showing the red light and the two white towing lights, and that this signal was not answered. One of the captains of the barges, all of whom were compelled to flee for their lives, and who had barely time to climb upon the other scows, testifies that he heard a two-whistle signal exchanged with some boat, which appeared to be the Sif, then turning directly toward the Aldrich, and this signal corresponds to that testified to by the captain of the Conway above mentioned.

The Sif, after giving a one-whistle signal, which was heard by none of the other boats, ported her helm, with the evident idea of passing behind the Coleraine's tow, wherever that might be, and to the westward of the tug showing the red light.

The witnesses for the Sif, as well as the men upon all the barges upon the Coleraine, and upon the Nellie Tracy, testify that another tug, headed across toward Brooklyn, some distance back of the Nellie Tracy, showing a red light, with a white towing light, and with low white lights to the west or behind the red light of this tug, was seen or was visible just before the Sif turned toward the Aldrich.

The testimony also shows that the Walter Tracy, having a light tow, and being able to go across the anchorage ground, had overtaken the Coleraine and passed just before the collision directly across the wake of the Coleraine's tow. The Walter Tracy's captain was in doubt whether to follow the Coleraine and pass under the stern of the Sif which he observed coming down, starboard to starboard, or to go across her bow and pass her port to port. When the Sif turned to starboard he went on across her bow. The Walter Tracy reached a point at the time of the collision where its captain thought it better to put his barge in at Fifty-Sixth street and then go to the assistance of the fleet, than to turn back to their rescue with the barge in tow. He did so, picked up the Kirby, and followed the Nellie Tracy with the other barges which were still afloat to the New Jersey flats, where the injured barges were beached.

It is evident that the Walter Tracy was the boat observed by the witnesses upon the Sif, showing the red light, when the Sif ported her helm and attempted to run behind the Coleraine's bow. The Sif quickly reached a point where she was dead ahead of the Nellie Tracy, and within such distance that the red light of the Tracy would come into view, and particularly so if the Tracy cast loose and swung around to avoid collision.

By this time the Walter Tracy had gotten across and her light could plainly be distinguished from that of the Nellie Tracy, and confusion between the two could no longer be made. The Sif had no lookout from the time the Coleraine was observed off the Sif's starboard bow until just before the collision, her lookout having gone below deck and left in his place a carpenter who could not talk English. This carpenter attempted to communicate something, but the captain and the pilot of the Sif were so busy trying to make out the location of the tow of the Coleraine that the presence of this man as lookout served no purpose. The bridge is a considerable distance from the bow of the Sif, and under the circumstances the absence of a lookout was reprehensible, although the lookout's presence might not have prevented the collision if he discerned nothing more than the captain and the Sandy Hook pilot were able to observe, even with their marine glasses. The City of Augusta, 80 Fed. 297, 25 C. C. A. 430.

It is unnecessary to go into the testimony of the various men upon the scows. They all corroborated each other with the exception of one man who testified that the Nellie Tracy was around at the stern of the Arthur H. during the voyage. This was manifestly impossible and contrary to the Sif's own testimony, while one of the other captains placed the Walter Tracy at a position much closer to the tow than it evidently occupied before crossing astern.

Two faults are charged by the Sif. The first is the alleged lack of sufficient lights upon the scows. The rule governing lights in marine waters requires a white light forward on the outside boat of each tier and a white light aft on the outside boats of the stern or last tier. These lights are to be of sufficient strength to be visible at a distance of at least five miles. There were apparently lights upon the barges in this tow. The bows and sterns of the barges were close together, and a light at the stern of one barge would give the same warning as a light upon the bow of the barge immediately following. In order to comply with the rule, however, there should have been lights at the forward end of the outside boats in the first tier. If the testimony showed that the lack of these two lights contributed in any way to the collision, it would be proper to find that the usual disregard for this rule as to the placing of lights should not be overlooked. The Wenona, 19 Wall. 41, 22 L. Ed. 52. But in the present case the difficulty with the Sif was in making out the lights of the boats at all, not in distinguishing which were which. The towing lights of the Nellie Tracy were seen but dimly. The lights of tow of the Walter Tracy were not seen at all at the outset, although she was but a short distance away, and conditions must have been bad as the Sandy Hook pilot, an experienced and honest man, could not see with sufficient clearness to know just what the situation was when half a mile away. Up to this time the Sif had been going with the engines at full speed. Both her captain and the pilot knew that there were tows requiring careful navigation, which, according to her own testimony, did not answer a one-whistle signal, and which in a very short time proved to be a part of the tow which the Sif had voluntarily undertaken to pass starboard to starboard without giving any signals at all.

Under these circumstances it was negligence to continue until so

close that reversing the engines for two minutes would not prevent cutting through two loaded barges. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. In this connection the absence of the lookout at this precise moment has some significance in that he might have signaled to reverse sooner than this appeared to be necessary to the pilot and captain.

The other fault alleged by the Sif is the presence of the Coleraine's tow on the wrong side of the channel. The Bay Ridge Channel is a narrow channel, requiring navigation to the right of the center. La Bretagne, 179 Fed. 286, 102 C. C. A. 651. If the presence of the tow on the wrong side of the channel had entered into the situation and had been in any way the proximate cause of the collision, the Coleraine would have been in fault. She evidently chose this side of the channel for her own purposes, but the Sif, when it went down this channel, passing boats starboard to starboard, accepted the actual position of the tow, and was bound to navigate accordingly.

The Nellie Tracy could not have shown her red light to the Sif unless the Nellie Tracy was improperly maintaining her position alongside the tow. The presence of the Coleraine's tow upon the wrong side of the channel, if coupled with the maintenance of a second towboat in such position as to show conflicting lights, would plainly be a sufficient ground of liability, if a boat were confused thereby. This was the evident conclusion of the captain and pilot of the Sif, to which they were led by their observation of the red light of the Walter Tracy, and their ultimate observation of the red light of the Nellie Tracy as she sought to get away from the scene of collision. The witnesses upon the Sif talk about a green light some distance ahead, which they identify as the light of the Coleraine, but Lune, the man who left his post as lookout, seems to have seen before leaving a green light in the position of the Nellie Tracy. He thus corroborates the witnesses of the tow, and it must be held upon the whole record that the Sif does not show sufficiently to justify a finding that the Nellie Tracy was showing a red light before the Sif reached a point where collision was imminent. Under either circumstance it was the Sif's duty to stop, to ascertain the conditions which were confronting her, and to avoid the danger, unless the positions of the boats became apparent and whistle signals were successful in initiating navigation which would evidently be safe.

There should be a decree for each of the various libelants, with a separate bill of costs to each party represented by a separate proctor. The petition for limitation of liability will be granted to the extent of relieving the Coleraine from liability, but without costs, as the petition seems unnecessary in advance of any finding of liability.

P. DOUGHERTY CO. v. BADER COAL CO.

(District Court, D. Massachusetts. January 27, 1917.)

No. 1416.

1. SHIPPING ⟸54—CHARTERS—LIABILITY FOR INJURY TO VESSEL—GUARANTY OF DEPTH AT DOCK.
A guaranty in the charter party of a barge of a certain depth of water at the dock where she was required to discharge extends also to the surrounding water which would naturally be traversed or used by a vessel of her dimensions in discharging there or the use of which in the course of discharging should reasonably have been anticipated.

2. SHIPPING ⟸54—CHARTER—LIABILITY FOR INJURY TO VESSEL.
A charter party of a barge to carry a cargo of coal to be discharged at a certain dock by the charterer guaranteed 12 feet of water at the dock. The barge was too long to be discharged at the wharf in the ordinary manner, and it was necessary to turn her to reach the hatches at one end, and in doing so she stranded and was injured, although her draft was less than 12 feet. *Held*, that the charterer was bound to anticipate the probable necessity of such turning, and that the guaranty of depth applied to the water necessarily used in making the maneuver, and that, being charged through its consignee as its agent with the duty of handling the vessel in discharging, it was liable for the injury, although the master took charge of the movement.

In Admiralty. Suit by the P. Dougherty Company against the Bader Coal Company. Decree for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for plaintiff.

Berry & Bucknam, of Boston, Mass., for defendant.

MORTON, District Judge. This is a libel by the owner of a barge against the charterer to recover damages for injuries received by the barge through grounding at or near the dock of the Augusta State Hospital, at Augusta, Me. The facts are as follows:

The Dougherty Company owner of the barge Maine, chartered her to the Bader Coal Company, to take a cargo of coal from Norfolk, Va., "to alongside dock of the Augusta State Hospital, 12 feet of water guaranteed, Augusta, Me." The owner was to do the towing to Parkers Flats, near the mouth of the river, above which point it was to be done by the charterer. The barge was duly loaded at Norfolk, and the voyage was completed to Augusta. The discharging was to be done by the charterer or its consignees or representatives.

When the barge was being placed in the dock at high water, about 1 p. m. on Monday, her stern grounded 5 or 6 feet out, and she could not be got in any further. She was then drawing about 4 inches over 12 feet. The discharging apparatus was shifted slightly to reach her, and discharge was commenced from the rear hatch. Enough coal was taken out that afternoon so that her draft was reduced to 12 feet or less. On the high tide that night she floated and was hauled in snug to the wharf. It does not appear that she suffered any damage from this grounding. On the following low tide the rudder grounded on a rock and was forced up, doing some damage.

The next forenoon (Tuesday) the discharge was continued, and the rear hatch was cleared. It then became necessary to discharge from the forward hatch; and in order to get at it with the stationary discharging apparatus with which the dock was equipped, it became necessary to change the position of the barge. It was the duty of the charterer (or of the consignee which stood in its place) to make this change. Hastorf v. Moore (D. C.) 92 Fed. 398; Thompson v. Winslow (D. C.) 128 Fed. 73; Id., 134 Fed. 546, 67 C. C. A. 470 (C. C. A. 1st Cir.). The representative of the consignee proposed to do so by hauling the barge back along the wharf. This would have been the proper method if there had been good water for a sufficient distance astern of the barge as she then lay. The dock was, however, too short for the barge to be so moved at it. She was much the largest vessel that had ever been there and was too long to be properly accommodated. Obviously this was something for which the owner of the barge was not in any way responsible. Her master objected to hauling her back, saying that such a movement would bring her stern over rocks on which she would rest at low tide and by which she would be injured. He declined to allow it to be done; and in this he was clearly right.

The only other way to get at the coal in the forward hatch with the discharging apparatus was to turn the barge around; and the best way to do that was to get tugs and have them turn her. There were no tugs at hand, and this method would have involved expense and delay for the consignee. In order to avoid it, the consignee's representative proposed to swing out the bow of the barge, which was pointing up river, until it caught the current, and then let it swing around downstream, holding the stern against the wharf. The rail of the barge was above the top of the wharf, and her master again objected, saying that the rudder of the barge would be forced hard against the wharf and would be broken. In this also he was right.

The details as to what next occurred are much in dispute, and the testimony cannot be reconciled; but I think, and I find, that it was substantially as follows: A discussion took place between the consignee's representative and the master of the barge as to how she should be turned. The master expressed his opinion that, if she was to be turned without tugs, the way to do it was to pull her stern out and around upstream. The consignee's representative finally said, in substance: "Go ahead and do it in your own way. We will let you have our men." The master testifies that the consignee's representative said he would take the responsibility for any injury to the vessel. The consignee's representative denies this. He testifies, and is corroborated by some of his workmen, that he said the master was to take the responsibility, and the master agreed to do so, which the master denies. The change of position was nothing which the barge was interested in having done. It devolved upon the charterer, or the consignee, to get the cargo out of her in a proper way within the lay days, or to pay demurrage. She was adequately protected by the provision for demurrage in the charter party. There was no valid reason for her master to assume responsibility for injury and little likelihood that he would do so, even if, which I doubt, he had

authority to bind the vessel by such an agreement in the absence of any necessity therefor. The master was informed about rocks astern of the barge as she lay in the dock, and there was undoubtedly talk about them. It is possible that some of the witnesses who testified to having overheard warnings given him as to obstructions out in the river were mistaken as to what was referred to in the conversations, parts only of which they claim to have overheard. The evidence fails to satisfy me either that the master was warned or knew about obstructions out in the river before the accident or that he, or the consignee's representative, explicitly assumed responsibility for injuries which might be received by the barge in the effort to turn her without tugs.

Following the talks referred to, an attempt was made to turn the barge around by swinging her stern upstream. The master was in command of this undertaking, the consignee's men assisting in it under his orders. When the barge was well out into the river, control of her was lost, she swung back, grounded, and lay out in the river over two low tides. The effort to swing her around was abandoned, and tugs were sent for. They arrived the next day (Wednesday), completed the turning, and replaced the barge alongside the wharf. Thereafter the discharge was accomplished, apparently, by hauling the barge backward and forward along the wharf. After the completion of the discharge, the barge was found to be seriously injured by grounding.

The minimum depth of the water in and near the dock while the Maine was there cannot be exactly determined. An elaborately prepared chart has been put in evidence by the respondent, giving the depth in 10-foot squares. But it is to be noted, in the first place, that the depths given on this chart refer to mean low water, while there is uncontradicted evidence that at this time there was an unusually low run of tides, and, in the second place, that the figures refer to a height of the river (aside from the tide) about 2 feet greater than probably then existed. The depths shown on the chart appear, therefore, to be at least two feet too much; how much more than two feet is uncertain. Making these corrections, it is apparent from the chart that there was not the guaranteed depth of water at the dock, and that the barge must have grounded there, as her master says she did, during every low tide, until the discharge was pretty well advanced. It is the contention of the libelants that the major injuries were received in this way. It is the contention of the respondent that they were occasioned by the turning in the river. The libelant contends that the respondent's chart shows that there was nothing in the river on which the barge could have stranded, and that she did not strand there. But the chart was made by vertical soundings only; and it was entirely possible that rocks not of much area might not be detected or shown on it. Something certainly happened which caused the parties to abandon the attempt to swing the barge around. No reason has been suggested except that she grounded. There is testimony by disinterested and apparently accurate observers that she clearly appeared to be aground in the river. I find that she did ground and lie there substantially as claimed by the respondent.

It is obvious that, if a loaded barge grounded at high water on a detached rock projecting above the river bed, and remained there

over two low tides, having a fall of more than 4 feet, she might be severely injured. The character of the injuries might be helpful in determining whether they were received in this way; but no evidence has been offered concerning them, although it was obviously within the power of the libelant to do so. Upon all the evidence I find that the Maine received her principal injuries through the stranding in the river, that she was also injured by grounding in the dock, and that at the time of said stranding and grounding she was drawing less than 12 feet of water.

[1] The charter party constituted an express invitation and license to the Maine to use the dock. This invitation extended to the approaches to the dock, and to the water which would naturally be traversed or used by a vessel discharging there. Hartford & N. Y. Transp. Co. v. Hughes (D. C.) 125 Fed. 981, reviewing authorities; Smith v. Burnett, 173 U. S. 430, 436, 19 Sup. Ct. 442, 43 L. Ed. 756. The guaranty was, as to the points under discussion, as broad as the invitation. It insured to the Maine at least 12 feet of water, under all ordinary conditions, in the dock referred to and in its individual approaches (as distinguished from the common channel) and in the immediate vicinity of the dock where a vessel using it might fairly be expected to pass, except, perhaps, in places as to which express notice to the contrary was given by marks or otherwise. The Annie R. Lewis (D. C.) 50 Fed. 556.

Under this construction of the guaranty, it is clear that for the injuries which the Maine received while lying at the dock the respondent is liable. Whether it is also liable for the injuries received out in the river depends on whether it should reasonably have been anticipated by the respondent when the charter party was made that, in the course of the discharge, the barge might be moved over the place where she grounded. If so, the guaranty would apply thereto, no express warning to the contrary having been given, and the questions of negligence become immaterial.

[2] If a change of the barge's position by swinging her at the wharf was reasonably to have been anticipated in the course of the discharge, the water where she was grounded was so likely to be used in such a movement that it was fairly within the scope of the guaranty. It is true that the barge did not pass over that place on the swing upriver; it was not until control of her was lost and she fell back that she hit the obstruction. Just how far she fell back before striking is not clear on the evidence; but I infer that it was a comparatively short distance. Her bow seems never to have got out of control, and to have been against, or very close to, the wharf or river bank, all the time. Apparently the stern was hauled pretty straight out into the river, and the bow was allowed to follow down the bank and the front of the wharf. When control was lost, the barge pivoted on the bow, and the stern swung down onto the rocks. If the barge had been swung bow out, as the consignee proposed to do, she would have gone over, or very close to, the place where she was injured.

Whether a swinging of the barge at the wharf ought reasonably to have been anticipated by the charterer is perhaps doubtful. With

one exception, all the vessels that had previously discharged there had been much shorter than the Maine, and apparently had been hauled backward and forward along the wharf. One other vessel, too long to be handled in that way, had been there shortly before the Maine. It had been turned for discharge, but by the use of tugs. The charterers were bound to know that the vessel which they chartered was too long to discharge at the dock in the ordinary way and would have to be turned during the discharge. If turned, she would have either to be swung or to be moved by tugs. The swinging method was adopted at the suggestion of the charterer's representative, the consignee, and was apparently regarded by both parties before the accident as an ordinary method of changing a vessel's position at a wharf where she could not be moved backward and forward. As the swinging movement was requested and suggested on behalf of the consignee, there may be doubt whether it is now open to the charterer to contend that it was improper and unusual. It has been held that a consignee's request to place a vessel in his dock, or under some circumstances his silence even, when he knew the vessel was about to go there, carried an implied representation that the place and the approach were safe for her. Hale, J., Phila. & Reading Ry. Co. v. Walker (D. C.) 139 Fed. 857; Look v. Portsmouth, etc., Ry. Co. (D. C.) 141 Fed. 182. Assuming, however, that the point is open to the respondent, it seems to me that at a dock where the vessel under charter would have to be turned during discharge, and at which tugs were not readily available, the charterer was bound to anticipate that an effort was likely to be made to reverse the direction of the vessel by swinging. I therefore hold that the guaranty covered the water in the river where the Maine grounded, and that the respondent is liable under it for the injuries there received.

If the swinging of the barge without the assistance of tugs was something unusual and extraordinary, it ought not to have been attempted, and it was negligence to undertake it. In this connection and in view of the possibility of appeal, a finding ought perhaps to be made on the further question whether the barge was making the turning movement on her own account, as a gratuitous assistance to the charterer, or whether it was being made by the charterer. Considering that the movement was one in which the barge herself had no interest and which it was the consignee's duty to make, that the consignee had started to make it without the master's assistance, and although subsequently relinquishing control of it to him was still actively assisting in it, and that the change of position was requested by the consignee and undertaken by the master only in pursuance of that request and in order to save the consignee expense, it seems to me, and I find, that the movement was being made on behalf of the consignee, and that the master, in directing it, acted for the consignee, and not for the vessel.

There must be a decree for the libelant for full damages, and the case must be referred to an assessor to state them. In stating them he should, if practicable, report how much of the total damages were caused by grounding on the rock and how much by the stranding out in the river.

FRIEDE v. WHITE CO.

(District Court, S. D. New York. July 26, 1917.)

1. PRINCIPAL AND AGENT ⟨⟩81(4)—MUTUAL RIGHTS AND LIABILITIES—AGENCY FOR SALE ON COMMISSION—DUTY OF PRINCIPAL TO ACCEPT ORDERS.
Defendant, an American manufacturer of motor trucks, contracted with plaintiff who was engaged in selling such articles in Russia, that for a period of two years "all business with the Russian government" should be done through plaintiff, and to pay him a commission on such business. *Held*, that such contract did not give plaintiff the right to demand acceptance of all orders he might procure from the Russian government, but that defendant retained the right to control its own business and to determine whether or not it would accept such orders, provided it acted in good faith and in the exercise of its business judgment.

2. PLEADING ⟨⟩350(3)—MOTION FOR JUDGMENT ON PLEADINGS.
On a motion for judgment on the pleadings a bill of particulars may be read as a part of the pleading.

At Law. Action by M. Sergey Friede against the White Company. On motion for judgment on pleadings as to one cause of action alleged. Motion sustained.

This is a motion under section 547 of the New York Code of Civil Procedure for an interlocutory judgment upon the pleadings dismissing the second cause of action contained in the complaint. This cause of action is in substance as follows:

Article First. That the plaintiff is a citizen of the state of New York and resides therein.

Article Second. That the defendant is an Ohio corporation.

Article Third. That the plaintiff was engaged in the sale among other things of motor trucks, their parts and accessories, in the then empire of Russia, and that the defendant was engaged in the manufacture and sale of such trucks and accessories.

Article Fourth. That at the city of Moscow, Russia, on the 9th day of December, 1912, the defendant for good and valuable consideration entered into a contract in writing with the plaintiff agreeing that it would give the plaintiff the exclusive agency to sell its motor trucks and their accessories to the Russian government for two years from the 1st of January, 1913, and that all business pertaining to the sale of such trucks and their accessories to the Russian government should be conducted through the plaintiff, and that it would furnish to the plaintiff all such trucks and accessories manufactured by it which should be necessary to fill the orders of the Russian government for the same, and that it would allow to the plaintiff on that account a commission of 30 per cent. off its catalogue prices on all such trucks; that the plaintiff agreed to, and did, accept this agency from the defendant.

Article Sixth. That the plaintiff has performed all the conditions necessary to be performed on his part, but that the defendant has refused to perform those to be performed on its part.

Article Eighth. That on the 1st day of December, 1914, the Russian government was ready and willing to give the plaintiff and the plaintiff to accept an order for 610 3-ton trucks, 540 1½-ton trucks and 35 5-ton trucks manufactured by the defendant, together with certain spare parts; that the plaintiff notified the defendant of "said order" and of the readiness and willingness of the Russian government to make the same, and requested the defendant to supply such trucks and parts under the contract, but that the defendant refused.

The plaintiff by order gave a bill of particulars of the contract, which consisted of two letters from the defendant, set forth at length. The first, dated December 9, 1912, is as follows: "In consideration of your order for ten

3-ton trucks I agree on behalf of the White Company that for a period of two years from January 1, 1913, all business with the Russian government shall be done through you. Should an arrangement be made with you later to represent our full line in Russia it is understood that you are not to accept any other American truck."

The second letter, dated February 14, 1913, stated the terms upon which the defendant would send on both pleasure cars and trucks, with the latter of which only we are here concerned. It gave the plaintiff certain catalogue prices at which he was supposed to sell, and inclosed a list of net prices at which cars would be sold to him, together with a description of the trucks, their weights and dimensions.

The question invited by the motion is whether the first letter of December 9, 1912, required the defendant to fill all orders transmitted to it by the plaintiff for trucks which the Russian government might order during the years 1913 and 1914.

Lindley M. Garrison, of New York City, for the motion.

Cyril F. Dos Passos and W. Benton Crisp, both of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] The case, although large in amount, is in narrow compass. It depends wholly upon the meaning of the language:

"I agree * * * that for a period of two years * * * all business with the Russian government shall be done through you."

Does that mean "all sales which I shall conclude with the Russian government," or "all orders which you shall transmit"? Does it give the plaintiff an indefinite option on the defendant's production for two years regardless of the amount which he might require? The allegations themselves show that the Russian government was a large purchaser, ready to accept nearly 1,200 motor trucks in one order after the war arose. The case is quite different from one in which the seller authorizes a broker to sell a given piece of land or a limited amount of personal property. Baker Transfer Co. v. Merchants' Mfg. Co., 1 App. Div. 507, 37 N. Y. Supp. 276. Such contracts commit the seller to engagements of known amount; they do not subject him to the possibility of indefinite and enormous orders, which he must fill regardless of his capacity and his other demands. It would be strange if the defendant here had not retained the right to determine how many trucks it could spare for the Russian market, or how far it wished to deal with the Russian government. Otherwise it would have been impossible in apportioning its production to know how far it might be committed by indefinite contracts procured through the plaintiff. It might find its other trade more profitable; it might find the Russian government a factious customer and a slow debtor. I cannot suppose that it intended to give the plaintiff that control over its business by any such vague language as was used. On the contrary, the purpose of the two letters was no more than to give the plaintiff the right to the exercise of an honest business judgment.

The cases bear out this construction. In re English & Scottish Marine Co., McClure's Claim, L. R. 5 Ch. 737, the Court of Appeal held that an agreement to give an agent commission on all business was not violated when the company discontinued business. A different result

was reached in Horton v. Hall & Clark Mfg. Co., 94 App. Div. 404, 88 N. Y. Supp. 73, on nearly the same facts, except that the evidence permitted the jury to find an express agreement that the defendant would not sell out during the period, which in fact it did do. In Du Pont, etc., Co. v. Schlottman, 218 Fed. 353, 134 C. C. A. 161, it was part of the contract of sale that, if at the end of a year the defendant should be making powder at stated prices, the seller should get an added price. The defendant closed up the factory, and was held liable. Jacquin v. Boutard, 89 Hun, 437, 35 N. Y. Supp. 496, affirmed on opinion below in 157 N. Y. 686, 51 N. E. 1091, is the same, because the employer refused to give the broker those samples and price lists without which he could not go on. I mention these only to distinguish them. Whatever is the proper rule, they have nothing to do with the case at bar, because they all proceed on the theory that the seller has finally repudiated the contract and made it impossible for the agent to continue in the employment. They are not cases where he has refused a single order or a number of such, but leaves the agent still able to continue the employment as to other orders. Nearer to this case are cases like Taylor v. Enoch Morgan Sons Co., 124 N. Y. 184, 26 N. E. 314, in which the agent is allowed to recover for orders sent in and refused, though his contract gives him commissions only upon those accepted. Such was the result also in Madden v. Equitable Life Assurance Co., 11 Misc. Rep. 540, 32 N. Y. Supp. 752. In Re Ladue Tate Mfg. Co. (D. C.) 135 Fed. 910, Judge Hazel reached the opposite result because the employer had rejected the offer in the honest exercise of his judgment. Stone v. Argersinger, 32 App. Div. 208, 53 N. Y. Supp. 63, holds the employer liable, even though the rejections were because he could not fill the orders in "the usual course of business." The point involved a very trifling sum, and the case cannot stand upon the authority of Taylor v. Enoch Morgan Sons, supra, which professed to depend upon an arbitrary rejection of the order. The rule established by these cases when the employer rejects specific orders is this: The principal is bound to accept all orders sent in by the agent which in the exercise of an honest business judgment he would accept if he were actuated only by genuine business motives. The agreement is commercial, and presupposes that both sides will continue in good faith to prosecute the venture in which they have engaged. Nevertheless the principal does not place the conduct of his business in the hands of his agent or agree in advance that every order which the agent sends in must be accepted, regardless of his own judgment as to what business it will be profitable for him to transact. If it were so, the principal would have abdicated the conduct of his own affairs. If, on the other hand, the principal does not honestly exercise that judgment, but is moved by a desire to exclude the agent, or by any personal motive other than to prosecute his business with a sole eye to its success, he is responsible. This is what is meant by an "arbitrary" refusal of orders. This fact the agent must allege and prove, since prima facie the principal is presumed to be acting in accordance with the arrangement which gives him complete freedom as his judgment may dictate. As there is no such allegation in the complaint, it is bad as a pleading.

[2] As for the practice adopted, it is at least an open question whether or not the bill of particulars may be read along with the complaint. Dineen v. May, 149 App. Div. 469, 134 N. Y. Supp. 7; Kaufmann v. Hopper, 151 App. Div. 28, 135 N. Y. Supp. 363. Where the choice is open, no one can hesitate to read the bill of particulars, as a part of the pleading. Any other procedure is a technical absurdity.

The motion is granted. The judgment will dismiss the second cause of action on the merits unless the plaintiff pleads over within 20 days.

MACKEY WALL PLASTER CO. v. UNITED STATES GYPSUM CO.

(District Court, D. Montana. July 25, 1917.)

No. 78.

1. LANDLORD AND TENANT ⟸92(1)—OPTIONS TO PURCHASE—SUFFICIENCY OF NOTICE.

   Under a lease containing an option to purchase and requiring the lessee to give written notice of its determination not to exercise the option before a certain date, a letter written the lessor by the lessee stating that the option would expire on May 5th, that conditions were such that it would be necessary to cancel the arrangement at the expiration of the lease, that the lessee would be glad to talk over the matter with the lessor, and that it expected to give formal notice on May 5th that it did not care to purchase the property, was not a sufficient notice to relieve it from the obligation to purchase, as it was only tentative, and an unequivocal and unambiguous notice was required.

2. ESTOPPEL ⟸118—WEIGHT AND SUFFICIENCY OF EVIDENCE.

   One alleging waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements, and where the evidence is in equipoise the burden is not sustained.

3. MINES AND MINERALS ⟸53—OPTIONS TO PURCHASE—NOTICE—TIME.

   Under a lease of mining and other property containing an option to purchase and requiring the lessee to give written notice before May 3d of its decision not to exercise the option, a notice given on May 11th was too late, as in this state time is of the essence of options upon mining property.

4. SPECIFIC PERFORMANCE ⟸130—RELIEF TO DEFENDANT.

   In a vendor's suit for specific performance, if there are incumbrances for which the vendor is responsible, purchase-money deductions can be made in the decree.

5. VENDOR AND PURCHASER ⟸78—TIME OF CONVEYANCE—TIME AS OF THE ESSENCE.

   Under a lease with an option to purchase requiring the lessee to give notice before a certain date of its decision not to exercise the option, though time was of the essence of the lessee's refusal to purchase, it was not of the essence of the lessor's subsequent conveyance, and it had a reasonable time within which to convey.

6. SPECIFIC PERFORMANCE ⟸32(3)—MUTUALITY OF OBLIGATION.

   Where a lease of property part of which the lessor held under a lease from a railway company contained an option to purchase and required the lessee to give notice of its determination not to purchase, which notice was not given, specific performance would not be denied for want of mutuality, though the railway company had not consented to the sale of the leasehold, since mutuality of remedy, and not of obligation, is alone required, and if plaintiff is able to perform at the time of the decree, no bad faith appearing, specific performance may be had.

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7. SPECIFIC PERFORMANCE ⊜14—NECESSITY OF CONSENT OF THIRD PERSON.
Where the railway lease contained the usual condition of nonassignment, there could be no specific performance without its consent, though the contract between plaintiff and defendant was silent respecting the railway company's consent, and though defendant did not require such consent, as a court of equity will not render a decree injuriously affecting parties not before it or involving a party's breach of his contract with a third party.

In Equity. Suit by the Mackey Wall Plaster Company against the United States Gypsum Company. Decree for plaintiff conditionally.

Cooper, Stephenson & Hoover, of Great Falls, Mont., for plaintiff.

Scott, Bancroft, Martin & Stephens, of Chicago, Ill., and Norris & Hurd, of Great Falls, Mont., for defendant.

BOURQUIN, District Judge. Specific performance. It appears that by indenture plaintiff leased to defendant all the former's "right, title, estate, and interest" in and to certain mining and other property, the latter in part land plaintiff enjoyed under lease from a railway company subject to the usual condition of nonassignment and forfeiture for condition broken and of which defendant had notice.

The indenture contained an option to defendant to purchase during the term, and was twice renewed, the last renewal for one year. As additional consideration for the last renewal, defendant agreed that, if it determined it would not exercise the option, it would timely give to plaintiff written notice "to the effect that lessee will not purchase"; neglect or failure to give such notice obligating it to purchase. Defendant enjoyed the premises seven years, the term ending July 6, 1916. Notice of nonpurchase could be given at any time between July 6, 1915, and May 3, 1916.

Plaintiff alleges defendant failed to give such notice, that plaintiff offered to perform, that defendant refused performance, and plaintiff offers to do equity. Defendant denies said failure to give notice, and pleads waiver and estoppel in respect to notice, and that plaintiff cannot convey a good title nor any in respect to the railway lease.

April 19, 1916, defendant wrote plaintiff as follows:

"United States Gypsum Co., 205 W. Monroe St.

"Chicago, April 19, 1916.

"Mr. A. D. Mackey, 1224 Chestnut Street, Minneapolis, Minn.—Dear Sir: On May 5th our option to purchase your mill property at Great Falls expires. I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration which is July 5th. We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless. If you care to come down and talk the matter over we will be glad to have you do so. Expect to give you formal notice on May 5th that we do not care to purchase your property.

"Yours truly, O. M. Knode, Manager Operation."

April 28, 1916, a conference followed in defendant's office between Mackey, plaintiff's president, and Knode, defendant's vice president and manager, Nold, defendant's superintendent, present. The evidence of this conference is as unsatisfactory as usual when oral passages sole-

ly between interested parties are relied upon by one of them to escape the obligation of a written contract by which he is otherwise bound, the other party resisting.

Defendant's is the testimony of Knode and Nold, in substance that they told Mackey conditions were adverse, and that defendant had decided not to purchase the property; that Mackey declared he would operate the property, then asked what defendant would do if it would not purchase; that Knode responded he would favor continuing the lease, whereupon Mackey requested such proposition be put in writing and sent to him, which Knode promised. Plaintiff's is the testimony of Mackey, in substance that conditions were discussed; that Knode said that on May 4th or 5th defendant would send Mackey formal notice defendant would not purchase; that later Knode said he would favor continuing the lease; and that Mackey responded that whatever defendant decided to do to send to him at Great Falls.

May 11, 1916, Knode wrote to Mackey, somewhat elaborately reciting that on April 19th he had written Mackey defendant would not purchase, that at the conference he had advised Mackey of defendant's decision not to purchase, that he wished to say defendant is unwilling to purchase the property, and briefly concluding defendant was willing to extend lease and option for an indefinite determinable term. May 12, 1916, and before receiving said letter, Mackey wrote defendant, assuming it had elected to purchase by failure to give notice otherwise. These and later letters seem obvious efforts to create self-serving documents.

[1] The letter of April 19th is not notice to the effect the lessee would not purchase. Notice of rejection of an irrevocable offer, like notice of acceptance of an offer, must be unequivocal and unambiguous. The reason and object are the same in both, viz. so that both parties are bound or both free, or neither is, so that subsequently neither can escape obligation of the contract or impose its obligation on the other, by belated construction of doubtful language. All doubts are resolved against the writer. The said letter is inconclusive. No prudent vendor would rely upon it and dispose of the property to another. The conditions the letter referred to—the judgment of the writer—might change. Men do not always conform to future necessity. To say the writer expects to give formal notice of refusal to purchase deprives the letter of all quality of the required notice, looks to the future, and advises that the writer has reason to consider it likely such notice will be given. It appears but tentative and for negotiation prior to the vital time, the day of decision. If it be conceded that this letter and defendants' version of the conference, if proven, make out the defense of waiver and estoppel, the proof fails.

[2] He who alleges waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements. Mindful that defendant's testimony is of two witnesses and plaintiff's of but one, circumstances tend to establish at least equipoise between them. And so defendant has not sustained the burden of proof imposed upon it by its defense. It has not persuaded the court. Amongst the circumstances referred to is that the written contract requires written notice, that such notice was not given, the letter of April 19th looking to

future notice, defendant's business experience, common sense business methods, the responsibility of its witnesses, their embarrassment and defendant's liability, Knode's mistake in dates and belief May 5th, would suffice for notice, which mistake he admits (though immediately qualifiedly receding) he discovered about May 5th, when he "came to look and see," and the letter of May 11th, with its iteration and reiteration of notice as though to impress Mackey with its truth, to save the situation, to escape the contract consequent upon neglect. Mackey, too, lacked somewhat of being a satisfactory witness, but his testimony and the circumstances at least serve to defeat persuasion of waiver and estoppel, that sufficing for plaintiff's case.

[3] The letter of May 11th is too late. In this state time is of the essence of options upon mining property. The contract is perhaps novel in real estate options so far as the books disclose, but is analogous to sales on approval requiring notice of disapproval by a time limited. Notice failing, the sale is made or absolute. By mistake or neglect defendant failed to give notice. It agreed upon such contingency to purchase. No hardship is pleaded or proven, and nothing is perceived to move the discretion of a court of equity to withhold specific performance.

[4] If there are incumbrances for which plaintiff is responsible (none pointed out in a voluminous exhibit), purchase-money deductions can be made in the decree. Plaintiff's offer of performance was without its railway landlord's consent to assignment of that lease. Defendant did not base refusal to accept performance thereon, but on notice of rejection, waiver, and estoppel.

[5] Apparently when the contract was entered into both parties contemplated either that plaintiff would secure such consent or that it was unnecessary, or defendant was willing to hazard it. Time was of the essence of defendant's rejection of purchase, but not of plaintiff's subsequent conveyance. For that it had reasonable time.

[6] This is not a case, as defendant contends, of lack of mutuality in that a stranger's (the railway lessor) consent is necessary and cannot be compelled; hence, since defendant could not have specific performance, plaintiff cannot. It is the ordinary case of a contract to convey land which the vendor does not own, wherein he could not then perform his contract. If able to perform when due, or at time of decree, no bad faith appearing, specific performance may be had.

[7] Mutuality of remedy, not obligation, is alone required, and suffices if it exists at time of decree. This is now familiar law. The doctrine for which defendant contends applies where one party engages a stranger shall perform some service for the other party, and not where one party contracts to convey what he does not own or but by defective title, incidentally involving that he procure a stranger to perform a service for him, the vendor, viz. convey the property to the vendor or perfect the vendor's title, so he may perform his contract with the vendee. A contract to assign a lease involving the lessor's consent is like in principle. Cases to the contrary are believed distinguishable or lack authority in this jurisdiction. This distinction is to be noted, however: Even if the contract be silent in respect to the landlord's consent, or though the vendee does not require it, there

can be no specific performance without it; and that because a court of equity, of conscience, will not render a decree injuriously affecting parties not before it, and will not render a decree for specific performance which involves a party's breach of his contract with another. Otherwise would be the reverse of equity.

This court will not in effect decree the railway landlord must accept defendant as tenant for the term or invoke forfeiture of the lease. Nor will it by decree aid plaintiff to violate its covenant with its landlord. It is believed a landlord with right to determine its tenants can have injunction to restrain assignment of such a lease.

If within 30 days plaintiff secures the railway lessor's consent to the assignment, or a discharge of the covenant, and in all else is ready and able to perform, it shall have decree as prayed. Otherwise decree for defendant.

Ex parte LALIME et al.
Ex parte McKAY.

(District Court, D. Massachusetts. May 11, 1917.)

No. 1508 Civil.

1. ALIENS ⟸54—DEPORTATION—PROCEEDINGS.
In so-called warrant cases, where the alien has been admitted, and the question is as to his right to remain, the board of special inquiry performs two functions: It takes evidence, much like a commissioner in equity, and makes up a record which is sent to the Secretary of Labor for his decision; and it makes findings on the evidence and recommendations as to the proper disposition of the case, which are also transmitted to the Secretary.

2. ALIENS ⟸54—DEPORTATION—PROCEEDINGS.
Where the board of special inquiry, which heard the evidence in a proceeding for deportation of aliens admitted to the country, was guilty of intentional unfairness to the aliens, and the Secretary of Labor, without knowledge of that fact, adopted the findings of the board, such unfairness invalidates an order for the deportation of the aliens.

3. ALIENS ⟸54—DEPORTATION—RIGHT TO COUNSEL.
In proceedings for the deportation of aliens already admitted to the country, before a board of special inquiry, the board denied the aliens the right to counsel until practical completion of the examination, when they were satisfied that the aliens should be deported. Thereafter, when the board had already determined on its decision, the aliens were allowed counsel. *Held*, that the board, even though the aliens might not be constitutionally entitled to counsel, was guilty of unfairness, for the denial put upon the board a great burden of explanation and scrupulous regard for the aliens' rights, which was not sustained.

4. ALIENS ⟸53—DEPORTATION—RIGHT OF DEPORTATION.
That an alien not within the excluded classes, seeking admittance into the United States, made a misstatement as to where he was intending to proceed, is no ground for his deportation after admittance.

5. HABEAS CORPUS ⟸111(1)—EXCLUSION OF IMMIGRANTS—PROCEEDINGS—DISCHARGE.
When it appears, on petition for habeas corpus, that an order for the deportation of an alien was entered without a fair hearing, the court, while it cannot reverse the decision and remand the case, should make its order for the discharge of the alien conditional to become effective only in case the immigration authorities fail to order deportation after fair hearing within a reasonable time.

At Law. Petition by Frank J. McKay, on behalf of one Lalime and one Beaulieu, for a writ of habeas corpus. Order entered discharging Lalime and Beaulieu on condition.

Richard P. Stapleton, of Holyoke, Mass., for appellant.

MORTON, District Judge. Habeas corpus to the immigration commissioner at the port of Boston. The writ issued, and there was a hearing in open court on the question whether the aliens (who will be referred to as the petitioners) were entitled to be discharged. They have been ordered deported by the Secretary of Labor upon the grounds that they entered the United States as "contract laborers" (Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 [Comp. St. 1916, § 4244]), and without inspection as provided by law. They were in custody under the warrant of deportation when these proceedings were instituted. They contend (1) that they were not accorded a fair hearing by the immigration authorities, and (2) that there was no evidence justifying the Secretary's findings and order.

[Here followed a finding of the facts, after which the court proceeded as follows:]

[1] In so-called "warrant" cases, i. e. those where the alien has been admitted to this country and the question is as to his right to remain, the practice differs in some respects from that on applications for admission to the country, as was fully pointed out in Ex Parte Chin Loy You (D. C.) 223 Fed. 833, 834. In cases like the present the board of special inquiry performs two functions: (a) It takes evidence, much like a commissioner in equity, and makes up a record which is sent to the Secretary of Labor for his decision thereon; and (b) it makes findings on the evidence and recommendations as to the proper disposition of the case, which also go to the Secretary, and are an important factor in his decision.

[Here followed a further finding of the facts.]

[2] The record is a rather long one, and it is not practicable to refer to it with great detail, but it contains many indications of bias or hostility against the petitioners by the board of special inquiry. The members of the board apparently did not feel under any duty to conduct an impartial and fair investigation to get at the real facts, but acted as a prosecuting body, whose business it was to make as strong a case as possible against the aliens. The difficulty with this view is that the board had the judicial duty of making findings of fact, and was bound to act fairly to both sides in doing so. The effort to prevent an application to the courts for habeas corpus was indefensible and indicative of a wholly mistaken attitude towards the matter. It seems to me, and I am obliged to find, that there was intentional unfairness by the board of special inquiry towards the petitioners, which entered into the findings on which the Secretary acted and makes the proceedings invalid. The Secretary of Labor appears to have considered all the evidence and arguments submitted by the petitioners, but he also considered and adopted the findings of the board. They constitute such an important and vital part of the case submitted to

him that his decision must have been influenced by them. It does not appear that he disregarded them or was aware of their infirmities.

[3] As to the denial of the right of counsel: I assume for the purpose of the case, but without so deciding, that the petitioners, although duly admitted to this country, are not within the protection of the Constitution upon matters of this sort. The present case, in this and other aspects of it, is very similar to Ex parte Chin Loy You, supra, and what was then said as to the right of aliens to counsel is applicable here:

"Without undertaking to say that a prisoner has an absolute right to counsel before administrative boards, not composed of lawyers, or that the denial of counsel would in every case prevent such proceedings from being fair, I am of opinion that, under such circumstances as are disclosed in this case, where counsel for a prisoner seasonably requests the privilege of conferring with him before the trial and of being present during the taking of the evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of scrupulous regard for the prisoner's rights." 223 Fed. 833, at page 838.

The position of the board of special inquiry on the question, as testified to by its chairman, was as follows:

"Q. Is it the practice of the board with respect to that, Mr. Hurley, to practically complete your direct examination of the witnesses before the alien's counsel comes, or only partially complete it? A. We conduct our hearings to such a stage as we are satisfied to sustain the allegations in the warrant of arrest, and if we are then and there satisfied, with all the members of the board present— The Court: Just a minute. You say you conduct your hearing— The witness: As far as we are satisfied to sustain the allegations contained in the warrant of arrest issued by the Secretary of the Department of Labor. If we are then and there satisfied, I generally ask the members of the board if there are any questions to be asked. They reply in the negative. We notify the alien of his rights. We generally give him the warrant to read, and if he cannot read English we have the interpreter read it for him. We also notify him of his bonding privileges—to be released. We notify him of his rights to be represented by counsel at that hearing or any future hearing. Q. You said in your answer you waited until you were satisfied that the allegations of the complainant were true or something of that kind? A. As far as we were concerned. Q. Supposing you are not satisfied, when would you notify him of his right to have counsel present? A. Not until such stage of the proceedings that we were satisfied ourselves. Q. Did you hear any other witnesses besides the two aliens before notifying him of his right to counsel? A. No, sir; not at that stage. Q. Supposing the testimony of the aliens failed to satisfy you of the allegations, would you still notify him of his right to counsel? A. No; we might postpone it, for some one reason or other. Q. But some time before you finished you would always notify him of his right to counsel? A. It has always been customary, in hearings of this kind, that we complete the hearing, if possible, unless something transpired that we would be unable to conclude the hearing, so far as we are concerned. That is not a final hearing, you understand. Q. Some time before you complete your record and send it to Washington is it always your custom to give him a right to counsel? A. Always; yes, sir. Q. And give him an apportunity to present evidence? A. Yes, sir. The Court: After you have made up your minds? Is that it? The Witness: After we have secured evidence enough to satisfy ourselves that the alien is unlawfully in the United States. But that is not final. The Court: After you have satisfied yourselves that he is unlawfully in the United States, then you let him have counsel? The Witness: After we have satisfied ourselves that the alien is unlawfully in the United States—after we have personally satisfied ourselves, the board, that we have no further questions to ask—we notify him of his right to have counsel. The Court: But before that you do not do that? The Witness: Not until we are satisfied that the hearing is

complete, so far as we are concerned. Q. But I asked you, if you are not satisfied by the evidence what you would then do? A. We are generally satisfied. I don't know of any case where the evidence did not satisfy the board to close it. I know of no case that it was held over for any length of time. It is not a question of proving everything. We have to satisfy the Department of Labor, and we think we have sufficient evidence to satisfy the Department of Labor. Q. If a case should arise where you think you have not sufficient evidence. what would be your method? A. I know of none that has arisen in my experience. Q. How would you meet such a contingency, if it should arise? A. We would close the case, and notify him of his right to counsel. Q. You would then notify him of his right to counsel? A. Yes, sir. We have generally agreed that we had evidence in our minds to satisfy the Commissioner that the alien was here unlawfully." (Pages 7, 8, 9, 10.)

Subsequently the witness attempted to modify some of these statements, but I am satisfied that they correctly represent the attitude of the board. It thus appears that the board of special inquiry denied to the petitioners the advice and assistance of counsel until it was ready to decide against them. The board, before making its findings, did not hear or consider any arguments by counsel, those being addressed solely to the Secretary. The assistance of counsel was denied at the time when it is most valuable. The evidence by no means establishes such a sincere effort by the board to arrive at the truth, and such scrupulous regard for the prisoners' rights, as justify the denial of counsel, under the law as above stated. The denial was a substantial injustice, because the board made findings adverse to the petitioners.

[4] What has been said is sufficient to dispose of the case, and it is unnecessary to decide whether there was any evidence in support of the Secretary's findings and order; but, in view of the possibility of an appeal, the question ought perhaps to be passed upon in this court. Upon the whole evidence, it seems to me that the finding that the petitioners were "contract laborers," within the statute, is so unsupported by evidence as to be unreasonable and arbitrary.

In the warrant a second ground for deportation is stated, namely:

"That they (the aliens) entered without the inspection contemplated and required by said act, having secured admission by means of false and misleading statements (section 20 and all sections requiring aliens to be inspected), and may be deported in accordance therewith."

This has not been urged as a separate ground of deportation. The only misstatement of which there is the slightest evidence is that the aliens said they were going to "Armadas (sic) Robert, 28 Lyons St., Holyoke, Mass." One of them said that Robert was a "cousin," and the other that Robert was a "friend." The record is incomplete, and there is no satisfactory evidence that the statements were made by the aliens. It does not appear that the records of which copies were put in evidence are invariably, or even customarily, made from statements by the aliens therein referred to. No decision has been called to my attention holding that a misstatement to an immigration inspector, made by a person not within the excluded classes, is ground for deportation after the alien has been admitted into this country. There is no express provision to that effect in the statute, and I do not think the statute can properly be extended by implication to confer such extremely wide powers.

[5] The petitioners contend that, in cases where there was actual and intentional unfairness toward the alien by the immigration authorities, the method of disposition established by Ex parte Petkos, 214 Fed. 978, —— C. C. A. ——, ought not to be followed, but that such cases ought to be heard by the court upon the question of the alien's right to enter, or to remain in, the country; citing Chin You v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. This court is, however, bound by the Petkos decision, and the present case will be disposed of in accordance therewith. The respondent has made certain requests for findings and rulings. In view of what has already been said, it is unnecessary to pass upon them specifically.

An order will be entered on June 15th next discharging the petitioners, unless it be made to appear that there is, at that time, outstanding against them a valid order of deportation made after fair hearing by the immigration authorities, or there is on file in these proceedings a request by the respondent for further hearing in this court on the right of the petitioners to remain in this country.

In re BELOOCHISTAN RUG WEAVING CO.

(District Court, S. D. New York. July 5, 1917.)

No. 110.

CUSTOMS DUTIES ⇐132—FORFEITURES—SUMMARY INVESTIGATION.

Act June 22, 1874, § 17, 18 Stat. 189 (Comp. St. 1916, § 10132), provides that whenever, for an alleged violation of the customs revenue laws, any person charged with having incurred any penalty or disability, or interested in any vessel or merchandise seized or subject to seizure, when the appraised value is not less than $1,000, shall petition to the judge of the district in which the alleged violation occurred, or in which the property is situated, praying for relief, such judge shall proceed in a summary manner to inquire into the case. Section 18 (Comp. St. 1916, § 10133) provides for the holding of the summary investigation before the judge, or any United States commissioner, and that all the facts appearing, with a certified copy of the evidence, shall be transmitted to the Secretary of the Treasury, who shall have power to mitigate or remit the punishment, or any part of it. Merchandise was seized by the customs officer for violation of the Tariff Act.* Before a libel had been filed, petitioner asked for a summary investigation. The petition was opposed on the ground that, being for the remission of a forfeiture, it could not be maintained, because the forfeiture was neither admitted nor established by the court. Rev. St. § 5292, as amended by Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 252 (Comp. St. 1916, § 10130), provides that any person who shall have incurred any fine or forfeiture or is interested in any vessel or merchandise the subject of seizure or forfeiture, shall prefer his petition to the judge of the district in which such fine, penalty, or forfeiture has accrued, and pray that the same be mitigated. *Held*, that the latter section referred to a petition to obtain remission of a fine or forfeiture already declared, and that a summary investigation under the act of 1874 could not be refused because the fine or forfeiture had not been imposed or declared.

At Law. In the matter of the petition of the Beloochistan Rug Weaving Company for a summary investigation into the facts and circumstances of a proposed seizure of certain shipments of wash-

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

*Act Oct. 3, 1913, c. 16, 38 Stat. 114.

able India rugs. On objection by the government to consideration of petition. Investigation as prayed directed.

Barber, Watson & Gibboney, of New York City, for petitioner.

Francis G. Caffey, U. S. Dist. Atty., of New York City, for the United States.

MANTON, District Judge. The merchandise in question has been seized by the customs officers for violation of paragraph H, § 3, of the Tariff Act, being the act of October 3, 1913.[1] The seizure is in accordance with section 3072 of the Revised Statutes (Comp. St. 1916, § 5775) to secure the goods in question for trial. A libel has not as yet been filed, but it is represented by the federal attorney that one is about to be filed.

The petitioner, under sections 17, 18, of the act of June 22, 1874, asks for this summary investigation by a District Judge or commissioner. The government attorney opposes, urging that the petition is for the remission of a forfeiture, and cannot be maintained, for the reason that the forfeiture is neither admitted nor established by an adjudication of the court. Sections 17 and 18 of the act of June 22, 1874, provide:

"Sec. 17. Whenever, for an alleged violation of the customs revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment, or shall be interested in any vessel or merchandise seized or subject to seizure, when the appraised value of such vessel or merchandise is not less than one thousand dollars, shall present his petition to the judge of the district in which the alleged violation occurred, or in which the property is situated, setting forth, truly and particularly, the facts and circumstances of the case, and praying for relief, such judge shall, if the case, in his judgment, requires, proceed to inquire, in a summary manner, into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose, of which the district attorney and the collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should be refused.

"Sec. 18. The summary investigation hereby provided for may be held before the judge to whom the petition is presented, or if he shall so direct, before any United States commissioner for such district, and the facts appearing thereon shall be stated and annexed to the petition, and together with a certified copy of the evidence, transmitted to the Secretary of the Treasury, who shall thereupon have power to mitigate or remit such fine, penalty, or forfeiture, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without willful negligence or any intention of fraud in the person or persons incurring the same, and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just."

Under section 18, the Secretary of the Treasury is authorized "to mitigate or remit such fine, penalty, or forfeiture, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without willful negligence," etc.

In support of the claim of the government, the case of the jewels stolen from the Princess of Orange (1831; Fed. Cas. No. 11,431) and the case of United States v. Dozen of Long Gloves (D. C.) 168 Fed. 1010, are cited. The Princess of Orange Case decided that a proceeding under Act March 3, 1797, c. 13, § 1, 1 Stat. 506 (Comp. St. 1916, § 10130), for the remission of a forfeiture, cannot be main-

[1] 38 Stat. 183, c. 16, Comp. St. 1916, § 5526.

tained until the forfeiture suit has proceeded to judgment, and that property stolen from a friendly foreign sovereign and smuggled into the United States is not subject to forfeiture for illegal importation. Judge Chatfield said, in the latter case:

"The case of The Princess of Orange, Fed. Cas. No. 11,431, seems to settle the first question which must be considered; that is, that in relation to certain proceedings for forfeiture, no application to remit can be instituted until a forfeiture has been declared. But in the present case the additional fact that the woman now asking to be relieved as owner of the gloves was the same individual from whose possession they were taken, and who therefore would seem to have admitted, by her failure to claim the property taken, that she had no title thereto, raises at once the question whether, as between all parties properly charged with notice by the condemnation proceedings, the decree of condemnation renders the issues involved res adjudicata, and prevents any application for remission of the forfeiture under the sections mentioned. * * * The present case might be distinguished from all of those cited, in that the claimant was in default, the decree of condemnation was entered, and the rights of all claimants as against the United States thereby determined, before the present petition was filed. The cases cited simply decide that the Secretary of the Treasury has the power to consider the petition after a decree; but it would seem that, if the Congress has protected individuals from the forfeiture of their property where an injustice may have been done, by allowing the forfeiture to be remitted at any time up to the covering of the money into the treasury (for that is what payment to the collector substantially implies), it would be a hardship to hold that the claimant must at his peril defend the action at law, as well as summarily petition the Secretary of the Treasury through the court for relief. Substantial justice seems to require that the present petition be considered, and that the final decree of distribution in the action be withheld until the petition under the sections mentioned can be heard."

In United States v. Morris, 10 Wheat. (23 U. S.) 246, 6 L. Ed. 314, the Supreme Court recognized the power of the Commissioners of the Treasury to remit. In the Confiscation Cases, 7 Wall. (74 U. S.) 454, 19 L. Ed. 196, the Supreme Court said:

It has been decided that "the Secretary had authority under that act to remit a forfeiture at any time before or after a final decree or judgment until the money was actually paid over to the collector for distribution."

And in The Laura Case, 114 U. S. 411, 5 Sup. Ct. 881, 29 L. Ed. 147, where proceedings upon a bond were pending, it was held that a penalty incurred by a steam vessel for violation of the law relating to the carrying of passengers could be remitted before judgment and after a suit had been brought by a private individual to recover the penalty provided. In Peacock v. United States, 125 Fed. 588, 60 C. C. A. 389, it was said that a petition can be acted upon after the decree as well as before.

The wording of the statute of 1874, under which this proceeding is instituted, provides for a remission in the case of a fine, penalty, forfeiture, or disability other than imprisonment, or merchandise seized or subject to seizure when the appraised value is not less than $1,000, etc. Judge Betts, in the early case of the Princess of Orange, disposed of that case when he decided that property stolen from a foreign friendly sovereign and smuggled into the United States is not subject to forfeiture for illegal importation; but under the phraseology of the statute of 1874, I think it was the intention of Congress to provide for this summary remedy to obtain possession of the seized goods

at any time after the seizure up to the time of judgment where a libel is filed. It is not alone the remission of a fine or penalty, but it is a remedy which is afforded to the importer to obtain his goods, if he can establish a case which appeals to the conscience of the Secretary of the Treasury. The history of what occurred after the goods were seized, in the case at bar, and the apparent frankness and honesty of the importer in trying to obtain a correct and true valuation, as told by the petition, and, of course, uncontradicted in this proceeding, indicates the wisdom of the remedy afforded in this statute. The holding by the government may be called a seizure or a forfeiture. Whichever it may be, the result is the same. The rugs are being held by the government, away from the true owner, by reason of some disability, and this disability and reason for withholding can be relieved by the remedy afforded by this section, to wit, the summary investigation by a District Judge or commissioner and subsequent action of the Secretary of the Treasury.

I therefore think that the relief obtainable under the terms of this statute is not a remission or a pardon, but it is a right which a claimant to the goods has to obtain his property, if he can make out a case strong enough to appeal to the Secretary of the Treasury as to the justice of his cause, and then the Secretary may remove the seizure or the disability, if he shall find that it has been incurred without willful negligence or any intention of fraud by the person or persons incurring the same.

Section 5292 of the Revised Statutes, provides that:

> Whenever any person, "who shall have incurred any fine, penalty, or forfeiture, or disability, or may be interested in any vessel or merchandise which has become subject to any seizure, forfeiture, or disability by authority of any provisions of law for imposing or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and for regulating the same, or providing for the suppression of insurrections or unlawful combinations against the United States, shall prefer his petition to the judge of the district in which such fine, penalty, or forfeiture, or disability has accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the judge shall inquire, in a summary manner, into the circumstances of the case, first causing reasonable notice to be given to the person claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof; and shall cause the facts appearing upon such inquiry to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury."

The use of the phrase in this statute of "merchandise which has become the subject of seizure" surely can mean nothing other than when property is taken at the outset of prospective litigation to follow by the filing of a libel by the government. The act of 1797 provided that, whenever any person shall have incurred any fine, penalty, etc., he shall prefer his petition to the judge of the district and shall pray that the same be mitigated or remitted. Such language in the statute means a prayer for remission or mitigation of the fine, penalty, or forfeiture which has been adjudicated or is admitted; but the present act, under which this petition is filed, provides that whenever, for an alleged violation of the customs revenue laws, etc., which must mean a time before there has been an adjudication, and it will

be noted that the language of the statute does not limit the prayer for relief to a remission or mitigation of the fine, etc., but, on the contrary, refers to the alleged violation of the customs laws by any person who shall be charged with having incurred a fine. Thus it will be seen that the act under consideration grants to a person interested the right to present his petition for a summary hearing just as soon as the government makes a charge against him, and does not require that he wait until the fines shall be adjudicated or a forfeiture admitted.

The merits of the present petition are, of course, not determined on this application, for this objection is raised preliminarily by the government; but it is sufficient to say that there is enough set forth in the petition to require of a District Judge to make a summary investigation and to overrule the objection made by the United States attorney.

UNITED STATES v. CHAKRABERTY et al.

SAME v. GUPTA.

(District Court, S. D. New York. May 7, 1917.)

No. 77.

1. NEUTRALITY LAWS ⟸3—OFFENSES—MILITARY EXPEDITION.

Under U. S. Cr. Code, § 13 (Act March 4, 1909, c. 321, 35 Stat. 1090 [Comp. St. 1916, § 10177]), making it a crime for any one within the territory or jurisdiction of the United States to begin or set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony or district with whom the United States is at peace, the organization of an expedition of the prohibited character constitutes a violation of the act, and it is unnecessary that the expedition should have actually set out or should consist of any particular number of men.

2. NEUTRALITY LAWS ⟸5—OFFENSES—INDICTMENTS.

Indictments charging that defendants feloniously began preparations for and set on foot a military enterprise to be carried on from the United States against the territory and dominions of the British Empire, a foreign nation with whom the United States was and has been at peace, alleged that Germany was at war with Great Britain; that, for the purpose of aiding and assisting in carrying on the military operations of the German forces, it was desirable that in the colonies and territories of Great Britain there should be unrest, revolt, and rebellion; and that, for the purpose of provoking mutiny and unrest in India, defendants made preparations in the United States for the importation into India of arms and munitions, so that natives supplied with such arms and munitions might rise against British rule, and thus necessitate the use of troops in that portion which might otherwise be used against the German empire, etc. *Held*, that as the statute is violated if the act is one which can fairly be considered as an accompaniment of military operations so intimately connected with them that it forms a natural part of such operations, the indictments charged a violation of U. S. Cr. Code, § 13, even though the preparations in the United States anticipated a journey to another land by defendants.

Chandra Chakraberty, alias Chandra Chakrebarty, and others were indicted for a violation of Criminal Code, § 13, as was Hermeba L. Gupta. On demurrers to indictments. Demurrers overruled.

H. Snowden Marshall, U. S. Atty., of New York City, for the United States.

Crim & Wemple, of New York City, for defendants.

MANTON, District Judge. This is an indictment charging a violation of section 13 of the United States Criminal Code. It accuses defendants that on the 1st day of July, 1915, and continuously thereafter, including the 5th day of March, 1917, within the Southern district of New York and the jurisdiction of this court, "did willfully, knowingly, unlawfully, and feloniously begin and set on foot, and provide and prepare the means for, a certain military enterprise, to be carried on from within the territory and jurisdiction of the United States, and against the territory and dominions of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India, a foreign prince with whom the United States of America, at all the times herein mentioned, have been and now are at peace." The accusation further charges "that the Emperor of Germany was at war with the King of the United Kingdom of Great Britain and Ireland and the Emperor of India, as the defendants and each of them well knew." That the defendants and each of them, "for the purpose of aiding and assisting in carrying on the military operations by land and sea of the forces of the Empire of Germany, it being desirable and necessary that in the colonies and territories of the King of the United Kingdom of Great Britain and Ireland the Emperor of India, that there should be unrest, revolt, revolution, and mutiny among the citizens and natives in the various provinces and dominions and other portions of the territory of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, and particularly in India, to the end that in such provinces and dominions and other portions of the territory of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India the unrest, revolt, revolution, and mutiny upon the part of the natives and inhabitants thereof should require that there be stationed and be on duty in, at, and about the places of such unrest, revolts, revolutions and mutinies large numbers of trustworthy and loyal troops and soldiers, who, were it not for such unrest, revolts, revolutions, and mutinies, would be released for service in the interests of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India, at various points in Europe, Egypt, and other places where the troops of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India were in contact with troops of the Emperor of Germany or his allies, and that by reason of the service of such troops and soldiers at the places of such unrest, revolts, rebellions, and mutinies, in the provinces and territories of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India against the troops and forces of the Emperor of Germany and his allies, and that by reason of such unrest, revolts, rebellions, and mutinies, the rule of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India would in some of his dominions and provinces be overthrown, to the great injury and detriment of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India"; and it is

further charged "that within the Southern district of New York the defendants did begin and set on foot a military enterprise to be carried on from within the territory of the United States, to wit, the Southern district of New York, that is to say, to send against the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India certain persons who would be engaged in importing into India large quantities of arms and munitions of war which were to be supplied to the natives of India, among whom there was unrest and dissatisfaction at the rule of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, for the purpose of enabling them to rise against the said rule and overthrow the military and civil dominition of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India." As a part of the plan and purposes of the defendants, it is charged "that certain natives, being so supplied with arms and munitions of war, should rise in open rebellion, and that for the suppression thereof it would be necessary that the King of the United Kingdom of Great Britain and Ireland and the Emperor of India to send against said rebels and mutineers large numbers of Indian native troops, who, upon coming in contact with the rebellious elements among the natives of India, would themselves revolt against English rule, and they, together with the rebels and mutineers, would outnumber and be superior in strength to the troops and soldiers of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India who would remain loyal and true to their King and Emperor." And it is further charged "that Chandra Chakraberty did go from the Southern district of New York, and from within the jurisdiction of this court, to Berlin, in the Empire of Germany, and did then and there have a conference with certain officials of the German Empire and members of the Indian Nationalist Party, and in making said trip from the city of New York to the city of Berlin the said Chakraberty did sail under the name of Reza Bager, and did pretend to be a Persian merchant, and in the city of Berlin did obtain and acquire information relating to said military enterprise, the exact nature and character of which was unknown to the grand jurors"; and it is further charged "that, for the purpose of setting on foot said military enterprise and to effect the object thereof, Wolf von Igel, at and within the Southern district of New York, upon various dates within the period herein specified, did give and pay to the defendant Ernest Se Kunna sixty thousand dollars for transmission to the said Chandra Chakraberty for the purpose of accomplishing the details of said military enterprise." That, "in pursuance of and for the purpose of setting on foot the said military enterprise, and to effect the objects thereof, the defendant Chandra Chakraberty returned to the United States on or about the 2d of February, 1916, and did there confer at various times with the said defendant Se Kunna; and that further, in pursuance of the said purposes of setting on foot said military enterprise and to effect the object thereof, the said defendant Chakraberty, within the jurisdiction of this court, did pay to a Chinese person by the name of Chen a sum of money for the purpose of enabling the said Chinese person to go abroad to China for the purpose of aiding and assisting the importation into India of large quantities of arms

and munitions to carry into effect the purposes and plans of the above-named defendants and each of them." It is further charged "that, in pursuance of this purpose of setting on foot said military enterprise and to effect the object thereof, the defendant Chakraberty, within the jurisdiction of this court, did make arrangements with one Tarak Nath Das that he should go to China, and there engage in certain activities relating to the carrying on of said military purposes, all of which it is charged is a violation of section 13 of the United States Criminal Code."

This indictment is demurred to on the ground that it is insufficient in law and does not constitute an offense against the United States.

An indictment has been found against the defendant Gupta, to which he has demurred, and both indictments may be treated together in this memorandum.

It is charged against Gupta, together with Franz von Papen (not indicted), "that he did, within the Southern district of New York, willfully, knowingly, unlawfully, and feloniously begin and set on foot and provide and prepare the means for certain military enterprise to be carried on from within the territory and jurisdiction of the United States, and against the territory and dominions of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India, a foreign prince with whom the United States of America at all the times mentioned has been and now are at peace." It is further charged in the indictment "that the Emperor of Germany was at war with the King of the United Kingdom of Great Britain and Ireland and the Emperor of India, as the defendant well knew, and that for the purpose of doing and assisting and carrying on the military operations by land and sea of the forces of the Emperor of Germany it was desirable and necessary that in the colonies and territory of the King of the United Kingdom of Great Britain and Ireland the Emperor of India there should be unrest, revolt, rebellion, and mutiny among the citizens and natives in the various provinces and dominions and other portions of the territory of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, and particularly in India, to the end that in such provinces and dominions and other portions of said territory of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India the unrest, revolts, rebellions, and mutinies upon the part of the natives and inhabitants thereof should require that there be stationed and be on duty, in and about the places of such unrest, revolts, rebellions, and mutinies, large numbers of trustworthy and loyal troops and soldiers who, were it not for such unrest, revolts, rebellions, and mutinies, should be released for service in the interests of said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, at various points in Europe and other places where the troops of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India were in contact with the troops of the Emperor of Germany or his allies"; and "that by reason of such troops and soldiers at the place of such unrest, revolts, rebellions, and mutinies in the provinces and territories of the King of the United

Kingdom of Great Britain and Ireland and the Emperor of India would lessen the strength and force of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India against the troops and forces of the Emperor of Germany and his allies, and by reason of such unrest, revolts, rebellions, and mutinies the rule of the King of the United Kingdom of Great Britain and Ireland and the Emperor of India would, in some of his dominions and provinces, be overthrown to the great injury and detriment of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India"; and it is further charged "that within the jurisdiction of this court the defendant Gupta, together with Franz von Papen, willfully, knowingly, unlawfully, and feloniously did begin and set on foot a military enterprise to be carried on from within the territory of the United States, to wit, the Southern district of New York, to send against the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India certain persons who would be engaged in importing into India large quantities of arms and munitions of war, which were to be supplied to the natives of India, among whom there was unrest and dissatisfaction at the rule of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, for the purpose of enabling them to rise against the said rule and overthrow the military and civil domination of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India, and that as a part of the plan and purpose of the said defendant, together with Franz von Papen, that certain natives, being so supplied with arms and munitions of war, should rise in open rebellion, and that for the suppression thereof it be necessary for the King of the United Kingdom of Great Britain and Ireland and the Emperor of India to send against said rebels and mutineers large numbers of Indian native troops, who, upon coming in contact with the said rebellious elements of the natives of India, would themselves revolt against English rule, and they, together with the rebels and mutineers, would outnumber and be superior to the troops and soldiers of the said King of the United Kingdom of Great Britain and Ireland and the Emperor of India who were stationed in India and would remain true to their King and Emperor. And in pursuance of and for the purpose of setting on foot said military enterprise, and to effect the object thereof, the said defendant Gupta, at the Southern district of New York and within the jurisdiction of this court, upon various dates, within the period hereinbefore specified, did receive from Franz von Papen fourteen thousand dollars, and in pursuance of and for the purpose of setting on foot said military enterprise, and to effect the object thereof, the said Gupta on the 28th of August, 1915, did start from the state of New York, Southern district of New York, to go to Japan, for the purpose of there having conferences with certain persons whom it was arranged he should meet, to make further plans for the importation into India of large quantities of arms and munitions, all of which it is charged is a violation of section 13 of the United States Criminal Code."

To this indictment the defendant has demurred on the ground that

the matters therein stated are insufficient in law and do not constitute an offense against this statute.

[1, 2] This statute was recently considered by Judge Wolverton, sitting in this district, and Judge A. N. Hand, the former in United States v. Tauscher (D. C.) 233 Fed. 597, and the latter in the case of United States v. Sander et al. (D. C.) 241 Fed. 417. The test applied by Judge Wolverton in the Tauscher Case was adopted by Judge A. N. Hand, and should be followed here. It is: "Was the act one which can fairly be considered as an accompaniment of military operations, so intimately connected with them that it forms a natural, if not inevitable, part of such operations? And were the person or persons engaged in it such persons as are reasonably to be regarded as part of a military or warlike enterprise?" As Judge Hand stated, "What is the substantial character of the act?"

Section 13 makes it a crime for any one, within the territory or jurisdiction of the United States, to begin or set on foot, or provide or prepare, the means for any military expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

The acts charged against the defendants in each indictment directly charges them with beginning or setting on foot and preparing the means for a military expedition or enterprise against the King of the United Kingdom of Great Britain and Ireland and the Emperor of India. It has been held that this section does not require that the expedition should have actually set out or any particular number of men, the crime being completed by the organization only. United States v. Ybanez (C. C.) 53 Fed. 536.

It is sufficient to charge in the indictment that the defendants, by an act the character of which is of a warlike nature, inaugurated and set on foot an enterprise for the furtherance of a military or warlike purpose against a kingdom or country with which the United States are at peace. With a state of war existing between the Empire of Germany and the United Kingdom of Great Britain and Ireland and the Empire of India, acts on the part of each of the defendants, prepared or begun in this country, even though it anticipated a journey to another land by the defendants, which had for its purpose the creating of unrest, revolt, rebellions, and mutinies among the troops and inhabitants of India, with the sole view of war or military purposes against the ruling power of that province, is a sufficient charge to bring it within the inhibition of the statute. Preparations for, and setting on foot means of, importing into India large quantities of arms and munitions of war to be supplied to the natives of India and the acceptance of money for this purpose, is a sufficient charge, if true, to charge a crime within section 13.

It was said in United States v. Hart (D. C.) 78 Fed. 868, that the section creates two offenses: First, the setting on foot, within this country, of a military expedition; and, second, providing the means therefor, such as transportation.

Individuals, as well as a number of persons, may assist in providing the means for a military expedition, to wit, the preparing for the shipment of arms and munitions of war, so as to commit a crime within the meaning of section 13.

I think both the indictments are sufficient in their statement of wrongs committed to charge a crime, and that the demurrers to the indictments should be overruled.

MANNERS v. TRIANGLE FILM CORP. et al.

(District Court, S. D. New York. June 14, 1917.)

No. 94.

1. TRADE-MARKS AND TRADE-NAMES ⟸97—RIGHT TO INJUNCTION—NOTICE.
Where plaintiff, the author of a duly copyrighted play entitled "Happiness," which had been presented but withdrawn, notified defendants, the producers of a photo-play, on discovering that they were offering a play under the same name, that they were violating his rights, and defendants, despite the notice and protest, continued to advertise their photo-play under such name, insisting that they were authorized to use it, an injunction in favor of plaintiff cannot be denied on the ground of unfairness.

2. TRADE-MARKS AND TRADE-NAMES ⟸13—UNFAIR COMPETITION—TITLE OF PLAY.
The title of a drama, though not protected by copyright, may, on the theory of a trade-mark, be protected and the producer of a photo-play enjoined from using it.

3. TRADE-MARKS AND TRADE-NAMES ⟸21—UNFAIR COMPETITION.
Plaintiff, a successful dramatic author, wrote a play which he entitled "Happiness." The play was duly copyrighted and was presented at a prominent theater, one of the foremost actresses of her day being in the cast. After some performances, the play was withdrawn, it being intended to subsequently revive its production. *Held* that, though the word "Happiness" is in general use, yet, plaintiff being the first in the field, his adoption gave to the word a secondary meaning indicating his play, and he is entitled to protection of rights thus acquired, and defendants will be enjoined from producing a photo-play under the same name.

4. TRADE-MARKS AND TRADE-NAMES ⟸21—UNFAIR COMPETITION—DEFENSES.
In such case, plaintiff's rights are not affected because of a previous dramatic production under the same name for a charitable purpose, which took place in a private house.

5. TRADE-MARKS AND TRADE-NAMES ⟸97—TITLE—RIGHT TO INJUNCTION.
While there can be no copyright in a title, nevertheless equity will enjoin the use of the title of a well-known publication by a rival work.

In Equity. Action by J. Hartley Manners against the Triangle Film Corporation and another. On motion for injunction pendente lite. Motion granted and motion to dismiss denied.

David Gerber, of New York City, for plaintiff.

Walter N. Seligsberg, of New York City, Alex L. Strouse, of Milwaukee, Wis., and Jay Leo Rothschild, of New York City, for defendants.

MANTON, District Judge. The plaintiff is a well-known playwright, and seeks in this action to restrain, by injunction, the defend-

ants from using the title "Happiness" as the title of a play or photoplay. He claims that, in violation of his sole right in the title "Happiness" as a trade-name or trade-mark, the defendants should not only be restrained in its use, but should compensate him for the damages he has sustained. The action has been removed from the state court.

The defendants move to dismiss the complaint on the ground that it does not state facts warranting equitable relief.

Much is claimed by plaintiff as to delays on the part of the defendants in defending the action, and it is argued that this practice is indulged in so as to avoid a trial of the action before the summer recess of this court, to the advantage of the defendants, in that the defendants may profit by the use of the title "Happiness" in the interim. It is claimed that the life of a motion picture of the type produced by the defendants is but a few months, and that, since this cause cannot be tried until the October session of the court, unless an injunction be granted now an injunction resulting from the trial of the action would be of little avail.

The plaintiff is the author of "Peg o' my Heart," "The Harp of Life," and "Out There." His wife, under the stage name of "Miss Laurette Taylor," is well known to the theater-going public and has had a successful career. The play "Happiness," written by the plaintiff, has been copyrighted. In March, 1914, it was presented at the Cort Theater, in New York City, and after some performances taken off. The moving affidavits indicate that the play is to be used in the future under this title.

[1] The plaintiff's attention was called, in April last, to the announcement of the production of the photo-play at the Rialto Theater, in this city, under the title "Happiness." Notice was served upon the theater and the producers of the play, the defendants herein, of the claim of ownership by the plaintiff of the title "Happiness" as the title of a play. After notice, defendants refused to discontinue the use of the title "Happiness," and advertised it extensively in the press and otherwise under this title, and continued performing in motion pictures under said title in various cities mentioned in the affidavits. In addition to this the plaintiff personally visited and called upon Mr. Rothapfel, manager of the defendant theater company, and protested against the use of this title.

Dodd, Mead & Co. are the plaintiff's publishers, and have acquired from the plaintiff sole right to publish, plaintiff reserving the dramatic rights, and the rights of presentation upon the stage in any and every form.

The defense interposed is that on November 12, 1910, a lady named Spiegelberg gave a performance of a tragedy in one act entitled "Happiness," and this was performed in her country residence in Westchester county, N. Y., and for which a charge of $5 was made for the benefit of a hospital; and, further, the presentation of a play called "Happiness" by the Chatauqua Association. However, this latter play was produced in 1916, two years after the production by the plaintiff of his play and after his play had been copyrighted. Upon notice and protest by the plaintiff, the Chautauqua Association changed the title of the play to "The Quest for Happiness." The defendants, having

received notice of the claim of the plaintiff, proceeded to produce their photo-play under this title, and the capital thus invested was after due and timely notice, and can only be based upon insistence that they were right in the position which they took. Therefore it will not be unfair to grant this injunction as against the defendants unless the strict rule of law forbids the granting of such relief. And, in addition thereto, it is claimed, and properly so, by the plaintiff, that the matter of change of title by the defendants is a simple one if the photo-play is permitted to continue. What is now probably a five and ten cent moving picture performance will undoubtedly take from a valuable asset the trade-name of this play, which will be produced under expensive auspices to a theater-going-public.

[2-4] If the title "Happiness" is infringed, it can be protected on the doctrine of unfair competition. Corbett v. Purdy (C. C.) 80 Fed. 901; Glaser v. St. Elmo Co. (C. C.) 175 Fed. 276.

The courts have exercised their equitable jurisdiction and enjoined defendants from using as the title of photo-plays the plaintiff's title, such as "A Fool There Was," where the plaintiff had been using it as the title of a drama. Klaw & Erlanger v. General Film Co., 171 App. Div. 945, 156 N. Y. Supp. 1128. Valuable titles which have been used as trade-names have been protected in the following cases: Shook v. Wood, 32 Pa. Leg. Int. 264; Outcault v. Lamar, 135 App. Div. 110, 119 N. Y. Supp. 930; Frohman v. Morris, 68 Misc. Rep. 461, 123 N. Y. Supp. 1090; Frohman v. Payton, 34 Misc. Rep. 275, 68 N. Y. Supp. 849. A fanciful title, such as "The Come Back," was protected by Judge Clark in the state court. Dickey v. Mutual Film Corp. (Sup. Ct. S. T.) 160 N. Y. Supp. 609.

In Aronson v. Fleckenstein (C. C.) 28 Fed. 75, the rule was laid down that the name given a composition by its author, by which it has become known to the public, is a property right which should be protected, and that it is a fraud upon the public and the complainant to permit its use.

The use of the title "Happiness" in a prominent theater in New York City, staged for performance by one of the foremost actresses of her time, has given to such title a value and asset as to constitute a property right in this plaintiff which should be protected. While it is true that the title of a copyrighted play is not protected by the copyright, the use of that title is none the less to be secured by the owner of the copyrighted matter as a trade-mark, if the title so first employed by him has acquired a trade significance as an arbitrary designation. If the word "Happiness," even though a word in common use, was adopted by the plaintiff, and at the time of its adoption was not employed by another as the designation of the title of a play, it may become a trade-name or trade-mark. The title may in no sense be descriptive of the drama as such, and, indeed, it may be an arbitrary title employed to identify rather than describe the composition itself. If the title is serviceable as a description of the subject portrayed in the play, it was open to adoption by the plaintiff, and, if such use gave it a secondary meaning in identification of the plaintiff's dramatic composition, it became so associated with the good will of the drama as to be established in the production of the play and was a trade-mark.

I think the circumstances and use of the title by the plaintiff herein justify the conclusion that the plaintiff had secured a trade-mark or trade-name in said title. After full notice, the defendants, having chosen the title and advertised it in a photo-play, did so at their peril. Justification for this use cannot be found in the isolated case of the production of a play of a similar title at Mrs. Spiegelberg's home.

[5] The right to a title vests in the first to apply and use the title. McLean v. Flemming, 96 U. S. 245, 24 L. Ed. 828. In the G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 117 C. C. A. 245, it was said:

"A trade-mark is a trade-mark because it is indicative of the origin of the goods. The original right to its exclusive use was not based upon any statute, but upon principles of equity; and the right is acquired, not by discovery or invention or registration, but by adoption and use."

In Drone on Copyrights (page 535) it is said:

"There can be no copyright in a title; but, on general principles of equity, an injunction will be granted restraining a person from appropriating the title of a well-known publication for a rival work, nor will a person be allowed to use a title which is a mere colorable imitation of another for the purpose of misleading the public into buying one publication in the belief that it is the other."

I think the use of the title for a motion picture play as used by the defendants is an infringement of the plaintiff's sole right to the title as the title of a play in drama on the stage, and that the injunction should be granted. Kalem v. Harper, 222 U. S. 61, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

Upon examination of the bill of complaint, I deem the objections offered to its sufficiency not well founded, and therefore the motion to dismiss the bill will be denied.

UNITED STATES v. SALEN.

(District Court, S. D. New York. July 23, 1917.)

No. 122.

1. JUDGMENT ⊂=648—CONCLUSIVENESS—RES JUDICATA.
Defendant was indicted for defrauding the United States of customs duties, the indictment charging that defendant knowingly understated the value of imports, and suppressed information. On the merits, the indictment was dismissed. *Held*, that such judgment of dismissal was conclusive against the right of the United States to recover, in a civil action based on the same statute, the amount of the loss in duty which was claimed resulted from defendant's fraud, even though the form of action and rights sought to be enforced were different.

2. JUDGMENT ⊂=656—CONCLUSIVENESS—CONCLUSIVE JUDGMENT.
Judgment on demurrer on the merits is sufficient to furnish basis for principle of res judicata.

3. JUDGMENT ⊂=654—DISMISSAL—CONCLUSIVENESS.
Where an indictment charging that the United States was defrauded out of customs was dismissed, and the government did not appeal, such dismissal was a conclusive adjudication on the merits against the government's claim.

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

4. PLEADING ⊂=245(2)—AMENDMENT—CHANGE OF THEORY.
After the expiration of three years, and after an indictment charging the defrauding of the United States was dismissed, a complaint, in a civil action, seeking to recover an alleged loss of customs duties, which was based on defendant's fraud in suppressing documents which would have disclosed that the foreign invoices undervalued the goods, cannot be amended so as to rely on defendant's knowledge and the undervaluation as substantive facts, the transactions being in each case the same.

5. JUDGMENT ⊂=948(1)—CONCLUSIVENESS.
A complaint seeking recovery of customs duties, which it was asserted the government had lost through defendant's fraud, will not be dismissed where res judicata was not pleaded as a defense, though it appeared on motion for dismissal that an indictment charging the crime of defrauding the government out of customs duties had been dismissed, and was thus a conclusive adjudication against recovery.

At Law. Action by the United States against Herman A. Salen. On motion to amend complaint, and defendant's motion to dismiss complaint. Motions denied.

Francis G. Caffey, U. S. Dist. Atty., of New York City (John E. Walker, Asst. U. S. Dist. Atty., of New York City, of counsel), for the United States.

Erwin, Fried & Czaki, of New York City, for defendant.

MANTON, District Judge. The plaintiff moves to amend its complaint and the defendant moves to dismiss the complaint. Both motions will be considered together.

The complaint alleges that between the 25th of February, 1910, and the 9th of June, 1913, the defendant imported into the United States laces, embroideries, trimmings, etc., which were subject to duty by law; that they were entered at false values, and for failure to enter the true value the United States has suffered loss in the collection of customs duties, and demands damages at $196,651.47. The defendant has not only had this lawsuit to contend with, but was indicted. He demurred to the indictment, and the demurrer to the sixth count thereof was sustained, and overruled as to the other five counts, in an opinion by Judge Hough. On appeal from this decision, Judge Hough was sustained. United States v. Salen, 235 U. S. 237, 35 Sup. Ct. 51, 59 L. Ed. 210.

The theory of the amendment is that "the original complaint contains various allegations of fraud based upon the suppression clauses in the declarations, which should be stricken out in view of the decision of the United States Supreme Court, and the amendment sought is to rest the action solely upon the proposition that the defendant entered various importations of merchandise knowing that the foreign market value at the time of the importation was in excess of the values set forth in the respective invoices and entries." The indictment was ultimately dismissed as to the five other counts.

The defendant says that the allegations of the original complaint tend to make out a case of fraudulent importation, which were the state of facts averred in the sixth count of the indictment against the

defendant, they being the identical importations embraced in the complaint. The count of the indictment referred to alleges suppression of facts in entries eight years preceding March 17, 1913, and which cover all the entries in the civil action. The proposed amended complaint covers the same importations.

It is claimed that by the dismissal of the indictment, and particularly the sixth count thereof, the doctrine of res adjudicata applies and controls in this civil action, and that, therefore, leave to amend should not be granted and that the complaint should be dismissed.

The gist of the allegations of the complaint is a general charge of fraudulent practices by means of false and fraudulent invoices and entries, stated by way of inducement, the specifications and particulars of the fraud relied upon being set forth in the sixth and seventh paragraphs of the complaint.

[1] The case in the original complaint rests wholly on alleged acts of fraud, and is predicated upon the suppression clause of the declarations, and specifies the suppression and concealment of the Robinson lists, showing past high prices of the merchandise in this country, for which it is charged that the defendant acquired knowledge that the consular invoices understated the foreign market values. An examination of the sixth count of the indictment satisfies me that the action is one predicated upon frauds in concealment and suppression which are charged there, and which the Supreme Court has held constituted no violation of any statute of the United States. There was, therefore, a judgment on the merits in the criminal proceeding against the plaintiff, and if the same issues are presented in this civil case and are dependent upon the same facts, although the form of action and rights sought to be enforced are different, it is res adjudicata.

In Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, a proceeding was instituted to forfeit a distillery after a verdict of not guilty in a criminal prosecution. The proceeding was based upon the same acts as the prosecution. It was there said—

"that, although one section counted on in the information declared, as a consequence of the commission of the prohibited act, (1) that certain specific property should be forfeited, and (2) that the offender should be fined and imprisoned, yet, as the issue raised as to the existence of the act or fact had been tried in a criminal proceeding against the claimant, instituted by the United States, and a judgment of acquittal rendered in his favor, that judgment was conclusive in his favor."

In United States v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777, it was sought to recover the value of merchandise forfeited under section 9 of the Customs Act of June 10, 1890, c. 407, 26 Stat. 131. This language was used by the court:

"Of course, if the government had elected to prosecute the present defendants criminally for the offense defined in the ninth section of the act of 1890, a verdict and judgment of acquittal could have been pleaded in bar of an action to recover the value of the merchandise."

Since the adjudication of the Supreme Court is that, upon the same allegations of fact set forth in the civil action here, an offense under the statute of the fraudulent suppression or concealment was not made

out, it seems to be a judgment of the merits, on the same facts relied upon in the civil action. The theory of responsibility in the civil action is based upon the same statute, the same provision of the Customs Act, as was the alleged criminal liability.

[2] The judgment on the demurrer on the merits is sufficient. Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491. It is as conclusive as the verdict of a jury. Gould v. Evansville Ry., 92 U. S. 526, 23 L. Ed. 416; Bissell v. Spring Valley R. Co., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411.

[3] Before the dismissal of the remaining five counts of the indictment, this civil action was instituted and a bill of particulars was ordered and given. Thereafter Judge Hough quashed the indictment. The government did not appeal, and this amounts to an adjudication, on the merits, that there was nothing concealed or suppressed of any character whatever on these entries by which the government might have been defrauded.

[4] The effort to amend was to change the character of the cause of action, and not to change any of the facts, to add to or subtract from various entries as named in the litigation heretofore. In fact, Exhibit A, attached to the amended complaint, describes the several importations by defendants of importations, steamships, serial numbers, serial number of entries at New York, under value, true value in France, true duty, home value or market value of said respective importations. It is the same as the schedule annexed to the original complaint. Therefore the theory of the original complaint as well as the amended complaint in the civil action is based upon fraud in the suppression of documents, to wit, the Robinson lists giving high prices at which similar goods had sold for in this country for which the defendant was alleged to have acquired knowledge, and from which, if disclosed, the collector might likewise have acquired knowledge of undervaluation in the foreign invoices, and, on the other hand, that the theory of the proposed amendment is based upon knowledge and of undervaluations as a substantive fact. This was also the theory of the criminal prosecution. The amendment seeks to fix responsibility of making the claim on the theory of the suppression of documents. This should not be allowed, after the expiration of three years, particularly where the whole question seems to have been decided adverse to the government.

The motion to amend the complaint will therefore be denied.

[5] I should dismiss the complaint on the defendant's motion if res adjudicata was pleaded as a defense, but, since it is not pleaded and the action is one at law, I am constrained to hold that I am without power to dismiss.

The motion to amend the complaint will therefore be denied, as will the motion to dismiss.

AMERICAN STEEL CO. v. AMERICAN STEEL & WIRE CO. et al.

(District Court, D. Massachusetts. October 17, 1916.)

No. 685.

1. MONOPOLIES ⟸28—RIGHT OF ACTION FOR DAMAGES.
Where a company attempted to monopolize the manufacture and sale of coated wire nails, and as part of its plan engaged in various illegal and unfair practices, such as hindering its competitors from obtaining raw materials and the necessary machines, bribing their factory employés to disclose factory conditions and to send out defective goods, and bribing office employés to disclose the names of their customers and their contracts, and then selling to such customers below cost, a competitor attacked in these ways had a right of action for damages, under Sherman Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1916, §§ 8820–8823), since, while no action lies under that act for unfair practices, damages are recoverable thereunder for monopolizing, or attempting to monopolize, and acts which are a part of the monopolizing, or attempting to monopolize, are a subject for damages.

2. MONOPOLIES ⟸28—RIGHT OF ACTION FOR DAMAGES—PERSONS LIABLE.
Where a company was engaged in a single continuing attempt to secure a monopoly of a particular business, in which attempt different parties joined successively, and by which a competitor was injured, all those joining in the unlawful attempt at different times became liable for whatever injury resulted from the tortious act in which he participated.

3. MONOPOLIES ⟸28—RIGHT OF ACTION FOR DAMAGES—PERSONS LIABLE.
A party participating in a company's attempt to monopolize a particular business need not expect to profit by his illegal conduct, in order to render him liable.

4. MONOPOLIES ⟸28—ACTIONS FOR DAMAGES—PLEADING.
In an action for damages, caused by a combination and conspiracy in restraint of the manufacture and interstate sale of coated wire nails, a count containing no description of the trade, or of the business situation to which the alleged conspiracy or combination applied, and which did not describe plaintiff's business, or that of defendant, and which contained no allegations that defendant's acts were intended to affect anybody but plaintiff, nor that they were part of any general scheme or conspiracy relating to, and affecting in any broad or substantial manner, the manufacture and sale of such nails, or that they did or could affect such manufacture and sale generally, was insufficient.

5. MONOPOLIES ⟸28—PLEADING—ESSENTIALS OF DECLARATION.
In an action against an illegal monopoly for damages under the Sherman Act, the declaration must describe the conditions in the trade in question, the alleged conspiracy or combination, and the business of plaintiff, and the effect thereon of the alleged conspiracy or combination, sufficiently so that the court can see that its acts might have affected the general conditions in the trade, and that plaintiff's business and situation were such that it might have been damaged by its conduct.

At Law. Action by the American Steel Company against the American Steel & Wire Company and others. On demurrer. Demurrer overruled as to the first count, and sustained as to the second count.

McLellan, Carney & Brickley, of Boston, Mass., for plaintiff.

Elbridge R. Anderson, of Boston, Mass., for defendant Baackes.

Samuel D. Elmore, of Boston, Mass., for defendants Ayres and J. C. Pearson Co.

MORTON, District Judge. This is an action for threefold damages under the Sherman Act (26 Stat. 209). The business in question is that of manufacturing and selling coated wire nails. The first count charges a monopoly or attempted monopoly in such manufacture and sale; the second, a combination or conspiracy in restraint of trade in respect thereto. The defendants have demurred; and the question is whether the declaration states a cause of action. It covers, without the annexed exhibits, 74 closely printed pages, and I shall not attempt to restate or summarize it.

As to the first count: This count describes, as I construe it, the following business situation:

A group of men planned to obtain a monopolistic control of the manufacture and first-hand sale of wire nails. To this end, after two abortive attempts, they organized the principal defendant, the American Steel & Wire Company of New Jersey (hereinafter referred to as the Wire Company), which secured control of 75 per cent. of the entire output of such nails in the United States.

Coated wire nails are made from wire nails by a further process of manufacture, and constitute, evidently, a separate article of commerce. The Wire Company (to discuss the case first with reference to it alone and consider the other defendants later), thus producing or controlling three-quarters of all uncoated wire nails, determined to acquire a monopoly in the manufacture and first-hand sale of coated wire nails. The plan which it adopted to accomplish that result was, broadly speaking, to create such difficulties for its competitors—first, in the manufacture, and, second, in the sale, of coated wire nails—as to drive out of the business all of them with whom it was unable to come to terms.

The details of what was done in carrying out this plan varied with different competitors. On the manufacturing side, some were hindered in obtaining their raw material (nails, rods, or wire), and some in obtaining the necessary machinery; some were secretly attacked by bribing their factory employés to disclose their factory conditions, and to send out defective goods, so that their trade was lost; and various other expedients were resorted to, to make manufacture of coated wire nails by the defendant's competitors difficult or impossible. On the selling side, competitors were attacked by bribing their office employés to inform the defendant as to their customers and contracts, and then selling to these customers below cost, and by a general policy of selling below cost when competition developed, until the competitor was forced out of that market, or out of business. Other methods, which it is unnecessary to state in detail, were also used by the Wire Company to hinder and interfere with the sale of coated wire nails by its competitors.

Without particularizing further, it is enough to say that, on the allegations of the declaration, the defendant's conduct and methods were lawless and indefensible. They were adopted, not simply for the purpose of injuring or putting out of business each separate competitor on whom they were practiced, but as co-ordinated movements in a campaign having as its object the elimination of all effective competition

with the defendants in the manufacture and sale of coated wire nails. The result was that, in large and important commercial districts comprising many states, the defendants were successful, and all effective competition was destroyed. The defendants' campaign was inaugurated years before the plaintiff came into the business; but it was continued thereafter along the same lines, and in pursuance of it the plaintiff was attacked in several of the ways above mentioned, and was damaged.

[1] It is urged for the defendant that an action does not lie under the Sherman Act for unfair business practices, which of course is true. But the first count of the declaration plainly sets up a claim for damages for an illegal monopoly, or attempted monopoly, in coated wire nails; and the illegal and unfair practices are alleged only in connection therewith, and as part thereof. The thing forbidden by the statute, and for which damages may be recovered, is monopolizing or attempting to monopolize. These would usually involve—and are here alleged to have involved—many separate acts, each of which, so far as it was part of the monopolizing, or attempt to monopolize, would be forbidden, and therefore a subject for damages under the statute. The defendant had a perfect right, for instance, so far as the Sherman Act goes, to undersell the plaintiff in ordinary business competition, or for the purpose of putting the plaintiff out of business. It had no right to do so as part of a plan to drive everybody out of the trade in order to obtain a monopoly for itself, which is what is alleged. Swift v. United States, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518; Monarch Tobacco Works v. American Tobacco Co. (C. C.) 165 Fed. 774. The first count of the declaration states a cause of action against the American Steel & Wire Company of New Jersey and against Baackes, its vice president, director, and general sales manager.

There remains the further question under this count, whether it states a case against the other defendants, viz. J. C. Pearson Company, J. C. Pearson Company, Incorporated, and Frank C. Ayres. Ayres was treasurer, director, and general manager of J. C. Pearson Company; he was president of J. C. Pearson Company, Incorporated. J. C. Pearson Company, Incorporated, succeeded J. C. Pearson Company as selling agent of the Wire Company on June 30, 1913, and has since acted in that capacity. For several years before that date, the relations between the Wire Company and J. C. Pearson Company were evidently close, though it is not alleged specifically that the latter acted as agent of the former.

[2, 3] The plaintiff began business January 1, 1912, and has continued it up to the present time. During all this period the Wire Company has been carrying out its plan, as above outlined, for monopolizing, or attempted monopolizing, the manufacture and sale of coated wire nails. During the first part of the period J. C. Pearson Company knowingly and actively co-operated with and assisted the Wire Company in so doing. Since June 30, 1913, J. C. Pearson Company, Incorporated, has been doing the same sort of thing; all its stock is owned by the Wire Company. Both of the Pearson companies and

Ayres, through whom they acted, are alleged to have been engaged in an attempt, various acts in connection with which are set forth in detail, to monopolize the trade in question for the benefit of the Wire Company. There were not successive attempts by the Wire Company to secure a monopoly; there was a single continuing one, in which different parties joined successively, and by which the plaintiff was injured. Everybody who joined in the unlawful attempt became liable for whatever injury resulted from the tortious act in which he participated. United States v. Nunnemacher, 7 Bissell, 111, 123, Fed. Cas. No. 15,902; Atlantic & Pacific R. R. Co. v. Laird, 164 U. S. 393, 396, 17 Sup. Ct. 120, 41 L. Ed. 485. It is not necessary that a defendant should expect to profit by his illegal conduct in order to render him liable therefor. Commonwealth v. Harley, 7 Metc. (Mass.) 462. Whether this count can be supported, as the plaintiff contends, as alleging a conspiracy in restraint of trade, without an explicit allegation to that effect, is doubtful; but, upon the ground stated, it seems to me good against all the defendants.

As to the second count: The second count is founded upon an alleged combination and conspiracy, under the same statute (section 1), among the defendants in restraint of the manufacture and interstate sale of coated wire nails.

[4] This count omits many of what seem to me to be important allegations in the first count. It contains no description of the trade or of the business situation to which the alleged conspiracy or combination applied. It does not describe, either the business of the plaintiff, or that of the defendant. There is no allegation that the defendant's acts were intended to affect anybody but the plaintiff, nor that they were part of any general scheme or conspiracy relating to, and affecting in any broad or substantial manner, the manufacture and sale of the product in question, nor that they did or could affect generally such manufacture and sale.

[5] It is well settled that a declaration under this section must describe (a) conditions in the trade in question; (b) the alleged conspiracy or combination; and (c) the business of the plaintiff, and the effect thereon of the alleged conspiracy or combination, sufficiently, so that the court can see that the defendant's acts might have affected general conditions in the trade in question, and that the plaintiff's business and situation were such that it might have been damaged by the defendant's conduct.

Applying this test, it is clear that the second count is insufficient. The demurrer to it must be sustained.

Demurrer overruled as to first count; sustained as to second count.

PERLMAN RIM CORP. v. FIRESTONE TIRE & RUBBER CO.

(District Court, S. D. New York. August 11, 1917.)

No. 139.

1. GRAND JURY ⊂=33—EVIDENCE—UNREASONABLE SEARCHES.
In an action, a witness offered in evidence exhibits which were impounded in the clerk's custody. After trial, the witness was arrested and held for the grand jury on a charge of perjury in the litigation, and he petitioned that the exhibits be returned to him, and that the district attorney be restrained from using the exhibits before the grand jury. Const. Amend. 4, declares that the right of the people to be secure in the right of their papers against unreasonable seizures shall not be violated, and that no warrant shall issue, but upon proper cause, describing the place to be searched and the person or things to be seized. Amendment 5 declares that no person shall be compelled in any criminal cause to bear witness against himself. *Held* that, as the witness voluntarily offered the exhibits in evidence, there was no unreasonable search or seizure which would entitle him to prevent their use, and such exhibits, the court having power to impound them, could be used just as though the witness might have been compelled to produce them by subpœna duces tecum.

2. CRIMINAL LAW ⊂=627½—POWERS OF COURT—IMPOUNDING.
Where exhibits are offered in evidence the trial court has the power to impound them with the clerk for future use; such power being analogous to that underlying subpœna duces tecum.

At Law. Action by the Perlman Rim Corporation against the Firestone Tire & Rubber Company. On motion by Louis H. Perlman, a witness in the above case, to prevent the use before the grand jury of his property which was offered in evidence as exhibits and impounded in clerk's custody. Motion denied.

Silberberg & Davis, of New York City, for the motion.
Harold Harper, Asst. U. S. Atty., of New York City, opposed.

MANTON, District Judge. Louis H. Perlman, a witness in the above-entitled action, asks this court to prevent the use before the United States grand jury of his property, which was offered in evidence as exhibits by the plaintiff on the trial of this action, and which were impounded in the clerk's custody. After a trial, on application of the plaintiff, this action was discontinued; one of the conditions imposed being that the exhibits, including the exhibits in question, be impounded with the clerk of the court. Perlman has been arrested and held for the grand jury on the charge of perjury in this litigation. His petition now asks, first, that his exhibits be returned to him; and, second, that the district attorney be restrained from using the exhibits before the grand jury. He has abandoned the first request, and insists upon the second in this application. His contention is that to permit the use of these exhibits under the circumstances would be a violation of the Fourth and Fifth Amendments of the Constitution. The Fourth Amendment reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment reads:

"Nor shall any person be compelled in any criminal case to be a witness against himself."

[1] As to the claim of a violation of the Fourth Amendment, unless the direction of the trial judge that the exhibits be impounded with the clerk amounts to an unreasonable seizure of the applicant's property, the grand jury cannot be foreclosed from seeing and using the exhibits. Assuming that the exhibits are Perlman's, he appeared in court with them and consented to their introduction in evidence, making them a matter of public record in this litigation then on trial. He disclaims interest in the litigation, saying that he is not a party plaintiff or defendant, but he was interested to the extent of being a witness only and to permitting his exhibits to be used without objection. His testimony upon that trial has resulted in a grand jury investigation as to its truth or falsity, and now he endeavors to avoid an indictment, as his counsel frankly admitted on the argument, by attempting to forbid the use of these exhibits. The cases cited by learned counsel are cases where officers of the law made search and seizure which were held to be unreasonable, and which were, in many cases, within the sanctity of the home of the petitioner.

In the case of Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, a marshal entered the house of the accused, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. In Flagg v. U. S., 233 Fed. 481, 147 C. C. A. 367, the defendant was arrested at his place of business in Fortieth street and his books and papers were seized. There was no warrant or procedure of any kind, either of arrest or of search, issued against him. In U. S. v. Abrams (D. C.) 230 Fed. 313, papers were taken from the defendants by officials of the United States acting under the color of their office. In U. S. v. Mounday (D. C.) 208 Fed. 187, there was a seizure of the papers.

Examining the authorities indicates that the test is the manner in which the property was obtained, and not the mere fact that the accused has the title to the property or exhibits in question. So, unless there has been an unreasonable search and seizure of the exhibits in question, they may be retained and offered against him before the grand jury.

[2] Concerning the power of the trial court to impound exhibits for use, Judge Sanborn, in U. S. v. McHie (D. C.) 196 Fed. 586, at page 588, said:

"Very little authority upon the question of the impounding power has been cited. * * * But the power most clearly exists from the necessities of the situation in analogy to that underlying the subpœna duces tecum."

Judge Hand, when he impounded these exhibits, must have concluded that they be kept so as to serve the ends of justice in the light of what occurred at the trial, and that they should be kept until justice

had taken its course. They, therefore, should be retained in the possession and hands of the officers of the law. These articles, in the hands of a third person, would surely be subject to the rights of a subpœna duces tecum to produce them before a grand jury. Under the order of Judge Hand, they are rightfully in the possession of the clerk of the court, and counsel for the petitioner practically concedes this when he abandons his application for the return of the property.

Since they are, therefore, rightly within the hands of the officer of the court, may they not then be produced by an order of the court for use before the grand jury, just as they may be subpœnaed under due process of law for use before the grand jury? Their possession by an officer of the law has been obtained peacefully and by order of the court, and not by any unreasonable search or seizure. Indeed, the papers on this application indicate that, when they were impounded with the clerk of the court in the above-entitled action, there was no protest on the part of the petitioner.

The cases relied upon by the applicant do not help this petitioner. The case of U. S. v. Wong Quong Wong (D. C.) 94 Fed. 832, is one where the government produced the letters, written in Chinese, which were handed by the defendant to an employé of the government, who in turn passed them to the customs officials, who opened and kept them, and then offered them in evidence, and it was there held, by the District Judge, that there was an unreasonable seizure; his language being:

"They are objected to as having been procured by unreasonable seizure if the mode of acquiring them as attempted to be shown is true, and as not being shown to have come from the appellants if it is not true. The fourth amendment to the Constitution of the United States declares that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,' and the fifth, among other things, that no person 'shall be compelled in any criminal case to be a witness against himself.' * * * The opening of the envelopes, and taking these letters from them, was a seizure of papers of the appellants that was unreasonable and contrary to the spirit of these amendments; and such papers, procured in that way, cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendments to all persons in this country."

But to grant the relief sought here would be analogous to forbidding the use of a pistol as an exhibit, found in a slayer's hand by an eyewitness at the time of a homicide, if it were committed within the four walls of a courtroom in the presence of the court, and the officers of the law were given possession of it by the presiding judge and directed to impound it for future use.

The motion will be denied.

BOOMER v. ROWE.

(District Court, D. Montana. August 1, 1917.)

No. 41.

1. CORPORATIONS ⟸351—DIRECTOR'S LIABILITY—FORM OF REMEDY.
A suit by corporate creditor against a director of a Montana corporation under Rev. Codes Mont. § 3827, based on the directors incurring of debts beyond the prescribed capital stock, is properly brought in equity; for that forum alone furnishes an adequate remedy.

2. CORPORATIONS ⟸349—DISSOLUTION—RIGHTS OF CREDITORS.
Rev. Codes Mont. § 3827, forbids directors creating debts beyond the prescribed capital stock and declares that for a violation they shall be liable in their individual and private capacity jointly and severally to the corporation and creditors thereof, in the event of its dissolution, to the full amount of the debts contracted, and that no statute of limitations is a bar to any suit therefor. A corporation of which defendant was a director was incorporated in 1910, and the directorate incurred debts in excess of the subscribed capital. All of the corporate property was sold at sheriff's sale in 1914, and the corporation, having no property and being insolvent, transacted no business thereafter. Its last annual report filed in 1916 stated that the corporation had ceased to be a going firm and it ceased to incur voluntary financial obligations. *Held*, that corporate creditors could not, on the theory that the corporation had been dissolved, maintain a suit directly against the directors, for such voluntary cessation of business did not operate as a dissolution of the corporation, entitling creditors to sue, and, as the statute provided no double liability for directors violating its terms and removed the bar of limitations, the director could not be held liable to creditors without possibility of a subsequent liability to the corporation.

In Equity. Suit by Laura A. Boomer against James H. Rowe. Dismissed.

Maury & Wheeler and J. O. Davies, all of Butte, Mont., for plaintiff.

J. B. Roote, J. A. Poore, and Enos E. Alley, all of Butte, Mont., for defendant.

BOURQUIN, District Judge. Plaintiff, creditor of a Montana corporation, for herself and other creditors, sues defendant, director of the corporation, to recover for that as a director he caused the corporation to become indebted in excess of the subscribed stock, contrary to statute. She alleges that for more than two years the corporation has been and now is "insolvent, * * * has entirely ceased to do business," and "it is thereby dissolved." The answer pleads lack of jurisdiction in equity, and that the corporation has not been dissolved.

Section 3837, R. C. Montana, provides, amongst other things, that the directors must not do certain things, "nor must they create debts beyond their subscribed capital stock. * * * For a violation" thereof the directors responsible "are, in their individual and private capacity, jointly and severally liable to the corporation and to the creditors thereof, in the event of its dissolution, to the full amount of

the * * * debt contracted; and no statute of limitations is a bar to any suit" therefor.

[1] The suit is well brought; equity alone furnishing an adequate remedy. Stone v. Chisolm, 113 U. S. 308, 5 Sup. Ct. 497, 28 L. Ed. 991; Lyman v. Hilliard, 154 Fed. 339, 83 C. C. A. 117.

[2] It appears the incorporation is of 1910, for 20 years, for all business purposes. The directors, including defendant, incurred the debt sued for, and in excess of the subscribed capital stock. January 30, 1914, all its property was sold at sheriff's sale. It has no property, is insolvent, and transacts no business. Its last annual report was filed January 20, 1916, from which it appears its officers were the same as the previous year. Defendant is director now and from the beginning, and secretary now and for at least four years. In said report is a recital that the "corporation has ceased to be a going concern and has ceased to voluntarily incur financial obligations because of its insolvency"; the local law providing that thereafter directors "shall not be liable for a failure to file annual reports during such time as the disability of such corporation shall continue." Contending the corporation is dissolved within said section 3837, plaintiff cites McDonnell v. Ins. Co., 85 Ala. 401, 5 South. 120, and other Alabama cases. Done v. Jones, 61 Me. 160; Gibbs v. Davis, 27 Fla. 531, 8 South. 633; Perry v. Turner, 55 Mo. 418, and other Missouri cases; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273. These are cases wherein statutes imposed upon stockholders a contractual liability to creditors for debts of the corporation dissolved, very different from section 3837, supra, which imposes an obligation upon directors, penal in its nature (see Moss v. Smith, 171 Cal. 777, 155 Pac. 90), in favor (1) of the corporation, (2) of creditors in the event of dissolution.

It is worthy of note that the leading case, Slee v. Bloom, involves a situation wherein the stockholders had acted upon a resolution to refrain from further elections and to abandon the property and corporation. They intended to and did abandon all corporate property and franchise rights. The bill in substance charged all this, and also that the corporation was dissolved, none of which was denied by defendants. America's greatest chancellor, Kent, dismissed the bill for that the corporation was not dissolved within the meaning of the statute. He was reversed by a court composed mainly of lay judges, the senate of New York, possibly more sensitive to the even then rising tide of popular feeling anent corporations. It is submitted that Kent's reasoning and conclusion are the better. And it is noted that the reversal counts much upon mistaken analogy between common law and canon law, so-called corporations sole and more ecclesiastical than lay, and statutory business corporations aggregate, and also proceeds upon failure to distinguish between the condition of the corporation which would authorize the crown in behalf of rights of the government to there create a new corporation, and the condition which would defeat the personal privileges of the members of the corporation. Furthermore, the construction was induced by anxiety to furnish a prompt remedy, where otherwise was none or one that might be defeated by time. Limitations were not barred as in the statute of the instant suit,

and no right of action was given the corporation which might furnish a remedy to creditors, as in the statute here. Ex necessitate, potent there, is absent here.

The great chancellor in his Commentaries recognizes that the doctrine of Slee v. Bloom is more judicial than legislative, and mildly observes that it "is not to be carried beyond the precise facts on which it rested." Its general statements, however, have been seized upon, its limitations ignored, to expand the doctrine so far that now, in assumed application of it to cases involving statutes like Montana's, courts have gone so far as to declare that corporations are dissolved within the intent of the statute "by insolvency or cessation of business." Stoltz v. Scott, 23 Idaho, 104, 129 Pac. 342. The Montana Statute confers the right of action: (1) Upon the corporation for all the excess debt, even though it be not damaged and recovery not necessary for creditors' protection; and (2) upon the creditors for less than the excess debt if sufficient to satisfy their claims, and only upon the happening of a contingency—dissolution of the corporation. The creditors' right arises only when the corporation's expires, viz. when it is so far dissolved that it has no capacity to sue. This corporation has capacity to sue. It might now sue defendant for the excess debt, and recovery would not be barred by recovery in this suit; for the corporation cannot be concluded in the matter of its property or right of action by a suit to which it is not a party. Nor is defendant subject to a double liability. The statute imposes none such. Given by statute, creditors take the right subject to the contingency. Nothing in the statute indicates the Legislature intended dissolution in other than its ordinary sense, the approved usage of the word elsewhere in the Codes, viz. death of the corporation. Failure of election, inactivity or cessation of business "on account of insolvency or for any other reason," are covered by code provisions guarding against dissolution thereby and contemplating future elections, business, solvency.

Other and the usual remedies are available to creditors of inactive and insolvent, but not dissolved corporations, obviating necessity for judicial construction to create a right and remedy where the Legislature has not. See Appleton v. Co., 65 N. J. Eq. 375, 54 Atl. 454. The statute has not been construed by the Supreme Court of this state. If the Legislature had intended a new right and remedy before dissolution in the approved usage of the word, it is believed it would have plainly said so. The statutory right of action is the corporation's, it is not dissolved within the meaning of the statute, plaintiff has not the right herein asserted, and the suit is dismissed.

UNITED STATES v. UNITED STATES FIDELITY & GUARANTY CO. et al.

(District Court, E. D. New York. July 26, 1917.)

1. ARMY AND NAVY ⟸13(2)—NAVAL OFFICERS—STATUS FOR COMPUTING PAY—"APPOINTMENT FROM CIVIL LIFE."

Under Act March 3, 1899, c. 413, § 13, 30 Stat. 1007 (Comp. St. 1916, § 2818), providing that "all officers, including warrant officers who have been or may be appointed to the navy from civil life shall, on the day of appointment, be credited, for computing their pay, with five years' service," which entitles the appointee to an increased rate of pay, an enlisted man who while in the service took the examination for a higher position, and having passed, and two days before his appointment, and when it was practically assured, obtained his discharge from the service, cannot be rated as an appointee from civil life in the sense of the statute, but his appointment must be considered as a promotion in the service.

2. ARMY AND NAVY ⟸13(15)—NAVAL OFFICERS—STATUS FOR COMPUTING PAY.

Where, however, such officer was rated as an appointee from civil life, which he was according to the strict letter of the law, for a number of years, and vouchers for the increased pay were approved, he is entitled to retain such pay up to the time when his rating was corrected.

At Law. Action by the United States against the United States Fidelity & Guaranty Company and Thomas D. Harris. Judgment for defendants.

Melville J. France, U. S. Atty., and Thomas J. Cuff, Asst. U. S. Atty., both of Brooklyn, N. Y.

George Hiram Mann, of New York City, for defendants.

CHATFIELD, District Judge. The United States has brought suit to recover the sum of $1,301.96 paid to the defendant Harris between January 1, 1905, and December 31, 1910, as a part of his salary as assistant paymaster during that period.

[1] It appears that Harris was an enlisted man in the United States navy, having served from May 10, 1898, until June 13, 1900, upon which day he received a discharge upon the express statement that his services were no longer required. It also appears that he had requested this discharge upon the day before, when he learned that he had been certified as qualified for appointment as assistant paymaster. He had upon March 1, 1900, been allowed to take the examination for assistant paymaster, there being two vacancies, and two applicants taking the examination, both of whom passed. Harris was appointed assistant paymaster upon June 15, 1900, took his oath upon the 22d day of June, and states in his testimony that he resigned because he "hoped," in the sense of expected, to be appointed a paymaster after his resignation had taken effect. The record also shows that at the time of so doing Act March 3, 1899, c. 413, § 13, 30 Stats. at Large, p. 1007 (Comp. St. 1916, § 2818), provided:

"That all officers, including warrant officers, who have been or may be appointed to the navy from civil life shall, on the day of appointment, be credited, for computing their pay, with five years' service."

By the statute in force at the time an increase of pay allowed for the third five years' service caused Harris to pay himself during the

five years from 1905 to 1910 at a rate which gives a total for these increases of payment during that time of $1,301.96. This amount is sought to be recovered in this action.

There is no dispute as to the facts, and Mr. Harris has been examined in open court. In his testimony he states that at the time of his appointment he was misinformed as to the pay regulations and supposed that he would receive what he calls "old navy pay," which would be slightly greater during the five years in question than either of the methods of payment which are under consideration. He seeks thereby to meet the question of intent which is presented by the government as a controlling issue.

The case of United States v. Alger, 151 U. S. 362, 14 Sup. Ct. 346, 38 L. Ed. 192, establishes the law when the facts passed upon in the Alger Case are present. This case holds that:

"A resignation the very day before an appointment to a higher office, and when such appointment must have been known of and counted upon, was evidently tendered with no intention of leaving the service, and was but equivalent to a resignation which the law would have implied from acceptance of the higher office."

Hence an intention to leave the service or an intention to merely move from one position to a higher is a finding of fact based upon a construction of the law. Mr. Harris has attempted to show that his intention in fact was not to resign as a subterfuge to obtain the benefits of greater pay from the method of appointment. But, as was pointed out in the Alger Case, and in United States v. Thornton, 160 U. S. 654, 16 Sup. Ct. 415, 40 L. Ed. 570, the honesty of purpose and righteousness of receiving the increased amount of pay is not the test as to the effect of such a resignation. The Alger Case establishes the proposition that a resignation which, to the knowledge of the person resigning, is for the purpose of obtaining the higher appointment, is no different in effect than if simultaneous therewith, and if expressly stated to be for the purpose of receiving that appointment. Such promotion cannot be, as a matter of law, used for the establishment of facts indicating a different condition of relations than those which evidently existed.

In the present case Harris applied for appointment while he was an enlisted man, took the examination for the appointment as a promotion, and sent in his resignation with the expectation of being appointed as a promotion unless he should fail of appointment. The mere extent of opportunity within which something might occur to cause failure of appointment, where the appointment was practically certain, would not affect the status of the individual who, while in the service, submits his application to the government for promotion. This was the ruling which resulted in the case of the present defendant, Harris, when the question of his status was first raised.

The Comptroller of the Treasury on January 29, 1910, decided that Harris could not hold a position as an appointee from civil life, in the sense meant by the statute. The matter was then taken by Harris to the Court of Claims, with reference to the salary from June 30, 1910, on, but was not prosecuted, and Harris has since acquiesced in the

rating established in accordance with the decision of the Comptroller of the Treasury.

It must be held that an appointment such as that given Mr. Harris should not be rated as one from civil life. The statute which provides for this increase of pay, and which evidently had in mind such treatment of the enlisted men in the navy, and also of those appointed from civil life, as to make their opportunities equal, shows that Congress took into account the actual promotion of a man in the service, and the actual appointment of a man who had not been in the service, in establishing the rates of increase in pay.

[2] But a determination that Harris should not be classified as appointed from civil life does not establish the right of the government to receive back the money which was paid him before such classification was made. During the years from 1905 to 1910 he had been paid the increased amount upon vouchers which were approved and were made out for him as an appointee from civil life. He had in all matters which legally established his status, received what was stated to be an appointment as a civilian, and until the form of his appointment was changed by a correction of his rating there was no wrongdoing in receiving pay according to the status approved by those responsible for the appointment. The mistake of law was not on the part of Mr. Harris.

Harris was in fact appointed from civil life, according to the letter of the law, but under such circumstances that the government had the right to compel him to accept the appointment as a promotion. The government did not compel him to accept the appointment in that form until 1910, and the suit to recover the amount paid him before that date should not prevail.

The defendants may have judgment.

THE CAMPANELLO.

(District Court, E. D. New York. July 30, 1917.)

COLLISION ⊂=22—VESSELS MOORED IN HARBOR.

Libelant's canal boat was lying alongside a steam elevator which in turn was moored to the side of a steamship lying inside the concrete pier which forms the boundary of the Atlantic Basin, when a sudden wind squall struck the bow of the steamship, which extended northward beyond the shed on the pier, causing the parting of the forward lines by which she was moored to the pier and swinging her around, causing injury to the canal boat. The wind was the strongest ever known in New York harbor, having a velocity of 88 miles an hour for five minutes and reaching 125 miles for half a minute. It was seen that a thunderstorm was coming up from the west, but there was nothing to indicate any unusual wind. The steamship was moored to the pier by lines sufficient to hold her in any ordinary or even an extraordinary wind. *Held*, that she was not chargeable with want of reasonable care, and that the injury to libelant's boat must be attributed to inevitable accident for which she was not liable.

In Admiralty. Suit by Christian Hansen against the steamship Campanello. Libel dismissed.

Macklin, Brown & Purdy, of New York City, for libelant.

Barry, Wainwright, Thacher & Symmers, of New York City (Anthony M. Menkel, of New York City, of counsel), for claimant.

CHATFIELD, District Judge. The canal boat Hopkins on July 23, 1914, was lying alongside a steam grain elevator, the International, which in turn was moored to the starboard side of the steamer Campanello. Cargo had been discharged through the elevator into the Hopkins on the afternoon of that day, the Campanello having come in from sea in the morning. Work was stopped at about 5 o'clock in the afternoon. The steamer was lying on the eastern side of the concrete pier or abutment which forms the outside boundary of the Atlantic Basin, in Brooklyn. The bow of the steamer extended to the north about 30 feet beyond the shed or structure which is upon the pier, to a point nearly even with the side wall forming the southerly boundary of the gap into the basin. At about 5 o'clock p. m. one of the strongest windstorms on record in the harbor of New York broke. The rate of wind movement as shown by the weather bureau reached 88 miles for a period of five minutes, from 5:05 to 5:10 p. m. During this five minutes one single mile of wind movement occurred in less than half a minute, or at the rate of 125 miles per hour. It appears that this wind velocity occurred at the outset of a thunder shower, and that thunderheads of the usual form observable in summer had been gathering throughout the afternoon. The conditions were such as to cause expectation of a severe thunderstorm, but there was nothing to indicate the extreme wind velocity which resulted.

The owner and master of the Hopkins testifies that he and his wife anticipated a severe thunder shower, while other of the witnesses for various periods before the storm noticed the weather conditions and knew the storm would break. The barometer had been going down, but did not, of course, record in advance the hurricane velocity which for a few moments made this storm the heaviest the witnesses have ever seen in New York harbor.

The officers of the steamer were aware of the general conditions, but did not anticipate more than the usual severe thunder shower, and did nothing to increase the moorings of the vessel, which were ample, in the opinion of these witnesses, to sustain the vessel in its position under any conditions that might have been expected. When the squall in question struck, it came from the northwest. The gap and the end of the building upon the pier at the south run east and west, and the wind up to this time had been coming from somewhat south of west. Thus until the shifting of the wind the steamer had been protected by the shed, except for a part of her upper deckhouse and bridge. The grain elevator reached fully as high as the structures upon the deck of the steamer, and may have added some surface to that exposed to the wind. The lighter which was moored on the inside and under the lee of the grain elevator received no wind directly. One of the iron mooring bitts upon the concrete abutment, near the stern, was started loose, and the lines running out from the bow of the steamer were parted by the squall, thus allowing the steamer to swing around on her stern lines, carrying the grain elevator and the

lighter with her, and bringing the lighter up on the opposite side of the slip, where she received the damage for which the present action has been brought. The Campanello had out 17 parts of new manila and wire lines.

The only negligence alleged is failure on the part of the officers of the steamer to observe the weather conditions and to anticipate that the moorings of the steamer might not be sufficient to hold her.

The bow of the steamer was higher than the stern, and the sudden shifting of the wind caused a sharp strain upon the lines at the bow, as the wind then suddenly swept straight through the gap against the bow of the steamer, with additional force from conjunction of the air turned away by the end of the shed upon the dock. The force exerted in breaking these lines was evidently much greater than ordinary lines were able to stand. The wind was at the highest strength for less than half a minute. The witnesses describe the shock as almost instantaneous, as a shout to cover the hatches on another vessel was immediately followed by the shift of the wind. The force was delivered like that of a cyclone, at the moment when the wind shifted to the precise point where the bow of the boat was exposed to a gust, that was not reasonably to be anticipated. Ordinary precautions had been taken, and it would seem that these precautions were reasonable as against any thunder shower which should have been anticipated.

It would not be within the requirements of good seamanship to estimate that the hardest squall ever experienced in New York harbor, a change in wind in connection with this squall so as to suddenly present a cyclonic blast against the bow of the boat, and a quick application of strain sufficient to break lines which would hold against even an extraordinary wind should all combine so as to catch the bow of this boat on the small area where it projected beyond the pier shed, and where it would have the greatest leverage if abruptly subjected to a direct wind through the gap. Such an occurrence is an accident, and the failure on the part of the appliances of the vessel to safeguard the vessel against every physical injury does not show lack of care or actionable negligence. Neel v. Blythe (D. C.) 42 Fed. 457; The Olympia (D. C.) 52 Fed. 985.

The cases cited by the libelant, The Louisiana, 70 U. S. (3 Wall.) 164, 18 L. Ed. 85, The Bayonne, 213 Fed. 216, 129 C. C. A. 560, The Drumcraig (D. C.) 133 Fed. 804, and The William E. Reis, 152 Fed. 673, 82 C. C. A. 21, hold that:

"Inevitable accident is something that human skill and foresight could not in the exercise of ordinary prudence have provided against." The Pennsylvania (Union S. S. Co. v. New York & V. S. S. Co.) 65 U. S. (24 How.) 307, 16 L. Ed. 699.

In the absence of any testimony showing failure to use reasonable precautions, the confidence of the captain in the ordinarily safe moorings of his vessel and the testimony that the threatened thunderstorm need not be apprehended in any but the usual manner meet the burden of proof required. The C. H. Northam (D. C.) 181 Fed. 986; The Grace Girdler, 74 U. S. (7 Wall.) 196, 19 L. Ed. 113.

The libel must be dismissed.

In re GRIFFITH STILLINGS PRESS.

(District Court, D. Massachusetts. February 9, 1917.)

No. 23096.

1. BANKRUPTCY ⟸384—COMPOSITION—CREDITORS.
In a proceeding for confirmation of a composition approved by a creditor which had established a claim on a note having two indorsers, objecting creditors cannot show that the indorsers had prior to the offer paid the note; for the question of a claimant's right cannot be raised in collateral way, and it did not appear that indorsers who became subrogated to right of creditor objected.

2. BANKRUPTCY ⟸316(3)—CLAIMANTS—PAYMENT.
Under Bankr. Act July 1, 1898, c. 541, § 57i, 30 Stat. 560 (Comp. St. 1916, § 9641), and General Order 21, subsec. 3 (89 Fed. ix, 32 C. C. A. ix), indorsers on note of bankrupt, claim upon which was proven against the estate on paying the note, become subrogated to rights of the claimant.

3. BANKRUPTCY ⟸384—COMPOSITION—OFFERS.
Where a bankrupt, after having made an unsuccessful endeavor to carry through an offer of composition, makes a new offer in a larger amount, he has the burden of explaining his good faith; the practice of trading with the court and creditors on offers of composition not being proper.

4. BANKRUPTCY ⟸384—COMPOSITION—APPROVAL.
Whether an offer of composition should be confirmed depends upon whether it is for the best interest of all the creditors.

5. BANKRUPTCY ⟸384—COMPOSITION—APPROVAL.
The assent of a majority of the creditors to a composition is evidence that it is for their best interest, but is not conclusive for they may assent from considerations other than those affecting creditors generally, as friendship, etc.

6. BANKRUPTCY ⟸377—COMPOSITION—ASSENT.
Assent to composition through motives of friendship or desire for future business of bankrupt is not improper.

In Bankruptcy. In the matter of the bankruptcy of the Griffith Stillings Press. On objections to report of referee confirming an offer of composition. Report approved, and composition affirmed.

A. M. Schwarz and S. A. Dearborn, both of Boston, Mass., for creditors.

Swift, Friedman & Atherton, of Boston, Mass., for bankrupt.

MORTON, District Judge. This is a case of composition after adjudication. The bankrupts made an offer of 25 per cent. which was accepted by the creditors, but was objected to by a substantial number and amount of them. The referee reported that the offer was inadequate, because, in his opinion, the estate would pay upon full administration 33 or 34 per cent. This report was confirmed, and the composition was disapproved by the court. The bankrupt appealed from that decision. Subsequently the appeal was withdrawn, and a new offer in composition of 33 per cent. was made by the bankrupt, which was assented to by a sufficient number and amount of creditors. It was objected to by substantially the same creditors as had objected to the first offer. Various grounds of objection were specified which may conveniently be grouped, as is done in the specifications, into

those relating to the procedure, those relating to the bankrupt's alleged lack of good faith, and those in support of the allegation that the composition is not for the best interests of the creditors. The learned referee has reported in favor of the offer.

[1, 2] The objections, so far as they relate to practice, seem to me not well founded nor to require discussion, except as to the offer of evidence by the objecting creditor to show that the Exchange Trust Company, which had proved a claim for $11,000 upon a promissory note having two indorsers, and which assented to both offers, had, before assenting to the second offer, been paid in full by the indorsers and was no longer a creditor of the bankrupt. The evidence offered was excluded by the learned referee. His ruling was right. Questions of this sort must be raised in direct proceedings to which the holder of the claim objected to can be made a party, and not in an indirect and collateral way, as was attempted in this case. Upon payment of the note the indorsers became subrogated to the position of the trust company (Bankr. Act, § 57i; General Order 21 [3] [89 Fed. ix, 32 C. C. A. ix]; Collier on Bankruptcy [10th Ed.] p. 736), and there is perhaps a presumption that it was thereafter acting in their behalf. The facts certainly suggest that it could hardly have been acting without their knowledge, and they did not appear to object.

[3] As to whether the new offer is made in good faith, I entertain much greater doubt than apparently the learned referee did. The practice of trading with the court and creditors on offers in composition is not to be encouraged. A bankrupt or alleged bankrupt, who, after having made and unsuccessfully endeavored to carry through an offer in composition of a certain amount, makes a new offer of a larger amount, undertakes a considerable burden of explanation as to his good faith. In re Kinnane (D. C.) 221 Fed. 762, 34 Am. Bankr. R. 119, 129, where the court refused to entertain a third offer. The reasons given for not making the offer properly large in the first place seem to me unsatisfactory; but the learned referee, who saw the witnesses, has found that the bankrupt acted in good faith, and I am unable upon the record before me to say that he was clearly wrong.

[4-6] As to whether the composition has been shown to be not for the best interest of the creditors: Upon this point also the learned referee has found in favor of the offer. The question is whether the offer is for the best interest of all the creditors. In re Kinnane (D. C.) 221 Fed. 762, 34 Am. Bankr. R. 119, 124. The assent of a majority of them is evidence upon that point; but it is not conclusive, because individual creditors may be led to assent by other considerations than those affecting creditors generally, e. g., relationship, personal friendship, hope of future business, etc. Assent from such motives is not invalid or illegal (Re Spiller [D. C.] 230 Fed. 490); but the extent to which the majority is composed of creditors so influenced is an important factor in determining the weight to be given to the assent of the majority, upon the question whether the proposed composition is really for the best interest of all creditors.

In this case the majority in favor of composition was, as to amount, largely made up of claims held by persons closely associated with the corporation or its officers. Of what may be called "outside" creditors,

a somewhat larger amount opposed the composition than favored it. In view of the delay in the settlement of the estate, for which the bankrupt is clearly to blame, I think the creditors will now realize appreciably more under composition than upon full administration. The learned referee has so found. All the "inside" creditors, their claims being of relatively large amount and undisputed validity, desire the composition. Nearly as many in amount of the "outside" creditors favor it as oppose it. The case is not free from doubt, but it seems to me that it is for the best interest of creditors that the composition be approved.

Report of the referee confirmed. Offer in composition confirmed.

THE YARMOUTH.

(District Court, D. Massachusetts. February 18, 1902.)

No. 1031.

COLLISION ⇐154—SUITS FOR DAMAGES—COSTS.

Under the rule established by decision in the First circuit in a suit for collision in which no cross-libel or counterclaim is filed, libelant is entitled to recover full costs, although both vessels are held in fault, and he recovered but half damages.

In Admiralty. Suit for collision by the Nantasket Beach Steamship Company against the steamship Yarmouth. On question of costs. Libelant allowed full costs.

Nason & Proctor, Frederick Dodge, and E. S. Dodge, all of Boston, Mass., for plaintiff.

Carver & Blodgett, of Boston, Mass., for defendant.

LOWELL, District Judge. This was a libel brought by the owners of the steamer Mayflower against the steamer Yarmouth for a collision in which the Mayflower was seriously damaged, and the Yarmouth damaged hardly at all. Neither cross-libel nor counterclaim has been filed. Both vessels were found to be at fault, and an interlocutory decree was entered giving to the libelants half the damage suffered by the Mayflower. Thereafter there was a hearing before an assessor, whose report is now on file.

The question here presented concerns costs. The libelants contend that they are entitled to recover full costs, and in support of their contention cite The Hercules (C. C.) 20 Fed. 205, and other cases therein referred to. The Hercules was decided by the Circuit Court for this circuit, sitting as a Court of Appeal, and this court is bound to follow the opinion of that court unless it has been overruled. True, the decree in The Hercules divided the costs, but the general principles governing the case at bar were stated so fully and strongly in the opinion that, unless overruled, the case must be taken to determine, so far as this court is concerned, that, where there is neither cross-libel nor counterclaim, the libelant will, in the absence of peculiar circumstances, recover full costs, even though he recovers but half his damages. In

the case at bar no peculiar circumstances have been shown, and the case must be decided on general principles.

In The Horace B. Parker, 75 Fed. 238, 22 C. C. A. 418, the Court of Appeals for this circuit divided the costs, though there was no cross-libel, but only a counterclaim. In deciding the Horace B. Parker, did the Court of Appeals intend to overrule Judge Lowell's carefully reasoned opinion in The Hercules? If so, the costs must here be divided; if not, the libelant must recover them. In the substantial facts it is difficult to distinguish between the Horace B. Parker and this case. If two vessels are in collision, both will certainly be damaged, though the damage to one, as in this case, may be so slight as not to be worth the filing of a cross-libel, or even a counterclaim. Paint will be scratched, where nothing worse happens. If full costs are given to the libelant where neither cross-libel nor counterclaim is filed, and if they are to be divided upon filing a counterclaim and proof of the minutest damage, a cross-libel or counterclaim will always be forthcoming. Yet the distinction just stated between a counterclaim and no counterclaim, though it may seem illusory, is the precise distinction drawn in The Hercules, and not denied in The Horace B. Parker. Whatever the Court of Appeals may do, I cannot take upon myself to overrule the former case. There is no need to comment upon the case in the Supreme Court and in other circuits, as these were fully dealt with in The Hercules. The Edward Luckenback (D. C.) 94 Fed. 544, seems to show that the practice in the Second circuit, which was somewhat relied upon in The Hercules, is now settled against the opinion in that case. The difference between a collision case in which only half damages are recovered and any other case in which the defendant reduces the plaintiff's demand may be greater than was perceived in The Hercules (C. C.) 20 Fed. 206. A. sues B. If B. has done A. a wrong (injuria), and damage (damnum) has resulted therefrom, A. recovers the amount of the damage and the costs incident to collecting his claim. If, however, the damage did not result altogether from the wrong done by B., but in part from A.'s own carelessness, A. ordinarily recovers neither damages nor costs. If A. and B. both suffer damage through the wrong of both, neither recovers anything; the loss is left to lie where it fell. In admiralty the rule is that above stated where the damage results altogether from the wrong of B. But where damage to both A. and B. results from the wrong of both A. and B., the rule of the admiralty is peculiar. The damages are added, and A. and B. are assessed each for half of the sum, and the costs are halved also. If A. alone suffers damage, caused by the wrong of both A. and B., the principle is the same. Theoretically B.'s damage is added to that of A., though there be no damage to add, and it should seem that, on principle, the costs should still be divided. By establishing that A.'s fault contributed to the damage, B. has done much more than reduce A.'s demand. He has shown that A. has committed a wrong against him from which arises a claim against A. for contribution. If B. has suffered no actual damage, the claim needs no money payment to satisfy it, but in theory B. still pays not the half of the damage A. has suffered, but half the sum of the damage suffered by A. and B. To apply the rule of the

civil law quoted in The Hercules, A. and B. are each victus and victor. A. has not established the right alleged in his libel to recover from B. the damage resulting from B.'s wrong, but has established only his right, shared by B., to call upon a cosufferer and cotort-feasor for contribution. Weighty as this argument may appear to this court, however it cannot be permitted to overcome the reasoned opinion of a Court of Appeal.

In the Gladiator, an unreported case, a counterclaim was filed after the assessors' report was returned into this court, and the costs were divided accordingly. In the present state of the pleadings, the libelant here is entitled to full costs.

THE BERTHA.

THE ATHANASIOS.

(District Court, E. D. Virginia. June 29, 1917.)

1. COLLISION ⊂⊃69—ANCHORED VESSELS—PRECAUTIONS IN ANCHORING.
   It is the duty of a vessel last coming to anchor to allow ample berth space to other vessels already anchored in the vicinity.

2. COLLISION ⊂⊃71(1)—VESSELS AT ANCHOR—INSECURE ANCHORAGE.
   A collision between two vessels anchored in Hampton Roads during a sudden windstorm *held* due solely to the fault of one, which was light and with an unusually high freeboard, in failing to anchor securely in the first place, or to take proper precautions when the storm came on to prevent dragging the single anchor she had out.

In Admiralty. Suit for collision between the Norwegian steamship Bertha and the Greek steamship Athanasios. Decree in favor of the Bertha.

Hughes & Vandeventer, of Norfolk, Va., for the Bertha.
Hughes, Little & Seawell, of Norfolk, Va., for the Athanasios.

WADDILL, District Judge. On the evening of the 21st of December, 1916, the Norwegian steamship Bertha anchored in Hampton Roads, Va., 600 to 900 feet away from the Greek steamship Athanasios, which had come in and anchored during the afternoon of the day before in the same vicinity. Both vessels were anchored near the quarantine station, off Old Point, and each was brought in and located by a Virginia pilot, and at the time of the anchorage of the Bertha there were several other ships also anchored in the vicinity. On the morning of the 22d of December, about 8 o'clock, a hurricane suddenly came up from the southwest, and the Bertha and Athanasios came into collision, inflicting injury to the Bertha's stem, and damaging the superstructure of the Athanasios. The Bertha is 245 feet long, 38 feet beam, about 20 feet deep, and of the net register of 1,067 tons; and the Athanasios 355 feet long, 51 feet beam, 26 feet depth, and of the net register of 2,691 tons. Both vessels were light; the Athanasios had out her starboard anchor on 45 fathoms of cable, and about an

hour before the collision the master of the Athanasios, going ashore about 7 a. m., caused 30 fathoms of chain additional to be paid out.

The Bertha insists that the Athanasios was in fault in failing to anchor securely and properly, taking into account her size and unusual freeboard; for not having up steam and using the same; for not having a proper anchor watch, who would have observed the approaching storm and cast out an additional anchor; and for not maneuvering, upon her anchor dragging, in such manner as to avoid colliding with the Bertha while drifting. The Athanasios charges the Bertha with coming into a crowded harbor at night, in a fog, and anchoring in too close proximity to vessels already anchored; for failure, upon discovering this fact, to move to a safe place, or, upon the coming of the storm, to pay out more of her cable, with a view of allowing other vessels greater room to swing.

This case turns almost entirely upon a question of fact, as to whether the accident occurred by reason of the Athanasios' anchor dragging, causing her to collide with the Bertha, or because the latter failed to give the Athanasios sufficient room upon her coming to anchor, and this can be solved only by a full consideration of all the testimony.

[1, 2] That it was the duty of the Bertha, the vessel last coming to anchor, to allow ample berth space to other vessels to anchor, may be conceded (The Juniata [The Sovereign of the Seas] 124 Fed. 861 [D. C.]); and the court's conclusion, after taking into consideration all of the facts and circumstances of the case, including the anchorage grounds, and the presence of other vessels, is that the Bertha's anchorage was proper, and that sufficient space was allowed to the Athanasios, had she either made a proper anchorage originally, or, upon the coming of the storm, exercised proper care and caution to have provided against her anchors dragging, by reason of the force of the sudden wind, causing her to drift into the Bertha. Nor can the Athanasios escape responsibility, under the circumstances here (The Severn [D. C.] 113 Fed. 578), because of the suddenness and violence of the storm. It is true it came on suddenly from the southwest, and blew with great violence from 40 to possibly 80 miles an hour for a few minutes; but there was no reason why those in charge of the Athanasios, in the exercise of proper care on their part, should not have seen and anticipated this condition, in time to avoid accident therefrom, as did other vessels then lying at anchor. This is especially true of a ship of the size of the Athanasios, with its unusually high freeboard. The season of the year and the location of the anchorage grounds, should have admonished them that sudden storms might arise; and the Athanasios cannot escape liability to others, injured by her negligence in this respect, or ask them to share in her losses.

The court's conclusion upon the whole case, is that the collision was solely the fault of the Athanasios, and that she should bear the loss arising therefrom. A decree will be entered in accordance with these views, when presented.

TAYLOR et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 28, 1917.)

No. 1512.

1. CRIMINAL LAW ⊂⊃1156(1)—CONSIDERATION OF ERROR—REFUSAL OF TRIAL COURT TO GRANT NEW TRIAL.

Though the Circuit Court of Appeals will not entertain a writ of error in a criminal case where the trial court, in its discretion, refuses to grant new trial, nevertheless, in a prosecution for conspiring to violate the laws of the United States by returning another to the condition of peonage, where it is apparent on the face of the record that error has been committed determinative of the questions involved, the court will consider the same on error though the trial court refused to grant new trial.

2. SLAVES ⊂⊃24—STATUTE—"PEONAGE."

"Peonage," within Pen. Code 1909, § 269 (Act March 4, 1909, c. 321, 35 Stat. 1142 [Comp. St. 1916, § 10442]), providing that whoever holds, returns, or aids in the arrest or return of any person to a condition of peonage shall be fined or imprisoned, is a status or condition of compulsory service based on the indebtedness of the peon to the master.

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

3. SLAVES ⊂⊃24—RETURNING TO CONDITION OF PEONAGE—STATUTE.

Where defendant employed a servant for a year at $10 a month, and independently loaned him $13 to enable him to get married, and the servant, on discovering that he could not live on his wage, left the employment, and defendant, having initiated a prosecution against him under state law for so doing, declined to release the servant unless the latter paid up all he owed him, together with $25 additional for damages, and the servant paid, but defendant later procured his arrest on a magistrate's warrant, the servant being forced to work in the chain gang, neither defendant nor the magistrate placed the servant in a condition of peonage to warrant their conviction of the offense of so placing him in violation of Pen. Code 1909, § 269, the servant never having been in a condition of peonage.

4. CONSPIRACY ⊂⊃28—RETURNING SERVANT TO CONDITION OF PEONAGE—STATUTE.

The act of a master and a magistrate in conspiring to put the master's servant in a condition of involuntary servitude through a prosecution for breach of his contract of employment, in order to require him to perform his contract to work one year for the master, was insufficient to warrant a conviction, even if their conduct resulted in placing the servant in involuntary service, under Crim. Code 1909, § 37 (Comp. St. 1916, § 10,201), denouncing the offense of conspiring to commit an offense against the United States, for having conspired to violate section 269, providing that whoever returns any person to a condition of peonage shall be fined, etc., the servant never having been in such condition, so that his master and the magistrate could not return him to it.

5. SLAVES ⊂⊃24—STATUTE—"PEONAGE"—"DEBT."

One cannot be deemed guilty of peonage where he has held another in involuntary servitude to compel such other to comply with an agreement to work for a certain term, since an obligation to work cannot be reasonably construed to mean a "debt" as contemplated by the peonage statute (Pen. Code 1909, § 269).

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

6. CONSPIRACY ⟸28—RETURN TO CONDITION OF PEONAGE—STATUTE.
To sustain a conviction of conspiracy to return a servant to a condition of peonage, it must appear that defendants unlawfully conspired to return the servant to a condition of peonage as contemplated by Pen. Code 1909, § 269.

7. CONSPIRACY ⟸28—VIOLATION OF PEONAGE ACT.
Though a magistrate, by some agreement, express or implied, with the master of a servant being prosecuted before him under state law for breach of his contract of employment, at the time that the servant was convicted, had permitted the master to take him into custody, and thus require him to work long enough to perform his contract of employment, the magistrate would not thereby have rendered himself liable to conviction on the charge of conspiracy to violate the peonage statute (Pen. Code 1909, § 269), where at the time the servant had paid the master all the money he owed him.

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

J. G. Taylor and Ioor Hayes were convicted of an offense, and they bring error. Reversed.

Arthur R. Young, of Charleston, S. C. (Hagood, Rivers & Young, of Charleston, S. C., and E. L. Asbill, of Leesville, S. C., on the brief), for plaintiffs in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C. (J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., on the brief), for the United States.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The defendants were indicted in the District Court of the United States for the Eastern District of South Carolina charged with a violation of sections 37 and 269 of the Penal Code of 1909. The sections in question are in the following language:

"37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

"269. Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

The first indictment contains three counts, charging the defendants, Taylor and Hayes, with conspiring to return Cook to a condition of peonage. The second indictment contains three counts, in which the defendant Hayes is charged with violating section 269 of the Criminal Code, to wit, causing Cook to be arrested for the purpose of placing him in a condition of peonage. The third indictment also contains three counts, charging the defendant Taylor with having Cook arrested with felonious intent, for the purpose of placing Cook in a condition of peonage; that is, compelling him to work and labor for Taylor in car-

rying out a certain pretended contract. These indictments were consolidated at the time the defendants were placed upon trial.

Evidence was introduced to the effect that Willie Cook, a young white man, about 22 years of age, in the latter part of December, 1915, entered into an agreement with J. G. Taylor as laborer upon his farm during the year 1916, and was to receive as compensation therefor $10 per month and a house in which to live. Under this agreement Cook moved on the plantation of Taylor the latter part of 1915, where he remained until the last of February, 1916, at which time he left Taylor and went to the home of his father-in-law. Shortly thereafter Cook, accompanied by his father-in-law, returned to the home of Taylor with a view of securing his release from any further obligation on his contract, upon the ground that he found it impossible for himself and wife to live on the wages which Taylor had agreed to pay him. Cook and his father-in-law testified that they urged this view of the case to Taylor, and insisted that he relieve Cook of any further obligation under the contract. Taylor declined to grant this request unless he was paid all that Cook owed him, together with $25 additional for damages. It was shown that Cook, independent of the contract to work, owed Taylor $13. The learned judge who heard this case, referring to this phase of the testimony, said:

"According to the testimony, Taylor had, prior to Cook's making the contract for service, loaned Cook some thirteen dollars (but wholly independent of the contract), Cook stating he desired to get it in order to get married."

Cook was unable to reach an agreement with Taylor and returned to the home of his father-in-law. Taylor then conferred with the defendant Hayes, who was a magistrate, and instituted a prosecution against Cook for failing to work under his contract. Thereupon Hayes wrote the father-in-law of Cook, who, accompanied by Cook, went to see Hayes. At that time Hayes told them that Taylor must be satisfied before he could do anything, and unless the matter was adjusted with Taylor that he would at once proceed with the prosecution. Cook and his father-in-law then went to see Taylor, who again refused to allow him to stop working, and the defendant Hayes said to Cook that he must work for Taylor or go on the chain gang. Accordingly, a warrant was sworn out by Taylor against Cook, whereupon the defendant and his constable went to the house where Cook was residing, to execute the same. Finally an agreement was reached by which Cook was to plead guilty and pay the sum of $25, which was to end the matter. Cook entered a plea of guilty, and Hayes was paid $25. Cook and his father-in-law departed, thinking the matter was ended. However, a few days afterwards Hayes, under pressure from Taylor, issued a second warant for Cook. An interview followed between Cook, his father-in-law, and Hayes, in which Hayes said that Taylor had required him to prosecute under the contract, and that Cook must either work for Taylor or work on the chain gang for the rest of the year. Cook was tried under this warrant, sent to the chain gang, put in shackles, fined, and required to work for 30 days.

It appears that a third party then intervened in the interest of Cook, who interviewed Hayes in regard to the matter, but Hayes again or-

clared that Cook must either work for Taylor the rest of the year or spend the rest of the year working on the chain gang; that the contract was a monthly one, and that he would issue a fresh warrant every month. In the meantime the attention of the United States government was directed to this condition of affairs, and Hayes and Taylor were arrested.

The defendants were tried, and the jury found them guilty, whereupon the court entered judgment, to which the defendant excepted, and the case now comes here upon a writ of error.

While it appears that plaintiff failed to enter a motion in arrest of judgment, it does appear that a motion for a new trial was made, on the ground that the evidence did not disclose any element of peonage.

[1] It is insisted by counsel for the government that this court will not entertain a writ of error where the court below refuses to grant a new trial, inasmuch as the granting or refusing of a motion of that character is within the discretion of the trial judge. This is undoubtedly the general rule. However, in a case of this importance, where it is apparent on the face of the record that an error has been committed, which is determinative of the questions involved therein, the court will consider the same.

In the case of Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289, the Supreme Court said:

"No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

Also in the case of Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, in referring to this point, the court said:

"While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is the proper method of presenting the question whether there is evidence to sustain the verdict, yet Wiborg v. United States, 163 U. S. 632 [16 Sup. Ct. 1127, 1197, 41 L. Ed. 289], justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant."

Thus it will be seen that the Supreme Court has expressly affirmed the ruling of the court in the case of Wiborg, supra.

[2] In order to reach a correct conclusion as to the guilt or innocence of these defendants, it becomes necessary to ascertain the meaning of the term "peonage." In the case of Clyatt v. United States, supra, the Supreme Court affords us a clear definition of the term in the following language:

"What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in Jaremillo v. Romero, 1 N. M. 190, 194: 'One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their master's service.' Upon this is based a condition of compulsory service. * * * That which is contemplated by the statute is compulsory service to secure the payment of a debt."

This definition is also approved in the cases of Bailey v. Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191; United States v. Reynolds, 235 U. S. 133, 35 Sup. Ct. 86, 59 L. Ed. 162; Peonage Cases (D. C.) 136 Fed. 707; United States v. Clement (D. C.) 171 Fed. 974.

It clearly appears from the evidence that Cook was prosecuted because of his failure to comply with his contract, to wit, his failure to work the balance of the term for which he was employed. In referring to the conference Cook and his father-in-law had with Taylor we find the following in the evidence, which is reported in narrative form:

"At this conference Taylor positively declined to release Cook, warned Cook that if he did not voluntarily perform his work under the contract he would be compelled to, but finally said that he would release him provided he, Taylor, was paid up all that Cook owed him, together with $25.00 additional for damages. According to the testimony Taylor had, prior to Cook's making the contract for services, loaned Cook some $13.00 (but wholly independent of the contract), Cook stating he desired it in order to get married."

While it is true that at that time Taylor claimed that he had loaned Cook $13, nevertheless the learned judge who heard the case says that this amount was "wholly independent of the contract," which Taylor demanded that Cook comply with by working the balance of the time therein stipulated. What the defendants, according to the testimony, sought to have Cook do was to comply with his contract, which, as we have stated, consisted of an agreement to work for Taylor for the term of one year at $10 per month. It is significant that Taylor did not by force seek to compel Cook to render involuntary service for him. It does not appear that he detained Cook for even a moment in a condition of involuntary servitude.

[3] Under these circumstances we are of opinion that Cook was never placed in a condition of peonage by the defendant Taylor so as to warrant his conviction on those counts of the indictment which charge him with placing Cook in a condition of peonage. This is equally true as to the counts wherein it is charged that Cook was returned to a condition of peonage by the defendant Hayes. It appearing that Cook was never in a condition of peonage, it necessarily follows that an indictment could not be maintained against the defendants for returing him to a condition which never existed.

In the case of Clyatt v. United States, supra, the Supreme Court said:

"The indictment charges that the defendant did unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, * * * to work to and for Samuel M. Clyatt. Now, a 'return' implies the prior existence of some state or condition. Webster defines it 'to turn back; to go or come again to the same place or condition.' In the Standard Dictionary it is defined 'to cause to take again a former position; put, carry, or send back, as to a former place or holder.' A technical meaning in the law is thus given in Black's Law Dictionary: 'The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper.' It was essential, therefore, under the charge in this case, to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. We are not at liberty to transform this indictment into one charging that the defendant held them in a condition or state of peonage, or that he arrested them

with a view of placing them in such condition or state. The pleader has seen fit to charge a return to a condition of peonage. The defendant had a right to rely upon that as a charge, and to either offer testimony to show that Gordon and Ridley had never been in a condition of peonage or to rest upon the government's omission of proof of that fact."

This disposes of the second and third indictments, and leaves only the one which charges the defendants with conspiracy under section 37 of the Criminal Code. It is urged by the government that the defendants, in any event, are guilty under the counts which allege that they formed a conspiracy to return Cook to a condition of peonage.

[4] The question involved is as to whether conspiring to put Cook in a condition of involuntary servitude in order to require him to perform his contract to work one year for Taylor was sufficient (even if their conduct had resulted in placing Cook in involuntary service) to warrant their conviction under the peonage statute. We think not, for the reasons stated.

While it is not binding upon this court, it may not be amiss to call attention to the fact that the Department of Justice, after a thorough investigation of the subject, through one of its assistant attorneys general, in a report made to the Attorney General on October 10, 1907, which was later submitted to Congress by the Attorney General, clearly intimated that the scope of this statute was too narrow, and should be broadened so as to cover any and all cases where it appears that one has been held in involuntary servitude by another, the third and fourth paragraphs of the report being in the following language:

"(3) That what I think was the real intent of Congress as shown in Revised Statutes, § 1990 (Comp. St. 1916, § 3944), be made law; that is, that the definition of legal peonage be made broad enough to include the holding of persons in servitude whether in liquidation of an indebtedness 'or otherwise.'

"(4) That all doubt as to whether Revised Statutes, § 5522, concerning slavery, applies to involuntary servitude of any and every kind, be set at rest by a slight amendment."

It is obvious that it was to enable the government to successfully prosecute under the peonage statutes in cases analogous to the one at bar that these suggestions were made.

In the case of Smith et al. v. United States, 157 Fed. 721, 85 C. C. A. 353, the defendants were indicted under section 5508 of the Revised Statutes (Comp. St. 1916, § 10183), which reads as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars, and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

In that case the defendants were convicted and the judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit upon the theory that the right of freedom from slavery or involuntary servi-

tude was granted to every citizen of the United States under the Thirteenth Amendment.

The scope of the above section is much broader in its application, being intended to prevent the placing of one in involuntary servitude by denying him a right guaranteed under the Thirteenth Amendment. Notwithstanding this section, the Attorney General, charged with the enforcement of the statutes, was of the opinion that further legislation is necessary as respects this question.

We do not wish to be understood as condoning in the slightest degree the outrageous and inhuman conduct of the defendants in their treatment of Cook. Their action was reprehensible in the highest degree, and they should, if possible, be held accountable for the same. However, if the facts in this case were sufficient to warrant the conviction of the defendants on a charge of conspiracy, it must be remembered that one of the defendants was acting as a magistrate in enforcing a statute of the state of South Carolina, which counsel for defendants insist renders him immune from indictment upon the theory that judicial officers are not to be held liable for mistakes and errors committed in the discharge of their duty. It appears that Cook was indicted at the instance of Taylor under section 492 of the Criminal Code of South Carolina, which is in the following language:

"Any person who shall contract with another to render * * * personal service of any kind, and shall thereafter fraudulently, or with malicious intent to injure his employer, fail or refuse to render such service as agreed upon, shall be deemed guilty of a misdemeanor."

It further appears from the evidence that the defendant Hayes, who, as we have stated, is a magistrate of South Carolina, told Cook that Taylor had lodged a complaint against him for a violation of the foregoing statute, and that unless he complied with the contract which he had entered into with Taylor that he would be compelled to enforce the provisions of this statute by placing him on the chain gang. It also appears that Cook, with the assistance of his friends, was enabled to raise the sum of $25 which was demanded by Taylor as damages sustained by him on account of Cook's violation of the contract.

Hayes, who was acting as the agent of Taylor at that time, demanded $25 in full settlement of all matters in controversy between Taylor and Cook. The payment of this sum to Hayes was in complete satisfaction of any and all indebtedness alleged to be due Taylor. Therefore, instead of having a case of peonage as respects that transaction, it appears that Cook under compulsion paid to Hayes, as the agent of Taylor, the full amount claimed by Taylor as damages of every nature whatsoever alleged to be due Taylor by the failure of Cook to comply with his contract. It is true it was shown that this entire amount was subsequently turned over to the county by Hayes, but such action on the part of Hayes could not affect the transaction between Cook and Hayes by which Hayes, as the agent of Taylor, accepted this money in full settlement of all claims for damages or otherwise alleged to be due Taylor on account of Cook's failure to comply with his contract.

In other words, the acceptance by Hayes of the sum of $25 was in full satisfaction of all claims that Taylor had against Cook. Therefore the disposition of the money by Hayes thereafter did not in any wise affect the right of Cook to have the same applied in satisfaction of Taylor's claim, and that this was the intention of the parties is made manifest by the evidence offered by the prosecution that "Hayes finally agreed if Mack would pay $25 for Cook that that would be an end of the matter."

Thus it will be seen that Hayes, acting as the agent of Taylor, accepted the sum of $25 in full settlement of any demands that Taylor had made upon Cook up to that time, and that thereafter Cook was not in any sense of the word indebted to Taylor for money he had borrowed or otherwise. Therefore we need not concern ourselves about anything that transpired anterior to the date of this settlement in determining the guilt or innocence of these defendants.

It is further insisted, however, that the contract required Cook to work from month to month, and that this settlement, in so far as it related to Cook's agreement to work, pertained only to one month, and subsequent thereto, to wit, five days thereafter Hayes issued another warrant against Cook for failure to work under the contract, but there is not a word of testimony to indicate that he was arrested on account of a failure to pay a debt, which shows that all the parties to the transaction recognized the fact that by the payment of the $25 there was a full and complete satisfaction not only of the demands of Taylor that Cook should work in accordance with his contract, but that it was also in full settlement of the $13 which Cook had borrowed from Taylor. The evidence as to the reason why Cook was arrested the last time is epitomized as follows:

"Five days afterwards, viz. on the 22 March, 1916, Hayes issued a second warrant against Cook for failure to work under the contract, under which second warrant Cook was arrested. Mack and Cook thereupon had another interview with Hayes, in which Hayes said to them that Mr. Taylor required him to prosecute under the contract, and that Cook must either work for Taylor or work on the chain gang; that unless he came and worked for Taylor under the contract he would have to work on the chain gang for the rest of the year. The case was then tried, Cook was found guilty of violation of the statute by refusing to work under his contract, and was fined $50 or 30 days on the chain gang, and not paying the $50 he was sent to the chain gang; put in shackles, and confined and worked with the chain gang for 30 days."

Thus it appears that Cook was arrested the last time solely on account of his failure to comply with his contract to work for Taylor.

[5] This brings us to the question as to whether one can properly be deemed guilty of peonage where he has held another in involuntary servitude for the purpose of having him comply with an agreement to work for a certain term. An obligation to work, we think, cannot be reasonably construed to mean a debt as contemplated by the peonage statute. Indeed, the definition of "peonage" in Central America and in Mexico has always been restricted to actual indebtedness—that is, where one contracts to pay another a certain sum—and this definition has been rigidly adhered to by the courts of this country in every case

that has arisen under this statute. Clyatt v. United States, supra; Bailey v. Alabama, supra; United States v. Reynolds, supra; Peonage Cases, supra; United States v. Clement, supra.

As we have stated, it is further contended by counsel for defendants that inasmuch as the defendant Hayes was a magistrate, and as such committed Cook to work upon the public roads, he could not be held accountable, either criminally or otherwise, for his actions as respects this matter; and in support of such contention the opinion of Judge Jones in what is known as the Peonage Cases (D. C.) 123 Fed. 671, is relied upon. In that case the court, among other things, said:

"The magistrate or other judicial officer who makes an error of judgment in the exercise of his jurisdiction—exceeds his authority in the sentence imposed—is not guilty of the offense of causing the party to be held in a condition of peonage, or involuntary servitude, because in consequence of such sentence the defendant is put and kept at hard labor. There must be much more than that to involve the officer in criminal responsibility. For reasons of imperative public policy, a judicial officer is not responsible, civilly, for mistakes or errors of judgment; nor is he indictable or impeachable for such. The statutes against peonage and involuntary servitude are not intended to punish officers where persons are convicted or sentenced under unconstitutional laws, or through errors or mistakes in the administration of constitutional laws, and are held, under sentence thereon, to labor by state officers, or hired, according to the requirements of law to others, who restrain the convict and compel him to perform labor against his will. Imprisonment under an unconstitutional law is of course unlawful, and civil responsibilities may attach, under certain conditions, to other than judicial officers; but a person who does no more than to bring the machinery of the law into play from proper motives, or sits in judgment, or executes the sentence, is not criminally responsible, under the statutes, for holding or causing the party to be held to 'a condition of peonage' or involuntary servitude. The wisest and best men differ as to the constitutionality of laws, and the highest courts frequently overrule or depart from their own decisions, and constantly reverse the judgments of lower courts. There would be little independence or safety on the part of those who expound or execute the laws, if criminal responsibilities attached to honest errors or mistakes of judgment."

It is insisted, however, by counsel for the government that the evidence shows that Hayes willfully and corruptly entered into a conspiracy with Taylor to return Cook to a condition of involuntary servitude, and that, therefore, he is not entitled to the protection which is thrown around an officer in the discharge of his duty when he does no more than enforce the law, even if such law be unconstitutional. Even if this contention be true, these defendants cannot properly be convicted of a conspiracy to return Cook to a condition of peonage.

[6] In order to sustain a conviction in this instance, it must appear that the defendants unlawfully conspired to return Cook to a condition of peonage as contemplated by the statute. While it may be said that they were working in concert for the purpose of having Cook comply with his contract, this, as we have already stated, does not render the defendants guilty of the offense for which they are indicted, even if they had gone so far as to compel Cook to render compulsory service in pursuance of his contract. At most he was indicted under a state statute, and, because of his failure to comply with his contract, was placed upon the chain gang and required to render service there which

inured to the benefit of the state, and by which Taylor was not benefited in the least so far as the record shows.

While the evidence, we think, warrants the inference that Hayes acted in concert with Taylor in his efforts to have Cook comply with his contract, it does not appear that Hayes aided Taylor in placing Cook in a condition of servitude, and for the reasons hereinbefore stated Hayes could not be indicted for attempting to return Cook to a condition of servitude—a condition which never existed. All Hayes did was to fine Cook, and upon his failure to pay the same sentenced him to a term upon the chain gang, which in no sense of the word could be construed as requiring Cook to comply with his contract.

[7] Even if by some agreement, express or implied, at the time that Cook was convicted Hayes had permitted Taylor to take Cook into custody and thus require him to work a sufficient length of time to perform his contract, Hayes would not have thereby rendered himself liable to conviction on the charge of conspiracy as alleged in the indictment, inasmuch as it clearly appears that at that time Cook had paid every cent of the money that he owed Taylor. In the Peonage Cases, supra, Judge Jones, in referring to what is necessary to warrant a conviction of a judicial officer under the peonage statute, said:

"On the other hand, where a magistrate or other judicial officer corruptly exercises his functions in order that a citizen may be convicted unlawfully and sentenced, so that a particular person, with whom he has an understanding, express or implied by becoming the surety on confession of judgment, may get the custody of the convict, or make a profit out of a contract to be made between the convict and his surety, in consequence of which the convict is detained and put to hard labor, such magistrate or other judicial officer cannot escape criminal responsibility to the United States for the conspiracy, and its natural and designed result, in the holding of a citizen in a condition of peonage or involuntary servitude, because the judicial officer has taken the precaution to veil his wrong in the form of an official act."

There is nothing in the record to show, as we have stated, that Hayes, by indirection or otherwise, enabled Taylor to require Cook to comply, with his contract by rendering involuntary service, nor is there anything to show that Hayes made any profit in pursuance of any agreement that he entered into with Taylor.

We are therefore of opinion that this case is wholly lacking in the essential elements necessary to render Hayes and Taylor guilty as charged in the first indictment.

For the reasons stated, the judgment of the court below should be reversed.

WOODS, Circuit Judge (dissenting). The seriousness of the issues to a large class of unintelligent laborers seems to justify a statement of the reasoning on which I think it clear the judgment of the District Court should be affirmed.

The defendant J. G. Taylor, a farmer, and Ioor Hayes, a magistrate, were indicted jointly for conspiracy under section 37 of the Criminal Code, and separately for violation of section 269 relating to peonage. The cases were tried together by consent, and there was a general

verdict of guilty. The evidence and the course of the trial are thus set out in the record:

Willie Cook, a young man of 22 years of age, and just married, made the following written agreement with the defendant J. G. Taylor:

" 'State of South Carolina, Lexington County.

" 'This agreement witnesseth: That Wm. Cook binds and obligates himself to labor during the year 1916, beginning January 1st, 1916, and to labor continuously until December 31st, 1916, upon the farm and elsewhere as may be directed, for and under and by the direction of J. G. Taylor. To do and perform all labor wherever ordered of whatever kind so instructed by the said J. G. Taylor to do. And in consideration of such services given, the said J. G. Taylor shall pay to the said Wm. Cook ten and no/$_{100}$ dollars each month, of the twelve months.

" 'This done and witnesseth this December 27, 1915.

" 'William Cook,
" 'J. G. Taylor.

" 'Witness: Matthew Taylor,
" 'F. H. Hendrix.'

"After his marriage he moved to a house on the plantation of J. G. Taylor, which was furnished him by Taylor for himself and his wife to live in. He lived on the place and worked for Taylor, under Taylor's commands, from about the 1st of January, 1916, to the 26 or the 28 February, 1916, when, without saying anything to Taylor, his wife and himself left the house and walked to his father-in-law's, one J. C. Mack, about twelve miles away. Cook stated that up to the time of his leaving he had worked for Taylor voluntarily. He talked the matter over with his father-in-law, and a day or so afterwards his father-in-law and himself came together to see Taylor to ask Taylor to let Cook off from any further working on his contract, it being stated to Taylor that Cook found it impossible to support himself and his wife upon the agreed payment to be made to him under the terms of the contract. At this conference Taylor positively declined to release Cook, warned Cook that if he did not voluntarily perform his work under the contract he would be compelled to, but finally said that he would release him, provided he (Taylor) was paid up all that Cook owed him, together with $25 additional for damages. According to the testimony, Taylor had, prior to Cook's making the contract for services, loaned Cook some $13 (but wholly independent of the contract), Cook stating that he desired it in order to get married. Cook and his father-in-law, Mack, then returned to the latter's house, Cook refusing to return to Taylor's for work, and subsequently they received a letter from the defendant Ioor Hayes, who was a magistrate, to the effect that he was about to institute a prosecution against Cook for failing to work under his contract, and wanted a day for trial fixed. Cook and his father-in-law, Mack, then went to see Hayes, the magistrate, who, however, refused to do otherwise than say that if they wanted to settle the matter they must fix it up with Taylor; that he had nothing to do with it, and that if Taylor required him he must proceed with the prosecution, but that they must fix it up with Taylor. In accordance with this, Mack and Cook again went to see Taylor, and had a conversation with Taylor in which Taylor refused to allow Cook to stop working for him, and said that unless Cook returned and went on with his work for Taylor he would prosecute him, and put him on the chain gang; that he either should work for Taylor or he should work on the chain gang. After this Cook never worked for Taylor, but returned with Mack to the latter's house, and remained there, and shortly afterwards the defendant Hayes, the magistrate, with his constable, came to the house for the purpose of arresting Cook; and there Hayes had an interview with Mack and Cook, in which, according to the testimony for the prosecution, Hayes finally agreed that if Mack would pay the sum of $25 for Cook, that that would be an end of the matter, but if it was not paid he would have to prosecute him and put him on the chain gang. Mack did not have as much as $25, but he had $13, and Mack wrote a note to his landlord asking him to add the additional amount to make it $25, and send it to Hayes, which he did,

and the money was received by Hayes on the 17th of March, 1916. Hayes then wrote upon the warrant in that case that the defendant had pleaded guilty and a fine of $25 had been imposed and was paid, which amount Hayes turned over to the county treasurer. Five days afterwards, viz. on the 22 March, 1916, Hayes issued a second warrant against Cook for failure to work under the contract, under which second warrant Cook was arrested. Mack and Cook thereupon had another interview with Hayes, in which Hayes said to them that Mr. Taylor required him to prosecute under the contract, and that Cook must either work for Taylor or work on the chain gang; that unless Cook came and worked for Taylor under the contract he would have to work on the chain gang for the rest of the year. The case was then tried, Cook was found guilty of violation of the statute by refusing to work under his contract, and he was fined $50 or 30 days on the chain gang, and, not paying the $50, he was sent to the chain gang, put in shackles, and confined and worked with the chain gang for 30 days. In the meantime one Langford, being acquainted with Mack and hearing of Cook, and having an interest in the latter's misfortunes, busied himself to see if he could not get Cook released from his confinement on the chain gang, and he went also and had an interview with Hayes, when Hayes told him that there was no way of settling the matter except by Cook's working for Taylor, that Taylor was continually pressing him to punish Cook, and that Cook must either work for Taylor for the rest of the year, or he would have to spend the rest of the year working on the chain gang; that the contract was a monthly one, and that he would issue a fresh warrant every month and had other warrants against Cook. After the charge of the judge to the jury upon this and other testimony in the cause, the jury found the defendants guilty. No exceptions were made to either the testimony or the judge's charge. After sentence a motion was made for a new trial upon the ground that under the statute there must be a return to a condition of peonage; in other words, that the party charged could not be guilty unless there had first been involuntary or compelled service performed and the party performing it had ceased performing it and steps were taken to compel the return to a state of involuntary servitude; that in this case Cook appears to have worked voluntarily for Taylor until he left Taylor's employment, there having been no compulsion shown prior to that time, and that the only conspiracy or compulsion shown by the testimony was the compulsion or conspiracy to compel him to return to Taylor's service, which prior to that time had been voluntary, and therefore was not compulsion to compel him to return to a state of involuntary service to which he never did return; and that, taking a conspiracy to have been established, it was not a conspiracy to commit crime.

"The motion for a new trial was refused, and the defendants duly excepted to the refusal to grant them a new trial."

The statutes involved provide as follows:

"Sec. 269. Whoever holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Cook was never actually in a condition of peonage; that is, working under compulsion for Taylor in discharge of a debt. An expression in Clyatt v. United States, 197 U. S. 207, 216, 25 Sup. Ct. 429, 49 L. Ed. 726, might possibly be construed as an intimation that the crime is complete when an arrest is made for the purpose of placing one in a condition of peonage without actually accomplishing the purpose. But the point was not involved nor decided, and we are free to hold oth-

erwise. It seems clear that the peonage statutes do not make criminal an arrest with the purpose of placing a man in a condition of peonage without the actual accomplishment of the purpose. The crime denounced is in fact holding one in a condition of peonage, or returning one to a condition of peonage, or by means of arrest placing one in a condition of peonage, who may or may not have been a peon before. Since the arrest did not result in making Cook a peon or returning him to the condition of a peon, neither of the defendants could be convicted under the separate indictments against them under section 269 on the mere proof that they had him arrested for the purpose of compelling him to become a peon.

The conviction must, therefore, stand or fall on the indictment for conspiracy. The offense is complete, under section 37, whenever a conspiracy is formed to place a man in a condition of peonage and any single act is done in pursuance of the design, although the plan completely fails of accomplishment.

The argument is earnestly pressed that the indictment charges a conspiracy to return Cook to a condition of peonage, and hence the defendants could not properly be convicted under proof of a conspiracy to make him a peon by means of arrest when he had not before been one. The argument is technically plausible, but unsound in substance. The sole purpose of an indictment is to acquaint the defendant with the charge he is expected to meet. Here there is excessive verbiage, and the use of the words "return to a condition of peonage" was inappropriate in describing the purpose of the conspiracy proved; but in making the charge definite, and specifying what was meant by returning to a condition of peonage, the indictment charges that the conspiracy was—

"for the purpose of returning the said Willie Cook to a condition of peonage; that is to say, for the purpose of returning the said Willie Cook to a condition of peonage by then and there compelling and requiring him, the said Willie Cook, to serve and labor and work for the said J. G. Taylor against the will of him, the said Willie Cook, in liquidation of a certain debt, then and there claimed by the said J. G. Taylor, to be due and owing him, the said J. G. Taylor, by the said Willie Cook."

Thus the defendants were fully advised that they were charged with conspiring to compel Cook to work for Taylor in payment of a debt by means of his arrest, and that they had actually had him arrested for that purpose. The indictment is thus distinguished from that found unsustained by the proof in Clyatt v. United States, supra.

The facts agreed on carry on their face conclusive proof of a combination or agreement between Taylor and Hayes to arrest Cook and by means of the arrest to force him to labor for Taylor. Taylor's purpose was evident. Hayes' conduct and statements showed that he had an understanding with Taylor to pervert his official power to that end. Casting off his judicial character, he became the agent of Taylor in enforcing his demands on Cook, and, without trial or judicial hearing, he openly declared that Cook must either work for Taylor according to his demand, or he would have to spend the remainder of the year on the chain gang. The arm of the law would be weak indeed

if a magistrate could be allowed to shield himself from the consequences of such willful oppression on the pretense that he was acting in a judicial capacity. There was no exception to the charge of the District Judge, and, even if there had been room for doubt that Hayes was willfully perverting his judicial office for purposes of oppression in the interest of Taylor, it must be assumed that the issue was properly submitted to the jury. No error is assigned except the refusal of the motion for a new trial. In the grounds of the motion there is no claim whatever that the proof was insufficient to show that Hayes was perverting his judicial office to private ends, or that there was any lack of evidence to prove the corrupt combination between Taylor and Hayes, or that there was any error in the charge. Nor was there any claim in the District Court or at the argument here that the evidence was not sufficient to show that Hayes and Taylor, in pursuance of this corrupt combination, and acting in conjunction, threatened Cook with service on the chain gang, and twice had him arrested as a means of forcing him to labor for Taylor against his will. The case is therefore before us with the conspiracy to accomplish this nefarious purpose and the overt acts of threats and arrest in pursuance of it established by the verdict of the jury supported by plenary proof under a proper charge.

It is argued, however, that there was no proof of a debt or obligation in payment of which the service was to be exacted; and as the presence of a debt is an essential element of peonage, the defendants could not be guilty of a conspiracy to arrest Cook and thereby make him Taylor's peon. The evidence is conclusive that Taylor did assert a debt against Cook, and that it was in part at least an account of the existence of a debt that the defendants entered into a conspiracy to compel Cook to work for Taylor. When Cook left Taylor's employment the relation of master and servant was at an end, but he owed Taylor $13 for money lent. The evidence shows that when Taylor commenced proceedings, his claims against Cook which he undertook to enforce by requiring Cook to labor for him for the remainder of the year were: First, Cook's obligation to work expressed in the contract; second, the debt of $13; and, third, damages sustained by reason of Cook's breach of contract.

The first overt act of the defendants was a demand made on Cook that he should work for Taylor or he would be sentenced to the chain gang. While it does not appear that anything was then said about the debt, that its payment was to be exacted from Cook's enforced service is a fair inference from the circumstances, and also from the fact that when Cook refused to enter Taylor's service the demand was made for his payment of the debt of $13 and $25 damages on pain of sentence to service on the chain gang. Taylor's grasping character and his oppressive action leave no room for doubt that he intended to exact from Cook the last farthing. At the least the inference of the jury was reasonable that one of the purposes of the conspiracy was to force Cook to labor for Taylor and pay these debts from his labor. Obviously it could make no difference that the debt of $13 was contracted before Cook entered Taylor's service.

The inference being reasonable from the evidence that enforcement of the payment of the debts was one of the purposes of the conspiracy, as soon as the defendants took the first step in its execution by threatening Cook with arrest and punishment, and having him arrested and put on the chain gang, the crime of conspiracy, under section 37, was complete, although Cook, in fear of the threats, actually paid the money demanded and the purpose of the conspiracy was never effectuated by making Cook the peon of Taylor.

FORD MOTOR CO. v. BENJAMIN E. BOONE, Inc., et al.*

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2884.

1. TRADE-MARKS AND TRADE-NAMES ⟸73(1)—UNFAIR COMPETITION—DECEPTIVE PRACTICES.
   Even admitting the so-called agency contracts of plaintiff manufacturer of the Ford car, whereby the so-called agent is required to sell at a fixed uniform list price, and only to persons buying for immediate use, and not for resale, to be invalid, it is unfair competition for defendants, buying them from such an agent and reselling at less than list price, for the purpose of deceiving, to use plaintiff's trade-mark after the manner of a regular Ford agency, and to advertise that they are "Ford agents" and a "Ford auto agency."

2. SALES ⟸457—CONDITIONAL SALES.
   A contract between the manufacturer of automobiles and one whom it purports to appoint agent for their sale, in limited territory, and only to users residing therein, and only at list retail price fixed by the manufacturer, and by which it agrees with him that in consideration of his paying 85 per cent. of such price, and of his promise to sell only in such territory, and only to a user, and only for such stipulated price, it will consign the cars to him, but will retain title till it shall have received the full consideration, if constituting a sale, constitutes a conditional sale, transferring a qualified title, though the 85 per cent. is required to be paid before it parts with possession of the cars; title passing only on compliance with the other conditions constituting part of the consideration.

3. CONTRACTS ⟸116(7)—CONDITIONAL SALE OF PATENTED AUTOMOBILES—VALIDITY.
   Stipulation in sales to retailers by the patentee manufacturer of automobiles by which it retains title till the cars have been resold to a user at a stipulated price is not invalid as between them, as against the public policy; the manufacturer not being in exclusive control of an article of commerce for which there is no substantial substitute, but controlling only one of many similar devices which may be purchased on the open market, and the contract, so far as appears, not interfering with the free play of wholesome competition.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Ford Motor Company against Benjamin E. Boone, Incorporated, and others. Bill dismissed, and plaintiff appeals. Reversed, with directions.

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

*Rehearing denied October 8, 1917.

Platt & Platt and McDougal & McDougal, all of Portland, Or. (Alfred Lucking and L. B. Robertson, both of Detroit, Mich., and Harrison G. Platt, of Portland, Or., of counsel), for appellant.

Littlefield & Maguire, of Portland, Or. (E. V. Littlefield, of Portland, Or., of counsel), for appellees.

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

DIETRICH, District Judge. The plaintiff company is the manufacturer of the Ford automobile. It maintains what it calls an agency for the sale of its cars and extras, and for repair work, at Portland, Or. The defendants are engaged in a general automobile business in that city, but have never been authorized by the plaintiff, either as agents or otherwise, to sell its products. The suit is brought to restrain them from engaging in what the plaintiff claims to be unfair practices, by which its rights are violated and the public is deceived. Upon the defendants' motion the bill was dismissed in the lower court, and the plaintiff appeals.

Sketching the complaint a little more fully, it shows that for about 12 years last past the plaintiff has been engaged in the manufacture and sale of automobiles invented by it, and commonly known as the "Ford car," "Ford automobile," or "Ford," the same being fully protected by patents; that it has spent large sums of money advertising the "Ford," and by reason of its inherent merit and as a result of such advertising the "Ford" has come into great public favor; that in advertising plaintiff has very generally used two trade-marks duly registered and fully protected by the United States copyright and trade-mark laws, namely, a design known to the trade and the public as the "winged pyramid," which carries in script the word "Ford" above the words "The Universal Car," and also the word "Ford" in script; that in the conduct of its business the plaintiff appoints agents in limited territories throughout the United States, and that the rights and duties of such agents are defined by a uniform contract; that in connection with the signs on their buildings and windows, and their advertising by the use of cards, letter heads, and other printed matter, such agents are required to use the word "Ford" or "Fords" in dress and style resembling such trade-marks or designs, and as a consequence of such common use by the plaintiff and its agents it has come to be understood generally by the public that persons making use of such expressions and designs are duly authorized agents for the sale of the plaintiff's product in the territory where such advertising is used; that, although they are without any authority whatsoever from the plaintiff, for the purpose of misleading the public and of fraudulently and unfairly diverting the plaintiff's trade, which belongs to it and its authorized agents, and of causing the public to believe that the defendants are the plaintiff's authorized agents, they, the defendants, have made and are making, and threaten to continue to make, certain false and misleading representations, particularly in that: First, they maintain in a conspicuous place upon their business building the word "Fords"; second, they have caused to be printed and use certain

posters upon oil cans containing automobile oil, upon which posters is a winged pyramid, with the script word "Ford" thereon, imitative of the plaintiff's trade-mark, and at the bottom of the poster the words "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon"; third, they falsely and fraudulently represent to prospective purchasers of Ford cars that they are Ford agents, and that they obtain Ford cars in quantity from the plaintiff's factories; fourth, they have caused to be printed in the Portland classified index of the Pacific Telephone & Telegraph Company's directory the following: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966;" fifth, they have importuned certain of the plaintiff's "agents" to breach their "agency" contracts with the plaintiff, and in collusion with such agents they have sent in to plaintiff's factories false and fictitious orders for cars; sixth, they have advertised in the local papers the sale of Ford automobiles which they fraudulently obtained through the plaintiff's agents, at prices greatly below the regular, advertised, retail selling price of the plaintiff's cars.

The significance and materiality of the fifth and sixth specifications depend largely, if not entirely, upon the effect we give to the plaintiff's "agency contract," which the defendants contend is invalid. This contract is of great length, and we refer to such features only as have direct bearing upon the question of its validity. It purports to appoint an "agent" for the sale of the plaintiff's cars and of accessories and parts, and to provide facilities for making repairs. The right of the "agent" to sell is limited to certain defined territory. He may sell cars only to users residing in such territory, and only at the list retail prices fixed by the plaintiff. He must pay 85 per cent. of such list price in advance at the time of ordering the cars, and must pay freight charges and other expenses incident to the transportation of the cars from the factory to the agency, as well as taxes and insurance, and must suffer such loss, if any, as is sustained by injury to the cars from the time they leave the factory until they are delivered to the purchasing user. The 85 per cent. cash advance is the full money consideration which the plaintiff receives, but under the terms of the contract it retains complete title until a bill of sale signed by it has been delivered to the vendee, who shall be only a user, that is, one who purchases for immediate use, and not for resale. Additional compensation is provided for the "agent" over and above the 15 per cent. of the retail price by way of graduated commissions, depending upon the aggregate amount of sales during the year. The "agent" is required to "maintain on his own account and at his own expense a place of business and properly equipped repair shop, * * * and shall employ competent, efficient salesmen," and the plaintiff is not to be held responsible "for the rent, taxes, wages, or other charges or liabilities of any nature" arising out of or in connection with such business. Provision is also made for advertising and for many other details. The defendants' contention in brief is that, while the instrument is adroitly phrased, for the purpose of giving to the relation between the plaintiff and the other party, whom we shall call the consignee, the appearance of an agency, they in reality stand in the relation to each other of vendor and vendee.

[1] The first question is whether or not, even if we assume the invalidity of the agency contract, the defendants may, in the conduct of their business, engage in the deceptive practices pointed out in the first four specifications. It is too narrow a view to take of the scope of the doctrine of unfair competition to say, as is suggested, that there can be no unfair competition in such case because admittedly the defendants are selling genuine "Ford" cars. If there is no advantage to them and no corresponding disadvantage to the plaintiff, why the pretense of being a Ford agency? The purchase of an automobile is not like the purchase of a sack of potatoes. An automobile is a complex mechanism, designed to be used for an indefinite length of time. Parts wear out and must be replaced. The ordinary purchaser realizes that he is incompetent to judge whether in all respects an offered car is up to the manufacturer's advertised standard. It is a consideration of some importance to him to be able to deal with the maker or its recognized agent. He desires the assurance that the article he purchases is standard; that it has the maker's guaranty; that he will be able to procure parts and accessories as he may need them; and, of course, that no question will be raised touching his title. Obviously the defendants could not give a prospective purchaser all of these assurances. If they are rightfully in possession of new "Fords," they may, as a matter of course, sell them where and to whom they please, and as an inducement they may cut the plaintiff's price, but they cannot, by pretending to be its agents, thus do it the double wrong of pirating upon its patronage, and also injuring it in the estimation of the public, by making it appear to be actually selling its cars at different prices, while professing to maintain the same price for all. Such deceptive practices are of the very essence of unfair competition.

"A distinctive name of a place of business will be protected as a trade-name against use or imitation by others. Deceptive signs and names upon a place of business or deceptive dress of a store will be enjoined. The right to the exclusive use of a distinctive name or sign in a particular locality may be acquired." 38 Cyc. 826.

It is suggested in their brief that the defendants did not expressly claim or advertise that they were "agents of the Ford Motor Company." It is true that they did not, by advertisement or otherwise, make such claim with precision or in technical language, but such a defense is as common as it is futile. As was said by Mr. Justice Bradley in Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 97:

"It is not identical with the complainant's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary, unsuspecting customer is obnoxious to the law."

The defendants used plaintiff's trade-mark after the manner of a regular Ford agency. They falsely and with the intent to deceive advertised that they were "Ford agents," and that they are a "Ford auto agency," and for the same purpose they have fraudulently rep-

resented to prospective purchasers of Ford cars that they were "Ford agents." Admittedly they resorted to these practices for the purpose of deceiving, and there can be no question that the means employed were well adapted to that purpose. It may be that some people, with knowledge of the actual conditions, would purchase cars from the defendants for $25 below the current price, but, upon the other hand, it may very well be assumed that others would prefer to pay the additional $25 for the assurances and security supposed to attend purchases through a regular agency, and in its enjoyment of the trade which would naturally come to it from this latter class the plaintiff is entitled to protection against the defendants' unfair and deceptive practices.

[2] Passing now to a consideration of the validity of the agency contract: The defendants attach controlling significance to the fact that the consignee must pay the full money consideration before or at the time he receives the cars; the argument being that such payment ipso facto operates to transfer an unqualified title, notwithstanding the express agreement of the parties to the contrary. It is urged that the contract is only an adroit attempt to avoid the effect of certain decisions of the Supreme Court of the United States, such as Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107, Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, and Straus v. American Publishers' Ass'n, 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369, and that it runs counter to the principles recognized in Straus v. Victor Talking Machine Co. (No. 374) 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, decided April 9, 1917, and perhaps of the companion case, Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, decided at the same time. The plaintiff cites, among others, Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, and United States v. Keystone Watch Co. (D. C.) 218 Fed. 502, 514. It is to be admitted that the plaintiff, before parting with possession of its cars, requires the payment by the consignee of the entire money consideration which it expects to receive. Indeed, if the aggregate of the sales consummated by the consignee in a year exceeds a certain amount, the plaintiff is under obligation to return to it a part of the advance payment, by way of commissions. The defendants' contention, however, ignores the fact that there are other considerations deemed by the plaintiff to be valuable, and without the promise of which it would doubtless decline to enter into the contract. It agrees with the consignee that, in consideration of his paying 85 per cent. of the list retail price and of his promise to sell only within a certain territory to a user for a stipulated price, it will consign the car to him, but will retain title thereto until it shall have received the full consideration. May the consignee, knowing that the plaintiff will not deal with him unless he executes such a contract, assent to all of such

conditions, but with the intention of abiding by only one of them, and, upon the performance of this one, secure the absolute title to the car? If, instead of providing for the consignee's possession as soon as he pays the stipulated amount, it were agreed that the plaintiff should retain possession and deliver only to the purchasing user, could the consignee require delivery to himself, or to a dealer for resale? Or, if, instead of receiving payment of 85 per cent., the plaintiff received but 80 or 84 per cent., with the understanding that the right, and the only right, obtained by the consignee was to have possession of the car, with the power to negotiate a sale thereof to a user, to whom, and to whom only, the plaintiff would be bound to convey the title upon receiving the remaining 5 per cent., or 1 per cent., as the case might be, would there be any doubt of the retention of the title by the plaintiff, with the right to decline to convey to anyone other than the purchasing user? But other considerations are sometimes quite as valuable as the money to be paid for an article.

Admittedly the plaintiff has the right to sell its cars where and to whom it may choose, and for such price as it may see fit. It may decline to deal with the trade at all, and, dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents. Accordingly it may lawfully appoint an agent at Portland authorized to sell its cars, limiting his authority to sales within a prescribed territory, and to users, and for a fixed price; and it may impose as one of the conditions of sale that it will not pass title except to the ultimate user and after such price has been paid in full. In short, the plaintiff may lawfully do precisely what it professes to be doing under the existing contract, and the question therefore is not whether its object is legitimate, but whether the means it employs are unlawful or are for some other reason ineffective. Even if it be held that the contract under consideration does not create an agency in the strict sense, but in effect provides for a sale, it is still clearly the understanding of the parties that it is a conditional or restricted sale, and that the title to the cars passes only upon a compliance with the other conditions, as well as that of paying the 85 per cent.

[3] The intent of the parties is clear enough, and the only question is whether effect can be given to such intent. It being a well-recognized principle of law that the vendor may retain title to the thing sold until the full stipulated consideration therefor shall have been paid (Bailey v. Baker Ice Mach. Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275), it would seem that, if we are to hold the stipulation to that effect in this contract invalid, it must be because under the circumstances of the case such a transaction would be violative of some rule or principle of public policy. But, when the conditions are analyzed, what public interest would be subserved by striking down the contract and thwarting the intent of the parties thereto? As already suggested, it would be entirely possible for the plaintiff to accomplish all the objects which it seeks under the present plan, by marketing its product through its own agencies, so constituted that there could be no doubt that its salesmen were its agents merely, and not vendees. But, were it otherwise, what benefit would result to the public by open-

ing the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff has no monoply of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose. If, as was admitted to be the fact in the Motion Picture Patents Company Case, the plaintiff's car were wholly indispensable to the carrying on of a great industry, and if its plan of marketing were such as to constitute an instrument of oppression or favoritism, then the courts should perhaps be astute to discover means by which to disorganize its system and to encourage competitive effort as between the salesmen or distributors of its product; but such is not the case. Whatever its merits, the Ford car is not, except in the most remotely relative sense, essential to the well-being of the public or any group thereof, or any individual. There are other automobiles in great variety available to any one who has need and desires to purchase, some cheaper, some more expensive, some less efficient, some more efficient, some less attractive in appearance, others more attractive. Cole Motorcar Co. v. Hurst (C. C. A. 5th) 228 Fed. 280, 284, 142 C. C. A. 572. Obviously, therefore, the public already has competition to the fullest extent desirable, not a competition entailing the waste of duplication and overlapping effort in marketing the product, with sporadic price-cutting of an irrational sort, but the competition of many products, each independently seeking public favor, against one of like character, but slightly different. Is not each manufacturer now under the highest sort of pressure from without? Must it not be alert to discover new improvements and conveniences and to keep down to the minimum the cost of construction and distribution? It is a matter of public knowledge that fortunes are spent in advertising these competitive products, in an effort to attract and cultivate public favor. Under such conditions will the public be benefited by requiring the manufacturer to assume the further burden of internal guerrilla competition, with the confusion and waste entailed thereby? It is futile to say that such a burden will fall not upon the manufacturer or the public, but upon the local dealer or distributor. If there were ten dealers selling Ford cars in Portland, where there is now but one, would not the expense of marketing be greatly increased, and if, as is contended, the contract under consideration is harsh to the "dealer," does it not follow that, with the trade divided into ten parts, and with the expense of rentals and personal service multiplied, the price of the car to the public would increase? Does any one suppose that such dealers would for any considerable length of time cut the price? In the light of experience is it not so probable as virtually to amount to a certainty that the prices would soon reach a common level, and that level would be higher than the present one? Upon the other hand, will the public not have the benefit of the freest and most effective competition if each patentee manufacturer of automobiles is permitted to market his product in his own way? May it not be assumed that, impelled by considerations of self-interest, he will select the most economical meth-

od, and that the keen and vigorous competition of innumerable other manufacturers will force him to give to the public the major benefit arising from his economies? At least, we do not think that we would be warranted in holding that the contract here is inherently vicious. If, in fact, it is prejudicial to the public interest because to an unreasonable degree it operates in restraint of trade and interferes with the free play of wholesome competition, the defendants may plead and show the facts.

When we come to consider the decided cases, we find that no decision cited by either party from the Supreme Court of the United States involves the precise question, and that court, it is to be noted, appreciating from an early day the growing complexity of our industrial life and the importance of curtailing the liberty of contract only in so far as positive law or considerations of public policy might from time to time clearly require, has been careful to limit its decisions strictly to the matters directly in issue. Adams v. Burks, 17 Wall. 453, 21 L. Ed. 700; Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150. And in reading the cases these considerations should be kept in mind: There is no attempt here to bind the purchasing public by a mere notice attached to the machine, nor is there any claim that a patent is of such force that a violation of the warning or the provisions of a notice of that character constitutes an infringement. If involved at all, the rights of the public are only remotely affected. The issue is between the patentee manufacturer and the consignee, who have expressly contracted with each other. In the second place, as we have seen, the plaintiff is not in the exclusive control of a useful or desirable article of commerce, whether patented or copyrighted, for which there is no substantial substitute; that is, it is without the power to oppress the public by fixing grossly excessive prices or imposing onerous and unreasonable conditions upon the use of its product. It controls but one of many similar devices which may be purchased upon the open market. In the third place, the plaintiff makes no attempt to restrain trade in unpatented or uncopyrighted articles of commerce by requiring the use thereof upon or in connection with its cars.

That this first consideration has been deemed to be an important one not only appears to be held in other jurisdictions (see Trust Laws and Unfair Competition, issued by the government printing office in 1916, pp. 579, 580, 592, 593, 651, 652), but is abundantly shown by the decisions of the Supreme Court already referred to. In Adams v. Burks, 17 Wall. (84 U. S.) 453, 21 L. Ed. 700, it was held that, while the purchasers from a patentee had the right to manufacture, sell, and use the patented article only within the limits of a circle of ten miles around Boston, as stipulated in the contract, a purchaser from them of a single patented article acquired the right to use it anywhere. Note, too, the distinction made in Keeler v. Standard Folding Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848:

"Where the patentee," such is the language of the court, "has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article manufactured, it is obvious that a purchaser can use

the article in any part of the United States, and, *unless restrained by a contract with the patentee*, can sell or dispose of the same." (Italics ours.)

And again, after reviewing a number of cases, the court says:

"Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws."

In Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 350, 28 Sup. Ct. 722, 726 (52 L. Ed. 1086), it is said:

"In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of one dollar per copy.

"The precise question therefore in this case is: Does the sole right to vend secure to the owner of the copyright the right, after a sale of the book to a purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case of contract limitation nor license agreement controlling the subsequent sales of the book."

In Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, confidently relied upon by the defendants, the issue was expressly defined by the court as follows:

"May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from the jobber, who has paid to the agent of the patentee the full price asked for the article sold."

And again:

"The real question is whether in the exclusive right secured by statute to 'vend' a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made."

In United States v. Keystone Watch Co. (D. C.) decided by Judges Buffington, Hunt, and McPherson, 218 Fed. 502, 514, it was expressly held that:

"As the owner of these patents, the company had the right to make a direct agreement with the jobbers whereby a minimum price was fixed at which the jobbers might sell."

In stating the issue in one of the two most recent decisions (the Motion Picture Patents Company Case, supra), Mr. Justice Clark, speaking for the court, said:

"It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by

notice attached to a patented machine the conditions of its use, and the supplies which must be used in the operation of it under pain of infringement of the patent."

The case is also in striking contrast with what we have here, by reason of the fact that the plaintiff's patented device "is the only one with which motion picture films can be used successfully," and for the further reason that after the device was sold and paid for it continued to be subject not only to a restriction as to supplies which could be used with it, but to "conditions as to use or royalties which the company which authorized its sale might see fit after the sale from time to time to impose." Commenting upon this feature, the court said:

"The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent, should make courts astute, if need be, to defeat its operation. If these restrictions were sustained, plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin any one unfortunate enough to be dependent upon its confessedly important improvements for the doing of business."

In the Victor Talking Machine Case, supra, the court said:

"The abstract of the bill which we have given makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the 'license notice' attached to each machine; for no contract rights existed between them."

The question in the Standard Sanitary Manufacturing Co. Case, as well as in Straus v. American Publishers' Association, was whether or not a combination of 80 per cent. of all the manufacturers of enameled ware or of 75 per cent. of all the publishers of books, copyrighted and uncopyrighted, for the purpose of fixing prices and eliminating competition, was exempt from the operation of the anti-trust laws, merely because enameling is a patented process, and some of the books published were protected by copyright. Clearly no such question arises here. Were the plaintiff in a combination with 75 or 80 per cent. of the manufacturers of automobiles, for the purpose of fixing prices and restricting competition, we would have a similar case. The chief reliance of defendants seems to be upon Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. The complainant there was engaged in the manufacture and sale of proprietary medicines, prepared by means of secret formulas, but touching which there was no patent or other statutory grant. It adopted an intricate system for maintaining uniform prices to the retail as well as to the wholesale trade. In the respect in which the case has a bearing upon the question here under consideration, it may best be distinguished by the following excerpt quoted from the opinion:

"The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to rights secured by letters patent. Bement v. National Harrow Company, 186 U. S. 70 [22 Sup. Ct. 747, 46 L. Ed. 1058]. In the case cited there were licenses for the manufacture and sale of articles covered by letters patent with stipulations as to the prices at which the licensee should sell. The court said, referring to the

act of July 2, 1890 (pages 92, 93): 'But that statute clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale."

It may be noted that the passage here quoted from Bement v. National Harrow Company was subsequently again approved in the Standard Sanitary Manufacturing Company Case, supra.

By drawing attention to the fact that the plaintiff's automobile here is covered by letters patent, we do not intimate the view that the patents of themselves would be a sufficient basis upon which to grant the relief sought. As has been frequently held, the statutes conferring exclusive rights upon the patentee do not of their own vigor perpetuate such rights indefinitely, and therefore an unconditional sale of a patented article releases it from the patentee's control. So, going a step further, the patentee cannot unconditionally sell the article patented, and by attaching a notice thereto so extend the scope of the patent as to enable him successfully to claim that a violation of the provisions of the notice constitutes an infringement of his statutory right, as was the contention in the "Sanatogen" Case (Bauer v. O'Donnell). The plaintiff here makes no such claim. It is asserting only the right, to be exercised within such limits as may be prescribed by statutory law or considerations of sound public policy, expressly to contract with the person to whom it delivers possession of its patented product to reserve to itself a measure of the absolute ownership and control with which admittedly it is invested. So far as we are advised by the contract, and that is all that we have before us, the plaintiff's system of selling its cars cannot be made the means of laying an unreasonable restraint upon the free play of competition or of dealing oppressively with the public. Presumably the contract was adopted in good faith, to accomplish an object which apparently is in itself legitimate. It is of no present interest that in some of its provisions it may be harsh, or even unenforceable as against the consignee; he is not complaining. If he desires to withdraw from the relation, that is his right, but he cannot at the same time claim all the benefits of the contract and repudiate its burdens.

The objection that the complaint is insufficient to disclose jurisdiction in the court below we have considered, but it is deemed to be without merit.

The judgment will be reversed, with directions to overrule the motion to dismiss, and to take further proceedings not out of harmony with the views hereinbefore expressed.

WILLIAMS v. VREELAND.

(Circuit Court of Appeals, Third Circuit. August 21, 1917.)

No. 2239.

1. BANKS AND BANKING ⟸248(1)—STOCKHOLDERS—DOUBLE LIABILITY.
Where a person, with full knowledge of the fact, becomes a record shareholder in a national banking association, the double liability imposed by Rev. St. § 5151, continues until by his act he removes his name from the record, and a transfer of his shares without a change in the corporate records does not free him from liability.

2. BANKS AND BANKING ⟸249(3)—NATIONAL BANK—SHAREHOLDERS—LIABILITY—"RATIFICATION."
Where a person becomes and for a time continues to be a registered shareholder in a national banking association without knowledge of that fact, he does not incur the double liability imposed by Rev. St. § 5151, unless he approves the transfer by a ratification which implies an intended approval with full knowledge, and until such ostensible shareholder does or assents to some act of the party creating the alleged relation, no estoppel can arise.

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

3. BANKS AND BANKING ⟸250(5)—SHAREHOLDERS—PRIMA FACIE LIABILITY.
Proof that defendant was a shareholder of record in a national banking association and that she did nothing to remove her name establishes a prima facie case of the liability to assessment for the double liability imposed by Rev. St. § 5151.

4. BANKS AND BANKING ⟸250(5)—SUIT AGAINST STOCKHOLDER—BURDEN OF PROOF—SHIFTING OF BURDEN.
Where a bank receiver suing to enforce an assessment against a shareholder makes out a prima facie case, the burden of proving nonliability shifts to the shareholder.

5. BANKS AND BANKING ⟸249(3)—SHAREHOLDERS—LIABILITY—"RATIFICATION."
Where a husband without her knowledge transferred to his wife on the books of a national banking association stock owned by him, the wife's indorsement of a check payable to the husband and indorsed by him, which was drawn in payment of a dividend declared before the transfer, does not amount to a ratification rendering her liable as a shareholder; the check not indicating that she was the holder of the shares.

6. BANKS AND BANKING ⟸249(3)—STOCKHOLDERS—LIABILITY—EVIDENCE—"RATIFICATION."
In suit by the receiver of a national bank to enforce an assessment against defendant, who appeared on the books of the association as a shareholder, where defendant denied liability on the ground that the shares had been transferred to her by her husband without her knowledge, and that she had never ratified the transaction, the fact that defendant, at the request of her husband, who, in answer to questions, merely informed her that he had made a mistake, indorsed a power of attorney on the back of the certificates to such stock, did not, where she was not informed that the certificates were in her name, establish a ratification of the transfer, rendering defendant liable as a shareholder, and a contrary finding was warranted.

7. EVIDENCE ⟸66—PRESUMPTIONS.
Where a wife indorsed certificates of bank stock which had been transferred on the books of the banking association to her by her husband without knowledge, there is a presumption of law that she knew the nature of the transaction.

8. EVIDENCE ⟸86—PRESUMPTIONS—EFFECT.
A presumption stands in lieu of evidence of the fact, and may support a finding if not rebutted.

9. APPEAL AND ERROR ⟸1002—REVIEW—VERDICT.
Where the presumptions and evidence are conflicting, a verdict of the jury thereon is conclusive.

10. TRIAL ⟸177—BINDING INSTRUCTION—EFFECT OF REQUEST.
A prayer by each party for binding instructions in his favor is equivalent to a joint request for a finding of fact by the court, and does not amount to a submission without the intervention of a jury within Rev. St. §§ 649, 700 (Comp. St. 1916, §§ 1587, 1668); hence the direction of a verdict by the court is conclusive.

In Error to the District Court of the United States for the District of New Jersey; Thos. G. Haight, Judge.

Action by Christopher L. Williams, as receiver of the First National Bank of Bayonne, against Mary A. Vreeland. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for plaintiff in error.

Pierre P. Garvin, of Jersey City, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The single question is, whether the defendant is liable for an assessment, under Section 5151, R. S., on stock standing in her name on the books of an insolvent national bank.

In September, 1913, William H. Vreeland was the record owner of 125 shares of stock of The First National Bank of Bayonne, and Mary A. Vreeland, his wife, was the record owner of 15 shares. After the declaration of a dividend, and before its payment on October 1st following, Vreeland resolved to make a present to his wife of 100 of his shares. He did not, either then or later, disclose or even remotely intimate to her his intention, but proceeded to carry it out by surrendering to the bank certificates in his name for 100 shares, and having issued certificates in her name for a like number, and requesting that a cheque for the declared dividend on these shares be drawn in her favor. It being impracticable to comply with this request, because dividend cheques had already been drawn to shareholders of record upon the closing of the books, he accepted the new certificates in his wife's name and a cheque for dividends thereon in his own name.

Within a day or two Vreeland changed his mind about presenting the shares to his wife, and without mentioning the matter to her, consulted the bank's president as to a method of getting them back in his name, representing that the shares were good collateral and if given to his wife it might be awkward to get them again. The bank official advised him to procure his wife's signature to the customary power of attorney on the back of the certificates, and instructed him how the shares could again be placed in his name by transfer and registration of the wife's certificates (which had not been registered) and registra-

tion of the new certificate to be issued. He thereupon secured his wife's signature, but never surrendered the certificates for transfer or registration. He endorsed the dividend cheque and presented it to his wife, who likewise endorsed it and got the dividend. To that extent he carried out his idea of a gift, without telling his wife the measure of his first intention.

With the certificates of Mary A. Vreeland endorsed and outstanding, the bank failed, and a receiver took over its affairs. The Comptroller of the Currency levied an assessment under Section 5151, R. S., of 100 per cent. against the bank's shareholders. Although 115 shares were then standing in the name of Mary A. Vreeland on the stock ledger and notice of assessment on that number was mailed to her, the receiver treated 100 of these shares as though they belonged to her husband. In enforcing the assessment against both Vreelands (who were without money yet were possessed of property), the receiver took the bond of William H. Vreeland for $25,000, conditioned for the payment of his assessment of $12,500 on 125 shares (25 shares admittedly being his and 100 being the shares represented by his wife's certificates then in his hands). In this bond his wife joined to bar her dower. At the same time Mary A. Vreeland gave a bond for $3,000, conditioned for the payment of her assessment of $1,500 on her 15 shares. In this bond her husband joined. Execution was issued on both, followed by sales resulting in deficiencies. Mary A. Vreeland paid the deficiency on her bond and thus fully met the assessment against her 15 shares. William H. Vreeland had in the meantime gone into bankruptcy, and was unable to meet the deficiency on his bond, amounting to $5,660.80 and interest. Thereupon the receiver shifted his attack and instituted this suit against Mary A. Vreeland on her liability under Section 5151, R. S., upon the 100 shares which stood in her name, seeking to recover the deficiency on her husband's bond, given to meet the assessment enforced against him on the same 100 shares.

The trial court found it unnecessary, as we do, to pass upon questions raised as to the release of the wife's liability because the certificates for the shares had not been registered and because demand for the amount of the assessment had been made upon and settlement accepted from her husband. The determining question was and is, What was the liability of the wife on the record entry of her stock holding at the time of the assessment?

At the trial, the receiver proved that the defendant was a record shareholder. This the defendant admitted but pleaded her ignorance of it, showing by the testimony of others the circumstances how she became such and by her own testimony how she in ignorance continued such. The receiver also proved that she had done nothing to cause her name to be removed from the record. This also she admitted.

As there was no dispute in the testimony, counsel agreed that there was no question for the jury, and on motions for binding instructions for both the plaintiff and defendant, submitted the question to the court.

The question submitted, as we understand it, was not a question of what is the legal liability of a record shareholder of a national bank

to assessment under Section 5151, R. S. That liability, under varying circumstances, has been defined by the statute and settled by the courts. The question, as we view it, was one of evidence, or rather, of the sufficiency of evidence to bring the defendant as a shareholder within or to excuse her from the liability imposed by law.

[1] Section 5151, U. S. R. S., provides, that shareholders of a national bank shall be individually and ratably responsible for all debts and engagements of the bank to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares. This is generally known as the "double liability" act. As to its effect upon a record holder of stock, the Supreme Court has said (Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571):

"But the settled doctrine is that, as a general rule, the legal owner of stock of a national bank association—that is, the one in whose name stock stands on the books of the association—remains liable" to the association "so long as the stock is allowed to stand in his name on the books, and consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable."

[2] When, therefore, a person becomes a record shareholder with full knowledge of the fact, he continues such (notwithstanding he may have disposed of his shares) until by his act he removes his name from the record. But it has developed in the cases that persons have become and have for a time continued record shareholders without knowledge of that fact. With respect to the liability of such the Supreme Court has expressed itself. In Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531, the court, speaking with reference to the facts of that case, said:

"It is true, as already suggested, there was evidence tending to show that the transfers of stock were made originally without defendant's knowledge, and the jury might reasonably have concluded, under all the evidence, that the transfers were made, and caused to be made, by her husband. * * * The vital question remained whether the defendant became the owner of the stock within the meaning of the statute regulating the individual liability of the shareholders of national banking associations. * * *

"If she became *aware* of the transfers, after they were made, and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts and engagements of the bank, as fully as if the transfers had been made originally with her knowledge and consent. * * *

"We must not be understood as saying that the mere transfer of the stocks on the books of the bank to the name of the defendant imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. *If the transfers were, in fact, without her knowledge or consent, and she was not informed of what was so done—nothing more appearing, she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank.* But if, after the transfers she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

The test of liability therefore seems to be the fact of being a record shareholder, knowledge of that fact, and some act in approval or ratification of it. Along this line the cases have been tried.

In Kenyon v. Fowler, 155 Fed. 107, 83 C. C. A. 567, affirmed 215 U. S. 593, 30 Sup. Ct. 409, 54 L. Ed. 341, the case turned on the defendant's admitted knowledge, that by an unauthorized act stock had been placed in his name for the ostensible purpose of holding him out as a stockholder, and on the inference of his acquiescence therein because of his failure to disapprove or repudiate the act.

In Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. Ed. 531, stock had been placed in the name of the defendant without her knowledge, but knowledge thereafter was imputed to her by her acts in joining in an application to convert the savings bank into a national bank, and by accepting cheques for dividends on the stock drawn to her order and by her endorsed. Having accepted benefits arising from her stock ownership she was estopped to deny her liability. National Bank v. Case, 99 U. S. 628, 632, 25 L. Ed. 448; Pauly v. State Loan & Trust Co., 165 U. S. 606, 612, 17 Sup. Ct. 465, 41 L. Ed. 844.

In Finn v. Brown, 142 U. S. 56, 57, 12 Sup. Ct. 136, 35 L. Ed. 936, the person in whose name stock was entered on the books, was a director of the bank and acting cashier. To become the former he had to be a stockholder, and had to make an affidavit that he was a stockholder; while as a part of his duties in the latter position, he kept the stock ledger. He was therefore conclusively presumed to have known that he was a stockholder.

The law of ratification which we think applies to the case in hand, is that stated by the Court of Appeals of New York in Glenn v. Grath, 133 N. Y. 38, 31 N. E. 344, as follows:

"It (a ratification) implies a *conscious and intended approval of the act done.* It rests upon the actual and existing purpose to make such approval. Hence, the courts say, that *it must occur with full knowledge of all the facts.*"

Referring to the principle of estoppel, the court said:

"That question is not reached, because before it can be reached there must be shown to exist some act of the party, done by him or with his assent, creating the alleged apparent relation. That fact must be established before any question of estoppel can arise. If the act done, the false appearance created, is the act, not of the party, but of some third person, such party is in no manner bound or affected by it unless he either originally authorized it or subsequently ratified it."

And again the court said:

"Where the shareholder consciously accepts that relation, he ought to bear its burdens as well as enjoy its benefits, and it is easy to imply a promise to perform that duty. But where he does not accept the relation, where it was put upon him by another without authority and against his will, where, instead of accepting its benefits, he repudiates them at serious loss, where his mind and that of the company never met in any contractual relation, where it was not his duty to pay, and he explicitly refused to take what was offered, all foundation for an implied promise is gone. The facts do not admit of it, for *the law does not raise a fiction to accomplish a wrong.* And thus again we come to the proposition that the real truth must be ascertained, and when ascertained must control. And that real truth is that the defendants repudiated and did not ratify the unauthorized act of McKim. *The whole force of a*

ratification lies in conscious and intended assent with full knowledge of the facts. If there is no such intent and no such volition, but a contrary intent and an opposite purpose, there is no ratification. The absence of any such intent and the presence of a different one is clearly disclosed by the facts."

This being the law, the question in this case, as we have said, becomes one of evidence: Has the plaintiff established the defendant's liability by sufficient testimony? Or has the defendant overcome the plaintiff's case by evidence sufficient to establish her non-liability?

[3, 4] The plaintiff proved that the defendant was a shareholder of record and that she did nothing to remove her name as such. This was sufficient to establish prima facie the defendant's liability. Finn v. Brown, 142 U. S. 56, 57, 12 Sup. Ct. 136, 35 L. Ed. 936; Matteson v. Dent, 176 U. S. 521, 530, 20 Sup. Ct. 419, 44 L. Ed. 571. The burden then shifted to her (Finn v. Brown, supra) to show that the act of making her a shareholder was in the first instance unauthorized; that it was without her knowledge or consent; and that she has not since acquiesced in or ratified it. That she has sustained the burden upon the first two points is not disputed; therefore the remaining question is as to evidence of her ratification.

[5] Evidence of the defendant's ratification is restricted to her two acts, first, of endorsing a dividend cheque and receiving the dividend; and, second, of endorsing the certificates of stock, that is, of signing the power of attorney on the back of each. The first may readily be disposed of.

It is urged that in signing the dividend cheque the defendant came within the case of Keyser v. Hitz, supra. In that case the wife received three cheques made to her order. The cheques showed by appropriate printing that they were dividend cheques on stock of a named national bank. By endorsing them the court charged her with knowledge of what they inevitably told her. But here the cheque endorsed by the wife, though a dividend cheque, was made to the order of the husband, who first endorsed it. Her endorsement of a cheque made payable to the order of her husband, in carrying out what indubitably was a present to her, did not charge her with notice that the stock upon which the dividend was declared stood in her name. Following the reasoning in Keyser v. Hitz, the legal inference and imputation are just the contrary. By accepting from her husband a dividend cheque made payable to *his* order, she was justified in thinking that the stock upon which it was issued stood in *his* name. This thought, doubtless, had a bearing upon her next act.

[6] The defendant's next and last act in relation to the bank stock which had been placed in her name without her knowledge or consent, was in affixing her signature to the power of attorney upon the back of each certificate. This she did without looking at their face, or learning what they were. Her husband placed the certificates before her face down, and said, "Mary, will you sign these papers for me?" She said, "What are they?" He replied, "They are some bank stock; I have made a mistake." Continuing, she testified:

"I didn't know that the certificates were in my name; I didn't know anything about them; I knew that Mr. Vreeland would not ask me to do any-

thing I should not do; he never has. * * * He didn't tell me it was in my name. * * * He didn't tell me in what respect he had made a mistake. I didn't feel that he should explain it. He just said he had made a mistake and asked me to sign it. That was all."

Considering this testimony in connection with corroborating testimony, it appears to us, that what Mary A. Vreeland did, in legal effect, was to make a valid execution of a power of attorney for the transfer of stock. That act, in so far as it authorized a transfer of stock, she cannot avoid by pleading ignorance. As the question here does not involve the validity of the act to effect a transfer, but concerns its evidential imputation of the knowledge with which it was done, we are of opinion that the circumstances which attended the act were a part of it, and affected the evidential inferences to be drawn from it. These circumstances show, that before acting, the defendant requested to be informed as to what she was asked to do; this information was denied her. It was denied her under representations and influences, which, when she acted, led her to believe she was doing something entirely different from that which she was actually doing; that is, she was made to believe she was correcting a mistake of her husband, a mistake affecting his affairs, not that she was dealing with or assigning away her own property. Therefore, we think the circumstances were such as to negative the knowledge, which otherwise it is presumed her act would have imparted. They contradicted the normal imputations of her act, and left her without that knowledge which was a prerequisite to a valid ratification of her husband's unauthorized act.

Upon this line of reasoning we think the court's finding for the defendant upon the evidence can be sustained. But aside from the interpretation favorable to the defendant, of which we think the evidence is susceptible, we are of opinion the judgment must be sustained upon an altogether different ground.

[7-10] There is an undoubted presumption of law, that Mary A. Vreeland knew what she was doing when she endorsed the certificates of stock and that she knew their contents, and thus she ratified the act of her husband. Being a presumption it stands in lieu of evidence of the fact, and had it not been rebutted, it would have been sufficient to fasten liability upon her. Being only a presumption, she endeavored to rebut it by evidence. While neither the evidentiary presumption nor the rebuttal evidence was disputed, the two were in conflict. If the case had gone to the jury with the evidence in this state, the judge doubtless would have submitted the question of her knowledge, and the jury's finding upon the fact of her knowledge would have concluded both parties. Instead of submitting the case to the jury, however, each party asked the court for binding instructions in his favor, which, under Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, is not a submission to the court without the intervention of a jury, within the intent of Rev. Stat. §§ 649, 700 (Comp. St. 1916, §§ 1587, 1668), but is equivalent to a joint request for a finding of fact by the court, and when the court, acting upon such request, di-

rects the jury to find for one of the parties, both are concluded on its finding.

In this case the parties submitted to the court the question of the wife's ratification of her husband's unauthorized act; that question was one of fact; upon it depended her liability. The court's decision, as evidenced by its instruction to the jury that they render a verdict for the defendant, was a finding of fact, which concluded both parties as effectually as if the same fact had been found by the jury.

The judgment below is affirmed.

NORFOLK SOUTHERN R. CO. v. FOREMAN.

(Circuit Court of Appeals, Fourth Circuit. July 16, 1917.)

No. 1505.

1. ADMIRALTY ⟸46—PROCESS—STATE STATUTE.
A state statute as to how process may be served on a railroad corporation is not controlling in a proceeding in personam in admiralty, to which the Conformity Act June 1, 1872, c. 255 (17 Stat. 196), does not apply.

2. ADMIRALTY ⟸46—PROCESS—SERVICE ON CORPORATION'S SECRETARY.
Service of citation on the secretary of a corporation in a proceeding in personam against it in admiralty is good, he being such a head officer as secures knowledge thereof to it.

3. APPEARANCE ⟸24(1)—ACTIONS—SERVICE OF PROCESS—WAIVER OF OBJECTIONS.
The court having jurisdiction of the subject-matter, and the parties being within its territorial jurisdiction, and defendant's contention on special appearance being that the service of process on its secretary was not good service on it, it waives its rights, in that respect, by answering and going to trial on the merits, after such question is decided against it; especially where it not only asked that the service be quashed, but sought to procure a dismissal.

4. SHIPPING ⟸84(3)—INJURY TO SERVANT—DANGEROUS WORK—FACILITIES FOR RESCUE.
Devices and facilities reasonably fit and accessible to effect a rescue should be provided where an employé is required to work where he may be subjected to the danger of being thrown into the water.

5. ADMIRALTY ⟸70—PLEADING AND EVIDENCE.
Under the informal proceedings in admiralty, unless defendant pleads surprise and procures a continuance, the court may, in action for death of an employé, allow testimony of concurring circumstances indicating negligence, and base a decree thereon, though not particularly or specifically pleaded, especially when they are the dangerous character of the work required to be done if performed by an inexperienced man, as was deceased.

6. ADMIRALTY ⟸118—REVIEW—DECISION ON FACTS.
Decision of the judge in an admiralty case on questions of fact, there being involved conflicting evidence or the credibility of witnesses examined before him, will be reversed only if manifestly contrary to the evidence.

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

In Admiralty. Action by George W. Foreman, administrator of Alonzo Skinner, deceased, against the Norfolk Southern Railroad Company. Decree for libelant, and respondent appeals. Affirmed.

James G. Martin, of Norfolk, Va., for appellant.

S. Burnell Bragg and Luther B. Way, both of Norfolk, Va. (Pender & Way, of Norfolk, Va., on the brief), for appellee.

Before PRITCHARD and KNAPP, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This is an appeal in admiralty from a decree of the court below in favor of the appellee for $2,400, as damages due to the children of one Alonzo Skinner for his death through the negligence of the appellant. The appellant, the defendant below, is a domestic corporation of the state of Virginia, having its principal office in the city of Norfolk. The deceased, for whose death damages are claimed, was at the time of his death a resident of and employed in the city of Norfolk. The place where the death and the alleged act of negligence took place was in the port of Norfolk, and the plaintiff is a domestic administrator in Norfolk of the deceased. The statute of Virginia (Code, § 2902) provides that, where death has ensued from the negligence of those in charge of a ship or vessel, the same right of action which the deceased would have had if death had not ensued shall survive and continue. The appellant was the owner of the tug Lynnhaven, and this libel in personam was filed against the appellant, the Norfolk Southern Railroad Company, as the party responsible for the negligence of its employés in charge of that tug in causing the death of Skinner. The monition was served by the marshal on the secretary of the Norfolk Southern Railroad Company by delivering a true copy to him in person at the principal office of the Norfolk Southern Railroad Company in the city of Norfolk. The respondent then filed an appearance stating that it appeared specially in the cause and moved to quash the return and dismiss the libel and monition, for that it appeared that the monition had been served on the secretary of the respondent corporation, whereas the secretary was not a person upon whom service could be made under the statutes and laws of the state of Virginia. The court below heard the motion to dismiss the libel and monition and to quash the libel and to quash the monition, and quash the marshal's return on the monition, and overruled the motion and ordered the respondent to answer. Thereupon respondent filed its answer to the merits (without therein expressly reserving any rights under its previous special appearance), and the cause went to trial on the merits before the court. A large amount of testimony was introduced by both libelant and respondent, and the court rendered its decree on the merits in favor of libelant, for $2,400. From that decree this appeal is taken.

Three questions are made by the assignments of error: (1) That the court should have quashed the return and dismissed the libel and monition; (2) that the court erred in finding the respondents guilty of negligence; (3) that the court erred in not finding the deceased guilty of contributory negligence.

[1, 2] The statute of Virginia (Code, § 3225) provides that process against a railroad corporation may be made on its president, cashier, treasurer, general superintendent, or any one of its directors. Were the present cause an action at law, then under the conformity act of 1872 the Virginia statute might be held as controlling. It is a proceeding in admiralty, to which the conformity act does not apply; and the inquiry, then, is whether the service on the secretary was a good service on a corporation according to admiralty practice. The statute of Virginia could not possibly control the practice in the exclusive jurisdiction of a court of admiralty. If, when the statute of Virginia was enacted, by the practice of the court of admiralty a corporation could be served by a service on its secretary, then, to hold that the statute could restrict the court of admiralty in the exercise of its jurisdiction by limiting the service to only other officers—say to officers far removed from the point at which the court of admiralty sat—would seem to lead to the power of the state to practically deprive the court of admiralty of its salutary and summary jurisdiction in personam.

There appears to be no statute of Congress or rule of the District Court below expressly providing how citations in admiralty shall be served nor any decisions of any court of admiralty on the point. Walker v. Hughes (D. C.) 132 Fed. 885.

In the matter of In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991, the Supreme Court held that where the libelee (a foreign corporation) had, in pursuance of a state statute, appointed an agent in New Orleans on whom legal process might be served, then a monition in admiralty from the United States District Court for the Eastern District of Louisiana could also be served on that agent. This followed not from the permission or provision of the state statute, but because service on an agent was a good service in admiralty, and there was an agent (no matter why appointed) within the territorial jurisdiction who could be served.

In United States v. Bedouin Steamship Co. (D. C.) 167 Fed. 863, where the service on an agent of a foreign corporation was upheld, it does not appear that any reference was made to any authority based on a state statute. In the cases of Doe v. Springfield Boiler Co., 104 Fed. 684, 44 C. C. A. 128, and Insurance Co. of North America v. Frederick Leyland & Co. (D. C.) 139 Fed. 67, it was held in the cases of nonresidents, that where the state statutes required the designation of, or itself designated, the agents of foreign corporations on whom process could be served, that a service could be made of a monition in admiralty on the same agents. Nothing in these cases is restrictive of the power of a court of admiralty to serve either a domestic or a foreign corporation according to its established practice. A court of admiralty could not serve in personam a foreign nonresident corporation by extraterritorial service of the monition. Where, however, in obedience to state law, an intraterritorial agent exists on whom process can be served, then the court of admiralty can have its process served on that agent within the jurisdiction in like manner as a state court could do, and in like manner also as the court of admiralty might do if the agent within

its territorial jurisdiction were appointed without reference to any state statute. U. S. v. Bedouin S. S. Co., supra.

The Supreme Court has decided in Kansas City R. R. Co. v. Daughtry, 138 U. S. 298, 305, 11 Sup. Ct. 306, 308 (34 L. Ed. 963), that "at common law service was made on such head officer of a corporation as secured knowledge of the process to the corporation." There is no distinct separate adjudication to the same effect with regard to a court of admiralty, but it would seem to follow necessarily that the same rule held good in any court of record, and especially in a court of admiralty. By the general concensus of authority, the secretary of a corporation is such a head officer, and the learned judge below did not err in overruling the motion to quash the service.

[3] But apart from this, it appears that the appellant respondent, after the decision of the motion, answered and went to trial on the merits. The appellant insists that this was no waiver of its rights under its so-called special appearance, but that when that was overruled it had the right to defend itself on the merits, and reserve the right, should the merits be decided adversely to it, to renew its objection in this court, and have the adverse judgment reversed on this preliminary ground; that it was not bound to take the chances of being wrong on this preliminary question, but had the right to appear and contest the cause on the merits, and reserve this preliminary question as a resource should the merits be decided against it. There are, however, two sets of chances, and the argument should hold conversely. Why should the appellant have the right to compel the chances in its favor by taking the benefit of the trial on its merits, and the benefit of the judgment if in its favor, whilst denying that benefit to the appellee by holding in reserve this preliminary question? Is the appellant to be in the court for its purposes and at the same time out of it for the purposes of the appellee?

There is a great mass of conflicting decisions on this subject of so-called special appearances and their effect. Some jurisdictions uphold the right to appear specially, and, if the question be decided adversely to the party so appearing, then to file answers to the merits and contest those merits on trial, taking the chance of a favorable decision, and, if the decision on the merits be adverse, still to retain the right to make the question of power or jurisdiction advanced by the special appearance. Some jurisdictions deny this right, and in one jurisdiction (Texas) the statutory provision is to the effect that any such appearance shall be deemed and treated as a general appearance. On an appeal from a similar statutory provision of the state of Kentucky in the case of Western Indemnity Co. v. Rupp, 235 U. S. 261, 35 Sup. Ct. 37, 59 L. Ed. 220, the Supreme Court held:

"That a state, without violence to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this

court in York v. Texas, 137 U. S. 15 [11 Sup. Ct. 9, 34 L. Ed. 604]; followed in Kauffman v. Wooters, 138 U. S. 285 [11 Sup. Ct. 298, 34 L. Ed. 962]."

The court proceeds:

"A nonresident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 732, 733 [24 L. Ed. 565]; York v. Texas, 137 U. S. 15, 21 [11 Sup. Ct. 9, 34 L. Ed. 604]. But if he desires to raise the question of the validity of the proceedings in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case—that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

In the federal courts, however, it has been held that defendants appearing in the court under protest, with the sole purpose of denying the jurisdiction of the court, do not waive their rights, if such question be decided adversely to them, by then contesting the case on the merits. Western Indemnity Co. v. Rupp, supra; Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237; Southern Pac. Co. v. Denton, 146 U. S. 202, 206, 13 Sup. Ct. 44, 36 L. Ed. 942; Mexican Central Ry. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; Galveston, etc., Ry. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248; Citizens' Savings & Trust Co. v. Illinois Cent. R. R. Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703; Davidson Marble Co. v. Gibson, 213 U. S. 10–19, 29 Sup. Ct. 324, 53 L. Ed. 675.

This ruling, however, has been made in cases where the objection lay to the entire lack of jurisdiction of the court to hear the cause, either by reason of its inability to serve a nonresident defendant within the jurisdiction, or by reason of the statutory limitation of jurisdiction in the court affecting its power to assert jurisdiction; for as the Supreme Court adds in the case of Western Indemnity Co. v. Rupp, supra, on page 273 of 235 U. S., on page 41 of 35 Sup. Ct. (59 L. Ed. 220):

"As appears from Southern Pacific Co. v. Denton, and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the federal courts is such as to sometimes give an advantage of this kind to defendants."

The cases in the federal courts in which the rule has been applied have been as to one class upon cases begun in state courts and then removed from the state court to the federal court where it has been sought to procure personal judgments against parties who, by reason of extraterritorial residence, were completely beyond the jurisdiction of the state court. There the defendant has been allowed to appear and deny the power of the court to have any right to take jurisdiction at all

over him, and to reserve that question when decided against him, and notwithstanding that reservation to also contest the cause on its merits. The other class of cases have been cases in which, by the express terms of the act of Congress defining the jurisdiction of the federal court, it had no jurisdiction to entertain the cause except in the districts of the residence of the plaintiff or defendants. Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027.

The case at bar presents no such question. Here defendant is a domestic corporation with its residence and principal office within the court's territorial jurisdiction. Both the subject-matter of the cause and the persons of all the parties are within the court's power to act, and within its territorial jurisdiction. The question presented is not really one of competent jurisdiction in any sense as denying the court's power to take jurisdiction over either the cause or the parties. It is one of due service of process, i. e., of due process of law, of lack of due procedure to give the party cited his legal day in court. The defendant's contention is that it was not served with process as required by law so as to compel it to appear and have its day in court.

The object of the service of process is to bring the party into court, and, after due opportunity to him to defend, then to award judgment for or against him. If the receipt of that notice is admitted, and the party comes into court, and due time is given, and no snap or hasty judgment attempted, then it would appear that all the purposes of serving process have been accomplished.

The spectacle that would be here presented, if the contention of the appellant were sustained, would be that of a domestic corporation actually admitting receipt of the notice, and appearing in court, receiving its due time for preparation, filing its answer on the merits, proceeding to trial, cross-examining and examining at length its own and its adversary's witnesses, doing everything any other litigant could do in a court of justice, and then, after a solemn and final judgment rendered, upsetting and rendering naught all that has been done, simply because the notice delivered to it, and which it received, was delivered to its secretary and not to one of its directors, or its cashier, or president.

It seems to us that the rule with regard to nonresidents does not apply to residents in the position of the respondent below, and that its filing its answer to the merits, and appearing and contesting the cause on the merits, was a waiver of the alleged irregularity in the service of the monition.

We might add that, in the jurisdictions which permit such reservations of such preliminary questions, it is strictly required that the party protesting shall not solicit or ask or seek to procure any action of any kind on the merits until the decision of his protest. In the present case the respondent not only asked that the service be quashed so as to leave the cause still pending for another service, but sought to procure a dismissal of the libel and termination of the suit, which would have ended it for this suit so far as the merits were concerned, and not merely leave it open for another service of process.

The facts of the case appear to be that the deceased, Alonzo Skin-

ner, was a longshoreman or dock hand employed by the appellant about its docks at Berkley, on the southern side of the Elizabeth river, at Norfolk. His labor was to work trucking around the dock, and on barges, carrying trucks from the dock to the barges and back. On 22d August, 1913, a barge lying at the dock of appellant loaded with goods was about to be transferred across the Elizabeth river to the dock of the Old Dominion Steamship Company. The chief clerk of appellant on its dock called Skinner and directed him to go on the barge and carry the package of waybills across to the Old Dominion Steamship Company's dock. Skinner, in pursuance of instructions, went on the barge. He appears to have been the only person on the barge, as the barge had no crew. It was operated when towed by the crew of the appellant's tug, which did the towing. The barge was about 100 feet long and 30 feet wide and was then drawing not over 12 to 15 inches of water. It was a barge with a closed cabin or house built upon the deck of the barge. Between the sides of the house and the gunwale or side of the hull of the barge was a walkway or runway about 12 to 13 inches wide. For the support and protection of persons on this runway a line, called in the testimony the lifeline, was stretched along the side of the house two or three feet above the surface of the runway, and held to the side of the house by supports or fastenings at proper intervals; so that any one walking along the runway could hold this line to steady and support himself against falling off the barge. The appellant's tug Lynnhaven approached to tow over the barge about 5:10 p. m. The mate was off duty eating his supper. The captain was at the wheel of the tug, and the deck hand was handling the lines near the forward bitts of the tug. The captain called to Skinner, who was on the barge, apparently at one end of the barge, to put his hawser over a bolt on the corner of the barge, which Skinner did, and the tug then hauled the barge clear of the dock out into the stream, and the captain, wishing to make fast alongside the barge, slackened up on the hawser, and told Skinner to slip the hawser over the bolt and up to the bitt about amidships of the barge. This required Skinner to walk along the runway on the edge of the barge. He slipped the hawser over the bolt and attempted to carry it to the other bitt. The captain saw that, with the tug and barge drifting apart, Skinner was in danger of being pulled overboard, called to him to let the hawser go, and then backed the tug off the barge. He backed away some distance, and then went ahead again, in order to get up to the barge, which was drifting in the stream, so as to fasten his hawser to the barge. As he approached the barge, Skinner was standing on the runway of the barge. The tug struck the barge, shoving or swinging the barge away for several feet, and, from the force of the impact, causing Skinner to lose his balance, or his hold on the lifeline, and be precipitated over the side of the barge into the stream, when, after some ineffectual efforts on the part of the crew of the tug to rescue him, he was drowned. The libel charges that the drowning resulted from two acts of negligence on the part of the tug's crew, viz.: (1) That the tug in approaching the barge carelessly and negligently struck the barge with great and extraordinary force and vio-

lence, by reason of which the deceased was thrown overboard; (2) that no reasonable or proper efforts were made by the crew of the tug to save him, and had such efforts been made he would have been saved.

The learned judge who tried the case in the court below makes no specific findings as to the acts of negligence on which he bases his conclusion, but finds generally that "the deceased lost his life solely as the result of negligence of the defendant company and its servants and without fault on his part." There is another act of negligence claimed by the appellee as evidenced by the testimony, and which the appellee, in his argument, relies upon for affirmance of the decree below, viz.: That Skinner was an inexperienced person, who was directed by the captain of the tug to perform a piece of work he was entirely unfit and unqualified to perform, and lost his life in consequence; that the work he was required to perform was to walk along the narrow runway on the edge of the barge, and place a hawser over the bitt, that being a thing a green or inexperienced hand cannot perform with safety to himself.

The evidence does not seem to show that the blow struck by the tug on the barge when approaching for the purpose of making fast in the stream was of extraordinary or unusual violence. Neither the tug nor the barge appear to have been injured. The coming together of two such boats in midstream, both more or less in motion, is always accompanied by some jar or thump, and there is nothing in the testimony to show that the contact in this case was more violent than is usual in similar cases. There does seem to have been delay in the efforts to rescue Skinner due to the absence of the best facilities. The deck hand who endeavored to throw the line had a line apparently too heavy for him to fling far enough to reach Skinner where the latter was in the water, although a lighter line might have accomplished the purpose. There was no ring buoy or life preserver at hand at that juncture for the deck hand to fling to Skinner. The deck hand had to go up the side of the house of the tug to the deck above, near the pilothouse, and break open a box to get out a life preserver, and when he flung the life preserver the tug had drifted so far from Skinner the life preserver failed to reach him. From all the evidence it would appear that the drowning was the result of a chain of circumstances. Skinner was too inexperienced or too careless to handle himself on the runway of the barge, and the unexpected (to him) force of the jar and sheer caused by the tug striking the barge precipitated him overboard. He seems to have been unable to swim, and the lack of having at hand the proper facilities on the tug to rescue him caused a delay which made the efforts at rescue futile.

[4, 5] Assuming that Skinner's ignorance and inexperience with the act of the captain in putting him in a dangerous position were not in issue as not having been alleged in the libel, then the decree of the court below, construed as being responsive to the libel, found as a conclusion of fact that the respondent was guilty of negligence in one or both of the particulars charged in the libel. It seems to this court that if an employer requires its employés to work in a place where they may be subjected to the danger and peril of being precipitated

into the water, as in the present case, there should be provided devices and facilities reasonably fit and accessible to ward off a fatal eventuation by effecting a rescue if reasonably possible. It seems also that under the rather informal proceedings in admiralty, that unless the defendant pleads surprise, and procures a continuance for preparation, it is not improper for a court of admiralty, in its discretion, to allow testimony as to concurring circumstances, indicating negligence, and to base a decree thereon, although not particularly or specifically pleaded in the libel, especially when the circumstances are such as in the present case, the dangerous character of the work required to be done on the runway by Skinner if performed by an inexperienced man.

There seems to have been no one but Skinner on the barge. In obeying the captain's orders to make fast the tug to the barge, he was obeying the orders of one who he had a right to assume was, under the circumstances of this case, a superior employé of the common employer whose orders he was required to obey.

[6] The general rule is that the decision of the judge below in an admiralty cause on questions of fact, where there is conflicting testimony, or the credibility of witnesses is involved, and the witnesses have been examined before the judge below, will not be reversed unless manifestly contrary to the evidence. In the present case we do not find that the conclusions of the learned judge who tried the cause below and heard the testimony can be said to be manifestly against the evidence upon the questions of fact involved, but, on the contrary, that as a whole there is sufficient evidence to support them, and the decree below is accordingly affirmed.

Affirmed.

SUHOR et al. v. GOOCH.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1917.)

No. 1514.

1. HUSBAND AND WIFE ⟸34—ANTENUPTIAL SETTLEMENT—FRAUD—CONCEALING CONTENTS—EVIDENCE.

   That the man procured the woman's signature to the antenuptial settlement contract without her knowledge of its contents, claimed as ground of fraud for setting it aside, *held* disproved by the positive evidence, opposed only by statement of the woman's mother that, so far as she knew, her daughter had not seen the paper.

2. HUSBAND AND WIFE ⟸31(2)—ANTENUPTIAL CONTRACT—MERGER OF NEGOTIATIONS.

   In an antenuptial settlement contract executed with knowledge of its contents were merged all promises and negotiations for settlement of a greater amount.

3. HUSBAND AND WIFE ⟸34—ANTENUPTIAL SETTLEMENT—RELEASE OF WIFE'S INTEREST—GROSS DISPROPORTION—PRESUMPTION.

   There is no such gross disproportion between an antenuptial settlement for $50,000, with relinquishment by the woman of her interest as wife in the man's estate, and her expectancy, he being then worth $200,000 in personalty and $40,000 in realty, as to raise presumption of his concealment or failure to disclose the value of his property.

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4. HUSBAND AND WIFE ⇐33—ANTENUPTIAL SETTLEMENT—EFFECT OF SUICIDE.

Suicide of husband is not a fraud on the wife invalidating their antenuptial settlement.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Jeter C. Pritchard, Judge.

Suit by Margaret Corwin Radcliffe Gooch against Annie Wayne Suhor and others. Decree for plaintiff, and defendants appeal. Reversed.

S. S. P. Patteson and H. M. Smith, Jr., both of Richmond, Va. (Robert E. Henley, of Richmond, Va., on the brief), for appellants.

Edward P. Buford, of Lawrenceville, Va. (Marshall R. Peterson, of Lawrenceville, Va., C. T. Baskervill, of Boydton, Va., and S. E. Williams, of Lexington, N. C., on the brief), for appellee.

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

WOODS, Circuit Judge. W. H. Gooch and Margaret C. Radcliffe were married on October 14, 1915, at Lexington, N. C. Immediately before the marriage an antenuptial contract was executed by which Gooch promised in consideration of marriage that he would pay or cause or provide to be paid one year after his death to the Old Dominion Trust Company $50,000 in trust to pay the interest to his wife, Margaret, for her life or widowhood, and upon her death or second marriage to pay the principal as directed by his will, and upon failure of testamentary disposition to his children and their issue. Miss Radcliffe, in consideration of marriage and the provision for her above set out, agreed to accept from Gooch's executor, administrator, or heirs the settlement in lieu of her dower rights and all other rights in Gooch's estate, real and personal. On the same day husband and wife left on a trip to California. On this trip, one month after the marriage, Gooch was found in their apartment on a railroad train in Texas dead from a pistol shot supposed to have been self-inflicted. He left no will, and the only persons interested in his estate are his widow and his daughter, Annie W. Suhor, and her husband, George Suhor. Pending a controversy in the state courts as to the right of administration, the Old Dominion Trust Company was appointed curator of the estate. On January 24, 1916, the widow instituted this suit against Mrs. Suhor and her husband and the Old Dominion Trust Company to have the antenuptial contract annulled on the ground that Gooch obtained her signature to it by imposition and fraud. The District Court in a formal decree held that the allegations of the bill were sustained by the evidence, and set aside the settlement as fraudulent.

Three specifications of fraud are relied upon by Mrs. Gooch:

First. Imposition by Gooch in procuring her signature to the document without informing her of its meaning, and in violation of his promise previously made to settle on her a home worth $10,000 to $12,000 and an income of $3,000 to $4,000 a year.

Second. Concealment by Gooch of the value of his property while taking a relinquishment of his intended wife's interest in it for the consideration of a settlement grossly disproportionate to the value of the share of his estate she would have received on his death but for the settlement.

Third. Suicide immediately after marriage by which he fraudulently cut off her prospects of enjoying his estate and receiving gifts from him.

Because of the death of Gooch and the consequent incompetency of his widow to testify in the cause, the record consists chiefly of the evidence of Mrs. Radcliffe, the mother of Mrs. Gooch, and their correspondence with Gooch. This correspondence, taken with the other evidence, reveals the characters and attitude of the parties to it. Gooch was an illiterate man of natural force, about 50 years old, who had accumulated about $240,000. He had been divorced from his first wife, on whom he had made a settlement of the interest on $36,000 for her life. Afterwards he had association with a woman named Beulah Dickerson, who had given birth to a child and imputed to him its paternity. He was fond of his daughter, Mrs. Suhor, and had made to her numerous valuable gifts. After his engagement to Miss Radcliffe he gave her generously jewels and other articles and $570 in money. He was petulant, suspicious, jealous, and capricious, and these characteristics, according to Mrs. Radcliffe, were made known to her and her daughter openly and very disagreeably after the engagement. The engagement began in 1913, was broken in July, 1914, and renewed in July, 1915. After the renewal Gooch wrote a letter which Mrs. Radcliffe and her daughter considered highly insulting. He several times postponed the marriage, and entered into it with reluctance on the day last fixed only after Mrs. Radcliffe had insisted that the marriage should take place at the time appointed or not at all. No invitations were issued for fear Gooch would be unwilling to marry at the time appointed. One probable cause of this reluctance was anxiety over his former relations with Miss Dickerson and apprehension from threats of personal violence made by her. But the correspondence shows that another cause was his doubt of a happy result. Great as were his faults and sins, his acts of generosity go far to repel the suggestion that he would contrive a scheme to defraud the woman from whose companionship he hoped to derive happiness.

Miss Margaret Radcliffe was an educated teacher of music, 24 years of age at the time of her marriage. She was of social standing far above Gooch, and apparently had little, if anything, in common with him. Her mother, also an educated teacher, was her companion and intimate adviser in the affair. The letters of Gooch to Mrs. Radcliffe and Margaret, their letters to him, and the personal associations described by Mrs. Radcliffe indicate an engagement of bickerings and disagreements. Mother and daughter knew of his divorce and of his fear of Miss Dickerson, though apparently not of any sexual relations he may have had with her. The affair with Miss Dickerson they treated as the subject of merriment and contempt, rather than of objection, or of sympathy for Gooch's distress over it. Gooch's

record, his truculent conduct, his business as a liquor dealer, his illiteracy, his reluctance to marry, the difference in age, tastes, and association, and the constant bickerings almost to the day of the marriage produce the conviction, which Miss Radcliffe's declarations of affection in letters to Gooch do not remove, that the marriage was one of convenience with a large factor of mercenary consideration rather than of sentimental attachment.

[1, 2] In the light thus furnished by the personality of Gooch and Mrs. Gooch and her mother and their course of conduct, we consider the charges of fraud. The evidence, direct and circumstantial, affirmatively disproves the first charge that Gooch procured the complainant's signature to the contract without informing her of its meaning and in violation of an agreement to make a larger settlement. Gooch made known to both mother and daughter his desire and intention to make a marriage settlement, and discussed it with them in conversation and in correspondence more than a month before the marriage. He employed Mr. Patteson, an attorney of high character, to prepare it. It was prepared by Mr. Patteson and sent to Gooch some time before the marriage, and returned with the spelling of the middle name of Miss Radcliffe changed in such way as to indicate that the correction had been made by her or at her instance. It is true that the contract was executed hastily before the marriage because Gooch had been detained as a witness in Richmond so that he could not go to Lexington the day before as he had intended. But he took Mr. Patteson with him to see to its proper execution, having the best of reasons to believe that his presence would insure fairness. Mr. Patteson's direct and undenied evidence was that he told Miss Radcliffe she should understand it before executing it, and that she turned the leaves and said she had seen a copy of it and knew all about it. She must have referred to the copy sent to Gooch by Mr. Patteson, for there was no other that she could have seen. This shows knowledge by the complainant of the instrument and fair dealing with her. Against this the plaintiff offered nothing except the negative statement of Mrs. Radcliffe that, so far as she knew, her daughter had not seen the paper. The conclusion, which this proof requires, that Gooch had shown Miss Radcliffe a copy of the contract, and that she knew its import, disposes of the averment that he had before promised to settle on her a home worth $10,000 to $12,000 and an income of $3,000 to $4,000 a year; for any past promises or negotiations were merged in the instrument actually executed. Besides, it is made evident that Gooch was speaking of the home and income in a general indefinite way, and that his purpose was indefinite, by the statement attributed to him in the same connection that he had given his daughter, Annie, about $5,000, and that "I have told Annie I wanted to fix Margaret in the same way I had fixed her." He clearly indicated to Mrs. Radcliffe in conversation that he intended to make what he regarded a proper marriage settlement and give Margaret, as he had given Annie, some trips abroad. He made it very plain to Mrs. Radcliffe that he would determine later according to his own discretion whether they should have anything more. All this shows that the complainant knew the terms of the marriage settlement, and that she

understood that it gave her all she was to expect or claim as a legal right.

[3] The next charge against Gooch is fraud in taking a relinquishment from Miss Radcliffe of her interest as a wife in his estate without making a full disclosure of the value of his property. The principles of law relating to the validity of marriage contracts are well settled, but their application depends on the facts of each case. Such settlements are favored as promoting providence and domestic happiness, especially where the husband has other claims upon his bounty; but the parties are not charged with the diligence in protecting their rights required of those who contract at arm's length. On the contrary, they stand in a relation of the highest trust and confidence which demands the utmost good faith from one to the other. Hence, while good faith is presumed, as in all other contracts, the courts will closely scrutinize marriage settlements to discover material concealment or even failure to disclose material facts. Concealment or failure to give full information as to the items or value of the property of the party making the settlement may be shown to be prejudicial to the other party, either by direct extraneous evidence or by the character and consideration of the contract itself. So a relinquishment by a wife of her rights of dower and inheritance in her husband's property for a provision grossly disproportionate to the value of her reasonable expectancy from her husband's estate is itself sufficient to overcome the ordinary presumption of good faith, and cast upon the husband the burden of showing that there was a fair disclosure of the value of his property. To have this effect, however, the disproportion must be so gross as to lead the court to infer that, if it had been fully understood, the woman would not have voluntarily executed the contract. What is gross disproportion depends upon all the circumstances appearing at the time of the making of the contract. It is not to be inferred from the mere fact that the settlement is considerably less than it turned out the wife would have got but for the settlement, any more than gross excess is to be inferred from the fact that the settlement gave considerably more than it turned out the wife would have got but for the settlement. If that were the test, settlements would be of little, if any, value. Their purpose is to provide a certainty against a future uncertainty which may be greater or less. Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516; Gaines v. Gaines, 163 Ky. 260, 173 S. W. 774; Robinson's Estate, 222 Pa. 113, 70 Atl. 966, 128 Am. St. Rep. 794; 21 Cyc. 1250.

Without offering direct proof of concealment by her husband or his failure to inform her of the value of his property, Mrs. Gooch relies on the proposition that there was such gross disproportion between her expectancy in her husband's estate and the settlement made upon her as to cast upon Gooch's heir and personal representative the burden of proving full disclosure by Gooch of the value of his property, and that they have failed to make this proof. At the date of the contract the net value of Gooch's personal estate was about $200,000, and of his real estate about $40,000. If no marriage settlement had been made, the complainant, as his wife, would have had an expectancy of

one-third of his whole property, amounting to $70,000 to $80,000, on his death. The value of this expectancy is not to be estimated at the time of Gooch's untimely death, but at the date of the contract, when it was subject to the contingency of being reduced far below the value of the settlement by business misfortunes or by Gooch's bestowal of his property upon his daughter or other persons. While under the Virginia law he could not have cut off by will his wife's one-third interest in the estate which might be left at his death, the expectancy, except her dower rights of one-third for life in his real estate, was subject to the risk of any disposition that Gooch might have chosen to make in his lifetime, and also to the vicissitudes of business life. The complainant had not borne with him the sacrifice and labor of accumulation. Considering the disparity of age and education and association, the marriage was, at best, an experiment in the search for happiness. It was evident that he would continue to give liberally to his daughter; and it is probable he was under moral obligation to provide for Miss Dickerson and a natural child. The settlement, so far from being inadequate to the wife's comfortable support after her husband's death, was sufficient to raise her from dependence on her daily labor as a music teacher before her marriage to a position of comparative affluence. It would be going very far for this court to say that a reasonable woman with full knowledge of Gooch's property, if she looked at the matter even from a purely mercenary standpoint, and considered all the circumstances and prospects, would not have accepted a settlement which secured a comfortable support for her life or widowhood, in satisfaction of an expectancy with important elements of uncertainty. Still less admissible is the inference of disproportion between the settlement and the expectancy so gross as to raise the presumption of Gooch's concealment or failure to disclose the value of his property.

In all the cases we have examined, where such an inference was held to be warranted, the disproportion was far greater. For instance, in the case of In re Enyart's Appeal (Neb.) 160 N. W. 120, the husband was worth $225,000, and the settlement on the wife in full of all interests was equivalent to annual interest on $10,000 at 5 per cent. for 20 years. In Taylor v. Taylor, 144 Ill. 436, 33 N. E. 532, the settlement was $2,000 at death of husband out of an estate of $41,000. In Barker v. Barker, 126 Ala. 503, 28 South. 587, it was $500 out of an estate of $10,000 of a man 87 years old. In Slingerland v. Slingerland, 115 Minn. 270, 132 N. W. 326, the settlement provided for the payment of $5,000 out of an estate of $225,000; and the money was never paid. In Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712, the settlement was $300 on death of husband out of an estate of about $40,000; and in Achilles v. Achilles, 151 Ill. 136, 37 N. E. 693, $200 a year for life or widowhood out of an estate of $20,000.

Contracts have been sustained in cases where the disproportion was far greater than in the present case. In Landes v. Landes, 268 Ill. 11, 108 N. E. 691, the settlement was $10,000 and the estate $130,000; in Settles v. Settles, 130 Ky. 797, 114 S. W. 303, $2,000 out of an estate of $20,000; in Smith's Appeal, 115 Pa. 319, 8 Atl. 582, $1,200 a

year for life out of an estate of $391,000; in Neely's Appeal, 124 Pa. 406, 16 Atl. 883, 10 Am. St. Rep. 594, $600 a year for life out of an estate of more than $30,000.

We conclude there is no such gross disproportion between the settlement on Mrs. Gooch and her expectancy as to warrant the presumption of constructive fraud by concealment or failure to disclose the value of the husband's property. Besides, against such an inference there is positive and unassailed proof of full disclosure. The contract itself recites that "the subject of their pecuniary condition, situation, their prospects and desires, their mutual rights and obligations," had been fully considered. Smith's Appeal, 115 Pa. 319, 8 Atl. 582. The statement attributed to Miss Radcliffe by Mr. Patteson that she had seen a copy of the contract and knew all about it standing uncontradicted, taken in connection with Gooch's reputation for wealth and his style of living, is also strong affirmative evidence that the plaintiff was informed as to the value of the property of her intended husband.

[4] The contention that Gooch committed a fraud on plaintiff's marital rights by his suicide is without foundation. No doubt, Mrs. Gooch signed the contract with a hope that Gooch's liberality and affection would lead him to do much more for her; and this hope would probably have been realized had Gooch lived to realize his own hope of domestic happiness. But so far from agreeing or even intimating either expressly or impliedly that he would make further provision for his wife, Gooch made it very plain in conversation with Mrs. Radcliffe that he would not commit himself to do anything more than the marriage settlement would provide. There is no reason, and we think no authority, for saying that a man driven by despair to take his own life by the mere act of suicide commits a legal fraud on the property rights of his wife.

To sum up, the preponderance of the evidence supports these inferences: There was no direct evidence of fraud or misrepresentation; the settlement was not so grossly disproportionate to the wife's expectancy when all the circumstances of the parties are considered as to raise the presumption of fraud; the settlement was adequate for a comfortable support for Mrs. Gooch after the death of her husband and during widowhood. She knew of its terms; and the recitation of the instrument itself in connection with Gooch's reputation for wealth shows that there was no concealment. Mrs. Gooch married in full acceptance of the terms of the settlement, taking the chances of further beneficence from her husband; and Gooch would not have contracted the marriage but for her acceptance, leaving his other property free for such disposition as he might choose to make. The suicide of Gooch was a misadventure not anticipated by either party, and therefore it could not be an act of fraud affecting the validity of the settlement. The mere hope of future beneficence unsupported by a promise was not a property right, and therefore the blasting of that hope by suicide could not be a fraud.

The point that the settlement cannot be carried out by Mrs. Suhor as the heir of her father is without merit, since the contract provides

that Mrs. Gooch would accept the money in performance of Gooch's undertaking from his personal representatives or heirs. Neves v. Scott, 9 How. 196, 13 L. Ed. 102.

Reversed.

POCAHONTAS CONSOL. COLLIERIES CO., Inc., v. JOHNSON.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1917.)

No. 1508.

1. MASTER AND SERVANT ⟸137(1)—MINES—LIGHTS ON CARS—STATUTES.
   Virginia Mining Act, § 13 (Pollard's Code Supp. 1916, p. 298), requiring a light on the front of moving cars, except where cars are being hauled by gathering motors or mule teams at a place other than a main heading, applies where loaded cars are being pushed by a motor to the foot of the incline to be there connected to a hoist chain, which carries them to the tipple.
2. MASTER AND SERVANT ⟸139—INJURY—PROXIMATE CAUSE.
   Breach of the statutory duty to give warning of the approach of cars in a mine by a light on the front of them *held* proximate cause of injury to an employé struck by them while waiting on the track for cars to pass on the other track.
3. PENALTIES ⟸8—RIGHT TO SUE—VIOLATION OF PENAL STATUTE.
   Any one of a class for whose special benefit a penal statute is enacted has right of action for injuries resulting to him from its violation.
4. MASTER AND SERVANT ⟸204(2)—ASSUMPTION OF RISK—VIOLATION OF PENAL STATUTE.
   An employé does not assume the risk of known violation by the employer of a penal statute requiring a specific appliance deemed by the Legislature necessary for safety of employés.
5. MASTER AND SERVANT ⟸289(16)—CONTRIBUTORY NEGLIGENCE—MINERS—JURY QUESTION.
   It cannot be said as matter of law that an employé struck by cars in a mine was negligent in entering the mine in a way prohibited by Virginia Mining Act, § 8, in terms applicable only where other good roads are provided for that purpose, where there is evidence for the jury that the roof of the manway was not safe.
6. MASTER AND SERVANT ⟸241—CONTRIBUTORY NEGLIGENCE—MINERS—TRAVELING ON MOTOR ROAD.
   Going into the drift mouth of a mine to where it intersects, near the tipple, the entrance from the tipple, there to take a car and ride thereon into the mine, is not traveling on foot to work on a motor road, in violation of Virginia Mining Act, § 8, relative to contributory negligence of a mine employé struck by an unlighted car.
7. MASTER AND SERVANT ⟸243(5)—CONTRIBUTORY NEGLIGENCE—CUSTOMARY VIOLATION OF RULE.
   Relative to contributory negligence of an injured mine employé, the rule of the mine operator against riding on cars without authority is inapplicable, where the method of entering the mine by riding on cars, taking them where the drift mouth intersected the entrance from the tipple, was practiced so obviously and constantly as to warrant the inference that it was authorized and sanctioned by the employer.
8. MASTER AND SERVANT ⟸289(16)—CONTRIBUTORY NEGLIGENCE—STANDING ON TRACK IN MINE.
   Though there was a space of five and a half feet between the tracks in a mine, it was not contributory negligence as matter of law for an em-

ployé, while cars were passing rapidly on one track, to stand on the other track, where he was struck by cars not lighted at the front as required by statute.

9. MASTER AND SERVANT ⟸235(9)—CONTRIBUTORY NEGLIGENCE OF MINER—LISTENING FOR CARS.
Contributory negligence of employé struck by loaded cars on a track in a mine cannot be based on failure to listen, where effort to listen would have been useless because of the noise of empty cars passing on the other track.

10. DEATH ⟸58(1)—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.
There is a presumption, which defendant in action for death must overcome by affirmative proof, that deceased, struck by a car on a track in a mine, looked and failed to see the car.

11. DEATH ⟸58(1)—CONTRIBUTORY NEGLIGENCE—PRESUMPTION—EVIDENCE.
Evidence, in an action for death from being struck by a car in a mine, *held* insufficient to warrant finding, against presumption, that deceased did not look or that he could have seen the car in time.

12. APPEAL AND ERROR ⟸1067—HARMLESS ERROR—REFUSAL OF INSTRUCTION.
There being insufficient evidence to overcome the presumption that deceased, killed by a car in a mine, looked and failed to see the car, refusal of instruction that it was his duty to look, and that if he failed to do so, and by looking he could have seen the car in time, he was guilty of negligence, barring recovery, was harmless.

13. APPEAL AND ERROR ⟸1056(3)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.
Exclusion of witness' statement that if he had looked he could have seen the cars, was harmless, as such testimony could have little, if any, weight in the face of the positive statement of another, with him at the time, that he looked and did not see them.

14. MASTER AND SERVANT ⟸131—CONSTRUCTION OF STATUTE BY MINE INSPECTOR—DEFENSE BY MASTER.
The mine inspector's erroneous construction of a statute as not requiring a light on moving cars at the point in a mine where they struck and killed a miner, even if communicated to the mine operator, could not avail the operator, actual damages only being claimed.

Knapp, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Action by F. L. Johnson, administrator of J. D. Ross, deceased, against the Pocahontas Consolidated Collieries Company, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

E. M. Fulton, of Wise, Va., and S. C. Graham, of Tazewell, Va. (Graham & Hawthorne, of Tazewell, Va., and Fulton & Vicars, of Wise, Va., on the brief), for plaintiff in error.

William G. Werth, of Norton, Va., and William H. Werth, of Tazewell, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. This action is for damages caused by the death of J. D. Ross, an employé who was killed in defendant's coal mine. There were two main ways into the mine, the drift mouth and the entrance at the tipple. These intersected at a point about 800 feet from the drift mouth and about 300 feet from the tipple entrance. From the tipple to a point about 800 feet inside, the main entry was

double-tracked, the track on the right going into the mine being used for empty cars and that on the left for loaded cars. The cars were moved by an electric motor within the mine, and by a chain hoist or "creeper" from the foot of the incline to the tipple. In the movement of these loaded cars from within it was necessary to uncouple the electric motor from the cars at a point about 300 feet from the tipple. The motor then crossed over a switch to the track for empty cars, ran back into the mine to the point where the empty and loaded car tracks joined, then forward on the loaded car track, coupled to the cars from the rear, and pushed them forward to the foot of the incline, where they were connected to the creeper, which carried them to the tipple. After being unloaded the cars then drifted back into the mine on the track for unloaded cars.

Ross, a mine engineer, together with two helpers, Herrold and Murray, entered the drift mouth and walked in as far as the intersection of the two entries. Upon reaching the intersection, which was only a few feet from the cross-over which the motor took to change from the front to the rear of the cars, he found the motor was then making the change so as to run down and get behind the loaded cars and push them to the creeper. Ross started to follow the motor then backing down the track which was used for empty cars, when the motorman told him not to follow but to wait until a train of empties came by going into the mine. Murray asked the motorman whether the empties were to be pulled or pushed into the mine, and the motorman replied that they were to be pushed in. Ross, Herrold, and Murray stopped and stepped back on the track for loaded cars and stood there waiting for the empty cars to pass. The reason for not going in on the motor pushing cars into the mine seems to have been that it was dangerous to do so, while it was comparatively safe to go in on a motor pulling the cars. While a train of empties was passing them, making a loud rumbling noise, the train of loaded cars, to which the motor had in the meantime coupled in the rear, struck and injured Herrold and ran over and killed Ross. The train of loaded cars had no light on the front end, the motor with a light being at the rear. The nearest light to the scene of the accident was a 32 candle-power electric lamp attached to a post about 30 feet away. Each of the men had a cap with a carbide light used by mining engineers.

The court below entered judgment upon a verdict found in favor of the plaintiff for $5,083 and costs. The charge of negligence, the basis of the verdict, was the failure of defendant to have a light on the front of the train of cars, the allegation being that the light on the car would have warned Ross and his companions of its approach.

Among other precautions for the safety of miners, the Virginia statute, under penalty for disobedience, requires the following:

"On all haulways where hauling is done by machinery of any kind, the mine foreman shall provide a proper system of signals and for the carrying of a conspicuous light on the front, and a light or flag on the rear, of every trip or train of cars when in motion, provided that this shall not apply to trips being hauled by gathering motors or mule teams when operating on other than main headings, and when hoisting or lowering men occur before daylight in the morning or at evenings after darkness." Virginia Mining Act, § 13 (Pollard's Supplement 1916, p. 298).

[1] The accident did not occur while cars were being hauled by gathering motors or mule teams at a place other than a main heading, and therefore the defendant's contention that there was no duty to provide a light on the front of the moving cars is without merit. No place in a mine would fall more clearly within the letter of the statute and the protection it was designed to afford than that where the accident occurred. Without artificial light, the place was absolutely dark and there was much movement of cars.

[2, 3] Under the circumstances stated, evidently the breach of the imperative statutory duty to give warning of the approach of the cars by a light in front was such a probable, proximate cause of the accident as to afford sufficient support for the judgment, unless there was such assumption of risk or contributory negligence by Ross as to defeat the action. Minneapolis, etc., R. Co. v. Gotschall, 244 U. S. 66, 37 Sup. Ct. 598, 61 L. Ed. 995 (May 21, 1917). Any one of a class for whose special benefit a penal statute is enacted has a right of action for injuries resulting to him from its violation. Texas, etc., R. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874.

[4] There is no doubt that Ross knew that the defendant's method of work was to push the loaded cars to the tipple without a light in front; and the court was requested, but refused, to charge that if he had that knowledge he assumed all risk incident to the absence of the light. Thus arises the question whether an employé assumes the risk of known violation by the employer of a penal statute requiring a specific appliance deemed by the Legislature necessary for the safety of employés. Our conviction, supported by the great and growing current of authority, is clear that he does not, though the decisions are in hopeless conflict on the subject. The arguments in favor of the opposing views are stated by Judge Taft in Narramore v. Cleveland, etc., R. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, and by Judge Carland in Denver, etc., R. Co. v. Norgate, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448. Neither the Supreme Court of the United States nor the Supreme Court of Appeals of Virginia have directly passed on the question. The cases are collated in 5 Labatt on Master and Servant, 5061, 6 L. R. A. (N. S.) 981, 26 Cyc. 1181, and annotations of 1914–1917, and other text-books and annotated cases.

Assumption of the risk of a business inherently dangerous, but conducted with due care, is a doctrine evidently fair and just. But the doctrine of assumption of risk by the servant of the continued negligence of the master, because such negligence was known to the servant, is a hard one and all statutes looking to relief from it should be liberally construed against it. Penal statutes requiring safeguards for laborers rest on the care of the state for the employé for the sake of himself, of the persons dependent on him, and of the community. The primary and insistent necessity for their enactment is that men will work in mines and other dangerous places at the constant risk of death or injury whether such precautions are taken for their safety or not. The Legislature assumed that men will work in the mines without the protection of the required lights; otherwise the enactment would not

have been necessary. In this case it is probable there was not a man less in the mine because of defendant's failure to provide the safeguard of a light on the front of moving cars. Hence the precautions which the Legislature regards obviously necessary to safety it places out of the domain of waiver by the employé or of contract, either express or implied, between the parties, and requires such precautions as a matter of public policy, under the sanction of penalties inflicted for failure to provide them.

The proposition that the violation by the master of a penal statute intended for the protection of the servant as a matter of public policy is nothing more than ordinary negligence, and stands on the same legal footing as common-law negligence, seems to us obviously and fundamentally unsound.

Assumption of risk arises either out of the contract of employment, as an incident of it, or out of the status or relation voluntarily assumed and continued by the employé towards the instrumentalities of the employer. In the one view the statute, with its requirements and penalties, attaches to the contract as a part of it; and in the other view it becomes an element of the status or relation. Assumption of risk is an affirmative defense. Baltimore, etc., R. Co. v. Taylor, 186 Fed. 828, 109 C. C. A. 172. In this case its two elements would be violation of a penal statute by the employer, and waiver or acceptance of the violation without objection by the employé. Hence, to make out its defense of assumption of risk the defendant must assert, as one of its elements, its own violation of a penal statute. No one can assert an affirmative claim of any kind when one of its essential elements is his own violation of a criminal statute.

From this the conclusion follows that it would have been tautological for the statute to abolish in express language the defense of assumption of risk as to the absence of lights, since in making their absence criminal it did that and more. The doctrine has been applied to usury statutes and many others. A penal statute against usury makes waiver of its provisions ineffectual, without any express enactment that it should be so. We conclude that the District Judge was right in refusing to instruct the jury that the deceased assumed the risk of defendant's violation of a penal statute requiring lights on the approaching car.

[5-7] Error is next assigned in the refusal to instruct the jury that Ross was guilty of contributory negligence and could not recover. Assumption of risk and contributory negligence stand in a different legal relation to the violation of a penal statute. Assumption of risk imports no delict on the part of an employé, and hence it may well be held inapplicable when an employé is injured in consequence of the violation by his employer of a penal statute. Contributory negligence, on the contrary, is a delict or neglect of duty by the employé, and hence he cannot recover for the delict of the employer, even in violation of a statute, if his own delict has contributed to his injury as a proximate cause.

The first alleged act of negligence attributed to the deceased was going into the mine through the drift mouth when he should have entered

through a manway provided for all employés. Section 8, Virginia Mining Statute, enacts under penalty that "no person shall travel on foot to and from his work upon any slope, engine plane or motor road when other *good roads* are provided for *that purpose.*" If Ross entered the mine in violation of this statute, there would be ground to say that he was guilty of contributory negligence per se. Southern R. Co. v. Rice, 115 Va. 235, 78 S. E. 592. More accurately, there could be no recovery, because Ross would have lost his life in consequence of his own violation of a criminal statute. But the court could not say as a matter of law that another "good road" was provided, for there was evidence for the jury tending to show that the roof of the manway was not safe. Besides, Ross did not go into the drift mouth with the intention of traveling on foot. The evidence tended to prove a custom for the engineers to go where Ross was and ride in on the cars, and that therefore Ross was not in the position of a person who traveled on foot. In addition it was for the jury to say whether this method of entering by riding on the cars was so near the tipple and practiced so obviously and constantly as to warrant the inference that it was authorized and sanctioned by the defendant. If it was, then neither the above-cited statute nor the defendant's rule against riding on cars without authority would apply.

[8] The five and a half foot space between the tracks was sufficient for Ross and his party to stand between the tracks in safety. But the empty cars were passing rapidly on the other track, and it was a natural impulse, even of a prudent man, to stand away from them. If the defendant had warned Ross of the approach of the cars by a light on the front car, as it was its statutory duty to do, the argument that he was guilty of contributory negligence as a conclusion of law, in being on the track, would be very strong. But to hold that without such warning it is contributory negligence per se to stand on a track in the narrow spaces of a coal mine because there is another place to stand would be to exact as a matter of law perfection of care. Even on surface roads, the question is usually one for the jury whether an employé is guilty of contributory negligence in standing or walking on a railroad track. Erie R. Co. v. Purucker, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166 (June 4, 1917). There was no error in refusing to direct a verdict for the defendant.

[9-12] The following requested instruction was refused:

"The court instructs the jury that when deceased, Ross, took a position on the loaded track to wait for the passing of the cars on the empty tracks (whether the taking of such position was negligent or not), it was the duty of the deceased to look and listen for the approach of cars on the loaded track on which he was standing; and if he failed to so look and listen, and by either looking or listening he could have discovered the approach of the cars on the loaded track in time to have gotten out of the way and prevented said accident, then he was guilty of such negligence as bars any recovery in this case, and the jury shall find for the defendant."

The duty to look and listen, as we held in Dernberger v. Baltimore, etc., R. R. Co., 243 Fed. 21, — C. C. A. — (May, 1917), is not absolute, but depends on circumstances. Effort to listen was in this case useless, because the noise of the empty cars made it impossible to hear

and distinguish the sound of the loaded cars. If it be assumed as a matter of law that the circumstances in which Ross was did impose on him the duty to look, and that in this case the request was a correct proposition of law, which might well have been given to the jury, careful consideration leads us to the conclusion that giving it would not have affected the result. The presumption is that Ross did look and failed to see the cars. Texas, etc., R. Co. v. Gentry, 163 U. S. 358, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore, etc., R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. The burden was on the defendant to overcome this presumption by affirmative proof. Central, etc., R. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252. Such affirmative proof may be furnished by circumstances as well as by direct evidence. The circumstances relied on here to rebut the presumption were the light on the motor behind the approaching cars, the carbide lights on the caps of the three men, and the electric light on a pole near by. It is argued that the jury might well have concluded that these lights were sufficient to enable Ross to see the approaching cars if he looked. The evidence as to the power of the electric light and the carbide light, and as to the location of the stationary electric light, and the light on the motor, standing alone, would leave any fair mind in serious doubt whether the presumption that Ross had looked was overcome, and whether in the darkness of a mine he could have seen the moving cars in time to escape. The direct evidence could hardly fail to solve the doubt in favor of the conclusion that he could not have seen the cars. Herrold and Murray were the only persons on the ground. Herrold testified positively, and his testimony is not disputed, that he did look down the loaded track and did not see the cars. Murray's testimony was negative to the effect that he did not look at all. Hence we conclude that the evidence that Ross could have seen the cars if he had looked is too slight to warrant the jury in finding, contrary to the presumption, that he did not look or that he could have seen the cars in time.

Our conviction that this alleged error in the charge was not material is strengthened by the fact that the District Judge gave the following comprehensive instruction on the subject of contributory negligence:

"The court instructs the jury that the defendant was not the insurer of the safety of J. D. Ross, but that it was the duty of J. D. Ross to exercise reasonable care for his own safety; and if you believe from the evidence that he failed in any way to exercise such reasonable care for his own safety, and that his failure to exercise care for his own safety contributed proximately to the happening of the accident which caused his death, you will find for the defendant."

[13] There was technical error in the exclusion of Murray's statement that if he had looked he could have seen the cars. But this was a mere opinion, which could have had little, if any, weight in the minds of the jury in face of Herrold's positive statement that he did look and did not see them.

[14] All the material evidence alleged to have been erroneously excluded was afterwards admitted, except the opinion of Murray above referred to, and that of the mine inspector that the statute requiring

a light on the moving cars did not apply to this place in the mine. The claim was for actual damages only, and erroneous construction of the statute by the mine inspector, even if communicated to the defendant, would have availed nothing. The testimony alleged to have been improperly admitted was obviously either incompetent or not material.

On consideration of the whole case, we can find no error which we think could possibly have affected the result.

Affirmed.

KNAPP, Circuit Judge (dissenting). In the circumstances here disclosed I cannot agree that defendant was precluded from setting up the defense of assumed risk. Ross had been in the company's employ for a number of years, and was fully aware that the statute in question, though observed elsewhere in the mine, was at no time complied with at this particular place. He was as familiar with the facts in that regard as any one could be, and as able to appreciate the increased hazard resulting from neglect to put a light on the front car of a loaded train at this point, when the motor was detached to take the crossover to the other track.

As respects the right to plead assumption of risk in such a case, I do not see that there is any distinction between disregard by the employer of a common-law duty and disregard of a statutory duty. The employé's knowledge of the default and of the added danger therefrom is clearly a fact, or question of fact, which depends in no wise upon the nature of the default, and if that fact is available as a defense in the one case, as is conceded, why should it not also be available in the other? The majority opinion says because "to make out its defense of assumption of risk the defendant must assert as one of its elements its own violation of a penal statute." But in precisely the same sense the defendant "must assert" its own dereliction, as an element of the defense of assumed risk, when the negligence charged is the violation of a common-law duty. If this defense rests at all upon the admission of wrongdoing, why should it be taken away by admission of failure to comply with a statute, and not taken away by admission of failure to comply with a plain and definite common-law obligation? But I venture the belief that the answer of the majority involves a misconception. To my mind the defense of assumption of risk is no more based upon acknowledgment of fault than is the defense of contributory negligence, which admittedly may be interposed although the cause of action sued on is the violation of a penal statute. The latter defense rests upon the employé's acts, the former upon his knowledge, but neither of them depends upon the assertion of a breach of duty. What the defendant in this case says is that Ross had full knowledge of the fact upon which its negligence is predicated, namely, the habitual omission of a light on the forward car, when a train arrived at the place in question and the motor was detached for the purpose of pushing the cars up the incline; that he was at all times cognizant of whatever danger resulted from that omission; and that he was therefore chargeable with assuming the risk of which he was perfectly aware. On the undisputed proofs of record, I am of opinion that the defense of as-

sumption of risk was as valid and legitimate in this case as was the defense of contributory negligence.

Moreover, as the jury might well have found, Ross himself constantly violated a Virginia statute, with the knowledge and consent of defendant, by entering the mine through the drift mouth instead of going in by the "good road" provided for that purpose. We have, then, this rather peculiar, if not illogical, situation, that the suit for causing the death of Ross is not barred or the right of recovery in the least impaired by the circumstance that he put himself in a place of danger in violation of one law of the state, because his violation thereof was known and assented to by the defendant, yet its violation of another law of the state, though such violation was known and assented to by Ross, operates nevertheless to destroy a defense long recognized and upheld in negligence cases.

But I refrain from further discussion of a question upon which volumes have been written and courts of high standing are hopelessly divided. The opposing views are well illustrated by the Narramore Case, 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68, and the Norgate Case, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448. Believing the later case, to which I can add nothing, to be the better reasoned, I think it should be followed until the Supreme Court otherwise decides.

It goes without saying that the enactment which imposes a duty upon the employer may provide that its nonobservance shall deprive the employer of the defense of assumed risk, or for that matter of the defense of contributory negligence. Numerous examples of this appear in recent legislation, both federal and state. And it is conceivable, though I know of no instance, that a statute could be so framed as to effect that result by necessary and unavoidable implication. It is also well settled that the construction of such a statute by the highest court of the enacting state must be followed by the federal courts in cases arising in that state. Columbia Box Co. v. Saucier, 213 Fed. 310, 129 C. C. A. 656. But the instant case belongs to none of these classes. The Virginia Supreme Court of Appeals has not passed upon the provision under review, and there is nothing in its language, as I read it, which indicates an intent to deprive the offending employer of any defense he might otherwise assert, or to subject him to any different penalty than that fixed by its terms. The statute itself prescribes the method of its enforcement, and in my judgment it is not for the courts to say that other and unexpressed consequences shall follow its violation. I must therefore vote to reverse the judgment for error in excluding the defense of assumption of risk. Upon the issue of contributory negligence I express no opinion.

UNITED STATES ex rel. PALMER v. LAPP, U. S. Marshal.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2975.

1. UNITED STATES MARSHALS ⊂⊃3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

Under Act Oct. 22, 1913, c. 32 (38 Stat. 208), providing that any deputy collector of internal revenue or deputy marshal, who may be required by law or by authority or direction of the collector or marshal to execute a bond, may be appointed by the collector or marshal who may require such bond without regard to the Civil Service Act, Jan. 16, 1883, c. 27, 22 Stat. 403, and the amendments thereto, or any rule or regulation made in pursuance thereof, and that the officer requiring such bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor, at his discretion, without regard to such acts, amendments, rules, or regulations, the power of appointment may be exercised by the marshal according to his individual discretion, as the grant of a general power to appoint carries with it the right to remove at any time or in any manner deemed best, with or without notice.

2. UNITED STATES MARSHALS ⊂⊃3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

Act Oct. 22, 1913, concerning the appointment and removal of deputy marshals, is in conflict with Act Aug. 24, 1912, c. 389 (37 Stat. 555), under which no person in the classified civil service could be removed except for cause and upon notice and an opportunity to answer the charges, and the act of 1912 must yield so far as the removal of deputy marshals is concerned.

3. MANDAMUS ⊂⊃16(1)—GROUNDS FOR DENIAL—WRIT INEFFECTUAL OR FRUITLESS.

Under Act Oct. 22, 1913, where a United States marshal removed a deputy marshal appointed prior to the enactment of that act, without requiring him to execute a bond, and then revoking his appointment and naming his successor, a writ of mandamus would not be issued to compel the deputy marshal's reinstatement, as it would be fruitless, since it could be avoided by the marshal through mere demand of a bond and notice that the appointment would be revoked upon presentation of the bond.

4. UNITED STATES MARSHALS ⊂⊃3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

It was within the power of Congress to authorize United States marshals to revoke the appointment of deputy marshals at their discretion, as was done by Act Oct. 22, 1913.

5. UNITED STATES MARSHALS ⊂⊃3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.

That the Act Oct. 22, 1913, as to the appointment and removal of deputy marshals, was a rider to an appropriation bill, cannot affect its construction.

6. OFFICERS ⊂⊃7—POWER TO REMOVE.

In the absence of constitutional or statutory regulations, the power of appointment carries with it, as an incident, the power to remove, when no definite term is attached to the office by law.

7. OFFICERS ⊂⊃7—POWER TO REMOVE.

When an appointee holds an office at the will and discretion of his superior having the power of appointment, he is subject to removal at pleasure.

8. UNITED STATES ⊂⊃36—REMOVAL OF OFFICERS—REVIEW.

The civil service regulations made by the civil service commissioners and the President, and promulgated by the President, do not have the

force and effect of law, nor can the courts enforce them as such, or review the action of an appointing officer in removing an employé, though the President may enforce them by removing any person who refuses to abide by them.

9. STATUTES ⟸131—AMENDMENT—NATURE OF AMENDMENT.
An amendment to a statute may be effected by a mere addition thereto, in the absence of a constitutional prohibition, as a law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish its object or purpose.

10. STATUTES ⟸225½—CONSTRUCTION—GENERAL AND SPECIAL STATUTES.
General legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes, and generally the provisions must be so interpreted as to embrace only cases to which the special provisions are not applicable.

11. CONSTITUTIONAL LAW ⟸70(3)—JUDICIAL FUNCTIONS—WISDOM OF STATUTES.
The courts may not question the wisdom of a statute.

12. UNITED STATES MARSHALS ⟸3—DEPUTY MARSHALS—APPOINTMENT AND REMOVAL.
Under Act Oct. 22, 1913, a deputy marshal could be removed by the marshal without notice or a hearing.

13. MANDAMUS ⟸76—REMOVAL OF OFFICERS—DISCRETION.
As under Act Oct. 22, 1913, a United States marshal may remove a deputy marshal at his discretion, a writ of mandamus will not issue to control such discretion, as in exercising his power to remove the marshal does not act in a judicial capacity.

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

Mandamus by the United States, on relation of Charles H. A. Palmer, against Charles W. Lapp, United States marshal for the Northern district of Ohio. The writ was denied, and relator brings error. Affirmed.

W. L. Flory, of Cleveland, Ohio, for plaintiff in error.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The United States marshal for the Northern district of Ohio revoked the appointment of his chief office deputy, and the court below refused to issue a writ of mandamus to compel the marshal to reinstate the deputy. The facts on which the mandamus proceeding was based and the reasons for denying the writ appear in the trial judge's opinion, hereafter set out. In our judgment the writ was rightly denied, and, subject to some explanation, we approve of the reasoning on which refusal of the writ was based. It is true that at the time the relator, Palmer, received his last appointment as chief office deputy, August 4, 1913, he belonged to the classified civil service; and that according to section 6 of the act of August 24, 1912, c. 389, 37 Stat. 555 (Comp. St. 1916, § 3287), "no person in the classified civil service" could be removed except for such cause

as would "promote the efficiency of said service, and for reasons given in writing" and upon notice, service of a copy of any charges preferred, and allowance of a reasonable time to answer the charges in writing. It is to be observed of this provision that in terms it applies generally to all persons engaged in the classified civil service; and admittedly the legal removal of relator could have been effected only through observance of the mode prescribed by that act if no other legislation had intervened. However, on October 22, 1913, an act was passed in which it was provided, in paragraph entitled "Civil Service Commission" (38 Stat. pt. 1, p. 208):

"That hereafter any deputy collector of internal revenue or deputy marshal who may be required by law or by authority or direction of the collector of internal revenue or the United States marshal to execute a bond to the collector of internal revenue or United States marshal to secure faithful performance of official duty, may be appointed by the said collector or marshal, who may require such bond without regard to the provisions of an Act of Congress entitled 'An act to regulate and improve the civil service of the United States,' approved January sixteenth, eighteen hundred and eighty-three, and amendments thereto, or any rule or regulation made in pursuance thereof, and the officer requiring said bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor at his discretion without regard to the act, amendments, rules, or regulations aforesaid."

[1] It will be noticed that this provision is special in its terms and application; it relates distinctly and only to deputy collectors and deputy marshals and their principals, respectively; and the right to revoke appointments of either of these classes of deputies and to appoint successors is discretionary in the several collectors and marshals; that is, such power of revocation and appointment may be exercised by those officials according to their individual discretion, since "the grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice." Eckloff v. District of Columbia, 135 U. S. 240, 241, 10 Sup. Ct. 752, 34 L. Ed. 120.

[2] Judge Sater was undoubtedly right in applying the established rule that, where there is any conflict between a general statutory provision and a special one upon the same subject, the former must yield to the latter regardless of the fact that the two provisions are found in different enactments. It is to be presumed, for example, that by the special act here involved Congress intended to create an exception as respects the appointment and removal of these two classes of deputies. That there is conflict between the two enactments, the one of 1912 and the other of 1913, concerning deputy collectors and deputy marshals who belong to the classified civil service, seems clear enough. The act of 1912, as we have seen, is comprehensive in its application to all persons "in the classified civil service," and it forbids their removal except in accordance with the formal mode there prescribed; while the act of 1913 authorizes summary removal and appointment of the two classes of deputies mentioned, one of which, through express official designation, includes relator. This conflict is accentuated by the fact that the removing officer is invested with power to appoint a successor regardless of the Civil Service Act of January 16, 1883. True, the scheme of this last-mentioned act is

not directly to provide for removal from office, but it is to discourage unmerited removal by requiring vacancies to be filled only with persons who have passed competitive examinations according to requirements of the act or of rules adopted in pursuance of it. 22 Stat. 403, 406, §§ 2, 7 (Comp. St. 1916, §§ 3272, 3278); Flemming v. Stahl (D. C.) 83 Fed. 943, 944; Woods v. Gary, Postmaster General, 25 Wash. Law Rep. 591, 594, 595; Page v. Moffett (C. C.) 85 Fed. 38, 40. It is therefore not open to relator to claim both protection of the act of 1912 and exemption from that of 1913, upon any theory of lack of conflict between the two acts.

[3-5] There is another feature of the act of 1913 which deserves attention. Applying its language concretely, after the passage of the act the marshal might have required relator to execute a bond to him to secure faithful performance of official duty, and thereupon have revoked relator's appointment and named his successor, at the marshal's discretion. This does not appear to have been the method chosen. Its adoption, however, would have been, at most, a mere formality; and the allowance of a writ of mandamus would have been fruitless, since it could have been avoided by the marshal through mere demand of a bond and notice that the appointment would, upon presentation of the bond, be revoked. It results that, for reasons satisfactory to Congress, official positions like that of relator were taken out of the restraints of civil service legislation, including the restraint of the act of 1912, and placed within the plenary power and control of the marshal. The subject was within the power of Congress, and it is vain to urge that the courts can rightfully interfere with such legislation. The point that the act of 1913 was a "rider" to an appropriation bill cannot affect construction; and it should not be overlooked by relator's counsel that the act of 1912, upon which they rely, is of the same character.

The judgment must be affirmed.

The opinion of the learned trial judge follows:

SATER, District Judge. The relator, Palmer, claiming an unlawful revocation of his appointment as chief office deputy of the United States marshal, prays that a writ of mandamus issue requiring his restoration by the defendant to that position.

The relator, as a duly qualified person, was in 1892 appointed to a position in the competitive classified civil service in the post office department of the city of Cleveland. With the consent of the proper governmental departments, he was in 1910 transferred to the marshal's office, following which, to validate such transfer, he took a noncompetitive examination, was passed to the classified service, and filled the position of chief office deputy under the defendant's predecessor. On August 4, 1913, the defendant, after his designation and qualification as marshal, regularly appointed the relator as his chief office deputy at a salary of $2,000 per year, who thereupon qualified and entered upon the discharge of his duties. On January 13, 1916, defendant informed him of an intended change in his position, and at his instance cheerfully gave him a letter recommending him as a

capable, painstaking, industrious man, who can prove his worth in any capacity, and who, in so far as the defendant knew, had excellently kept the records of the marshal's office. The parties discussed, as between themselves, the proposed change from time to time, and on February 8 the relator notified the defendant that he could not be removed from his position unless the defendant complied with the act of August 24, 1912 (37 Stat. 555), which provides, in so far as need be noticed, that no person in the classified civil service shall be removed therefrom, except for such cause as will promote the efficiency of the service and for reasons given in writing, and that the accused person is entitled to notice of his intended removal and of any charges preferred against him, and to a copy thereof, and also to reasonable time personally to answer the same in writing. The defendant having designated, with the assent of the Department of Justice, another person to succeed the relator, informed him on February 9 that the appointment of his successor would become effective on February 15. The relator at all times expressed a willingness to instruct his intended successor as to the duties devolving upon the chief office deputy, but disclaimed that such willingness should be construed as an acquiescence on his part to his ousting and to the appointment of his successor. He made known to defendant his readiness and willingness to perform the duties devolving on him in his position, that he would insist that he was entitled to continue therein until removed in accordance with the above-mentioned act, and that he would continue to claim compensation until his removal was thus made. On February 14 he was notified by the defendant in writing of the revocation of his appointment, the same to become effective on February 15. When he presented himself on the 16th and offered to continue the performance of his duties as before, he was refused permission so to do. He thereupon in writing tendered his services and demanded permission to discharge the duties pertaining to his position. The tender and demand were rejected and his salary discontinued. His successor, having qualified, was installed as chief office deputy. The relations between the parties continued friendly down to and including February 15. The defendant testified that he still thinks that the relator is a capable man. The expressed cause for revocation of the appointment was political reasons, no other cause therefor being given to the relator, or, in so far as the record shows, to any other person. The only other matter which was known to the defendant prior to February 16, and which, although unexpressed, influenced him, according to his evidence, in recalling the appointment, was brought out in the evidence taken under exception that the relator was the cause of disharmony in the office, due, it would seem, to orders given by him and his suggesting his own friends as guards in nearly all instances for the removal of prisoners, the other deputies feeling that they ought to have their friends to make such trips; but it does not appear that the persons thus suggested were not competent or rendered inefficient service, or what the character of the orders were, the inference being that they pertained to the conduct of the business of the office. At the time of the hearing the court was and is still of the

opinion that, in whatever aspect the case is viewed, the evidence as to the undisclosed want of harmony was unimportant; for, if the relator could be removed only in the manner specified in the act of August 24, 1912, his ousting was unlawful, and, on the other hand, if the provisions of such act were not applicable to the relator's case on account of his being no longer protected in his position, as claimed by defendant, by the civil service law, the defendant was at liberty, at his pleasure, to revoke the appointment. If such act is not applicable, and if the act of 1913 were silent on the power to revoke, the right so to do might still exist (People v. Lathrop, 142 N. Y. 113, 116, 36 N. E. 805); but this point need not be decided.

[6-8] In the absence of constitutional or statutory regulations, the power of appointment carries with it as an incident the power to remove when no definite term is attached to the office by law. Re Hennen, 13 Pet. 230, 259, 10 L. Ed. 136; Parsons v. United States, 167 U. S. 324, 331, 17 Sup. Ct. 880, 42 L. Ed. 185; Morgan v. Nunn (C. C.) 84 Fed. 551, 552; People v. Robb, 126 N. Y. 180, 182, 27 N. E. 267; People v. Fire Com'rs, 73 N. Y. 437. When an appointee holds at the will and discretion of his superior, he is subject to removal at pleasure, the power of removal residing in the person in whom is vested the power of appointment. Re Hennen, 13 Pet. at page 259; Keim v. United States, 177 U. S. 293, 294, 20 Sup. Ct. 574, 44 L. Ed. 774; Robertson v. Coughlin, 196 Mass. 539, 542, 82 N. E. 678, 13 Ann. Cas. 804. It is also well settled that civil service regulations made by the civil service commissioners and the President, and promulgated by the latter, do not have the effect and force of law, nor can the courts enforce them as such, or entertain jurisdiction to review the action of an appointing officer in removing an employé. The President, nevertheless, may enforce them by removing any person who refuses to abide by them. Morgan v. Nunn (C. C.) 84 Fed. at page 553; Flemming v. Stahl (D. C.) 83 Fed. 940, 941; Page v. Moffett (C. C.) 85 Fed. 38; Carr v. Gordon (C. C.) 82 Fed. 373, 379; Taylor v. Taft, 24 App. D. C. 95. The act of August 24, 1912, however, specifically defines the conditions on which removals from the classified civil service list may be effected. The defendant did not, in eliminating the relator and substituting another in his stead, comply with the requirements of that act. His position, the correctness of which is controverted by relator, is that his action is fully warranted by the act of October 22, 1913 (38 Stat. 208, c. 32), which provides that any deputy marshal, who may be required by law or by authority or direction of the United States marshal to execute a bond to such marshal to secure the faithful performance of official duties, may be appointed by the marshal requiring such bond without regard to the provisions of the act of Congress to regulate and improve the civil service, approved January 16, 1883 (22 Stat. 403), and the amendments thereto, or any rule or regulation made in pursuance thereof; and the marshal so requiring such bond shall have power to revoke the appointment of any subordinate officer or employé and appoint his successor at his discretion, without regard to such last-named act, amendments thereto, or rules and regulations made in pursuance of

the same. Whether such act wholly put the marshal's office without the operation of such law, amendments, rules, and regulations, and vested in the defendant the power to make appointments and revoke them at his discretion, when and as he chooses, is the vital question for decision. The act under which the marshal justifies purports thus to relieve him in the matter of appointments and revocations. If the act of 1912 is but an amendment to the original act of 1883, the defendant's position is correct; if, however, the act of 1913 does not exempt the defendant from the procedure specified in the act of 1912 touching removals, the relator ought to prevail.

[9] The act of 1912 is not a supplemental act in that it is not an independent law (State v. Hubbard, 148 Ala. 391, 394, 41 South. 903), and does not so operate as not to alter or modify the original act. 26 Am. & Eng. Ency. Law, 708; United States v. Stocking (D. C.) 87 Fed. 857, 858; McCleary v. Babcock, 169 Ind. 228, 233, 82 N. E. 453. Prior to August 24, 1912, the only statutory provision regulating the removal of a person in the classified civil service list was found in section 13 of the act of 1883 (Comp. St. 1916, § 10290), which declares that no such officer or employé of the United States as is mentioned therein shall be discharged, promoted, degraded, or changed as to official rank or compensation, or shall be given a promise or subjected to a threat in any of such respects, for giving, withholding, or neglecting to make any contribution of money or valuable thing for any political purpose. See, also, Taylor v. Taft, 24 App. D. C. 95. Indeed, it would seem from the debates in Congress mentioned in Flemming v. Stahl (D. C.) 83 Fed. 940, that it was not intended that the act of 1883 should interfere with the right of removal, except to deny it to the extent above mentioned. The purpose of the act of 1912 was to change the existing law by restricting the discretionary power of superior officers in the matter of removals. It was designed to give greater security to those occupying subordinate positions, and thereby to improve the public service, by requiring that removals shall be for cause and after a hearing. An amendment to an act, in the absence of a constitutional prohibition, may be effected by a mere addition thereto (State v. Hubbard, 148 Ala. at page 395; Henderson v. Galveston, 102 Tex. 163, 169, 114 S. W. 108), or by adding other provisions (26 Am. & Eng. Ency. Law, 706; 36 Cyc. 1054). A law is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made, or some other object or purpose. Falconer v. Robinson, 46 Ala. 340, 348. The act of 1912 is amendatory of the previous civil service law, adding thereto an additional section to remove a fault and better the then existing law.

[10, 11] It was competent for Congress to exempt the marshal's office from the provisions of all laws relating to civil service and to subject the deputies to the terms of the exempting enactment. People v. Keller, 158 N. Y. 187, 52 N. E. 1107. The act of 1912 is general; that of 1913 is specific. It is not ambiguous. By express terms

it relieves the marshal from the method of removal prescribed by the preceding act and is controlling. This view finds support in the settled rule of statutory construction that general legislation must give way to special legislation on the same subject, whether the provisions are found in the same statute or in different statutes; and generally the provisions must be interpreted so as to embrace only cases to which the special provisions are not applicable. Magone v. King, 51 Fed. 525, 526, 2 C. C. A. 363 (C. C. A. 2), Peck v. Jenness, 7 How. 612, 622, 12 L. Ed. 841, Kepner v. United States, 195 U. S. 100, 125, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655, People v. Mayor, 82 N. Y. 491, and Lawrence v. City of Cincinnati, 3 Am. Law Rec. 597, 602, are pertinent. The relator's term of service having expired with that of the defendant's predecessor, he saw fit to accept an appointment to a position, subject, it is true, to the law as it then existed, but chargeable with knowledge that Congress, which enacted that law and created the position which he accepted, might further legislate on the same subject-matter and the position so accepted by him. It did in fact modify such existing law, and the relator cannot be heard to complain that the marshal exercised the added power conferred on him by the later enactment. The act of October, 1913, does not say that it shall be inapplicable to those holding under a prior appointment. The wisdom, but not the validity, of an act is assailed. As to its wisdom, the court may not question.

Buckingham v. Steubenville & Ind. R. Co., 10 Ohio St. 25, on which the relator relies, has been examined, but it is not thought to be helpful. An analogous case, however, is that of People v. Whitlock, 92 N. Y. 191, from which it appears that an act of the Legislature passed in 1869 provided that police commissioners might be removed for cause. An amendment of 1881 omitted this provision and gave the mayor the power to remove any commissioner for cause sufficient to himself. Like the act of 1913, it substituted one tribunal for another, and a new mode of procedure for that which had prevailed. The court, speaking for the removed commissioner, said (92 N. Y., at page 198):

"He can no more complain that he is proceeded against by the altered mode than a suitor in our courts can claim to maintain or resist a cause of action by the procedure in force when it accrued. * * * The office was created by the Legislature, and they might abridge its term by express words, or specify an event upon the happening of which it should end. * * * In this case the event specified by the Legislature is removal by the mayor."

On the question of notice and a hearing before final action by the mayor, it was held that the entire matter was within the control of the Legislature, and, as it gave the power to appoint, it could also give the power to remove; and in the absence of provisions that removal should be only for cause and upon notice, it was enough, if the mayor thought there was sufficient cause for removal, even if no opportunity was given to be heard. Cause, it was said, might or might not exist except in his imagination, but his conclusion was final.

[12, 13] The teachings of Re Hennen and People v. Lathrop are, as we have seen, that the subordinate who holds at the discretion of a superior appointing power is subject to removal at pleasure. Under such circumstances the power of removal is absolute, it being vest-

ed in the unlimited discretion of the removing officer, to be exercised at such time and for such reasons as he may deem proper and sufficient. As the relator held at the pleasure of the defendant, and as the defendant exercised the power of removal at his discretion, the relator could be removed without notice or a hearing. Mechem, Public Officers, §§ 448, 454. Considering the state of the law and the facts, a writ of mandamus will not issue to control such discretion. Mechem, § 945; Dillon, Munic. Corp. (4th Ed.) § 250; People v. Drake, 43 App. Div. 325, 60 N. Y. Supp. 309, 312. People v. Mayor, 82 N. Y. 493, 494, thus states the rule:

"It would seem, however, to be quite clear that, whenever a statute in express terms gives a discretionary power to any person, to be exercised by him upon his own pleasure, he is thus made the sole and exclusive judge as to the propriety of its exercise, and in such a case his will or private opinion must stand in place of any reason. Such a power is not to be construed as a judicial discretion, to be regulated according to the known rules of law. * * * It may be arbitrary and fanciful, but such was the condition of the relator's official tenure. He took office at the pleasure of the mayor, and his pleasure, by whatever reason influenced, is the measure of its term."

That the defendant, in exercising his power to remove, did not act in a judicial capacity, see State v. Hawkins, 44 Ohio St. 115, 5 N. E. 228; State v. Sullivan, 58 Ohio St. 504, 514, 51 N. E. 48, 65 Am. St. Rep. 781; State v. Board of Police Com'rs of Cincinnati, 7 Ohio Dec. 326.

Writ of mandamus denied. Petition dismissed.

SUPREME COUNCIL OF ROYAL ARCANUM v. HOBART.

(Circuit Court of Appeals, First Circuit. June 15, 1917. On Petition for Rehearing, August 25, 1917.)

No. 1285.

1. APPEAL AND ERROR ⟸185(2)—REVIEW—JURISDICTIONAL QUESTIONS.
It is the duty of the Circuit Court of Appeals to see that the statutory jurisdiction of the District Court has not been exceeded, irrespective of any question raised by the parties in regard to the matters.

2. COURTS ⟸282(3)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.
Assuming that St. Mass. 1911, c. 628, § 25, providing that no application for injunction against, or proceedings for dissolution of, or the appointment of a receiver for, any fraternal benefit society, shall be entertained, unless made by the Attorney General, violates the rights of certificate holders under Const. U. S. Amend. 14, this does not give federal courts jurisdiction of a suit for a receiver, unless such violation is so connected with the real cause of action set forth as to form an essential part thereof.

3. COURTS ⟸282(3)—FEDERAL COURTS—JURISDICTION—CONSTITUTIONAL QUESTIONS.
The violation of a certificate holder's rights by St. Mass. 1911, c. 628, § 25, was not an essential part of the cause of action in a suit by him for the appointment of a receiver for a fraternal society on the ground that it was conducting its business illegally, improvidently, and fraudulently,

and as a result would soon become insolvent, where he had not tried to get the state officials to proceed against the society according to the statute, and defendant had made no objection to such an attempt, and had not availed itself of the statute to his prejudice, and hence a federal court had no jurisdiction.

4. COURTS ⊜280—DETERMINATION OF QUESTION OF JURISDICTION—PRESUMPTIONS.
In determining whether the alleged unconstitutionality of a state statute gives jurisdiction to a federal court, the presumption is that, if the statute is unconstitutional, the state courts will so declare when the question is brought before them.

5. RECEIVERS ⊜35(1)—APPOINTMENT WITHOUT NOTICE—DISCRETION.
Where a suit for the appointment of a receiver for a fraternal insurance society alleged that it was conducting its business illegally, improvidently, and fraudulently, and would soon become insolvent as a result, and that clear and irreparable loss and injury would thereby be suffered by plaintiff and other certificate holders, and an accompanying affidavit alleged that its funds were in imminent danger of being removed from the state, there was no abuse of discretion in appointing a receiver without notice; the appointment being subject to be vacated or modified eight days later, after hearing any party aggrieved, and not to become permanent until such hearing.

6. RECEIVERS ⊜35(3)—APPOINTMENT WITHOUT NOTICE—RIGHT TO OBJECT.
Where the society appeared and was heard before the appointed hearing, obtaining modifications of the decree, whereby exercise of the receiver's active duties was suspended until further order, and his custody of defendant's property was so limited as not to prevent it from carrying on its current and usual business, it was in no position to claim that any omission of due notice had seriously prejudiced its rights.

On Petition for Rehearing.

7. COURTS ⊜405(18)—CIRCUIT COURT OF APPEALS—REHEARING.
In a case in which the Circuit Court of Appeals ordered a dismissal of the bill for want of jurisdiction, though it discussed other questions argued by the parties, a rehearing upon such questions would not be ordered, as no rehearing would alter the result.

8. COURTS ⊜405(18)—CIRCUIT COURT OF APPEALS—REHEARING.
In such case, it was not a ground for a rehearing that after the argument and submission of the appeal, but before the decision was handed down, a party intervened, thus giving the necessary diversity of citizenship, where this was not brought to the court's attention until after the opinion was handed down.

9. COURTS ⊜407(5)—CIRCUIT COURT OF APPEALS—SCOPE OF REVIEW.
Under Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1916, § 1121), providing that where an injunction shall be granted, continued, etc., or an interlocutory order or decree made appointing a receiver, 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, the Circuit Court of Appeals, on appeal from such an interlocutory decree, may pass upon the jurisdiction of the District Court.

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

Suit by Arthur L. Hobart against the Supreme Council of the Royal Arcanum. From a decree appointing a receiver, and decrees modifying the original decree, defendant appeals. Reversed and remanded, with directions.

Howard C. Wiggins, of Rome, N. Y. (Curtis H. Waterman, of Boston, Mass., on the brief), for appellant.

Harvey H. Pratt, of Boston, Mass. (James A. Tirrell, of Boston, Mass., on the brief), for appellee.

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

DODGE, Circuit Judge. [1] Whether or not the District Court had jurisdiction is first to be determined. It is our duty to see to it that the statutory jurisdiction of that court is not exceeded, irrespective of any question raised by the parties in regard to the matter. Louisville, etc., Co. v. Mottley, 211 U. S. 149, 152, 29 Sup. Ct. 42, 53 L. Ed. 126.

The plaintiff, a Massachusetts citizen, holds a "death benefit certificate" for $500, issued December 26, 1916, by the defendant, a fraternal benefit society organized under the laws of Massachusetts.

On April 13, 1917, upon a bill in equity that day filed by him in the Massachusetts District Court, a receiver was appointed to take charge of the defendant's business and assets. The decree appointing the receiver was later modified by subsequent decrees, entered April 17 and April 20, 1917, whereby exercise of his active duties was suspended until further order of the court, and his custody of the defendant's property so limited as not to prevent it meanwhile from carrying on its current and usual business.

The present appeal is taken by the defendant from the above decrees under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 (Comp. St. 1916, § 1121). The appellee and appellant are hereafter referred to as plaintiff and defendant, respectively.

The plaintiff's bill is brought on behalf of himself and all other death benefit certificate holders in good standing, who may join therein and contribute to the expense of the suit. No other holders of such certificates have yet so joined.

The bill alleges, in substance, that the defendant is conducting its business illegally, improvidently, and fraudulently, that it is now or will soon become insolvent as a result, and that great and irreparable loss and injury will thereby be suffered by the plaintiff and other holders of similar certificates. The relief prayed for is an accounting of the defendant's assets and liabilities, and the appointment of a receiver to wind up its business, in order that its assets may be distributed under the court's direction.

Both parties being Massachusetts citizens, the Massachusetts District Court can have no jurisdiction of such a suit, unless the bill shows a federal question to be involved in the cause of action, and the amount in controversy to be more than $3,000.

The only allegations of the bill claimed to present a federal question are found in the second paragraph thereof. They are in substance that the defendant is conducting its business subject to a Massachusetts statute, namely, chapter 628 of the Acts of 1911, and that sections 24 and 25 of said chapter deprive the plaintiff of the equal protection of the law, the equal protection of his property rights, and the right

to be heard in the protection of said rights by the Massachusetts courts, in violation of the Fourteenth Amendment to the federal Constitution.

The Massachusetts statute thus referred to is entitled "An act to provide for the control and regulation of fraternal benefit societies." Sections 24 and 25, of which the above complaint is made, are quoted at length in paragraph 2 of the bill.

By section 24 power is given to the state insurance commissioner to inspect and investigate the affairs of any such society, and, whenever satisfied that its business is being conducted in a manner such as is charged in this bill, to present the facts to the state Attorney General, who, if he deem the circumstances to warrant such a course, is then to begin a quo warranto proceeding in a proper court. If after due notice and hearing, as provided by said section, the court finds that the society should be closed, it is to enjoin further business and appoint a receiver to wind up affairs and distribute its funds under the court's direction.

Section 25, which contains the principal provisions alleged to violate the plaintiff's constitutional rights, directs that:

"No application for injunction against, or proceedings for dissolution of, or the appointment of a receiver for, any such * * * society * * * shall be entertained by any court in this state unless the same is made by the Attorney General."

[2] The above are provisions which have formed part of the Massachusetts legislation regarding fraternal benefit societies since 1898. See chapter 474, § 19, of the Acts of that year. Assuming that they violate any constitutional right belonging to a certificate holder like the plaintiff, it must appear from the bill, before a federal question can be said to be involved as a ground of jurisdiction, that such violation is so connected with the real cause of action which the bill sets forth, as to form an essential part thereof. In other words, whether the remedy sought from the District Court is obtainable or not must depend upon the result of the constitutional question raised as to the validity of said provisions. New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; Bankers', etc., Co. v. Minneapolis, etc., Co., 192 U. S. 371, 385, 24 Sup. Ct. 325, 48 L. Ed. 484; Hull v. Burr, 234 U. S. 712, 720, 34 Sup. Ct. 892, 58 L. Ed. 1557.

[3] The plaintiff has never tried, so far as shown, to get the state officials to proceed against the defendant according to the above provisions; still less is any opposition by the defendant to such an attempt shown. The bill does not show that the defendant has in any way availed itself of them to the plaintiff's prejudice. That it is conducting its business subject to them, as part of the state legislation applicable to all such business, is not enough to render the defendant liable to any such charge. Nothing is found in said provisions which in any way purports to permit or justify maladministration of said business, such as that against which the bill prays relief. The District Court is not asked to enjoin their enforcement, and could not do so if asked.

[4] A suit to obtain the relief prayed for in the bill is not a suit which the federal statutes allow one Massachusetts citizen to bring against another in the federal courts. If it is true that unconstitution-

al limitations are imposed by the Massachusetts statutes upon the bringing of such suits, the right of one Massachusetts citizen to resort to a federal court for such relief against another Massachusetts citizen is not thereby enlarged. The method provided by existing statutes for raising a question of constitutionality as to any such limitations, in the federal court, is by raising it first in a Massachusetts court, and then by appealing to the Supreme Court from a decision sustaining them. The presumption to be made here is that, if such limitations are objectionable because unconstitutional, the Massachusetts courts will so declare when the question is brought before them. Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; Gundall v. Manhattan Rwy. Co. (D. C.) 205 Fed. 410. Should they fail to do so, the Supreme Court of the United States has power to correct their error, under section 237 of the Judicial Code (Comp. St. 1916, § 1214). In Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831, a decision cited to us by the plaintiff, the Massachusetts Supreme Court upheld the principle for which the plaintiff contends, viz.: That the power of courts to afford equitable relief cannot be impaired by legislation in such a way as to prevent its use in favor of one property owner while preserving it for the benefit of others. If the same principle is rightly applicable to the legislation of which the plaintiff complains, the same court will of course apply it thereto.

In Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, upon which the plaintiff has also relied, the federal question held to have given jurisdiction to the federal court, where the requisite diversity of citizenship did not exist, was presented by a bill seeking to enjoin the enforcement by state officials of the state statute complained of as unconstitutional.

We are of opinion, in view of the foregoing considerations, that those allegations of the bill which complain of the above provisions of Massachusetts law as violating constitutional rights of the plaintiff, do not constitute an essential part of the cause of action set forth, and are in no way necessary thereto. We hold, therefore, that the bill does not disclose any federal question, and that the District Court was without jurisdiction to entertain it.

We need not, in view of this result, determine the further question raised, whether or not the matter in controversy as set forth can be said to exceed $3,000.

We may add, however, in view of what has been discussed in the briefs before us, though without expressing any opinion upon the constitutionality of the statutory provisions in question, that similar provisions are found in the legislation of many other states, relating to similar societies or to insurance companies, that there have been several decisions sustaining them, by various state courts of last resort, against objections to their constitutionality, and that no decision sustaining any such objection has been brought to our attention. They establish no such penalties for their violation as were held in Ex parte Young to have denied the equal protection of the law, by deterring parties from testing their validity in the courts.

We may further add that the plaintiff appears by his own allegations to have received the certificate for $500, on which his suit is

based, at a time when the above provisions had for 18 years been part of the Massachusetts legislation applicable. It is true that he also alleges that it was purchased by him in 1916 to replace an earlier certificate for $3,000 purchased about 1884, from which it is inferable that he had continued during 18 years to pay the assessments called for and enjoy the protection afforded by said former certificate, without raising any objection after the enactment of said provisions in 1898. Since the laws of a state, existing when a contract is made and affecting the rights of the parties thereto, enter into and become part thereof, so as to be obligatory on all courts assuming to give a remedy thereon (Barnitz v. Beverly, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93; Bradley v. Lightcap, 195 U. S. 1, 20, 24 Sup. Ct. 748, 49 L. Ed. 65; Long Sault, etc., Co. v. Call, 242 U. S. 272, 277, 37 Sup. Ct. 79, 61 L. Ed. 294), we think the plaintiff would have to be regarded, upon his own showing, as having waived any right to assert, as between himself and the defendant, that the statutory provisions whereof he complains are not binding upon him.

[5, 6] Upon the assumption that the bill presents a case within the District Court's jurisdiction, as we think it does not, we find no error in the appointment of a receiver or the injunction issued in connection with said appointment. It is said that the issue of said injunction violated section 17 of the Clayton Act (38 Stat. 737), and equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix); but the defendant does not satisfy us that either said section or said rule necessarily applies to the usual injunction included in a decree appointing a receiver for the purpose of preventing interference with his control and custody. As to the claim that there was no sufficient notice to the defendant, the appointment was made subject to be vacated or modified eight days later, after hearing any party aggrieved, and was not to become permanent until such hearing. While the allegation in the affidavit which accompanied the bill, that the defendant's funds were in imminent danger of being removed out of Massachusetts, is not so specific as to facts as might be desired, there has been no suggestion that it was without foundation in fact, and it so far indicated immediate danger of irreparable injury as to prevent a finding that there was any abuse of discretion in entering the decree of April 13, 1917. After appearing and being heard before the hearing appointed for April 21st, and after having obtained thereby the modifications effected by the decrees of April 17th and April 20th, we could hardly regard the defendant as in a position to claim that any omission of due notice to it in the proceedings has seriously prejudiced its rights.

Our conclusion that the bill presents no case within the District Court's jurisdiction requires us to order its dismissal, without awarding costs of this appeal to either party.

The decrees of the District Court, entered April 13, 17, and 20, 1917, are reversed, and the case is remanded to that court, with directions to dismiss the bill, and neither party recovers costs in this court.

On Petition for Rehearing.

PER CURIAM. The interlocutory decrees appealed from were reversed, and dismissal ordered, upon the sole ground that, in our opin-

ion, the bill presented no federal question, and did not, therefore, state a case within the District Court's jurisdiction.

[7] Although we have expressed our opinion upon certain questions which were fully argued by the parties before us, not directly involving the point decided as above, no rehearing upon those questions would alter the result if, as we hold, no federal question was presented. This disposes of the first two grounds for rehearing set forth in the present petition.

[8] The third ground set forth is that on June 7, 1917, a certificate holder said to be "of Nashua, in the state of New Hampshire," has "come into the District Court and asked to intervene." If said certificate holder is a New Hampshire citizen, and could therefore, if admitted as a party plaintiff, assert the existence of jurisdiction based on diverse citizenship, as the plaintiff in the bill as it stands cannot, the fact constitutes no ground for rehearing of the appeal we have already heard and decided, but shows, at most, only that a different case may at some time be presented in the District Court. If said application for leave to intervene was filed in that court on June 7th, it was filed after argument and submission of the appeal here on May 16th, but before June 15th, when our decision thereon was handed down. If said application was to be brought to our attention for any purpose, this should have been done before the latter date. No suggestion to us regarding it, however, was ever made until the present petition for rehearing was filed on July 12th.

[9] As to the fourth ground for rehearing alleged in the petition, the plaintiff has, at our request, submitted authorities which have been duly considered. He denies jurisdiction in this court to determine, as it did, the question whether or not the bill stated a case within the District Court's jurisdiction.

In appeals from final decrees, under sections 128 and 238 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1133, 1157 [Comp. St. 1916, §§ 1120, 1215]), where the jurisdiction of the District Court as set out in the bill is based solely on a constitutional question, the appeal lies to the Supreme Court, and cannot be taken to a Court of Appeals, as the authorities relied on undoubtedly show. But in appeals like this, under section 129 of the Code, not from final, but from interlocutory, decrees below, the questions to be passed upon by the Court of Appeals are not limited as above. In such appeals the Court of Appeals is authorized—

"to review the whole of the interlocutory decree, not merely the part granting the injunction, and also to determine whether there was any insuperable objection, in point of jurisdiction or merits, to the maintenance of the suit, and if there was, to direct a final decree dismissing the bill."

See U. S. Fidelity Co. v. Bray, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055, and the prior decisions of the Supreme Court there cited. See, also, Seattle, etc., Co. v. Seattle, etc., Co., 185 Fed. 365, 368, 107 C. C. A. 421.

It is true that these decisions were before the Judicial Code became effective, and deal, not with section 129 in its present form, but with section 7 of the Court of Appeals Act as amended in 1906. We find

no difference, however, material for the present purpose, between the legislation therein considered and section 129 which incorporates it in the Code, whatever the changes thereby effected in respects not here material.

The petition for rehearing is therefore denied.

JARRETT et al. v. HALSEY et al.

(Circuit Court of Appeals, Fourth Circuit. July 27, 1917.)

No. 1526.

1. PUBLIC LANDS ⟸186—WEST VIRGINIA—FORFEITURE.
Under Act Va. March 22, 1842 (Acts 1842, c. 13), declaring that all the right, title, and interest which shall be vested in the commonwealth in any lands west of the Allegheny Mountains by reason of nonpayment of taxes, or the failure of the owners to cause the same to be entered, shall be absolutely transferred to and vested in any person or persons other than those for whose default the same may have been forfeited, for so much as such persons may have just title or claim to or derived from under any grant bearing date previous to January, 1843, who shall have discharged all taxes duly assessed and charged against him or them under such lands, and all taxes that ought to have been assessed or charged thereon, one claiming that a senior grant of such lands was on forfeiture, vested in him because of payment of taxes has the burden of showing strict compliance with the act, and hence defendants, who claimed under a grant subsequent to that of plaintiffs' predecessor which had been forfeited for nonpayment of taxes and resold, cannot defeat plaintiffs' title where they failed to show a listing of the land for taxation and payment of taxes by their predecessors for several years after the execution of the grant under which defendants claimed; the purpose of the act being to protect bona fide holders and claimants who had paid taxes against the rights of rival claimants who obtained grants at a nominal cost, but failed to pay the taxes.

2. PUBLIC LANDS ⟸186—FORFEITURE TO STATE—TRANSFER OF TITLE.
Where on behalf of defendants who claimed land in West Virginia only an undivided interest in the entire tract was listed or assessed, the failure to have assessed and pay the taxes on the remainder operated under Const. West Va. art. 13, § 3, as a forfeiture of the entire tract, and title passed to a rival claimant as by adverse possession who had paid taxes thereon for five years.

3. ABATEMENT AND REVIVAL ⟸12—GROUNDS OF ABATEMENT.
The pendency of a suit in a state court is no ground for plea in abatement to a suit on the same matter in a federal court.

4. ABATEMENT AND REVIVAL ⟸5—GROUNDS OF ABATEMENT.
Causes at law and in equity are so dissimilar that the pendency of one cannot be pleaded in abatement of the other.

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

Action by R. Ogden Halsey and others against Irvin Jarrett and others. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

This is an action of ejectment instituted in the District Court of the United States for the Southern District of West Virginia by plaintiffs, R. O. Halsey,

and others, against Irvin Jarrett and others, defendants, to recover a parcel of land situate in Fayette county, W. Va.

The plaintiffs base their title on a survey made by James Welch of 4,500 acres of land which was situated in the county of Greenbrier in 1802, and a grant followed in 1805. In 1818 this land became situate in the county of Nicholas, and afterwards, about 1831, most of it became situated in the county of Fayette. Under acts of the Legislature of Virginia forfeiting lands for the nonpayment of taxes, this parcel became forfeited and was sold in the summer of 1843 by the commissioner of delinquent and forfeited lands for the county of Fayette, and the plaintiffs claim title under this sale by deed from Alfred Beckley, commissioner of delinquent and forfeited lands of Fayette county, which deed is dated on the 16th day of June, 1843.

The title of Irvin Jarrett and others is based upon a survey made on the 14th day of August, 1799, for 600 acres for Henry Banks. This was followed by a grant in the year 1822 from the Governor of Virginia for this six hundred acres. The reason for the holding up of the grant so long was the fact that there was a suit pending between Henry Banks, as plaintiff, and Duvall and others, as defendants, in a court in Richmond, Va., involving the ownership of the land when the grant thereof was made. In 1824, as shown by the deed this 600-acre tract of land was sold in this suit by a special commissioner therein appointed, and became the property of Aaron Stockton and Joel Shrewsbury.

It is claimed by the plaintiffs in the ejectment suit that, although their survey was late, their grant was first, and, there being no exceptions in their grant, all the title of the commonwealth was vested in James Welch under the grant of 1805.

To meet this, the defendants in the ejectment suit claim that the lands so bought by Stockton and Shrewsbury were duly assessed with and the taxes paid thereon up to and including the year 1842.

By an act of the Legislature of Virginia passed on the 22d day of March, 1842 (Acts 1842, c. 13) it was provided in the third section that any forfeited titles then in the state of Virginia should be vested in any person having just title and claim thereto under any grant of the commonwealth bearing date prior to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him upon such land. The section in question is in the following language: "And be it further enacted, that all the right, title and interest which shall be vested in the commonwealth in any lands or lots lying west of the Allegheny Mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioners of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted, in reference to delinquent and omitted lands, shall be and the same are hereby absolutely transferred to and vested in, any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees), for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the first day of January eighteen hundred and forty-three, who shall have discharged all taxes, duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: Provided, that nothing in this section contained, shall be construed to impair the right or title of any person or persons, who shall bona fide claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

It was shown that the lines on the trial map show the location of the Banks survey and grant of 600 acres under which Jarrett and others claim, and also the lines of the land in controversy. Under the agreed statement of facts it appears that about 172 acres of the Banks grant interlocked with the Welch grant. The greater part of the Banks grant lay in the county of Nicholas,

leaving about 172 acres thereof in what is now the county of Fayette, but which was prior to its formation in the county of Nicholas.

George W. McClintic, of Charleston, W. Va. (McClintic, Mathews & Campbell, of Charleston, W. Va., and W. C. Reddy of Summersville, W. Va., on the brief), for plaintiffs in error.

E. C. Harrison and Buckner Clay, both of Charleston, W. Va. (Browning & Browning, of Orange, Va., on the brief), for defendants in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). In this action of ejectment the court below directed a verdict and judgment for plaintiffs, and the defendants have sued out this writ of error. The parties will be designated as they stood below. This controversy involves an overlap of 172 acres of land.

The plaintiffs, Halsey and others, claim under a Virginia grant of 1805 to one Welch of 4,500 acres which became forfeited and was in 1842 divided into lots and sold under the Virginia act of 1837, as amended in 1838. The defendants claim under a grant of the state of Virginia in 1822 to Banks for 600 acres.

By stipulation the substantial facts have been agreed and the issues have been narrowed by counsel to the determination of two questions:

First. Was the forfeited Welch title by operation of the legislative act of Virginia of March 22, 1842, transferred to and vested in the alienees of the Banks title so that the latter in law became the senior title?

Second. If so, did the Banks title subsequently become forfeited to the state by reason of nonpayment of taxes and under section 3, art. 13, of the Constitution of West Virginia, in turn become vested in plaintiffs as alienees of the purchasers of the Welch title under the sale of that title by the school commissioners under the act of 1842?

It is difficult to determine these questions intelligently without, to a limited extent, outlining the policy of the state of Virginia relative to lands lying west of the Alleghenies now largely embraced in the state of West Virginia.

From such cases as Fay v. Crozer (C. C.) 156 Fed. 486, Atkins v. Lewis, 14 Grat. (Va.) 30, and text-books such as Hutchinson's Land Titles (West Virginia), we find that Virginia in 1779 established, by legislative act, a land office and authorized the sale of lands west of the Alleghenies for two cents an acre to any one who, at his own expense, would cause a survey to be made, warrant and entry to be filed and patent secured for the number of acres selected and applied for. Doubtless the purpose of this legislation was twofold: First, to secure revenue by way of fixed and settled taxation; and, second, to secure pioneers to go and settle in these unbroken forests in the mountains. The legislation was, however, so loosely drawn and so limited in scope that it in practical effect thwarted both of its purposes and led to great confusion and litigation touching titles. Speculators made surveys of large tracts, possibly by making one or two corners and laying off the remaining lines on paper by protraction and naming other corners by

guess; others in a like way laid off, entered, and secured patents for similar large tracts, regardless of whether they covered or overlapped former surveys until it was not unusual for the same land to be the subject of several different grants. The owners of these grants lost confidence in their integrity and failed to pay taxes assessed, and persons seeking to settle found themselves wholly unable to determine from whom to buy a sound title. The result was that many acts were passed with a view to correct the evils thus created. Forfeitures for failure to pay taxes were declared, and then these forfeitures were repealed by other acts allowing redemption to be made within specific times. Finally, in 1837 and 1838, acts were passed prohibiting redemption of all delinquent and forfeited lands from and after July 1, 1838, and providing for their sale for the benefit of the school fund by a commissioner of delinquent and forfeited lands appointed in each county, under decree of the circuit courts of law and chancery.

By these acts these forfeited titles, good and bad, for what they were worth, became reinvested in the commonwealth. By their sale provisions it was proposed to start over again, and by means of the court's decree of confirmation and authorization the deed of the commissioner practically became a new grant from the commonwealth for the land sold.

But almost from the beginning of these forfeiture acts and those relieving such forfeitures and extending the times in which to redeem, it was apparent that actual settlers had purchased from junior grantees and were in actual possession and paying taxes to the state. To protect those, provisions were made allowing such settlers in actual possession and paying taxes to hold their lands as against senior forfeited titles.

In March, 1842, an act was passed that such forfeited senior title should be transferred to the holder of a junior grant, provided such junior grantee had paid all taxes charged and chargeable against him, thus making the junior grantee in effect, to the extent of any overlap, the senior upon the sole condition that he had upon his part paid all taxes charged or chargeable upon the lands embraced in his junior grant, and not upon the further condition, as theretofore, of his also being in actual possession.

The Welch title, overlapping by these 172 acres in controversy the Banks patent, was forfeited and sold in June, 1842, 14 days after this last-named act went into effect, by the commissioner of delinquent and forfeited lands, and the defendants now claim that by the provisions of this act their junior grant of 1822, embracing this 172 acres, became the senior one and gives them the right to the land. Whether or not it does depends upon whether from 1822 to 1842 their alienors had paid all taxes "charged or chargeable" upon the 600 acres embraced in the Banks grant.

[1, 2] It seems clear to us that, in order to defeat the commonwealth's right to retake and sell the land embraced in the senior forfeited grant and to regrant the same to a new purchaser in good faith, the obligation is upon those holding under the junior grant to show strict compliance with the requirements of this act of 1842, before they can claim that the senior grant has been transferred and vested

in them. This they have failed to do. The evidence shows that, although this junior grant was dated July 2, 1822, no assessment of taxes, nor payment of taxes chargeable thereon, were made on the 600 acres until 1825. Such taxes were, under the tax laws of Virginia then existing, clearly due and payable for the years 1823 and 1824, and there can be no question from the evidence that such taxes were not paid. It would seem from the evidence further that the taxes on the land were not paid for the years 1832 and 1833. Certain it is that taxes were assessed for those years and the land returned delinquent for nonpayment, and no redemption is shown. However, it may be assumed from the fact that no sale for delinquency was made, and the grantees of the land have since continued payment, that such question as to those two years would have been one of fact for the jury, and therefore we put aside all further consideration of that matter. The failure to pay all taxes for each and every year by the junior grantee was imperative to give him the benefit of the act of 1842. He failed to pay for the two years of 1822 and 1823, and therefore the right to plead the benefit of this act never has accrued to him or his alienees, and the Welch title, sold and regranted by the commonwealth by and through Beckley, the commissioner of delinquent and forfeited lands, to the alienors of plaintiffs, must be held to be the senior and superior title. It also appears that the plaintiffs' predecessors on title obtained a deed from Beckley, commissioner of forfeited and delinquent lands, in 1843, and taxes have since been paid under this title. For five years after 1875, on behalf of the defendants, only an undivided half interest in the entire tract claimed was assessed as 178 acres. The failure to have assessed and to pay the taxes on the remainder of this undivided interest produced a forfeiture of all, and this forfeiture inured to the benefit of the plaintiffs paying the taxes on all and holding a conveyance from the state through Beckley, commissioner. Smith, trustee, v. Tharp, 17 W. Va. 221; Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915, 921; Rowland Land Co. v. Barrett, 70 W. Va. 704, 75 S. E. 57; Lawson v. Pocahontas, etc., Co., 73 W. Va. 296, 81 S. E. 583; Caretta Ry. Co. v. Fisher, 74 W. Va. 115, 81 S. E. 710; Ewart v. Squire, 239 Fed. 34, —— C. C. A. ——, decided by this court December 2, 1916.

[3, 4] As regards the action of the court below, sustaining the demurrer to the plea in abatement the assignment of error in relation thereto does not seem to be insisted upon by counsel for defendants, and rightly so. The cases of Gordon v. Gilfoil, 99 U. S. 168, 178, 25 L. Ed. 383, and Risher v. Wheeling Roofing & Cornice Co., 57 W. Va. 149, 156, 49 S. E. 1016, 1019, very clearly established the two propositions:

(a) "That the pendency of a suit in a state court is no ground * * * for a plea in abatement to a suit upon the same matter in a federal court;" and (b) "that two causes, one at law and one in equity, are ex necessitate so dissimilar that the pendency of one cannot be pleaded in abatement of the other."

We see no error in the action of the court below in directing the verdict for the plaintiffs, and its judgment in this case must be affirmed.

BARRETT v. VIRGINIAN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1521.

1. MASTER AND SERVANT ⊂=125(1)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF MASTER.
   A master does not insure that appliances are in a safe and suitable condition, and to entitle a servant to recover for personal injuries, it must appear that the master had actual or constructive knowledge of the defect alleged to have caused the injury.
2. MASTER AND SERVANT ⊂=278(14)—INJURY TO SERVANT—KNOWLEDGE OF MASTER—EVIDENCE—SUFFICIENCY.
   In an action for injuries alleged to have been caused by the defective steps of an engine which plaintiff, as foreman of defendant's roundhouse, was required to repair, evidence *held* insufficient to show that the defendant had either actual or constructive notice of the defect.
3. WITNESSES ⊂=397—IMPEACHMENT—CONTRADICTORY STATEMENTS—SUBSTANTIVE TESTIMONY.
   Testimony of prior statements introduced to contradict the foreman could only be considered for that purpose, and was in no sense substantive evidence.
4. MASTER AND SERVANT ⊂=265(13)—ASSUMPTION OF RISK—PATENT DEFECTS.
   If the defective condition of the step of an engine was so patent as to be readily observed by every one, and plaintiff before he was injured made three trips over the step, he would be deemed to have assumed the risk incident to his employment.
5. DISMISSAL AND NONSUIT ⊂=30—VOLUNTARY NONSUIT—MOTION—TIME.
   Plaintiff was not as a matter of right entitled to a voluntary nonsuit after the court had decided to direct a verdict for defendant, as a plaintiff should elect whether to take a nonsuit at the time of the making of a motion for a directed verdict.

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Suit by S. D. Barrett against the Virginian Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. L. Welborn, of Roanoke, Va. (Welborn & Jamison and John G. Challice, all of Roanoke, Va., on the brief), for plaintiff in error.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va. (Hall & Apperson, of Roanoke, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a suit instituted by plaintiff in error, plaintiff below, in the District Court of the United States for the Western District of Virginia, to recover damages on account of injuries sustained by plaintiff, who was the foreman of the roundhouse, while attempting to clean out a sand pipe which was stopped up. Plaintiff was employed by the defendant as a machinist at Elmore, W. Va., at which a roundhouse is maintained where engines are stored and certain repairs are made.

Among other things, plaintiff, by virtue of his employment, was required to repair engines and other rolling stock at that point. The engine upon which plaintiff was working at the time he sustained the injury was being used and had been used for some time, in pusher and helper service. This particular engine had been placed upon what is known as the "ready track" to be employed in taking a train out of Elmore. After being placed, the engineer in charge discovered that the sand pipe was stopped up, and plaintiff was requested to clean it out. In order to perform this service it was necessary for the plaintiff to climb upon the engine. In front of the engine there were steps leading from the ground up over the pilot to the running board. In performing this service plaintiff made several trips up on the engine, and while coming down on the last trip he slipped and fell and sustained the injury upon which this action is based.

Plaintiff says that shortly after he had fallen and had been removed by other employés to a point several feet in front of the engine he looked at the engine and remarked that the step from which he slipped and fell was slanting from one to one and a half inches forward. However, there was no evidence offered tending to corroborate this statement by the other employés who were present. The other employés present testified that they did not observe that the step was slanting or that there was anything wrong with it. In addition to the plaintiff's testimony plaintiff introduced two other witnesses who said that they examined this step a month or two after the accident, and that it was slanting forward; the front portion of the step being from one to two inches lower than the rear portion.

Both the day and night foreman of the roundhouse at Elmore, who had charge of keeping the engine in repair, testified that they never knew there was anything wrong with the step. The engineer who had been running the engine and the hostler who had charge of it in the roundhouse also testified that they had no knowledge of any defect in the step. There was no evidence produced by the plaintiff to show how the alleged defect in the step was caused or how long it had been in that condition.

When all of the evidence had been introduced, the defendant moved the court to direct the jury to return a verdict in favor of the defendant. This motion was opposed by the counsel for the plaintiff, and after the motion was fully argued the court took the same under advisement from Saturday afternoon until Monday morning. When the court convened Monday morning the judge rendered an opinion in writing, which is made a part of the record, sustaining the defendant's motion to direct a verdict. After the court had rendered its decision, the plaintiff asked to be permitted to take a voluntary nonsuit. The court refused to grant plaintiff's request, and directed the jury to return a verdict in favor of the defendant, and judgment was entered accordingly. The plaintiff excepted, and the case now comes here on a writ of error.

[1] Only two points are involved in this controversy: First, as to whether the court below erred in directing a verdict in favor of the defendant; second, as to whether the court erred in refusing to permit

the plaintiff to take a nonsuit. It is earnestly contended by counsel that plaintiff's injury was due to the failure of the defendant to provide a safe and suitable place in which plaintiff was required to work at the time he was injured; in other words, it is insisted that the step on the engine was carelessly and negligently constructed, and that this was the proximate cause of plaintiff's injury. While it is well settled that the master must exercise ordinary care in providing for the use of servants reasonably safe, sound, and suitable machinery and appliances, and also to use ordinary care to discover and repair defects, the master does not insure or guarantee that the machinery or appliances are in a safe and suitable condition, and where defects exist the master is not held to be guilty of negligence unless it appears that he knew, or by the exercise of ordinary care could have known, that such machinery and appliances had become defective and were in an unsafe condition. In other words, it must appear, in order to entitle the plaintiff to recover, that the master had either actual or constructive notice of the defect alleged to have caused the injury, and these facts must be established by legal evidence. Washington, etc., Railway Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; Norfolk & Western Ry. Co. v. Reed, 167 Fed. 16, 92 C. C. A. 478; Virginia, etc., Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976.

[2] There are no facts or circumstances from which the jury could have inferred that the master had either actual or constructive notice of the alleged defective condition of the step. To entitle the plaintiff to recover, the burden is upon him to either show that defendant had actual or constructive notice.

In determining this point, it should be borne in mind that no witness testified that this step was defective before the accident occurred. Indeed, the first evidence we have of the existence of the alleged defective step is the testimony of the plaintiff, who says that he did not discover it until after he had been injured. From the nature of things, the respective engineers, firemen, and other employés who had from time to time had charge of this engine would have observed as glaring a defect as the one described by the plaintiff; therefore, if the step was defective in any respect, it appears that the defendant company could not have had either actual or constructive knowledge of the same prior to the time plaintiff was injured. It further appears that no one ever fell from the step or was injured in any way on account of its condition.

Counsel for plaintiff insists that the defective condition of the step was in plain view, and could have been seen even by casual observation, and, further, if the foreman had exercised even ordinary care as to the condition of the engine, he could have discovered the same. It appears from the testimony of plaintiff that the accident occurred when he was returning from the third trip to the point where he was working on the engine, and it further appears that he used this step each trip. If the defect was so obvious and easily discovered the plaintiff would undoubtedly have observed it, but, as we have stated, he testified positively that he never discovered that anything was wrong

with the step until after he had fallen to the ground, and then observed it.

[3] The plaintiff in rebuttal, among other things, testified that Bondurant, the foreman, told him that he had previously fallen off of the same step, injuring his leg in the same way. The foreman testified positively that he never knew anything about the defect, and that he never told plaintiff that he had fallen from the engine on account of the defective condition of the step and injured his leg. Plaintiff also introduced a witness by the name of Cook, in rebuttal, who testified that Bondurant had told him that he had fallen off of the same step and injured his leg prior to the time plaintiff sustained his injury. The testimony of this witness was introduced for the purpose of contradicting the foreman, who had been asked on cross-examination if he had not been injured prior to the time the plaintiff was hurt by slipping from the engine on account of the defective condition of the step. This testimony could only be considered for the purpose of contradicting and discrediting Bondurant as a witness, and was in no sense substantive evidence from which it could be inferred that the step was in a defective condition anterior to the time of the accident in question. This rule is so well settled that we do not deem it necessary to cite any authority in support of the same.

[4] If, as contended by the plaintiff, the defective condition of the step was so patent as to be readily observed by every one, and it appearing as it does that the plaintiff before he was injured made three trips, each time using this particular step, then he would be deemed to have assumed the risk incident to his employment; the rule being that if he knew, or by the exercise of ordinary care, could have known of the defective condition of the step, he would not be entitled to recover.

[5] The second question involves the point as to whether the plaintiff was entitled, as a matter of right, to take a voluntary nonsuit after the court had decided to direct a verdict for the defendant.

This court in the case of Parks v. Southern Railway Co., 143 Fed. 276, 74 C. C. A. 414, in discussing this phase of the question, says:

"At common law the action of the court upon a motion for a nonsuit was not a discretionary one, but the plaintiff, as of right, could at any time before verdict exercise this privilege; and this is now substantially the rule in North Carolina. But the more reasonable practice, certainly so far as the federal courts are concerned, is that the plaintiff has the right to take a nonsuit at any time before the case has been submitted to the judge or jury for determination. The plaintiff upon the making of a motion to instruct a verdict against him, that being one of the methods in the federal court of finally disposing of the cause, should then elect whether or not he will take a nonsuit, and not submit his cause upon a full hearing of that motion to the court, and take chances of an adverse decision thereon."

In view of what we have already said as respects this point, we do not deem it necessary to enter into a further discussion of the same, feeling as we do that the plaintiff was not taken by surprise, and that he was not deprived of introducing any newly discovered evidence before the case was submitted to the court for its final determination.

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

ANGLE v. BANKERS' SURETY CO

(Circuit Court of Appeals, Second Circuit. July 2, 1917.)

No. 198.

1. BANKRUPTCY ⟸303(1)—PREFERENTIAL TRANSFERS—BURDEN OF PROOF.
In a suit by the trustee in bankruptcy to set aside a mortgage deed given by the bankrupt to a surety company to secure repayment of a sum of money which the surety agreed to advance to a construction company to be applied on specified contracts, and also to indemnify the surety company against loss as surety on such contract, where it appeared that the surety company made the advances and that they were never repaid by the bankrupt, the bankrupt's trustee has the burden of showing repayment by the construction company.

2. BANKRUPTCY ⟸160—PREFERENCES—WHAT ARE.
The execution of a mortgage by one not shown to then be insolvent, to indemnify surety company which became surety on the bond of a construction company, cannot, the transaction being a future one, be treated as preferential, the contract not then being deemed preferential.

3. BANKRUPTCY ⟸181—FRAUDULENT TRANSFER—CONSIDERATION.
Where the bankrupt executed a mortgage deed to induce defendant to make advances to a construction company, a misapplication of the advances by an official of the company, with the consent of the bankrupt, furnishes no ground to avoid the mortgage.

4. CORPORATIONS ⟸387(1)—CONVEYANCES—RIGHT TO OBJECT.
Where a construction company conveyed its plant to its surety, one who had given a mortgage to the surety to indemnify it for liability cannot object that the conveyance was ultra vires, only the company being entitled to make that objection.

5. BANKRUPTCY ⟸303(3)—FRAUDULENT CONVEYANCES—EVIDENCE.
In a suit by the trustee of a bankrupt, who executed a mortgage to secure the repayment of advances by defendant to a construction company, and also to indemnify defendant against loss on the construction company's bond, to set aside the mortgage on the ground that the advances had been repaid, evidence *held* insufficient to establish that the advances had been repaid by the construction company or that the conveyance was in fraud of creditors.

6. BANKRUPTCY ⟸184(2)—CHATTEL MORTGAGES—WHAT ARE.
An agreement between a construction company and its surety, that upon the company's default title to its plant should vest in the surety company, which was required to complete the work, is not a chattel mortgage, and so is not void under Bankruptcy Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (Comp. St. 1916, § 9651), because not recorded as required by state laws.

7. BANKRUPTCY ⟸172—TRUSTEES—RIGHTS OF.
In a suit by the trustee of a bankrupt, who executed a mortgage to secure defendant for advances to a construction company and to indemnify it as surety on the company's bond, where the plant of the construction company which defaulted had been transferred to defendant in accordance with the contract between it and defendant, the surety of the bankrupt company cannot attack the transfer of the plant as one made to hinder, delay, and defraud the construction company's creditors, that right inhering only in the trustee in bankruptcy of the construction company.

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

Suit by Edwin C. Angle (now Gerardus Smith), as trustee in bankruptcy of the estate of Edward F. Garling, against the Bankers' Surety Company. From a decree for plaintiff, defendant appeals. Reversed.
See, also, 210 Fed. 289.

Daniel Naylon, Jr., and John D. Miller, both of Schenectady, N. Y., for plaintiff.
Joseph A. Murphy, of Albany, N. Y., for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal by the defendant in a suit brought by the trustee in bankruptcy of Edward F. Garling to set aside a deed executed by him and his wife in the form of a mortgage, and delivered to the Bankers' Surety Company to secure the repayment by Garling of the sum of $13,000 which the Bankers' Company agreed, at his request, to advance to the Mohawk Engineering & Construction Company to be applied by it on account of two specified contracts, and also to indemnify the Bankers' Company against any loss to it as surety upon the said contract.

The Mohawk Company's contracts in question were, one with the village of Matteawan for grading and paving, and the other a subcontract for work on the State Barge Canal, for the state of New York. The Bankers' Company was surety in the sum of $15,000 for performance of the Matteawan contract, and for $13,000 for the performance of the Barge Canal contract, having Garling, who was a stockholder, director, and treasurer of the Mohawk Company, as its indemnitor in each case.

The mortgage was dated August 2, 1910, and a petition in bankruptcy was filed against Garling November 29th, within four months thereafter.

The bill goes on three grounds: First, that Garling was insolvent and intended to prefer the Bankers' Company, which had reasonable cause to believe that a preference would be effected. Section 60 of the Bankruptcy Act (Comp. St. 1916, § 9644). Second, that the Bankers' Company had been repaid by the Mohawk Company the $13,000 advanced by it. Third, that the conveyance was made to delay, hinder, and defraud Garling's creditors, and was therefore void under section 67 of the Bankruptcy Act.

[1] The Bankers' Company did advance to the Mohawk Company $13,000 to be applied on the two contracts, and Garling personally never repaid any of it. The question is whether the Mohawk Company did. The burden of proof is on the complainant.

[2-5] The District Judge found that there was no evidence that Garling was insolvent August 2, 1910, or that he intended to prefer the Bankers' Company, or that the Bankers' Company had reasonable cause to believe that a preference would be effected, or that there was any fraudulent intent upon the part of any one in connection with the transaction. The mortgage was given not for a past, but for a present and future, consideration, and all parties regarded the contracts as profitable.

The Mohawk Company abandoned both these contracts, and the Bankers' Company, in accordance with the suretyship agreement, took over the Matteawan contract in October, 1910, its engineer Paul taking charge October 11th, completing it October 27th, and paying to the Bankers' Company what he testifies was the profit, $1,598.67. It also took over the Barge Canal contract in October, 1910, and completed it at a loss of over $200,000.

The District Judge found that there was no liability on Garling's part as indemnitor to the Bankers' Company on either bond, the Matteawan contract having been completed at a profit, and his liability as indemnitor in connection with the Barge Canal contract having been discharged as follows: The American Pipe & Construction Company had contracted with the state of New York for part of the work on the State Barge Canal and one Warner had subcontracted with the Pipe Company to perform this work. The Bankers' Company was surety to the Pipe Company in the sum of $20,000 for Warner's faithful performance of his contract, and he had indemnified the Bankers' Company against any loss. The Mohawk Company had subcontracted with Warner to do this same work, and the Bankers' Company was surety to Warner in the sum of $13,000 for its faithful performance, Garling and the Mohawk Company indemnifying the Bankers' Company. The Mohawk Company and then Warner abandoned the work. Warner, October 18, 1910, surrendered and canceled the bond of the Bankers' Company of $13,000 to him on the Mohawk Company's contract, and the Bankers' Company released him from his agreement to indemnify it in connection with his bond of $20,000 to the Pipe Company.

The District Judge found that the Bankers' Company was, by this arrangement, discharged of its liability as surety for the performance of the Barge Canal contract by the Mohawk Company, so that no claim survived against Garling. As a result he found, and we entirely concur with him, that the mortgage was a valid and subsisting lien for the $13,000, less the profit of $1,598.67 received from the Matteawan contract.

The District Judge disposed incidentally of another of the complainant's contentions. One Ryan was appointed by the Mohawk Company its attorney in fact to receive the advances to be made by the Bankers' Company to the amount of $13,000 and apply the same to the Matteawan and State Barge Canal contracts. Notwithstanding this, Ryan applied $2,500 out of the first advance of $3,000, with Garling's consent, to a different contract, viz. the Mohawk Company's Road Contract No. 5,028. This loan does not seem to have been returned, but the District Judge rightly held that even so, the Bankers' Company would not be responsible for the diversion, and that neither Garling, who consented to it, nor his trustee in bankruptcy, had any standing to complain.

Upon the petition of the trustee the case was reopened to let in proof that the Bankers' Company had received personal property subsequently valued by the special master at $10,655.28, which should be credited on account of Garling's mortgage debt. The claim comes about as follows: The Mohawk Company had a third contract with the state

known as Road Contract No. 5,028, for the performance of which the Bankers' Company was surety in the sum of $31,500. October 7, 1910, the Mohawk Company, having abandoned this contract, adopted a resolution to transfer all its plant in connection therewith at values to be appraised, in consideration of the payment by the Bankers' Company of the Mohawk Company's indebtedness outstanding on the contract, amounting to over $17,000, and of completing the contract without loss to it.

The transfer was in accordance with the contract of suretyship between the two companies, which contained the following provision:

"The undersigned further agrees that upon notice to, or discovery by, the company of any failure to comply with any provision of the contract for the completion of which the company has given its bonds, immediately upon said notice or discovery the right of possession of such plant as it may own or have upon said work shall vest in the company, so that the company may use same in the prosecution of said contract to completion."

We assume that the Mohawk Company was insolvent at the time, and that the Bankers' Company knew it.

A previous resolution had been prepared transferring the contract and plant to one Consalus, which was intended to be adopted at a meeting of the board called for October 6, 1910. Consalus in the meantime withdrew his offer, no meeting was held October 6th, and the resolution was never passed. October 7th, two of the three directors of the Mohawk Company being present, the above resolution transferring the contract and plant to the Bankers' Company was adopted. The complainant treats this as unauthorized and ultra vires, apparently because different from the resolution first drawn. However, the only person, if any, entitled to object was the Mohawk Company, which never did, but, on the contrary, ratified by making a formal assignment of the contract and plant to the Bankers' Company October 17, 1910, and its trustee in bankruptcy has never raised the question of ultra vires.

The special master charged the Bankers' Company with the value of this plant on the ground that it was a transfer without consideration and a preference under section 60 of the Bankruptcy Act, as well as under section 66 of the Stock Corporation Law of New York (Consol. Laws, c. 59), the material part of the latter being:

"(66) * * * No conveyance, assignment or transfer of any property of any such corporation by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, except that laborers' wages for services shall be preferred claims and be entitled to payment before any other creditors out of the corporation assets in excess of valid prior liens or incumbrances."

The Mohawk Company was adjudicated a bankrupt January 28, 1911, and its trustee brought suit in the state court of New York against the Bankers' Company, October 11, 1911, before the present suit was begun, April 24, 1912, to avoid the transfer as a preference, under section 60 of the Bankruptcy Act, within four months of the filing of the petition. This suit is still pending, and the question must

be disposed of in it. The trustee in bankruptcy of the Mohawk Company is the only person authorized to act in the premises.

At all events, we think the Bankers' Company paid for the plant by paying the Mohawk Company's outstanding liabilities in connection with it to a much larger amount and by completng the contract without loss to the Mohawk Company. The transfer was not in consideration of a prior indebtedness nor out of the regular course of business, as were the transfers by the corporations in the cases relied upon by the complainant. Cole v. M. I. Co., 133 N. Y. 164, 30 N. E. 847, 28 Am. St. Rep. 615; Hurd v. Laundry Co., 167 N. Y. 89, 60 N. E. 327. In them the corporation transferred all its assets to a new company, substituting a new defendant for the creditors. The transfer in this case was in pursuance of a very reasonable and usual provision of such contracts, viz. that if the contractor failed to complete the contract the surety might do so, and to that end be given either the possession or title to the plant existing at the time of the contractor's default. We discover no evidence whatever of an intent on the part of the Mohawk Company to prefer the Bankers' Company or any reasonable ground for the latter to believe that a preference would be effected. Indeed, if any preference were effected, it would be not to the Bankers' Company, but to the creditors whose claim that company paid, and who had no knowledge of the transaction whatever. The object of both parties was entirely different, viz. to complete the contract without loss.

The special master also charged the Bankers' Company with checks aggregating $5,976.34 received from the Fishkill Electric Railway Company. It is not made plain that these were payments on account of the Matteawan contract. At all events, the mere receipt by the Bankers' Company of moneys from that contract or from the Barge Canal contract does not show that the moneys were paid on account of the advance of $13,000 guaranteed by Garling. As the Bankers' Company lost over $200,000 on the Barge Canal contract, it might have received a great many checks to be applied to other purposes than to payment of this particular advance of $13,000, guaranteed by Garling. The parties not having made any application of the payments, the court should apply them to the Bankers' Company's unsecured claims in the first instance. In this way the Bankers' Company was brought in debt to the Mohawk Company, and the District Judge, confirming the report of the special master, entered a decree that the mortgage be canceled and discharged of record.

[6, 7] The defendant thereupon moved that the decree be vacated and the case reopened to permit it to offer testimony which it had failed to offer before the special master because of some misunderstanding as to the time of the closing of the case. This motion was granted. The special master then added a new charge against the Bankers' Company. He calculated the amount unpaid by the state under the Barge Canal contract at the time the Bankers' Company took it over at $9,643.54, which he held the company got for nothing; that the transfer was made without consideration and in fraud of the Mohawk Company's creditors under section 67e; that the agreement that the title to the plant should vest in the Surety Company upon the Mohawk Company's default was a chattel mortgage, and void under 67a,

because not recorded as required by section 230 of the New York Lien Law (Consol. Laws, c. 33). He cited, in support of this latter view, Title Guaranty Co. v. Witmire, 195 Fed. 41, 115 C. C. A. 43, and Massachusetts Bonding Co. v. Kempner, 220 Fed. 847, 136 C. C. A. 593. In those cases there was a present assignment of title to things not in existence, whereas in this case the agreement was that upon the contractor's default possession of the plant then existing should vest in the surety, and the assignment actually made was a present one. It is impossible to regard this provision as being a chattel mortgage. The other objection that the transfer was made to hinder, delay, and defraud the Mohawk Company's creditors is available to its trustee in bankruptcy and not to Garling's trustee. The District Judge affirmed the report of the special master, and, the Bankers' Company being found to be still more overpaid, entered a final decree ordering that the mortgage on Garling's property should be canceled, from which this appeal is taken.

We discover no evidence of any intent on the part of the Mohawk Company, in transferring this contract and plant to the Bankers' Company, to delay, hinder, or defraud its creditors. The transaction seems to us perfectly natural and in accordance with the terms of the suretyship agreement made between the parties. The Mohawk Company desired the contract to be completed without loss to itself. The Bankers' Company has completed it at a great loss, and has increased the Mohawk Company's estate by paying off indebtedness for which it would be liable and by relieving it of any claim by Warner for nonperformance. We are of opinion that the conclusion originally arrived at by the District Judge was right, and that the decree should be that the mortgage is a good and valid security to secure the sum of $13,000 advanced by the defendant with interest, less $1,598.67 received by it with interest, and that, upon payment of this sum within a time to be fixed by the District Court, the mortgage be discharged of record, in default whereof the bill be dismissed, with costs.

Decree reversed.

GREAT NORTHERN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 25, 1917.)

No. 2836.

1. COMMERCE ⟸5—CONSTITUTIONAL LAW ⟸301—SAFETY APPLIANCE ACTS—VALIDITY.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1916, §§ 8605–8615), and Act April 14, 1910, c. 160, 36 Stat. 298, being fairly within the scope of a regulation of commerce among the states, its validity is not impaired by the due process clause of the Fifth Amendment to the Constitution.

2. PLEADING ⟸127(2)—ADMISSIONS—CONSTRUCTION OF PLEADING.

In an action against a railway company for violations of the Safety Appliance Acts, in which the complaint alleged that the railway company ran its trains in interstate commerce when the speed of the trains was controlled by brakemen using the common hand brake, and when brake-

men were required to use such brake to control the speed of the train, and when the speed of the train was not controlled by power or train brakes used and operated by the engineer, an answer alleging that each engine was equipped with a powerful driving wheel brake and appliances for operating the train brake system, and that in each train not less than 85 per cent. of the cars were equipped with power or train brakes, which were operated by the engineer of the locomotive to control the speed of the train in connection with the hand brakes, did not deny, but, on the contrary, admitted, that the speed was to some extent controlled by brakemen using hand brakes, and was insufficient.

3. PLEADING ⟸8(6)—CONCLUSIONS—DENIAL OF VIOLATION OF LAW.

In a suit against a railway company for penalties for violations of the Safety Appliance Acts, a specific denial that the statute was violated by defendant was but a conclusion of the pleader, to be disregarded where the specific averments of the answer did not deny the material averments of the complaint.

4. RAILROADS ⟸229—EQUIPMENT OF TRAINS—BRAKES.

The Safety Appliance Acts are mandatory in requiring that trains must not only be equipped to run, but must actually be run, without requiring brakemen to use the hand brakes in the ordinary movement of the trains.

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Suit for penalties by the United States against the Great Northern Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This case for a second time comes before the court. It is a prosecution in 12 counts, brought to recover penalties against the railway company for violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85, Act March 2, 1903, c. 976, 32 Stat. 943, and Act April 14, 1910, 36 Stat. 298. Examination of the case as reported in U. S. v. Great Northern R. Co., 229 Fed. 927, 144 C. C. A. 209, and of the complaint herein, shows that the material allegations of the complaint are that the railway company ran its trains in interstate commerce when the speed of the train was controlled by the brakemen using the common hand brake for that purpose, and when the railway company required the brakemen to use the common hand brake to control the speed of the train, and when the speed of the train was not controlled by the power or train brakes used and operated by the engineer of the locomotive drawing the train.

Upon the first hearing before the District Court, demurrer to the complaint was sustained, and judgment went in favor of the railway

company. But this court reversed that judgment, and after remand the company answered in material part as follows:

"Said defendant further alleges that each engine upon each of said trains was equipped with a powerful driving wheel brake and appliances for operating the train brake system, and that in each train not less than 85 per cent. of the cars therein were equipped with power or train brakes, which were used and operated by the engineer of the locomotive drawing such train, to control its speed in connection with the hand brakes. Said defendant specifically denies that the act of Congress mentioned in the complaint herein as amended was violated by the said defendant," etc.

The United States by its counsel moved for judgment on the pleadings and against objection by the railroad company the motion was granted. The railway company contends that to allow recovery would be to deprive it of its property without due process of law, and would be violative of article 5 and section 1 of article 14 of the Amendments to the Constitution.

[1] We cannot sustain this view. The obvious purpose of the statute being to protect men employed upon trains in the movement of interstate commerce, the power of Congress may be fully exerted in the premises, and, the statute being fairly within the scope of the regulation of commerce among the states, in our opinion its validity is not impaired by the due process clause of the Fifth Amendment to the Constitution. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

[2, 3] It is said that the court erred in granting judgment upon the pleadings because the allegations of the complaint are denied, and the averments of facts embodied in the portion of the answer as heretofore quoted must be construed most favorably to the defendant. The argument made on this point would have us conclude that the sole effect of the answer interposed is that the train was properly equipped with power driving wheel brakes and appliances, and that at least 85 per cent. of the cars were equipped with power or train brakes; that these were used and operated by the engineers to control the speed of the trains in connection with the hand brakes; that there is no admission in the pleading that brakemen were employed upon the top of the cars or that brakemen were required to use the hand brakes to control the speed of the train; and that, for all that appears, the brakes may have been set before the cars were moved.

The error of this reasoning is apparent when we separate the averments of the complaint and answer and test those of the answer. Thus, there is an averment that the train was run when its speed was controlled by brakemen using the common hand brake for the purpose of controlling the speed. There is no attempt at denial of this allegation, except by averment that the engine was equipped with appliances for operating a train brake system, and that the cars in the train were equipped with power or train brakes, which were operated by the engineer of the locomotive drawing such train to control its speed in connection with the hand brakes. This, however, is but an admission that the speed was to an extent controlled by the brakemen using hand brakes for the purpose. Obviously, allegation of use of hand brakes

by men to control the speed in connection with the power brakes used by the engineer is not a denial of the charge that there was control of speed by the use of the hand brakes, but is rather a plea seeking to avoid liability by pleading use of dual means of control, hand brakes and power brakes.

Again, the complaint alleges that defendant required the brakemen to use the common hand brake to control the speed when the speed was not controlled by the power brakes used by the engineer of the locomotive. To this specific allegation of a requirement of use of hand brakes there is no specific denial. Nor is there a denial that the use of hand brakes to control speed was required when the speed was not controlled by the power brakes operated by the engineer of the locomotive; but, as above indicated, we find merely affirmative allegations of lawful equipment, with plea of use and operation of the two methods of breaking, the one in connection with the other. Such an answer is weighty of admission that men were required to go, and did go, on tops of the cars and between them, to use hand brakes to control the speed of the train. The denial that the act of Congress mentioned in the complaint was violated by the railway company is but a conclusion of the pleader, to be disregarded if the antecedent specific averments of the answer were not denials of the material averments of plaintiff's complaint. We think it is now clear that close inspection of the pleadings has shown that the material allegations of the complaint stand undenied; wherefore if, by authority of the decision upon the former writ of error, nothing by way of affirmative matter constituting legal defense was set forth in the answer, judgment on the pleadings was properly given. We have, then, to ascertain what was the substantive question of law decided by this court upon the former review. Upon consideration of a complaint and stipulation of fact, which presented the same issue as there is now before the court, it was said:

"Second. The act by its terms expresses with sufficient certainty the intention of Congress that hand brakes shall not be used on freight trains in the ordinary movement of such trains in interstate commerce. By the act Congress adopted for freight trains the system of braking that was in use on passenger trains. It made no specific mention of the number of cars in a train that should be equipped with power brakes, but it enacted in general terms that the train should be sufficiently equipped to be run without requiring the use of the common hand brake. The clause 'without requiring brakemen to use the common hand brake,' as found in the first section of the act, is used in the same sense as the words 'without the necessity of men going between the ends of the cars,' in the second section, which provides for automatic couplers. The language of the act was equivalent to declaring that after the date named freight trains should not only be equipped to run, but should actually be run without requiring brakemen to use the common hand brake. No implication to the contrary is to be found in the provision in section 2 that all cars must be equipped with 'efficient hand brakes,' a provision which is ascribable to the necessity of controlling the movement of cars in yards and elsewhere, when trains have been broken up or are being made up. In an act, the express purpose of which is to relieve brakemen from the danger of using hand brakes, a provision that the train shall be so equipped as to run without requiring the use of hand brakes is a prohibition against the use of hand brakes in the ordinary movement of the trains. In view of the protection which was intended to be afforded by the act, it would have been idle for Congress to declare that freight trains must be equipped with appliances to operate a power brake system, and at the same time leave it

optional with a railroad company to decide whether it would or would not operate its trains with that system. To say that [all] trains shall be provided with power brakes, and in the same breath to say that the carrier may refuse to use them, is to contradict the very purpose and terms of the act. Yet such is the effect of the law, if it be given the construction contended for by the defendant in error."

[4] The doctrine of the decision (the case has been followed by Judge Tuttle in the District Court in the Eastern District of Michigan in United States v. Grand Rapids & Indiana R. Co., 244 Fed. 609), is that the statute is mandatory in requiring that the trains must not only be equipped to run, but must actually be run without requiring brakemen to use the hand brakes in the ordinary movement of the trains. And as there is no contention that extraordinary circumstances or exigency of train movement enter into the case under consideration, the defendant company has advanced no firm ground for holding that it is excluded from the demands of the statute as it was interpreted upon the former writ of error.

The judgment is affirmed.

ROSS, Circuit Judge. I dissent, adhering, as I do, to the views expressed by me when the case was last under consideration here. 229 Fed. 927, 931.

WONG CHUNG v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2930.

1. ALIENS ⟹32(2)—DEPORTATION OF CHINESE—TIME OF PROCEEDINGS.
Under the provision of Immigration Act Feb. 20, 1907, c. 1134, § 43, 34 Stat. 911 (Comp. St. 1916, § 4289), that the act "shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons," the provisions of sections 20 and 21 (Comp. St. 1916, §§ 4269, 4270), requiring proceedings for deportation to be taken within three years after entry, do not apply to Chinese persons, who may be deported at any time under Exclusion Act May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 (Comp. St. 1916, §§ 4315–4323).

2. ALIENS ⟹32(8)—PROCEEDINGS FOR DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.
A finding by both the commissioner and District Court, which heard the witnesses, against the claim of a person of Chinese descent that he was born in the United States, *held* not so clearly erroneous as to warrant its reversal; the only witnesses in support of such claim being Chinese persons, and it appearing that defendant, although about 30 years old, could not speak the English language.

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

Proceeding for deportation by the United States against Wong Chung. From an order of deportation, made by the District Court, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, Cal., for appellant.

Albert Schoonover, U. S. Atty., and Clyde R. Moody, Asst. U. S. Atty., both of Los Angeles, Cal.

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

DIETRICH, District Judge. The appellant is a person of Chinese descent, who admittedly is in the United States without right, unless, as he claims, he was born in this country. Having been apprehended for deportation pursuant to the provisions of the Chinese Exclusion Acts (27 Stat. 25; 28 Stat. 7), the burden was upon him to establish his nativity "to the satisfaction" of a judge or commissioner. Section 3, Act May 5, 1892 (Comp. St. 1916, § 4317). The commissioner found against him, and upon appeal, after a trial de novo, the District Judge reached the same conclusion, and accordingly entered an order for his deportation. From this order he has appealed.

[1] It is first contended that the order is erroneous, for the reason that the deportation was not accomplished within three years from the date of the appellant's entry into the United States, and that therefore the proceedings are barred by the provisions of sections 20 and 21 of the General Immigration Act of February 20, 1907 (34 Stat. 898). But it is expressly provided in this act that it "shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent," and it is well established that the government may proceed under either the special Chinese Exclusion Acts or the General Immigration Act within three years from the wrongful entry of the Chinese person, or under the special Exclusion Acts alone, if more than three years have elapsed since the entry. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

[2] The more serious contention is that it should have been found that the appellant is native-born, and is therefore not subject to deportation. We are not particularly advised of the views of the lower court, but presumably the finding was against the appellant upon this issue of fact.

The appellant's story is, in substance, that he was born in San Francisco; that he is about 30 years of age, and is unmarried; that when he was very young his parents left him with his clansmen, and soon thereafter died; that when still a child of from 5 to 10 years of age he was brought by an uncle from San Francisco to Los Angeles, where he was placed in charge of a Chinese woman, and a few years later he was taken into a restaurant as a helper, where he remained a while, but most of his life has been spent in laundry work. Both the Chinese woman and the keeper of the restaurant testified in his behalf. He produced no witness having knowledge of his birth, and the only evidence relative thereto consists of his statement of what his uncle and other clansmen told him. He is strongly corroborated by the woman who cared for him and the Chinese restaurant keeper touching his claim that his uncle took him to Los Angeles when he was a child, and that he has resided there for about 20 years. Moreover,

it would seem to be quite incredible that the story he told to the inspector could have been fabricated upon the impulse of the moment, and before he had an opportunity to confer with friends or communicate with counsel.

Upon the other hand, it may be pointed out that there are some discrepancies and contradictions of a more or less serious character in his statements; that he produced no witness from Los Angeles, other than the two Chinese persons referred to, to establish his residence there; and that, notwithstanding his claim of birth and long residence in this country, he is apparently unable to understand or speak the English language. Were it conclusively shown that he has lived in Los Angeles since childhood, we would be inclined to give credence to the evidence touching the place of his birth, secondary though it may be, for the reason that direct evidence of the date and place of one's birth is frequently unavailable; but if the appellant has been in Los Angeles 20 years it should have been entirely possible for him to produce witnesses other than those of his own race. Furthermore, he should have explained why, if he was born in this country and has lived all of his life in a community like Los Angeles, he has not learned to speak the English language.

In view of these considerations, it is thought that we should not disturb a conclusion concurred in by both the commissioner and the District Judge. Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Quock Ting v. United States, 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501; Gee Fook Sing v. United States, 49 Fed. 146, 1 C. C. A. 211.

Accordingly the order appealed from will be affirmed.

STRATHLEVEN STEAMSHIP CO., Limited, v. BAULCH.

(Circuit Court of Appeals, Fourth Circuit. July 19, 1917.)

No. 1535.

1. NAVIGABLE WATERS ⇐23—OBSTRUCTION OF NAVIGATION—ANCHORAGE IN CHANNEL.

Whether the anchorage of a vessel in a navigable channel is in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (Comp. St. 1916, § 9920), which prohibits such anchorage "in such manner as to prevent or obstruct the passage of other vessels or craft," depends upon the facts of the particular case. If a vessel anchors at a point where other vessels navigated with care can safely pass her, she does not violate the statute, but if she occupies so much of the channel as to practically impede its navigation or make the effort to pass her a dangerous maneuver, she unlawfully obstructs it.

2. INDEMNITY ⇐14—CONCLUSIVENESS OF JUDGMENT AGAINST INDEMNITEE.

An adjudication that a vessel was in fault for a collision because of the place and manner of her anchorage is conclusive of such fact in a subsequent suit by the vessel against her pilot to charge him with responsibility therefor.

3. INDEMNITY ⇐14—CONCLUSIVENESS OF JUDGMENT AGAINST INDEMNITEE.

That a vessel in a suit for collision unsuccessfully contended that she was not in fault does not estop her from alleging such fault in a subsequent suit to charge her pilot with responsibility therefor.

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4. ADMIRALTY ⇐19—JURISDICTION—SUIT AGAINST PILOT.
A suit by a vessel against her pilot to charge him with responsibility for her anchorage in an unlawful place is within the admiralty jurisdiction.

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

Suit in admiralty by the Strathleven Steamship Company, Limited, owner of the steamship Strathleven, against William Baulch. Decree for respondent, and libelant appeals. Reversed.

Floyd Hughes, of Norfolk, Va. (Hughes & Vandeventer, of Norfolk, Va., and Ralph James M. Bullowa, of New York City, on the brief), for appellant.

Robert H. Talley, of Richmond, Va., for appelle.

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

KNAPP, Circuit Judge. The material facts are stated in the opinion of this court in the kindred case of The Strathleven, 213 Fed. 975, 130 C. C. A. 381. They appear in greater detail in the opinion of the District Court in that case, under the title of The Margaret J. Sanford (D. C.) 203 Fed. 331. The latter court found that the steamer Strathleven was solely at fault for the collision with a loaded scow which the tug Margaret J. Sanford had in tow, and accordingly dismissed the libel filed by the owner of the steamer against the tug. On appeal this court affirmed the finding that the steamer was at fault, but held that the tug was also at fault, and remanded the case, with directions "to modify the decree so as to adjudge both the Strathleven and the Sanford in fault and to provide that the damages and the costs below be divided equally between them."

[1] Such a decree having been entered, and in compliance therewith the owner of the tug having paid half the damages suffered by the Strathleven, this libel was filed to recover the other half from the pilot in charge of the steamer when the accident happened. The case was tried below on the testimony in the former suit with the added deposition of the master of the Strathleven to the effect that he had never before been in those waters, and that he depended entirely upon the pilot for the safe and proper anchoring of his vessel. The learned District Judge dismissed the libel upon the supposed authority of the decision of this court in the Strathleven Case, supra, which followed the earlier case of The Caldy, 153 Fed. 837, 83 C. C. A. 19, saying in his memorandum opinion:

"Under this corrected interpretation of the law, the pilot clearly had the right to anchor the Strathleven where he did, and he should not be held liable for the collision which subsequently occurred, brought about from causes not the result of the anchorage selected by him."

We are clearly of opinion that this ruling misconceives the import of the two decisions mentioned, construing and applying the act of Congress of March 3, 1899, which provides, among other things:

"That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels or craft."

In the Caldy Case, supra, it was said:

"We do not think the Congress intended by Act March 3, 1899, * * * to absolutely forbid anchoring in navigable waters, except only at such places as the location of the vessel would necessarily prevent the passage of other vessels, or obstruct them in passing to such an extent as to make the effort to do so a dangerous maneuver."

This language was repeated in the Strathleven Case, supra, with citation of The City of Birmingham, 138 Fed. 559, 71 C. C. A. 115, and The Europe, 190 Fed. 478, 111 C. C. A. 307, in which the same conclusions were reached. It follows from these decisions that the question whether the statute has been violated depends upon the facts of the particular case. If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels navigated with care can safely pass, she does not violate the statute or render herself liable under the general rules of navigation, although she obstructs the channel to a certain extent. On the other hand, if the anchored vessel occupies so much of the channel as to practically impede its navigation or make the effort to pass her a "dangerous maneuver," she has placed herself in a position which the statute forbids, and must take the consequences of her unlawful act. Each case must be judged by its own circumstances, and the decisions above cited are far from holding that appellee had the right as matter of law to anchor the Strathleven where and as he did. If in point of fact he anchored her "in such manner as to prevent or obstruct the passage of other vessels or craft," he violated the statute in so doing, to say nothing of the harbor regulations, and thereby made himself liable for the resulting collision.

Now, in the original Strathleven Case the trial court held, in an opinion which states and discusses the facts at length, that the steamer was solely responsible for the accident, and unquestionably the fault of the steamer was the fault of the pilot. This court, though holding that the tug was also to blame, fully affirmed for reasons stated the finding and conclusion that the steamer was at fault, and therefore in that case the question of her liability has been finally determined.

But this case was heard on the testimony in the former suit with a further statement by the master of the Strathleven, which certainly adds nothing of advantage to the appellee. The proofs relating to the negligence of the steamer are precisely the same in both cases. This court has passed upon those proofs and held that they show as matter of fact and law that the collision was caused, in part at least, by the fault of the Strathleven, that is, of her pilot, and no good reason now appears for reaching a different conclusion. On the contrary, a careful review of the testimony confirms the views expressed in our former opinion as to the liability of the steamer. The dismissal of the present libel is therefore without other support on the merits than the mistaken notion that this court had so construed the statute as to give appellee the legal right "to anchor the Srathleven where he did." The erroneous ruling resulted from this misconception.

[2] Strictly speaking, the decision in the original case is not res adjudicata as to Baulch, as he was not a party to the proceeding, but it is res adjudicata as to the finding and conclusion of negligence in the matter of the place and manner of anchoring the steamer, for which the appellee was responsible, and his liability follows by operation of law. Burley v. Compagnie De Nav. Fran., 194 Fed. 335, 115 C. C. A. 199.

[3] To an extent at least the position now taken by the libelant is inconsistent with its claim in the former suit that the Strathleven was properly anchored and her pilot without fault for the collision with the tug. But that claim was not sustained by the trial court or by this court, both finding it contrary to the fact, and we deem it too plain for discussion that the case here presented comes within no recognized rule of estoppel. 16 Cyc. 769.

[4] The contention that admiralty has no jurisdiction in a case of this kind is scarcely debatable. It is refuted by high authority and by the fact of its frequent exercise without question. Sideracudi v. Mapes (D. C.) 3 Fed. 873; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

The decree must be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

THE ALICE.

THE ETNA.

(Circuit Court of Appeals, Fourth Circuit. July 5, 1917.)

No. 1518.

SALVAGE ⇐31 — RESCUE OF SHIP FROM DANGER OF FIRE — ADEQUACY OF AWARD.

A salvage award of $500 to one of two tugs, which together towed a steamship from her slip where she was lying without steam some 300 feet from a burning elevator, *held* not so inadequate as to warrant interference by an appellate court, where, while there was possible danger to the ship and the service was meritorious the danger was not great and the tugs incurred little, if any, risk.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty by Sanford & Brooks Company, owner of the tug Alice, against the Navigazione Generale Italiana, owner of the steamship Etna. Decree for libelant, which appeals. Affirmed.

Daniel R. Randall, of Baltimore, Md. (R. E. Lee Marshall, of Baltimore, Md., on the brief), for appellant.

John B. Deming, of Baltimore, Md. (Whitelock, Deming & Kemp, of Baltimore, Md., on the brief), for appellee.

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

KNAPP, Circuit Judge. The Sanford & Brooks Company, owner of the steam tug Alice, libeled the Italian steamship Etna for alleged salvage service, got a decree for $500 in the court below, and brings this appeal on the ground of the inadequacy of the award. The circumstances in general are these:

In the afternoon of June 13, 1916, a fire occurred in an elevator at the water end of a pier extending southerly into the Patapsco river, in the harbor of Baltimore. The elevator was destroyed and nearby shipping and other property damaged or put in danger. When the fire broke out two steamers, the Etna and the Bologna, were lying bow in on the further or westerly side of the next pier to the west. The width of this pier is 65 feet and the width of the intervening slip 122 feet. The stern of the Etna was about 450 feet from the water end of the pier, and about 365 feet diagonally from the center of the elevator. The Bologna, between the Etna and the stream, had steam up at the time, and moved out under her own power to a place of safety. The Etna had not fully completed her loading, was not under steam, and had a scow at her stern from which some portion of cargo was to be taken.

When the elevator was seen to be on fire, the Alice, which was a thousand feet or so away, went at once to lend assistance. She entered the slip where the Etna was berthed, but in going about had the ill luck to run aground. She got off quickly, however, and in a few minutes had lines from the steamer fastened to her bitts. About this time —just when is somewhat uncertain—the Curtis Bay, a much larger and more powerful tug, arrived at the slip, backed in towards the stern of the ship, made fast to her in some way with the scow between them, and she was then pulled out into the river, the scow going adrift.

So much seems fairly free from doubt, the rest is a tangle of conflict and dispute. The owners of both tugs promptly filed libels, each claiming the credit of a gallant rescue, and each eager to be handsomely rewarded. The trial of the consolidated cases disclosed a variety of contentions. Witnesses for the Alice pictured a brave exploit, amid bursting flames and other perils, which saved a steamer and cargo worth millions from impending destruction. For the Curtis Bay less emphasis was placed on the risk to herself in getting the Etna away, but there was no lack of testimony that she alone effected the escape; the Alice having hindered rather than helped the delivery. On the other hand, the officers of the Etna testified that she was never in any danger, because of her distance from the elevator and the fact that the wind was in the northwest; that there was some heat, but not enough to be really uncomfortable, and it was a hot day anyhow; moreover, that arrangements had been made the night before to have the steamer towed over to Locust Point, where the balance of her cargo was to be taken on; and that when the tugs approached that afternoon it was supposed they had come for that purpose, as otherwise they would not have been allowed to remove her.

In all this contradiction it is not easy to discern the truth or to reach a conclusion that satisfies the sense of justice. The event seems to show, thanks among other things to the presence of a powerful fire

boat, that the Etna would probably not have been damaged if she had remained at her dock. But against this it cannot be denied that there was such possibility of injury, and perhaps serious injury, as to make her removal a matter of obvious prudence. The Alice was first on the scene, to be sure, but she met with a mishap in turning around, and so was not able, for some minutes at least, to give any help to the steamer. In the meantime, as nearly as we can make out, the Curtis Bay backed into the slip and rendered assistance that was prompt and effective. Neither tug took any considerable risk, and such damage as the Alice sustained was slight and unimportant. The service involved only ordinary effort and skill, and it was all over in something like half an hour.

Taking all the circumstances into account, we are not persuaded that the compensation allowed the Alice was so clearly inadequate as to warrant interference with the decree. True, as the case is here presented, the amount seems rather meager in comparison with the award of $1,000 to the Curtis Bay. But as that tug might be thought overpaid for what it did, the comparison plainly fails to show that the Alice was not paid enough. Each claim must stand on its own merits. The removal of the steamer was entirely proper and commendable, even if she were not in actual danger, but it was a salvage service of such low order as to be measured, not by value of ship or cargo, but rather by generous recognition of voluntary aid and generous allowance for the trouble and loss of time incurred by the rescuing tugs. On that basis, which we believe to be correct, the compensation awarded the Alice was not illiberal. Indeed, it appears ample in comparison with awards in other cases of the class to which this belongs, where the aided ship was not in imminent peril. The Rialto (D. C.) 15 Fed. 124; The John Swan (D. C.) 50 Fed. 447; The Dauntless (D. C.) 109 Fed. 912; The Fred E. Scammell (D. C.) 133 Fed. 608.

Affirmed.

In re BLUM.

BLUM et al. v. HOUSER.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1917.)

No. 2378.

BANKRUPTCY ⇐447—DECISION ON REVIEW—CONSTRUCTION.

On June 9th the referee made an order restraining the petitioners from transferring certain money. On June 30th he made another order requiring petitioners to turn over such money to the trustees. One of the petitioners sought to review and reverse both orders through separate petitions addressed to the District Court. Both petitions were heard at the same time, and but one order dated November 20, 1911, made "adjudging that the said orders dated June 9, 1911, and June 30, 1911, be, and the same are hereby, in all things affirmed." Thereafter petitioners secured a review by this court which adjudged that "the order or decree of the said District Court entered in this case November 20, 1911, be, and the same is hereby, reversed." *Held*, that the decree of this court vacated both orders.

Petition to Review and Revise Order made by the District Court of the United States for the Western District of Wisconsin.

In the matter of David Blum, bankrupt. Petition by David Blum and another against Walter L. Houser, trustee in bankruptcy, to review an order of the District Court confirming an order of the referee. Order vacated.

Andrew Gilbertson and Moritz Wittig, both of Milwaukee, Wis., for petitioners.

Richmond, Jackman & Owen, of Madison, Wis., for trustee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge. A previous order of this court made in this bankruptcy matter when another order was reviewed, disposes of the only question now presented for determination.

Upon an involuntary petition being filed against the bankrupt, David Blum, and an adjudication in bankruptcy following, a reference was ordered and a trustee appointed. At the creditors' meeting, the bankrupt was examined in open court and the referee concluded that certain transfers had been made by the bankrupt to his wife in fraud of creditors. It further appeared that the wife disposed of the property so conveyed, and the proceeds were deposited in a bank in the city of Milwaukee.

Both petitioners were then present at the examination, and the referee made the following announcement:

"On the testimony so far before the referee, it seems to me that the $3,300 received by Mrs. Blum is the property of the bankrupt, David Blum. She is ordered not to use any of that money, not to use that money for any personal purpose, and that she be ordered to turn it over to the trustee in this matter forthwith."

On June 9, 1911, a formal written order was signed, the effect and intent of which was to embody therein the oral announcement of May 31st. That order reads as follows:

"Now, therefore, it is hereby ordered that David Blum and Nettie Levy Blum and their agents be and they are hereby enjoined and restrained from in any manner transferring or disposing of the sum of $3,300, being the money received from Joseph J. Schwartz and Bertha Schwartz, his wife, and being the proceeds of the sale of a certain moving picture house in Milwaukee, Wis., until the further order of this court. This order to take effect and be in force as of the 31st day of May, A. D. 1911."

Upon the same day an order was made requiring petitioners to show cause why the money realized by Nettie Blum from the sale of the moving picture business should not be immediately turned over to the trustee. Objection was made that the referee was powerless to pass upon the title to this money in a summary proceeding, but the objection was overruled, and an order bearing date June 30, 1911 was made, the essential part being as follows:

"Second, it is ordered that the said Nettie Levy Blum and David Blum forthwith turn over to the said Walter L. Houser, in his capacity as trustee in the estate of David Blum, bankrupt, the sum of $3,000, being the amount

of money originally invested in the moving picture business in Milwaukee, Wis., by the said David Blum, and which said investment was returned and paid on or about the 16th day of May, A. D. 1911, by Joseph Schwartz."

The petitioner Nettie Blum sought to vacate both orders above quoted through separate petitions to review and revise, addressed to the District Court. Both petitions were heard at the same time, and but one order was made, the material part of which was as follows:

"The review of the orders of the referee, dated June 9, 1911, and June 30, 1911, coming on to be heard and argued by counsel, in consideration whereof, and upon the record in this matter, it is adjudged that the said orders dated June 9, 1911, and June 30, 1911, be, and the same are hereby, in all things affirmed.

"Dated November 20, 1911."

Thereupon the petitioner Nettie Blum secured a review by this court of the order made on November 20th, with the result that such order was reversed and vacated. See opinion of this court in 202 Fed. 883, 121 C. C. A. 241.

The trustee thereafter assailed the transfer from husband to wife in a plenary action wherein a money judgment was sought in an amount equal to the sum realized from the sale of the moving picture business referred to in the foregoing orders. The action was tried before the court and a jury, and judgment was rendered in favor of the trustee, and against the petitoners herein for $3,875.78. Upon the marshal returning the fieri facias wholly unsatisfied, proceedings were instituted before the referee, resulting in an order the validity of which is challenged by this proceeding to review and revise.

After failing to collect its judgment against the petitioners, trustee applied to the referee for an order directing petitioners to pay over the amount of money in their possession May 31, 1911, that was realized from the sale of the moving picture business. This application was based upon the oral order of May 31st, followed by the written order of June 9th, which it was claimed had remained in force unmodified from the date of its entry.

Petitioners opposed the trustee's application, and therein asserted among other claims, that this order of June 9th had been vacated by this court in the proceedings heretofore referred to, and the referee was powerless to enforce it. The referee overruled the petitioners' answer, and ordered them to answer to the merits within five days. On review, this order was confirmed by the District Court, and it is this last order that is now under consideration.

The order here in question must be sustained, if at all, upon respondent's claim that the original order of June 9th was not vacated by this court. In other words, it must be conceded that, if the order of June 9th was vacated by this court on the previous hearing, then the order under present consideration must be vacated.

The order attacked in this court on the previous hearing was the order of November 20th, heretofore set forth, which order particularly confirmed not only the order of June 30th, but also the order of June 9th. The direction of this court in respect thereto was as follows:

"The decree of the District Court must be reversed, with directions to vacate the same and release further jurisdiction of the summary proceeding."

The mandate of this court is as follows:

"On consideration whereof it is now ordered, adjudged, and decreed by this court that the order or decree of the said District Court entered in this case November 20th, 1911, be, and the same is hereby reversed with costs; and that the said District Court vacate same and release further jurisdiction of the summary proceeding."

Both the order of June 9th and the order of June 30th were made in a summary proceeding.

Respondent admits that the decree of this court vacated and set aside the order of the referee bearing date June 30th. No reason is advanced and none is apparent why the order of this court vacating the order of the District Court bearing date November 20th should vacate the order of the referee made on June 30th, and not vacate the order of June 9th. There can be no escape from the conclusion that this court on the previous hearing vacated the order of the District Court made on November 20th, which in turn vacated the orders of the referee made on June 9th and on June 30th.

It follows, therefore, that the order of April 3, 1916, here under consideration must be vacated, and the proceedings before the referee to enforce the order of June 9th dismissed.

It is so ordered.

MYERS v. HALLIGAN, Warden of United States Penitentiary, et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2869.

HABEAS CORPUS ⊂⊃4—GROUND OF RELIEF—WANT OF JURISDICTION.

One convicted may not be released on habeas corpus because tried while an escaped insane patient, this not depriving the court of jurisdiction, so trying him being, at most, error for which appeal is the remedy.

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

Habeas corpus by Charles Myers against O. P. Halligan, Warden, and another. From an adverse judgment, petitioner appeals. Affirmed.

Van M. Dowd, of Tacoma, Wash., for appellant.

Clay Allen, U. S. Atty., of Seattle, Wash., and Geo. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for appellees.

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

WOLVERTON, District Judge. On November 21, 1914, the petitioner herein was brought before a United States commissioner for trial, on a charge of obtaining money under false pretenses, and, having entered a plea of insanity, the trial proceeded. The jury impaneled in the cause found that Myers was insane at the time, and he was ac-

cordingly committed to the Morningside Sanitarium, at Portland, Or., on May 6, 1915. He escaped from that institution in June, and was next in evidence at Tanana, Alaska, in July, 1915. He was later arrested and put on trial for the offenses of which he was convicted. The judgment shows that he was indicted February 19, 1916, that the offenses with which he was charged were committed October 3, 1914, near the time of the commission of the offense for which he was previously tried, and that he was committed to the penitentiary at McNeil Island for the aggregate term of five years. The proceeding now inaugurated and pending is designed to liberate him from prison.

The principal, and in reality the only, ground relied upon for his liberation is that he could not be lawfully tried while an escaped insane patient.

We think the plain answer to the contention is that the fundamental underlying principle of the writ of habeas corpus is that it is not in any sense a writ of error, and cannot be used to correct mere irregularities in procedure.

"No court," says the Supreme Court in Kaizo v. Henry, 211 U. S. 146, 148, 29 Sup. Ct. 41, 42 (53 L. Ed. 125) "may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering its proceedings void."

Or, as concisely stated in the headnote to Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849:

"The writ of habeas corpus cannot be used for purposes of proceedings in error; the jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law."

See, also, Glasgow v. Moyer, 225 U. S. 420, 32 Sup. Ct. 753, 56 L. Ed. 1147, and Ex parte Spencer, 228 U. S. 652, 33 Sup. Ct. 709, 57 L. Ed. 1010.

The petitioner files his own petition for the writ, not by another; and neither in his petition nor in a lengthy affidavit filed in its support does he pretend that he was insane or non compos at the time of the trial at which he was convicted.

The trial, it will be noted, was upon different charges from the one preferred against him at the trial on which he was adjudged insane. He therefore was in a position to interpose the defense of insanity in the later case as well, or the defense, if it amounted to such, that he was an escaped insane person, and if he neglected to do so, it was a matter of his own choosing. That court was competent to try all these matters, and if it erred touching the same, the petitioner's remedy was by appeal therefrom, and not by writ of habeas corpus. That he might have been insane at the time of the commission of the offenses with which he was charged, or at some time had been adjudged insane and had escaped from his place of confinement without a regular discharge, affords no reason why the court was without jurisdiction to try him on the later charges. Insane persons are brought into court every day, and their cases are humanely and properly disposed of without resort to habeas corpus. We are unable to see that the petitioner here is any exception to the general rule.

Judgment affirmed.

MINER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 27, 1917.)

No. 2236.

1. CRIMINAL LAW ⟸979(2)—SENTENCE—IMPOSITION AFTER TRIAL TERM—JURISDICTION.
   Jurisdiction to impose sentence at a term after the trial term is retained, where the court's purpose in postponing sentence is not to pardon or parole, but is incident to the administration of justice within its powers, and its orders of postponement are unconditional and for definite periods.
2. CRIMINAL LAW ⟸1144(17)—APPEAL—PRESUMPTION—REASONS FOR POSTPONING SENTENCE.
   Regarding jurisdiction to impose sentence after the trial term, notwithstanding postponements from term to term, indicated to be unconditional, applied for by defendant and opposed by the government, it must be presumed that they were for a lawful purpose; the reasons not appearing of record.

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

John Read Miner was sentenced on plea of guilty, and brings error. Affirmed.

George C. Bradshaw and Thomson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, Asst. U. S. Atty., of Pittsburgh, Pa., and Neil W. McGill, Asst. U. S. Atty., of Cleveland, Ohio.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. John Read Miner was indicted for violating section 5209, Revised Statutes (Comp. St. 1916, § 9772). On March 11, 1915, he entered a plea of guilty. Sentence was deferred to May 1, 1915. Thereafter sentence was postponed on the application of the defendant from term to term for three terms, recognizance being required and given at each term for his appearance at the next. On January 15, 1917, he was called for sentence. In response, he filed a motion in arrest of judgment. Upon its denial, sentence was imposed. He now brings this writ and raises the question: Whether the court, by failing to impose sentence at the trial term, lost jurisdiction to impose sentence at a later term.

In support of his contention that the postponement of sentence beyond the trial term, though on his motion, deprived the court of jurisdiction to impose sentence upon him at any other term, the defendant cites for authority Ex parte United States (Killetts), 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, Ann. Cas. 1917B, 355, and numerous state decisions, holding that a court is without power to suspend a sentence once imposed, and similarly is without power to suspend the imposition of sentence, conditioned, in either instance, upon the good behavior of the prisoner or upon the future attitude of the court toward him.

These decisions are based upon the principle that the penalty for a crime is a matter within the legislative department of the government, the imposition of the penalty by sentence is the function of the judicial department, to be performed as prescribed, and relief therefrom by pardon is exclusively within the executive department. This principle, of course, is not open to dispute. The questions are, when is the principle invaded, and what is the effect of its invasion upon the further jurisdiction of the court over an offender?

It is now very generally held that the principle is invaded when a court, by an act done either before sentence or after, attempts to pardon a convict, or to parole him when it is not vested with power of parole, or to parole him in a manner different from that provided by law. That such an act is beyond the jurisdiction of a federal court and therefore invalid, has lately been decided by the Supreme Court in the Killetts Case. There the prisoner had been convicted and sentence had been imposed. The court then ordered, "that the execution of the sentence be, and it is hereby, suspended during the good behavior of the defendant, and for the purpose of this case the term of this court is kept open for five years." The Supreme court held the order invalid and directed that it be vacated.

While it is no longer questioned that an order of suspension either of sentence or of the imposition of sentence in the exercise of a power of pardon or parole not possessed by a court is invalid, the courts are divided upon the question of the legal effect of such an invalid order upon the continued jurisdiction of a court to impose or enforce a sentence after the term, some holding that jurisdiction is lost by the illegal act, others that it is retained.

In State of Kansas v. Sapp, 87 Kan. 740, 125 Pac. 78, 42 L. R. A. (N. S.) 249, the court recognized the general rule that where a verdict or plea of guilty is final, a court has no discretion, as a disciplinary measure, to suspend the imposition of sentence, and held, that the legal effect of the exercise of such discretion by suspending the imposition of a sentence, indefinitely or conditionally, is to deprive the court of jurisdiction to impose sentence at a later term. Other courts have held the same view with reference to sentences imposed and conditionally suspended. United States v. Wilson (C. C.) 46 Fed. 748; Ex parte Clendenning, 22 Okl. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628; Ex parte Peterson, 19 Idaho, 433, 113 Pac. 729, 35 L. R. A. (N. S.) 1067; In re Strickler, 51 Kan. 700, 33 Pac. 620; Gray v. State, 107 Ind. 177, 8 N. E. 16; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482; Weaver v. People, 33 Mich. 296; Grundel v. People, 33 Colo. 191, 79 Pac. 1022, 108 Am. St. Rep. 75; Re Flint, 25 Utah, 338, 71 Pac. 531, 95 Am. St. Rep. 853; People v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 472; People v. Barrett, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230; State v. Hockett, 129 Mo. App. 639, 108 S. W. 599; In re Beck, 63 Kan. 57, 64 Pac. 971.

Opposed to this line of cases is another, in which the invalidity of an order conditionally postponing or suspending sentence is similarly recognized, but an opposite view of its effect upon the court's juris-

diction is entertained. In these cases it is held, in effect, that the order, being illegal, is so, not because it is irregular or technically defective, but because it is beyond the power of the court, and being for that reason void, the conviction or sentence stands, unaffected by the order, and is enforceable by the court at any time after the term, and until the convict has suffered the penalties the law imposes. Morgan v. Adams, 226 Fed. 719, 141 C. C. A. 475; State v. Abbott, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189; State v. Drew, 75 N. H. 402, 74 Atl. 875; Sylvester v. State, 65 N. H. 193, 20 Atl. 954; State v. Hatley, 110 N. C. 522, 14 S. E. 751; State v. Whitt, 117 N. C. 804, 23 S. E. 452; Tanner v. Wiggins, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718; Fuller v. State, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242, Ann. Cas. 1914A, 98.

[1] From this brief survey of the cases it is pertinent to note, that the question before us as to the jurisdictional effect of the court's orders postponing sentence from term to term is controlled by the validity or invalidity of the orders, and the validity of the orders is determined by their character and purpose. If, in this case the purpose of the District Court in postponing sentence was to pardon or parole the defendant, then we have to decide whether the court had jurisdiction to impose sentence at a later term. If, on the other hand, the court's purpose was incident to the administration of justice within its conceded powers, and its orders postponing sentence were unconditional and to definite periods, then we have no jurisdictional question before us, for all courts agree that in such a case jurisdiction to impose sentence at a term after the trial term is retained.

[2] What then does the record show as to the validity of the orders? The record shows that sentence was regularly postponed from term to term, recognizances given and appearance made. The postponements, therefore, were entirely definite. They were made in each instance upon application of the defendant and against objection by the government. Hence we must assume that some reasons for the postponements were offered and controverted by the parties, and in that sense were litigated before and decided by the court. The reasons for the postponements do not appear of record. We cannot assume that they were not substantial.

There is nothing to show that the postponements were conditional. On the contrary, the proceedings clearly indicate that they were unconditional. If the court was moved by impulse to postpone sentence, it does not so appear. We should not assume that it was actuated by improper or unlawful considerations. Nor does the court's purpose appear. But every legal intendment favors the notion that it had a purpose and that the purpose was lawful. In fact, we must assume, in the absence of anything in the record to the contrary, that the postponements were made for a lawful purpose in the orderly progress of the case. This being true, the validity of the orders postponing sentence is established, leaving for decision no question of the court's jurisdiction to impose sentence at a later term.

The judgment below is affirmed.

SCHAEFFER v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 27, 1917.)

No. 2237.

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

Christian F. Schaeffer was sentenced on plea of guilty, and brings error. Affirmed.

George C. Bradshaw and Thomson & Bradshaw, all of Pittsburgh, Pa., for plaintiff in error.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., and Neil W. McGill, Asst. U. S. Atty., of Cleveland, Ohio.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This writ raises the question decided in Miner v. United States, 244 Fed. 422, — C. C. A. —. On authority of that case, it is ordered that the judgment below be affirmed.

CITIZENS' COAL & SUPPLY CO. v. CUSTARD.

(Circuit Court of Appeals, Fourth Circuit. July 19, 1917.)

No. 1539.

1. BANKRUPTCY ⊂⊃140(1)—PROPERTY—PASSING OF TITLE.
   Representation of purchaser in contract of sale of cement that it would be used in construction of a certain building which he had contracted to build is, at most, a promise the breaking of which by reason of his becoming bankrupt did not affect title to such cement as was delivered, which therewith passed to him, and thereafter vested in the trustee in bankruptcy.

2. SALES ⊂⊃474(2)—CONDITIONAL SALES—EFFECT AS TO BUYER'S CREDITORS—RECORDING.
   By provision of Code 1913 West Va. c. 74, § 3 (sec. 3831), to entitle seller of personalty delivered to purchaser to benefit of reservation of title till price is paid as against buyer's creditors, the contract must be recorded.

Appeal from the District Court of the United States for the Southern District of West Virginia, at Bluefield.

Proceeding in bankruptcy by the Citizens' Coal & Supply Company against J. H. Custard, trustee of the Bluestone Construction Company, bankrupt, to reclaim property sold by said Company to bankrupt. From a judgment confirming decision of the referee in bankruptcy in favor of the trustee, the seller appeals. Affirmed.

Russell S. Ritz, of Bluefield, W. Va., for appellant.

W. E. Ross, of Bluefield, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In October, 1916, the parties named therein made this contract:

"Citizens' Coal & Supply Company, of Bluefield, W. Va., hereinafter called the seller, sells, and Bluestone Construction Company, of Bluefield, W. Va..

hereinafter called the purchaser, purchases, Lehigh Portland cement on the following terms and condition:

"The purchaser does hereby represent to the seller that twelve hundred (1,200) barrels of cement are to be used in the construction of State Normal School building, Short Creek, W. Va., for which construction the purchaser has contract, and that he hereby purchases twelve hundred (1,200) barrels of Lehigh Portland cement from the seller for use in such work, and that no portion thereof will be used for any other purposes. * * *

"If the purchaser shall fail to comply with any of the terms, conditions, or limitations of this contract, or if any of the purchaser's representations herein are untrue, the seller may cancel this contract or any portion thereof, or any other order given to the seller by the purchaser, and such cancellation shall in no wise release the purchaser from unpaid accounts or from liability to said seller at the contract price for cement delivered prior to such cancellation."

Other provisions, not in dispute, relate to price, terms of payment, time and place of delivery, and the like.

Under this contract two carloads of cement were delivered, one in December, 1916, the other in January, 1917, and the purchaser stored the same on the premises where the school building was to be erected. On February 10, 1917, the purchaser, Bluestone Construction Company, was adjudicated bankrupt on its own petition, and a few days later Custard, the appellee, was appointed and qualified as trustee. At that time little or nothing had been done towards the construction of the building, except to make the excavation, and the bankruptcy of the contractor resulted in a total abandonment of the contract. The trustee took possession of the cement that the bankrupt had received and refused the seller's demand for its return. In a proceeding to reclaim the property the referee in bankruptcy decided in favor of the trustee, and his ruling was confirmed by the District Court. The seller appeals.

[1] It seems evident that the sale in question was absolute, and not conditional. The contract imports an absolute sale and contains no reservation of title express or implied. Credit was not obtained by the misrepresentation of any existing fact, either as to the solvency of the purchaser or otherwise. The cement was sold on time because, as the active partner of appellant testifies:

"We had done business with Mr. Lucas [the manager of the bankrupt concern] previous, and always found him very prompt in paying his bills."

In short, the sole basis of the asserted right to reclaim was the failure, brought about by bankruptcy, to use the cement furnished in erecting the building for which it was procured. But the "representation" that it would be so used was, at most, a promise to be kept in the future, the breaking of which in the manner shown did not and could not affect the purchaser's title. Indeed, we deem it too plain for argument that the title to this cement passed with its delivery to the construction company, and thereafter became vested in the trustee by virtue of the Bankruptcy Act.

[2] Nor would it aid the appellant to treat the contract in question as conditional, since in that case it would be void as against creditors for want of record under the stringent provisions of section 3, c. 74, of the Code of West Virginia (sec. 3831). The decision in Hyer v.

Smith, 48 W. Va. 550, 37 S. E. 632, is conclusive upon this point, the syllabus reading as follows:

"To entitle a vendor of personal property to the benefit of the reservation of title as security for the purchase money thereof, as against creditors and purchasers, under section 3, c. 74, an agreement or contract must be made cotemporaneously with the sale, or before the delivery of possession of the property, between the vendor and vendee, that such reservation shall be made, and such reservation recorded."

It is sufficient to add that under the amendment of 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840, amending Act July 1, 1898, c. 541, § 47, 30 Stat. 557 [Comp. St. 1916, § 9631]):

The trustee of a bankrupt. "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."

In our judgment, the title of appellee to the cement in controversy is not open to dispute.

The decree appealed from is affirmed.

GALION IRON WORKS CO. et al. v. OHIO CORRUGATED CULVERT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 3002.

1. INJUNCTION ⟸118(4)—SUIT TO ENJOIN ACTIONS AT LAW—SUFFICIENCY OF BILL.

A bill filed by the defendant in five actions at law in the same court brought by different territorial licensees for infringement of the same patent, alleging that all the actions involved the same questions, and praying that all be stayed except one to be selected and tried as a test case, *held* not to state a cause of action for equitable relief; there being no allegation that the several plaintiffs had refused to join in making a test case, and it not appearing that the court could not on motion in the law cases so regulate their hearing as to prevent hardship or oppression.

2. DISCOVERY ⟸9, 19—IN EQUITY—NECESSITY FOR EVIDENCE.

It is essential that a bill of discovery disclose a substantial necessity for the relief, and such a bill in aid of a defense at law cannot be maintained with the result of delaying the orderly prosecution of the action at law, where complainant is in possession of ample proof of the allegations in aid of which the evidence is sought, or where such evidence is plainly cumulative or comparatively unimportant.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; John H. Clarke and John M. Killits, Judges.

Bill in equity by the Galion Iron Works Company and others against the Ohio Corrugated Culvert Company and others. From a decree dismissing the bill, complainant appeals. Affirmed.

Complainant below, the Galion Company, was engaged in manufacturing and selling, throughout the United States, a corrugated steel culvert. A patent touching this subject-matter had been issued to James H. Watson, and he

had subdivided the United States into 31 districts, granting 31 licensees the exclusive right to make, use, and sell the invention within their respective districts. The patent having expired, the Ohio Corrugated Culvert Company brought a suit at law against the Galion Company in the court below for infringement of this patent through sales made by the Galion Company within the exclusive territory of the Ohio Company. Four others of these territorial licensees brought, in the same court, four other similar suits. Thereupon, the Galion Company filed in the same court a bill in equity making defendants thereto all the territorial licensees, and praying, first, that four of the pending suits, and the twenty-six other suits alleged to be threatened by the other licensees, be enjoined pending the hearing and disposition of one case to be selected as a test case, by the result of which the others must abide; and praying, second, discovery of various matters said to be essential to the making of the proper defense to the suits at law. No one of the five plaintiffs, in the suits brought, was a resident of Ohio or had any agent therein upon whom service of process could be made; but, upon the theory that the bill was ancillary to the suits at law, complainant made a motion for an order that service be directed upon the plaintiffs' counsel of record in the lawsuits. A motion was also made for leave to file interrogatories and for an order that answers be made thereto. In opposition to these motions, it was insisted that the bill did not state a case entitling the complainant to any relief in equity, and the District Court, being convinced that this view was correct, dismissed the bill. The Galion Company brings this appeal.

Harry Frease, of Canton, Ohio, for appellants.
George Mankle, of Chicago, Ill., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] In so far as injunction was sought against the prosecution of more suits than one, and by analogy to the nomenclature most nearly appropriate, this may be named a bill of peace. Assuming to the fullest extent complainants' general theories of this particular remedy, we agree with the court below that the facts here disclose no sufficient reason for the exertion of the powers of a court of equity through an independent bill. The apprehended suits were threatened by parties not within the jurisdiction of the court, and against whom there could be no relief. The five existing suits were pending in the same court before the same judge. There is no satisfactory and sufficient allegation that the several plaintiffs declined to enter into any reasonable arrangement whereby one suit should become a test case; nor, if the allegations on this subject be thought sufficient, does any reason appear why the court would not, upon motions in the law cases, regulate their hearing so as to prevent hardship or oppression. If it be true that all the licensees had a common interest in all the cases in that each suit is in fact prosecuted for the benefit of all—as is now claimed—this fact can be developed without difficulty as other facts are proved in cases at law, and a judgment in one case would become an adjudication in the others. Penfield v. Potts (C. C. A. 6) 126 Fed. 475, 61 C. C. A. 371; Greenwich Co. v. Friedman (C. C. A. 6) 142 Fed. 944, 74 C. C. A. 114. Indeed, counsel for appellees on the hearing in this court offer to join in any reasonable stipulation to make one case the test of others, or to use in one proofs in another, and we assume that

they will, in the court below, adhere to this offer. Upon the whole and upon this branch of the case, we see no sufficient basis for the suit.

[2] Coming to the subject of bills of discovery: For the purposes of this opinion, but without deciding, we may assume that appellants are right in their positions, which they base upon Carpenter v. Winn, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842. See, also, Cheatham Co. v. American Co. (D. C.) 198 Fed. 496; General Film Co. v. Sampliner (C. C. A. 6) 232 Fed. 95, 146 C. C. A. 287. These are: (1) The jurisdiction of a federal court of equity continues unimpaired to entertain a bill for discovery only filed in aid of the claim, affirmative or negative, made in another suit by the party who files the bill; (2) the various existing methods to procure evidence in proceedings at law are not "remedies," as that word is used in R. S. § 723 (Comp. St. 1916, § 1244); and (3) the cases like Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508, and United States v. Bitter Root Co., 200 U. S. 451, 26 Sup. Ct. 318, 66 C. C. A. 652, which intimate that it must appear that the evidence can be obtained in no other way, were cases brought for discovery and relief, and, consequently, are not pertinent. Conceding all these contentions and the further claim that the right in a proper case to have a decree for discovery is absolute and not discretionary with the court (Bell v. Pomeroy, Fed. Cas. No. 1,263), it still must be essential that the bill disclose a substantial necessity for the relief. There is neither precedent nor—as we think—reason for the institution of an independent proceeding in equity, delaying or tying up the orderly prosecution of a suit at law, if the only thing to be gained is the disclosure of evidence comparatively unimportant or merely cumulative. This bill discloses that the Galion Company is in the possession of ample and satisfactory proof of a great part of the things alleged; but, as to the remainder (and with one exception), it seems to pertain to matters which are relatively unsubstantial or are plainly cumulative. More specifically, the Watson patent has been sustained by the Court of Appeals for the Second Circuit. Its opinion discloses that the widespread public adoption of the device was an element of importance in determining that the invention was patentable.

The present bill alleges that this public adoption, and such public acquiescence in the patent as there was by decree or otherwise, resulted from other causes than the merits of the patent, e. g., combinations and promotive plans among the territorial licensees, payments and concessions to induce the cessation of any infringement and to procure consent decrees, the control through another patent of the only suitable material, etc., and it sets out much evidence of the same class and to the same effect already in the possession of the Galion Company. The careful analysis of the bill, found in appellant's brief, shows that seven of the eight points covered pertain each to an item of evidence tending to establish some one of these facts, which fact, in turn, tends to discredit the drawing of any presumption of patentable novelty from the history of the public adoption of the patented article, but no one of which is controlling as to the ultimate inference. We are clear that such things are beyond any scope which, under the most liberal construction, can now be permitted for bills of discovery.

The eighth point pertains to the common interest of all licensees in every suit by any one of them, and this can be material only because it may disclose a lack of right by one licensee to sue alone or because a judgment in one case will be a bar to the others. As to the first reason, in that event the bill would affect the title of the adverse party, and be a fishing bill. As to the second, there is no room to claim a former adjudication, until there has been a judgment, and the Galion Company's rights are protected by the control which the law court has over the five pending suits.

The decree below is affirmed.

INVENTIONS CORP. v. HOBBS et al.

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

No. 259.

1. CORPORATIONS ⟸548(9)—GRANT OF LICENSES UNDER PATENTS—KNOWLEDGE AND INTENT OF LICENSEE.

A judgment creditor of a corporation which was the owner of patents, *held*, on the evidence, not entitled to the cancellation of certain license contracts made by the company pending the action which resulted in the judgment as having been made to hinder, delay, and defraud creditors, the action being one at law which left the corporation free to contract, and it appearing that the licensees acted in good faith for their own interest and paid a substantial and reasonable amount under all the circumstances for the rights secured.

2. CORPORATIONS ⟸523—PROCEEDINGS SUPPLEMENTARY TO EXECUTION—SERVICE—FRAUDULENT RESIGNATION OF OFFICERS.

Code Civ. Proc. N. Y. §§ 2468, 2469, provide that the property of a judgment debtor vests in a receiver appointed in supplementary proceedings from the date of his appointment, and that when it has become so vested it relates back for the benefit of the judgment creditor in case an order requiring the debtor to appear for examination has been served to the date of such service. In such a proceeding against a nonresident corporation service of an order for examination was made on a resident who had been and was still supposed to be the president and a director of the defendant, and he appeared with counsel without objection. He had previously resigned as president, and his resignation had been accepted. He had also later sent his resignation as director, which was not accepted until afterward. The resignations were part of a fraudulent scheme to prevent the collection of the judgment. The proceedings resulted in the appointment of a receiver. *Held*, that whatever the effect of the fact that his resignation as director had not at that time been accepted might have as between him and the corporation, the resignation was not effective as against the judgment creditor, and the service on him was a valid service on the corporation, and carried back the receiver's title to that date to the exclusion of that of a trustee in bankruptcy appointed in voluntary proceedings instituted more than four months thereafter.

3. EXECUTION ⟸409—SUPPLEMENTARY PROCEEDINGS—RECEIVERS—SALE OF PATENTS.

While a receiver in supplementary proceedings may not, by virtue of his appointment, acquire title to patents so as to enable him to execute a

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

valid assignment to a purchaser, a court of equity has power to order such assignments made by the proper person.

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

Suit in equity by the Inventions Corporation against John H. Hobbs, Harris Hammond, Clyde H. Slease, Lewis C. Van Riper, the Continental Motion Picture Company, Incorporated, the Vanoscope Company, Incorporated, and Henry B. Singer, as trustee in bankruptcy of the Vanoscope Company. From the decree complainant appeals. Modified and affirmed.

See, also, 233 Fed. 53, 147 C. C. A. 123; 244 Fed. 445, — C. C. A. —.

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

The turning point of this case on the merits is whether the two contracts of May 9, 1914, and April 10, 1915, were in fraud of Robinson. It is of no consequence whether Hobbs and Hammond had earlier designs upon the stock of the Vanoscope Company which might have conflicted with Robinson's contract. If there is no evidence that the license agreements obstructed the collection of Robinson's claim, then this case must fail, regardless of other consideration. This claim before May 9, 1914, had become no more than for money, and later resulted in a judgment for money; obviously, there could be no fraud affecting the judgment which did not diminish the value of the property of the Vanoscope Company subject to be reached in execution. Now it is true that the Vanoscope Company under the contract parted with the right to exploit its patent except for the manufacture of home machines, and that this was the practical equivalent of an assignment to that extent of its rights. As the patent could have been made available upon Robinson's claim—though not subject to levy under execution—and as the license agreements prevented him from getting the benefit of the full value of the patents upon sale or the like, certainly it is true that they hindered and delayed him prima facie in his rights as a creditor. Yet these same agreements contained considerations, which gave the Vanoscope Company certain rights having more than merely a colorable value, and therefore the case is not one where the contract is a mere device to cover a gratuitous grant. The intent to hinder creditors does not follow necessarily from such agreements; it must independently appear that they were made with that intent. That Robinson should be hindered in his remedies against the patents would equally follow from any sale, yet the sale would not be fraudulent if the consideration was reasonably sufficient and equally available to him. In such cases it must appear that the parties were actuated by a desire to prevent the creditor from getting as much as he otherwise would, and that without added trouble.

There is no such proof respecting the first agreement, that of May 9, 1914. The payment down of $50,000 for a patent which had never been exploited, and which depended absolutely for any value upon its future success would alone suggest that the parties were not concerned in defrauding Robinson. The plaintiff urges that I must suppose that Van Riper appropriated this money, and that Hobbs & Hammond were in collusion with him. There is not a whit of evidence remotely suggesting any collusion between Van Riper and the New York Company if Van Riper embezzled the money, and there is indeed no evidence that he did embezzle it, except in so far as one may guess so from its disappearance.

Yet if I were to disregard this initial payment, and consider the contract as though it had not been paid, it would still not give any evidence of fraud. It contemplated the manufacture of 1,000 machines which were to be leased at between $20 and $30 a month. This meant, if the machine turned out a success, a gross return of between $240,000 and $360,000 during the first year of full exploitation. If we take the lower of these two figures the account between the two parties for the first seven years would have been as follows:

Vanoscope Co., Inc.		Vanoscope Company.
Operating expenses	$ 60,000	$240,000
Common dividend	42,000	
	$102,000	
Preferred sinking fund	45,000	
Average preferred stock dividend	10,500	157,500
	$157,500	$82,500

In this account I have figured the average of the preferred stock dividends, since they were to be computed each year upon only so much as the accumulated sinking fund should not cover at 105. I have also disregarded the repayment of $50,000 for the obvious reason that it had already been paid out to Vanoscope Company as advanced royalties. The preferred stock represented the outside amount of capital to be invested, and the provisions for its redemption were certainly intended to repay the New York Company for all expenses of actual manufacture. The redemption provisions were therefore meant to be a way of repaying the expenses of manufacture; at least there was no other. The other expense was of general exploitation of the machines, of "operating" as it was called, which was fixed at 25 per cent. That this was a genuine estimate and not colorable is to be in any case assumed, and is strongly fortified, since it is the tentative figure fixed in the proposed contract between the Johns-Manville Company and the New York Company of the succeeding winter, into the negotiation of which no fraud could possibly have entered.

The result of the contract of May 9, 1914, was therefore that the real profits to the New York Company consisted of 7 per cent. on the preferred stock and 6 per cent. on the common stock of $700,000, which was all water. If the preferred dividend be averaged as above and the stock redemption and "operating" percentage be regarded as genuine expenses, the division if 1,000 machines were leased was $52,500 to the New York Company and $82,500 to the Vanoscope Company. If the machines had any life beyond seven years the division thereafter would have been $42,000 to the New York Company and $138,000 to the Vanoscope Company.

If the machines proved such a success that they could be rented for $30 a month, then the New York Company would have got the same return, but the Vanoscope Company $172,500 during the first seven years and $228,000 if the machine lived thereafter. In the second and third years the New York Company was to make 500 machines a year, and thereafter as many as the public required. The gross rentals on these were to be divided equally, with similar amortization agreements, if new capital were necessary.

It will be observed that the dividends are a first charge upon all earnings. and, as I shall show in another connection, the Vanoscope Company would not begin to make any money until more than 500 machines were leased at $20. It should also be observed that the amortization provision contains a premium of 15 per cent. on the preferred stock which may be sold at 90 and must be redeemed at 105. This adds 2 per cent. a year to the actual profits of the New York Company, or $6,000, and, strictly speaking, their return should figure at an average of $58,500 for the first seven years.

I can see nothing inequitable in this contract as a whole. It could not surely have been expected that capital must be forthcoming upon any such contingent enterprise at the mere return of 7 or 9 per cent. If we look at the common stock dividend as part of the interest, the aggregate rate was 23 per cent., certainly not exorbitant under the circumstances. The company had never put out a machine, had no capital to develop its business, and the value of the patent lay, and for that matter still lies, wholly in supposition. It is quite true that this capital might continue to draw 14 per cent. after it had been repaid, but we have no knowledge of the life of the machines; perhaps no one knew whether they would be of any value even as long as that. If I were compelled merely to guess, I should feel quite sure that the machines would be either disabled or antiquated long before the period fixed. I have

no hesitation in finding that the contract was not in fraud of Robinson, though it was made with full knowledge of his rights and of the action then pending.

Notice should be taken of a feature of the case not mentioned hitherto. Robinson swears that he showed to Hobbs and Hammond in February, 1914, a copy of his contract with Van Riper of October 31, 1912, part of which (article 2) gave him the exclusive agency to sell or lease machines or patents. This contract, though with Van Riper, was perhaps binding upon the Vanoscope Company, considering the control which Van Riper had of it. Hobbs and Hammond dispute Robinson's assertion that he ever showed them this clause of his contract, and I cannot make any certain finding in the case upon this conflict of testimony. The issue is nevertheless irrelevant in any case, because before May 9, 1914, Robinson had sued to recover damages for the breach of his contracts, and his position, therefore, on that date had already precluded him from recovering the stock, to which his rights of agency were only an incident. He had therefore put himself in a position where his right to any exclusive agency in selling machines or giving licenses under the patent had disappeared. Of this election Hobbs and Hammond had full notice, and their contract could not therefore have been in fraud of his rights under the Van Riper contract.

Manufacture under the contract was begun in July or August, 1914, and ten machines were started. None of them turned out satisfactory, and an issue arises as to whether the fault was of the New York Company's manufacturer, Garford, or of the design. It is quite clear that Berger in his letters of October was still experimenting with the machine to obviate a "vertical movement" of the films. Berger now says that the trouble was of the oxidization of the mirrors and of the metal which held them. At that time he did not mention those defects. Upon the conflict, if it be a conflict, between him and Lowenstein, I accept the latter as better qualified to judge, and I find that, regardless of any of the faults due to Garford, the machines had not yet been perfected. This conclusion is corroborated in some measure by two circumstances: First, that at least as late as December, 1913, or January, 1914, they had not been so perfected, for that was the issue in Robinson's suit; and, second, that none have yet appeared upon the market, though the defects mentioned by Berger could have been corrected by changes in material. Moreover, Berger himself made some changes, perhaps improvements to be sure, for which he is trying to get a patent. I am satisfied that the design was not commercially available in 1914.

Even though such were the fact, the plaintiff still insists that the New York Company was obliged to go on and make 1,000 machines or lose its deposit. Such a result would be grotesquely unjust and unreasonable; it would have been the surest way of destroying the patent and the interests of both parties to the agreement, and no court ought to put such a meaning on it unless the rules of law absolutely require it. They do not, because the case is clearly one where the contract was made under a common mistake of fact, each side thinking the machine already perfected in design. The suggested analogy of a sale caveat emptor is not applicable; in such sales there is no common mistake, for the seller knows, though he makes no representation. Moreover, if there is a common mistake, as for instance, regarding the actual existence of the goods, the contract of course may be voided. A seller has no interest in the goods sold after delivery; he cares only for the price. As to him the mistake, even if he shares in it, is not relevant to the transaction, so long as he gives no assurances to the buyer. But in the case at bar the licensor was as much interested as the licensee, because its payment, except the initial advance of $50,000, depended upon the success of the patent. If it had known the fault in design, it could not have intended the licensee to put out 1,000 machines; when it learned of the defect, it did not insist that the licensee should. To suggest that its failure to do so was evidence of fraud seems to me as perverse a position as the plaintiff could assume, and I pass it by.

The agreement of April 10, 1915, was made with a fuller knowledge, if possible, of Robinson's rights than its predecessor. The circumstances of its

execution lend some color to suspicion that it was made against the possibility of a verdict. I think it was certainly made with that prospect in mind and to settle the rights which had arisen under the first contract, but I cannot accept Harding's statement that it was to be used only in case of a verdict. Some new contract was, in any case, necessary between the parties, and the possibility of such a one is foreshadowed as far back as the proposed contract between the New York Company and the Johns-Manville Company. Moreover, it is most unlikely that the drafting was left till April 10, as Harding recalls; the contract is elaborate, and could not be made hastily out of the earlier one. It shows evidence of much care in preparation, and bears the indorsement of Hobbs' lawyers, contrary again to Harding's recollection. However, while I reject the idea that it was intended only for such use, the time of its appearance justifies a close scrutiny of its terms in comparison with those of the earlier contract.

The two are of the same general kind, the New York Company to manufacture and exploit the patent as its exclusive licensee, agreeing to make 1,000 machines within 18 months after the design had become commercially available, with 1,000 additional machines (really at its option) within the following year. The only important distinction between the two is in the division of the rentals which were to be the same as in the earlier. Under the old contract the New York Company was to repay itself the cost of manufacture by an amortization clause redeeming the preferred stock in seven years at 15 per cent. a year. This redemption included also a 15 per cent. appreciation of the stock, which might be issued at 90 per cent. and was to be redeemed at 105 per cent. In estimating the cost of manufacture we should therefore take a yearly allowance of 13 per cent. upon the preferred capital for seven years, or $30,000 a year. This is obviously tentative, but for 1,000 machines as near as we can get. The old contract also allowed 25 per cent. of the gross rentals as expenses of exploitation, which must be admitted, making an added item of $60,000 a year to keep out 1,000 in the hands of exhibitors. Thus there would be a yearly outlay of $99,000 and a net income or profit of $141,000 under the old contract.

We have seen that the average yearly profits of the New York Company amounted to $58,500, which is therefore between 41 per cent. and 42 per cent. of the net profits so calculated. On the face of the second contract this gives place to 66⅔ per cent. of the net profits to the New York Company for the same undertaking as they entered into in the first. But there is one important difference between the two which should be remembered; the New York Company had a priority under the first contract for all its profits, while under the second it had none. The practical results of this are extremely important. Thus under the first contract the Vanoscope Company would have received in average yearly profits only $1,500, although 550 machines were leased for seven years at $20 a month. Under the second contract they would have received an average profit of $20,000 out of the same gross rentals. The New York Company would have received under the first contract $58,500, and out of the second, $40,000. Again, if 700 machines were leased, under the first contract the New York Company would have got $58,500 profits and the Vanoscope Company $28,500, while under the second contract the figures would be, respectively, $58,000 and $29,000. In short, until the rentals exceeded 700 machines, the first contract was not so good for the Vanoscope Company as the second. Thereafter the advantage to the Vanoscope Company of the first contract mounted very rapidly. Yet I cannot see how it is possible now to say absolutely whether this clause of the second contract as a whole was worse or better; obviously that turns altogether on the probability that more than 700 machines should be placed during the first seven years, or the greater part of them.

The difference is not ambiguous, however, respecting the clause regulating the returns on additional machines in subsequent years. Under the first contract there was to be an equal division of gross rentals, with the same amortization clause as applied in the case of the first 1,000 machines, if new capital should be necessary. Under the second contract the same division applied to all subsequent machines as to the first 1,000. Now there was a very

great difference in this provision, and all to the disadvantage of the Vanoscope Company. Moreover, if the patent turned out to be a great success, the first year of its exploitation would be of trifling consequence compared with the subsequent years.

This analysis of the contracts shows, I think, that although the Vanoscope Company was better protected under the second contract, if there were 700 machines or less put out the first year and none the next, yet if the patent proved profitable the advantage would have been enormously increased to the New York Company by the change. It is quite true that the New York Company assumed no duty to make the additional machines under either contract, the right being only an option, which was expressly not to carry any liability if not exercised, yet as an option it had changed so as to be of much greater value. In explanation of this change the defendants urge that it was to fit in with the proposed contract between the Johns-Manville Company and the New York Company, by which the latter was to give up one-half of its 66⅔ per cent. so that it shared equally with the Vanoscope Company. That is true, but it should be remembered that in so doing it avoided the obligation to supply capital for manufacture and to exploit the patent. The result of its arrangements with both companies was that the New York Company would get one-third of the net profits for securing such a contract from the Johns-Manville Company. I cannot therefore see that the proposed contract with this third party helps very much to a solution of the question of fraud.

That question should be regarded in two aspects: First, whether the second contract as a whole was worse for the Vanoscope Company; second, if so, whether such a change is evidence of fraud. The first question turns upon what were the prospects of success; the change was from a priority of limited profits to a higher percentage without priority. Obviously, the choice between these two depends altogether upon what the parties thought of the certainty of success. If the patent turned out only a moderate success, the change was a benefit to the Vanoscope Company; if it would continue to be used for many years, they would be serious losers. The patent had not turned out successful hitherto; there was genuine doubt whether it could ever be made available commercially, and, if so, how profitable it would be. To say even now how much the New York Company got for what it gave up seems to me impossible. It is quite true that people do not go into such enterprises except upon the hope of great prizes, but it is equally true that they know the great prizes are necessarily contingent, and that they insist upon a discount proportionate to their risk.

But assuming that the change was for the worse, it does not by any means follow that it was the result of fraud. The Vanoscope Company was in no position to compel the New York Company to go on with the existing contract. They had failed to produce a commercial machine, and could not possibly say when such a machine would be forthcoming, or whether it ever would. The New York Company had the right to go on at the old terms if it would, or it might repudiate the contract and do what it could to recover its $50,000 out of the patent, but it certainly was not obliged to go on with the contract as it stood. This was a situation giving room for a new contract, and as such the second contract does not seem to me fraudulent or unfair. The Vanoscope Company had no capital, and no financial support; it was in trouble with Robinson who might have, and did get, a large judgment against it. Its only asset, its patents, had no value without capital, whoever owned them, Robinson or some one else; they were untried, indeed, not even adjudicated; they had been quite unsuccessful; therefore I cannot see how I am to say that the procuring of such support as the Johns-Manville Company was willing to give through the mediation of the New York Company would not have been worth two-thirds of the net profits. Without something of the sort there would have been no profits at all to divide. It does not appear that Robinson could have done better. Whatever went on in the hearts of the defendants, I can find no evidence in the case which would justify a finding of fraud in the change, and I decline to find it. Indeed, such a finding would, at most, do no more than reinstate the contract of May 9, 1914, with leave to the New York Company to manufacture as soon as it developed a commercial ma-

chine. I do not even know whether this would suit the plaintiff, but in any case there is no evidence on which to base it.

I have preferred to consider the substance of the controversy rather than to endeavor to pick a way for the plaintiff through the legal obstacles in his path. It is extremely doubtful whether Truett's resignation can be disregarded or whether, if it can, this bill may be tacked on to the supplementary proceedings under the rule in Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. Still the New York courts have at times spoken as though the supplementary proceedings were the equivalent of such a bill (Lynch v. Johnson, 48 N. Y. 27), and perhaps this bill should be taken as a continuation of the supplementary proceedings. None of these questions is involved in the view I take of the merits.

Bill dismissed, with costs.

Hector M. Hitchings, of New York City, for appellant.

Wellman, Gooch & Smyth, of New York City (William A. Redding and Frederic C. Scofield, both of New York City, of counsel), for appellees.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. To understand clearly the questions here in issue, it is desirable to divide the controversy into two parts: (1) That relating to the effort to set aside certain license agreements; and (2) that relating to the character in law of certain proceedings following the obtaining of certain judgments by plaintiff's assignor.

[1] First. Plaintiff is the assignee of one William J. Robinson, Miriam E. Robinson, Hector M. Hitchings, and Irving E. Burdick, of their respective interests in a judgment recovered by Robinson against Vanoscope Company (hereinafter called Delaware Company. It is also the purchaser of whatever right, title, and interest the receiver in supplementary proceedings of the Delaware Company had in and to the assets of the Delaware Company. Defendants Hobbs and Hammond are officers of and stockholders in Vanoscope Company incorporated (hereinafter called New York Company), licensee of Delaware Company, by virtue of two license agreements dated, respectively, May 9, 1914, and April 10, 1915, and also licensee of defendant Continental Motion Picture Company, Incorporated, by virtue of a license agreement dated April 10, 1015. Defendant Slease died pending the action, and it has abated as to him, and defendant Van Riper was never served and did not appear. Defendant Singer is the trustee in bankruptcy of Delaware Company appointed on April 6, 1916, by the referee in a voluntary bankruptcy proceeding pending in the United States District Court for the Southern District of New York in place of a previous trustee who had resigned.

The suit is brought by plaintiff in the dual capacity of assignee of the judgment creditor and as purchaser at the sale by the receiver in supplementary proceedings.

The Delaware corporation was formed to exploit an invention for projecting moving pictures by means of revolving mirrors in such a manner as to do away with the necessity for the shutter to cut off the light between each picture.

We are not concerned with the scientific details of the invention; suffice it to say that if the structure should be perfected so as to be commercially practicable, the patent covering the invention and here concerned may prove to be of substantial value.

Van Riper, the inventor, and Robinson, as promoter, entered into a contract on October 31, 1912, and the Delaware corporation, in which Van Riper was the controlling spirit and Robinson also entered into a contract dated January 13, 1913, the details of which it is unnecessary to set forth, the essential feature being that Robinson obtained the exclusive right to dispose of a certain amount of preferred and common stock of the Delaware Company under certain mutual terms, and the Delaware Company agreed that it would not—

"sell, assign or transfer or enter into any contract or agreement of any kind for the sale, assignment or transfer of any of the said treasury stock of said first party (Delaware Company) during the existence of this contract. * * *"

Both Robinson and Van Riper made various attempts without success to sell stock to Hobbs and Hammond, who had become attracted by the invention. About January, 1914, Robinson commenced to have differences with Van Riper and with the board of directors composed of stockholders who had bought stock through Robinson. The condition of the company was most unsatisfactory from a financial standpoint, and it practically did not have any assets except the invention, and the stockholders were not willing to add to their previous investments.

In February, 1914, Hobbs and Van Riper entered into an agreement for the sale of stock owned by Van Riper, but that agreement was surrendered by mutual consent and was never acted upon.

On March 2, 1914, Robinson commenced an action at law in the District Court for the Southern District of New York, against the Delaware corporation and Van Riper, for damages for the breach of his contracts. This action was subsequently severed by order of the District Court so that thenceforth one action was against the Delaware Company and one against Van Riper.

On April 16, 1914, an agreement was entered into between the Delaware Company and a group known as the Hammond-Hobbs-Dyer syndicate, giving them an option upon a license agreement under the patents upon payment of $50,000 prior to May 1, 1914. Under this arrangement Hobbs and Hammond were relying upon Dyer to furnish the capital and upon his failure so to do the option was canceled.

Hobbs and Hammond, however, obtained the co-operation of A. L. Garford of Elyria, Ohio, to take up the Dyer interest in the contract, and Hobbs entered into a new contract with the Delaware Company for an option for the license agreement and paid $10,000 on account of the consideration therefor.

Garford is a large manufacturer of repute, well known in the business community and having large facilities in the way of tools and machinery for perfecting an invention of the character here concerned. Meanwhile, Hobbs and Hammond had become stockholders in a New York corporation known as Vanoscope Company, Incorporated. Plaintiff contends that this company was formed as a step in a

conspiracy in derogation of Robinson's rights, but we fail to find any evidence to sustain that contention. To carry out the proposition of Hobbs for a license agreement, the Delaware Company and the New York Company entered into a license agreement dated May 9, 1914, which was deposited with a trust company in escrow to be held by it until the completion of $50,000 advance royalty to be paid prior to the delivery thereof.

The District Judge has carefully and fully analyzed this license agreement and we agree with his conclusions in respect thereof. It is true that Hobbs and Hammond knew that Robinson had commenced his lawsuits but, in the circumstances, such a course by Robinson could not prevent the Delaware Company and outside inventors from entering into any legitimate agreement calculated to progress the development and sale of machines covered by the patents owned by the Delaware Company. Robinson, by beginning an action at law, had elected to discard any remedy in equity, if such were available to him. He was suing, not to restrain the Delaware Company, but to obtain a money judgment for damages for breach of contract. The Delaware Company was not called upon to sit still and await the result of the Robinson action, nor were Hobbs and Hammond in any manner prevented from making any fair business arrangement. The cash advance of $50,000 and the various terms of the contract as discussed in detail by the District Judge are full assurance of the integrity of the transaction, and we have no doubt as to the validity of this agreement of May 9, 1914.

On March 20, 1915, a verdict was rendered in favor of Robinson against Van Riper upon which a judgment was entered for $100,110.95 on March 26, 1915. On April 7, 1915, the trial of the action of Robinson v. Delaware Co. was begun before Judge Hough and a jury, and that trial resulted on April 12, 1915, in a verdict upon which a judgment was entered on April 16, 1915, for $190,017.98. During the progress of this trial, viz. on April 10, 1915, Hobbs, Hammond, Van Riper, Hathaway, the president of defendant Continental Motion Picture Company, Incorporated, Slease, the attorney for Van Riper and the Delaware Company, and Harding, also one of the attorneys for Van Riper and the Delaware Company, met at luncheon at a club in Broad street and discussed the modification of the agreement of May 9, 1914, and a new agreement (drawn on the evening of April 9, 1915, by Wing & Russell, attorneys for Hobbs and Hammond) was entered into on April 10, 1915. This agreement was authorized by the board of directors of the Delaware Company and duly executed. At the same time a collateral agreement between defendant Continental Motion Picture Company, Incorporated, and the New York Company was executed for the nominal royalty of $1 per machine.

The agreement of April 10, 1915, between the Delaware Company and the New York Company recited, inter alia, that the Delaware Company was the owner of the entire right, title, and interest in and to applications for letters patent filed by Magnus Smith under the serial numbers 553,805 and 820,051. The agreement between Continental Motion Picture Company, Incorporated, and the New York

Company recited that the Continental Company was the owner of a patent issued to Smith No. 1,105,163 and of application serial number 820,051. (Note: No. 553,805 is the serial number of the application which resulted in patent No. 1,105,163.)

In addition to the Smith applications, the agreement between the Delaware Company and the New York Company covered a patent to and various applications for patents by Van Riper.

For brevity these agreements of April 10, 1915, will be referred to as one agreement, as there is no doubt on the evidence that Delaware Company was the owner of the Magnus Smith patent and application.

Before adverting to the terms of this new agreement, it is necessary to note that Harding testified that the new agreement was to be used only in case that Robinson obtained a verdict against the Delaware Company in the action then on trial. Plaintiff urges that Harding's testimony is to be accepted, and that it is confirmed by the fact that the parties must have contemplated that Robinson would gain a verdict in view of the successful outcome of the action against Van Riper.

The District Judge dealt with that contention as follows:

"The agreement of April 10, 1915, was made with a fuller knowledge, if possible, of Robinson's rights than its predecessor. The circumstances of its execution lend some color to suspicion that it was made against the possibility of a verdict. I think it was certainly made with that prospect in mind and to settle the rights which had arisen under the first contract, but I cannot accept Harding's statement that it was to be used only in case of a verdict. Some new contract was in any case necessary between the parties, and the possibility of such a one is foreshadowed as far back as the proposed contract between the New York Company and the Johns-Manville Company. Moreover, it is most unlikely that the drafting was left till April 10th, as Harding recalls; the contract is elaborate and could not be made hastily out of the earlier one. It shows evidence of much care in preparation, and bears the indorsement of Hobbs' lawyers, contrary again to Harding's recollection. However, while I reject the idea that it was intended only for such use, the time of its appearance justifies a close scrutiny of its terms in comparison with those of the earlier contract."

The District Judge then proceeded to analyze the agreement of April 10, 1915, and to point out that it was difficult to determine whether the agreement of April 10, 1915, as a whole was more or less favorable to the Delaware Company than the agreement of May 9, 1914. We agree with his conclusion that if the patent turned out only a moderate success, the change was a benefit to the Delaware Company, but that if the patent turned out successfully, the agreement in the long run would be more favorable to the New York Company and less favorable to the Delaware Company than was the agreement of May 9, 1914.

The situation must be approached from the standpoint of the surrounding and preceding circumstances. The District Judge had the advantage of seeing and hearing the witnesses, and in so far as the credibility of the witnesses is involved, we accept his conclusion. This conclusion we think was further borne out by all the circumstances. We are satisfied that up to this time the machines had not been made commercially successful. On this point the testimony of the expert Lowenstein is amply convincing, and the testimony on behalf of plain-

tiff of the expert Berger, who had worked on these machines at the Garford factory, is really confirmatory of this view, because Berger admitted that before the machines could be made commercially useful it was necessary to introduce certain changes which Berger refused to disclose because they represented patentable differences.

The New York Company had previously (about January, 1915), through Hobbs and Hammond, taken up the question of a license arrangement and sales agency with the H. W. Johns-Manville Company, a large concern in touch with motion picture exhibitors, by reason of its manufacture and sale of certain other products needed in the motion picture business.

The evidence is fully satisfactory that Hobbs and Hammond were acting in good faith in their own interest in a situation where the future of the patents was very much in doubt, and the past experience had been very discouraging. It may be assumed that they feared that if Robinson obtained a judgment it might be difficult to deal with him, but this view is not an indication of fraud nor of any attempt on the part of the New York Company to hinder, delay, or defraud creditors, provided that the agreement of April 10, 1915, was one which did not put the property of the Delaware Company beyond the reach of Robinson, nor deal with it under such circumstances as to indicate an intent to hinder, defraud or delay.

Once it is found that the contract of May 9, 1914, was legitimate and fair, then it must follow that the modification embodied in the contract of April 10, 1915, was on all the facts and in all the circumstances fully justified; and in this connection it may be observed that there is nothing in this record which indicates that Hobbs and Hammond were in any manner in any scheme or collusive effort to deprive Robinson of any of his rights and that the acts of Van Riper and his associates hereinafter referred to are not brought home to the knowledge of Hobbs and Hammond by any evidence in this record.

The situation was that the only money in sight by which anything whatever could be done to develop the commercial success of these patent machines was forthcoming from Hobbs and Hammond, and in an enterprise which at that time was very doubtful and the future of which was speculative, it is quite plain that Hobbs and Hammond were right in insisting upon such modifications as they obtained by virtue of the contract of April 10, 1915.

We conclude, therefore, that the District Judge was right in determining not to set aside the agreements of May 9, 1914, and of April 10, 1915.

[2] Second. After Robinson obtained his judgment against the Delaware Company, execution was issued to the marshal and returned nulla bona on May 26, 1915.

The main business of the company had been conducted from its Chicago offices, where Van Riper and others interested in the company resided. One Truett was the president and a director of the Delaware Company, and he could be reached by service of process in New York City.

On April 21, 1915, Truett tendered his resignation as president of the Delaware Company, but not as director, and the resignation was accepted at a meeting of the board of directors of the Delaware Company held on April 21, 1915.

On June 5, 1915, Robinson obtained an order for the examination of the Delaware Company in supplementary proceedings, the order requiring that the Delaware Company, judgment debtor, should appear for examination by its president, Truett, on June 11, 1915. This order was served on Truett on June 7, 1915. On June 10, 1915, the copy of the order which had been served on Truett was given to Harding by Slease or Van Riper (Harding did not recall which). Harding appeared with Truett when Truett was sworn, and did not enter any objection to Truett's examination on the ground that Truett had resigned, or that he was not president of the corporation, or that he (Harding) had no authority to appear generally in the proceeding. Harding had not received any information or intimation that he was not authorized to appear upon that examination.

On June 10, 1915, another order was made by the District Court for the examination of the Delaware Company in supplementary proceedings, this time requiring Van Riper to appear. This order was served the same day, and it is conceded that the service upon Van Riper as a director was valid service upon the company. The attorney for Robinson continued in his pursuit of the judgment debtor against obvious efforts to obstruct Robinson from collecting his judgment, until he succeeded in obtaining an order on June 21, 1915, appointing a receiver in the supplementary proceedings. It was recited in the order that "the former president and treasurer of Vanoscope Company" (meaning Truett and Van Riper) had been examined thereunder, and that notice of the motion for appointment of a receiver could not be served on any officer of the defendant in the state of New York, and that such notice of motion was dispensed with. Under section 2464 of the New York Code, at least two days' notice of application for an order appointing such a receiver must be given personally to the judgment debtor unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state.

On May 28, 1915, Truett purported to resign as a director, and it is now contended on behalf of defendants that the plaintiff's argument that the service on Truett was service on the Delaware Company is inconsistent with the affidavit of the attorney for plaintiff and the order made thereon, to the effect that the notice of motion for the appointment of a receiver could not be served within the state. We do not agree with this view. The order of June 21, 1915, stands valid and unassailed. There is nothing to negative the assertion made in the affidavit of the attorney for plaintiff that it was not possible to serve within the state the notice of motion upon any officers of the Delaware Company. The Delaware Company, by reason of its conduct, cannot be heard to assert that some officer could have been served; on the other hand, plaintiff, as the owner of the Robinson judgment, is entitled to urge that the service on Truett was valid service on the company. This service upon Truett becomes exceedingly important

for the reason that the petition of the Delaware Company in a voluntary proceeding in bankruptcy was filed on October 8, 1915. The service on Van Riper, therefore, came within the four months' period under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), while the service on Truett took place outside of the four months' period.[1]

From the time the judgment was entered the Delaware Company resorted to every means at its disposal to prevent the collection of the Robinson judgment. See record in Re Vanoscope Co., 233 Fed. 53, 147 C. C. A. 123.

On July 15, 1915, a special meeting of the Delaware Company was held at Chicago, the only persons present being Van Riper and one Morhardt, a man closely associated with Van Riper. The minutes of that meeting recite that it was called pursuant to a written request signed by Van Riper and Morhardt and go on to state that all of the directors and officers, with the exception of Satterfield, Morhardt, and Van Riper, had tendered their resignations, and thereupon a new board of directors was elected. The minutes also recite that the resignations of the directors and officers were accepted.

It will be noted that Truett purported to send forward his resignation as director to Morhardt as secretary of the Delaware Company at Chicago on May 28, 1915, just two days after Robinson's execution against the Delaware Company had been returned unsatisfied. It is an interesting fact that while Truett resigned as president in April, he did not attempt to resign as a director until after the execution had been returned unsatisfied as above stated. Whether this was an accidental omission in the scheme of Van Riper and his associates to evade collection of the Robinson judgment does not appear, but it would not be strange if, by some mischance, Truett had not been advised to resign as director as well as president.

We are fully satisfied from the record (exhibiting various acts unnecessary to set forth in detail) that the resignation of Truett was merely an obstructive device in fraud of Robinson to prevent service upon an officer and director who could be served within this jurisdiction, the purpose clearly being that only those who were nonresidents should remain as directors, thus leaving the difficult task of serving the order in supplementary proceedings to the chance of finding one of the nonresident directors such as Van Riper within this jurisdiction.

There are cases which hold that in the absence of statutory regulations the resignation of an officer of a corporation takes effect on his

[1] NOTE.—Section 2468 of the New York Code reads:

"The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him. * * *"

Section 2469 of the Code reads:

"Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of a judgment creditor in whose behalf the special proceeding was instituted as follows:

"1. Where an order, requiring the judgment debtor to attend and be examined, * * * has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or warrant."

delivery to the proper officer of his written resignation and before acceptance thereof by the board of directors; but in these cases some remedy is sought against the director personally, and the basis of these decisions is that where a director thus resigns, the inaction or refusal of a board of directors should not impose upon him a future liability or responsibility which he does not desire to undertake. International Bank of St. Louis v. Faber, 86 Fed. 443, 30 C. C. A. 178; Fearing v. Glenn, 73 Fed. 116, 19 C. C. A. 388; Manhattan Co. v. Kaldenberg, 165 N. Y. 1, 58 N. E. 790.

There may also be cases of which Continental Wall Paper Co. v. Lewis Voight & Sons Co. (C. C.) 106 Fed. 560, is an example, where an officer or director of a foreign corporation, who intends to visit another jurisdiction, may resign in order to avoid service of a summons in a foreign jurisdiction. But the case at bar falls in that class of cases in which the courts have expressed their condemnation of proceedings by which resignations of officers or directors of a corporation are attempted in order to effectuate a fraud.

In Zeltner v. Zeltner Brewing Co., 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574, it was held that where all the officers, except the secretary, and all the directors of an insolvent corporation resigned for the express purpose of instituting an action to procure the appointment of a receiver under the New York Code, such resignations are neither legal nor effective. See, also, Ehret v. Ringler, 144 App. Div. 480, 129 N. Y. Supp. 551.

The fact that Truett's resignation as a director was to take effect immediately, and that acceptance under the by-laws of the Delaware Company might not be necessary, does not change the situation, although it appears from the minutes of the special meeting of July 15, 1915, that Van Riper and Morhardt thought that it was necessary formally to accept the resignations of the directors. But whether or not this would be so in a legitimate transaction is immaterial here; for mere forms of procedure will be disregarded if those forms are utilized to perpetrate a wrong.

We need not be concerned with a consideration of the effect of the resignation of Truett as president if he was still a director on June 7, 1915; for whatever may have been the result of his resignation as director, as between him and the Delaware Company, in their relations with each other, that resignation was futile and of no effect as avoiding the service of the order in supplementary proceedings made on June 7, 1915; and we hold that service valid as against the Delaware Company.

On October 14, 1915, the receiver in supplementary proceedings sold his right, title, and interest in and to the property of the Delaware Company, and in the list of that property were the various patents herein referred to. The purchaser at the sale was this plaintiff, and by this sale the plaintiff became the owner of the patents subject to the license agreement of April 10, 1915, and subject to the execution and delivery of such instruments as were necessary to perfect the title to the patents.

[3] About a year later, on September 27, 1916, after a meeting of creditors had been called by the referee in bankruptcy, the trustee in bankruptcy was authorized, over the objection of plaintiff, to sell all his right, title, and interest in and to the same property which the receiver in supplementary proceedings had sold. Hathaway, the president of defendant Continental Motion Picture Company, Incorporated, was the purchaser at the trustee's sale, paying the sum of $1,000, and thereafter Hathaway released to the defendants the cause of action against them. The trustee, however, had nothing to sell, because whatever there was had previously been sold by the receiver. It is true that patents are not subject to seizure and sale on execution. Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942, and there is authority to the effect that a receiver, such as one in supplementary proceedings, does not, by virtue of his appointment, acquire title to patent rights. It is, however, well settled that a court of equity may order or decree that the proper person shall execute such assignment or other instrument as may be necessary to vest the title of the patent in the person entitled thereto. Ager v. Murray, supra; Gillette v. Bate, 86 N. Y. 87.

After the sale by the receiver, there remained with the trustee only the duty of executing and delivering any and all formal instruments necessary to perfect the title of the purchaser at the receiver's sale. No demand was made by plaintiff upon the trustee so to do, but under the bill of complaint and the issues made, the court has full power to order the trustee to fulfill these formal requirements.

If there should be any question as to the necessity of the execution of such instruments by Hathaway, plaintiff is at liberty to institute such action or proceeding in that regard as it may be advised.

The result of the foregoing is that the decree of the District Court must be modified so as to decree that the trustee shall execute and deliver to plaintiff any and all assignments or other instruments necessary to vest in plaintiff the title to all property sold by the receiver in supplementary proceedings subject to the license agreement of April 10, 1915.

As thus modified, the decree is affirmed, without costs in this court or in the District Court, and the District Court is directed to make its decree in accordance herewith.

In re VANOSCOPE CO.

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

No. 258.

BANKRUPTCY ⇐260—SALE OF PROPERTY BY TRUSTEE—OBJECTION BY ADVERSE CLAIMANT.

An adverse claimant of property also claimed by a trustee in bankruptcy has no standing to object to an order directing the trustee to sell his "right, title, and interest" in the property.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York, in Bankruptcy.

In the matter of the Vanoscope Company, bankrupt. Petition by the Inventions Corporation, to revise an order of the District Court. Affirmed.

Hector M. Hitchings, of New York City, for petitioner.

Arthur Leonard Rosenberg, of New York City, for appellee.

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. This is a petition to revise an order of the District Court for the Southern District of New York, dismissing the petition of the Inventions Corporation, to review the order of the referee in bankruptcy, directing the trustee in bankruptcy to sell certain property claimed by him to belong to the bankrupt estate.

The estate did not have any liquid assets, and all the property to which the trustee claimed any right, title, or interest was the subject-matter of the litigation between the Inventions Corporation and Hobbs et al., defendants, 244 Fed. 430, —— C. C. A. ——, decided herewith.

At a final meeting of creditors duly called by the referee, the trustee asked for leave to sell all his right, title, and interest in the estate of the bankrupt, which request had been duly set forth in the notice to creditors. The trustee was without funds, and was made a party defendant in the suit above referred to. The attorney for the Inventions Corporation, plaintiff in the equity suit, objected to the granting by the referee of permission to sell the trustee's right, title, and interest.

The proceedings were in all respects regular, and on the situation as it was developed before the referee he decided that it was to the interest of the estate to order the sale asked for. The trustee did not purport to sell anything, but his right, title, and interest. No rights were affected or impaired.

It was the lookout of the purchaser as to what he was buying, and he has not complained.

We are unable to find that any error was committed by the referee or the District Court, and the order of the District Court dismissing the petition is affirmed, with costs.

REECE SHOE MACHINERY CO. v. UNITED SHOE MACHINERY CO.

(Circuit Court of Appeals, Third Circuit. July 30, 1917.)

No. 2250.

PATENTS ⟸328—INFRINGEMENT—STOP MOTION.

The Goodyear patent, No. 818,159, for a stop motion for high-speed machines, especially designed for use on power sewing machines, is limited by the proceedings in the Patent Office to a mechanism for effecting a stop which is predetermined, automatic, and machine-controlled. As so construed, *held* not infringed by a machine in which the stop mechanism is manually controlled by the operator.

Appeal from the District Court of the United States for the District of New Jersey.

Suit in equity by the Reece Shoe Machinery Company against the United Shoe Machinery Company. Decree for defendant, and complainant appeals. Affirmed.

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

This is a suit for infringement of patent No. 818,159, issued to William E. Goodyear on April 17, 1906, and now owned by the plaintiff. Both plaintiff and defendant, as their corporate names indicate, are engaged in the manufacture of shoe machinery. It is claimed that one of the machines manufactured and marketed by the defendant infringes the machine of the patent. It may be noted at the outset that it is not claimed that the plaintiff's commercial machine embodies the novel features of the patent, except that, as plaintiff's expert testified, it has some of the latter's "broad or general features"; the former being designed in accordance with patent No. 1,085,093, issued to A. R. Schoenky on January 20, 1914. According to the testimony of the president of the plaintiff company, the patent in suit was first brought to plaintiff's attention in the "spring of 1914," when it was engaged in developing its commercial machine, and was purchased because plaintiff was advised that it was "important" that it should own the same "to protect" its machine. The patentee was thereupon looked up. It was actually acquired from the patentee on April 10, 1914, by the Reece Buttonhole Machine Company, a concern closely affiliated with the plaintiff and engaged in manufacturing machines for which the device of the patent was primarily designed. It was, however, never used by that corporation. As far as the evidence shows, it was assigned by it to the plaintiff on May 1, 1914. On June 3d of that year this suit was instituted. For all that appears, it is a mere paper patent, never having been put to any practical use, although the patentee was at the time it was issued an employé of the Singer Sewing Machine Company. The object sought by the patentee, as set forth in the specifications, was "the production of stop motion for high-speed machines which will positively stop the mechanism at a predetermined position and without shock." Although the device was stated to be intended for use in connection with sewing machines, and particularly buttonhole sewing machines, the patentee claimed that it might be applied to any other form of sewing machines or to any machine to which the stop motion might be used "with advantage." The result accomplished, as stated in the specifications, is that the machine "may be gradually started and positively stopped, but before stopping its speed will be reduced so that the action of stopping will be without shock." Broadly stated, the device consists in attaching to a sewing machine two pulleys, connected by a system of planetary gears with the working shaft, which are designed to be operated by a single belt connected with the power source; the belt being shifted from one pulley to the other by a belt shifter, which operates automatically through a

series of levers; the latter being operated and controlled by a cam carried on a disk, which, in turn, is operated by the working shaft. In the particular device described in the specifications the disk is designed to make one revolution to a predetermined number of revolutions of the working or driven shaft. When the machine is at rest, the belt is connected with one of the pulleys which revolves idly, but when the belt is shifted to the other pulley, it operates both pulleys through the system of planetary gears, and the machine is then run at high speed. When the driven shaft has made the required number of revolutions and thus rotated the disk, the cam, through the levers, causes the belt shifter to shift the belt to the first mentioned pulley, and at the same time brings into play a brake which frictionally engages a collar connected with the second pulley, and thus holds the latter stationary. The effect of this, through the planetary gears, is to cause the first-mentioned pulley to operate the machine at a low speed, which bears a fixed relation to the working or high speed. After the driven shaft has made a given number of revolutions at a low speed, and has thus moved the disk and the cam further in their annular course, the cam, through the series of levers before mentioned, releases the brake from the second pulley, and thus disengages the low speed, and at the same time throws a dog stop, located on one of the arms of one of the levers, into engagement with a projection on the working shaft, and thus brings the whole machine to a positive stop at a predetermined position. It will be noted from the above description, brief and inartistic as it is, that the disengagement of the high speed and the introduction of the low does not depend in any way upon the action of the operator, although, conceivably, he could control them by keeping the pedal depressed so that the cam could not work until he saw fit to release the pedal. But in a machine to which the mechanism of the patent was primarily designed to be applied—a buttonhole sewing machine—it is not ordinarily desirable that the operator should exercise any control over the stoppage of the machine after he has once set it in motion, because the machine is designed to work around a buttonhole, and thus make a predetermined number of stitches and come to a stop. The defendant's machine, on the other hand, is designed and useful only for stitching the outsole to the welt of a shoe. As such work requires that the speed of the machine shall differ as to certain parts of the work, for instance, around the toe and along the ball of the shoe, it is necessary that the speed shall at all times be under the control of the operator and be variable. Moreover, as the sizes of the shoes to be sewed vary, it is also necessary that the stoppage of the machine shall be under the control of the operator. In these two respects, it will thus be seen, a buttonhole sewing machine and a machine such as defendant's materially differ. The variable speed feature of the defendant's machine is produced by a friction clutch, to which the operating treadle is connected, which permits the operator, by varying the pressure on the treadle, to produce a variable speed, dependent upon how firmly the faces of the friction clutch are pressed together. The degree of the speed is therefore entirely under his control at all times, and the machine can be stopped only by releasing the treadle or pedal. It is also important that the defendant's machine stop without shock and with the needle out of the work, as it is likewise in a machine such as the device of the patent was primarily designed to be attached to. To accomplish these latter purposes the defendant has incorporated in its machine the mechanism which the plaintiff alleges infringes certain claims of the patent in suit. This mechanism is, briefly, as follows: Attached to the main power shaft (to which also is connected the friction clutch through which power is transmitted to the driven or working shaft) is a pulley which revolves continually at a constant speed. This is connected by a belt with another pulley, which, in turn, through a shaft and worm gear, operates a worm wheel; the latter being loose on the working or driven shaft. Hence this worm wheel is always turning slowly, irrespective of whether the variable speed is in action or not, and at a constant speed. It has an internal cone friction face, which is designed to receive a cam wheel, having an external cone friction face, coupled to the driven shaft, so as to rotate therewith, but free to slide, to a certain extent, laterally thereon. While the high or working speed is on, this cam wheel rotates idly with the shaft

and performs no function. Extending around the shoulder of the cam wheel is an inclined or tortuous groove or track in which a cam roll is designed to travel. The latter is attached to one of the arms of a two-armed pivoted lever, the other arm of which is designed, by means of a socket at the end thereof, to engage a bolt which, through a system of levers, is connected with the treadle, and hence is under the control of the operator, being either depressed or permitted to rise, as he wills. While the bolt is held depressed, the two-armed lever and the cam roll simply vibrate and perform no function. However, when the bolt rises and registers with the socket, the lever is held stationary, with the result that the cam roll, when it meets the incline of the cam track, forces the exterior friction face of the cam wheel into engagement with the interior friction face of the worm wheel. Thereupon, the high or working speed having been disengaged by the releasing of the treadle, and the constant speed being continually in operation, the driven shaft to which the cam wheel is attached is operated at the constant speed of the worm wheel, until the cam roll has passed over the incline in the cam track, when the cone faces are brought out of frictional engagement, and the main shaft, being without power, revolves only through momentum. At the same time that the constant speed is disengaged a brake, through a series of levers operating through the cam, is applied to the main pulley connected with the driven shaft, and a dog stop comes into engagement with a projection on the main shaft and positively stops the machine, in case the brake has not already done so. It is thus obvious that the cutting off of the high speed is not dependent on the action of the cam, but solely on the will of the operator, as, in a broad sense, is also the introduction of the constant speed. In fact, the operator, after cutting off the high speed, may allow the machine to come to a stop without the introduction of the constant speed; the main shaft can make no more than 1⅓ revolutions, and ordinarily does make only a fraction of a revolution. Both mechanisms are designed to effect a stopping of their respective machines by the introduction of a low speed between the cutting off of the high and the final stop. The essential difference between the stop mechanism of the patent as described therein, and that of the defendant's machine, is in the method by which they are respectively set in operation. The defendant contends, however, that there are other differences, besides those of mere form, which negative infringement. But if I were compelled to rest my decision upon any of them, I would have great hesitancy in finding that any, save possibly that relative to the character or functions of the respective cams, have that effect. To so hold would require a more narrow and restricted construction to be given to the claims in suit than I am inclined to believe is warranted. The difference before mentioned is, however, vital, and, unless the claims in suit are entitled to a construction such as the plaintiff contends for, it is decisive. The claims alleged to be infringed are the first seven, 21, and 31. They can best be set forth by quoting No. 2 and pointing out the important differences, other than mere variations of expression, between it and them. It is as follows: "A stop motion, wherein means are employed to automatically reduce the speed of the machine before stopping it, and to continue the engagement of the driving power after the speed is reduced, such means being controlled by the machine."

Claim 1 uses the expression "means for positively driving it at a reduced speed to a predetermined stopping position," instead of the expression of claim 2 "to continue the engagement of the driving power after the speed is reduced." In other respects it is the same. Claim 3 contains the additional element "of means for driving the shaft at high speed" and "means for positively stopping the shaft." The expression of means "to automatically reduce the speed" is not used in this claim, or in 4, 5, or 6, but in each there is an element of means "for automatically (in some claims 'positively,' also) driving the shaft at a reduced speed, such means being controlled by the driven shaft" or "driven member." Claim 4 requires, in addition, means for "positively" driving the shaft at high speed, and the means for automatically driving it at a reduced speed are limited by the expression "to a predetermined stopping position." In other respects it is the same as claim 3. Claim 5 requires that the means for driving the driven member at high speed shall

be "disengageable"; also that there shall be means for "stopping the driven member," which shall comprise "means for automatically operating the driven member at a reduced speed." In other respects material to this inquiry it is the same as claim 3. Claim 6 requires a "positive stop" and "means for applying the stop after the driven member has been moved to a predetermined stopping position." The remaining three claims are more restricted than those just analyzed. They will be discussed hereafter. It will thus be noted that each of the first six claims requires either that there be "means for automatically reducing the speed of the machine (the driven member or driven shaft)" before stopping it, as in claims 1 and 2, or that there be "means for driving the shaft at a high speed" and "means for automatically driving the shaft (driven shaft or driven member) at a reduced speed," as in claims 3, 4, 5, and 6. It is also a requirement of each of these claims that the means for automatically reducing the speed or driving the driven shaft at a reduced speed, as the case may be, shall be "controlled by the machine," or the "driven shaft," or "driven member," according to the particular expression used. The word "automatically" and the element last mentioned were only inserted in the claims after the Patent Office had refused to allow them in their original form. The Mills patent, No. 728,269, covering a stop mechanism for sewing machines, was first cited against them. In an argument presented to the Commissioner of Patents the pertinency of this reference was contested on the ground that the stop motion of that patent would not "positively stop a machine at the desired position and without shock, for its operation entirely depends on the varying friction of a brake." It was also said that in the invention of the patent in suit the brake shoe did not stop the machine or have anything to do with stopping it, but that it was "a portion of the change speed mechanism." However, the claims were again rejected, but this time not on Mills, but on Richardson patent, No. 710,612, covering a shoe-sewing machine. The machine of this latter patent was fitted with a high and low speed mechanism, which would not permit the high speed to be thrown out without the low speed being thrown in, although it is conceivable that they might occur almost simultaneously. But the introduction of the low speed did not automatically bring the machine to a stop after a predetermined number of revolutions or otherwise, it being necessary for the operator to put additional mechanism (although a part of the change speed mechanism) into operation to effect stoppage. The change of speed was also under the control of the operator and dependent upon his action. However, when he disconnected the high speed, the low, immediately and without further action on this part, was thrown in, unless he completely released the pedal in the first instance, when the dog stop happened to be in a given position, in which case the low speed would really not take effect so as to make any appreciable difference in the stoppage operation, and the machine would be brought to a stop abruptly. That machine was designed to do exactly the same kind of work as the defendant's machine. The patentee then and without further argument amended the claims by inserting the word "automatically" in each of the first six claims (claim 2 having been added at the time of the first rejection). In the argument to support the allowance of the claims as thus amended it was said: "The first six claims have been amended to specify an automatic arrangement for driving the machinery at a reduced speed. The Richardson structure is not automatic. The shifting from one speed to the other is effected by means of a pedal." The claims in question were, however, again rejected on Richardson, the examiner, holding that the stop mechanism of that patent was automatic, because after the operator had removed his foot from the treadle the machine would automatically stop after a certain time. The patentee, while not admitting the correctness of that ruling, amended the claims by inserting the clause "such means being controlled by the machine" or "driven shaft" or "driven member," as the case may be. It was expressly stated that the last amendment was made in order to make the meaning of the word "automatic," as used in the claims, clear. Without attempting at this time to recite all of the argument then advanced to show that the Richardson device was not automatic, suffice it to say that a distinction was drawn between a "speed-shifting" mechanism controlled by the operator and one controlled by the "driven member" or "driv-

en shaft." The claims were thereupon allowed. It will be noticed that the first two claims call for "means for automatically reducing the speed," while the next four do not in so many words, but require "means for automatically driving the shaft at a reduced speed." While the last four do not therefore expressly require as one of their elements the automatic introduction of the low or reduced speed, as the first two necessarily do, yet I think it clear that they impliedly do so. They each expressly require means for driving at a high speed and at a low speed. The use of the word "automatically" in connection with the means for driving the shaft at a reduced speed, when considered in the light of the Richardson patent, the other element of high-speed drive, the specifications, the fact that the means for driving at slow speed are to be controlled by the driven member, and that the patentee's solicitors, in their arguments before the Patent Office, insisted, as respects all of these claims, that the Richardson patent was not automatic because "the shifting from one speed to the other is effected by means of a pedal," and later, when explaining the meaning of "automatic," said that "the speed shifting means is controlled by the driven member," seems to necessarily imply that it was intended to include in the "means for operating at a reduced speed," at least the automatic throwing in of the low speed. If this is not the proper construction, the word "automatically" is mere surplusage; for the machine would necessarily continue to operate at the reduced speed so long as power was applied, after it had once been set in operation. Indeed, I do not think this conclusion is controverted. Therefore, for the purposes of the present inquiry, as will appear when the contentions of the respective parties are stated, there is no essential difference between any of the first six claims.

The plaintiff contends that the claims in question should be construed as applying only to the operation of the stop-motion mechanism after it has once been started, and as having nothing to do with its initiation—the throwing out of the high speed. Hence it is argued that the defendant's machine infringes because, after the high speed is disengaged, although this must be done by the operator, the stop motion is automatically initiated and thereafter controlled (i. e., the low speed thrown in and the machine operated at a reduced speed) by means which are the same or the equivalent of those of the patent (i. e., by the cam on the driven shaft). This conclusion would probably be sound if the premise were correct. The defendant, on the other hand, contends that a proper construction of the claims will not permit the elimination of the throwing out of the high speed, but that they must be construed to cover all movements from the throwing out of the high speed to the disengagement of the low. Hence it is insisted that the defendant's machine does not infringe, because the cutting off of the high speed is not automatic, but wholly under the control of the operator and dependent upon his action, as is also the introduction of the low speed. The decision of the question of the infringement of the first six claims depends, therefore, upon whether these claims are to be construed as applying simply to a mechanism which initiates a reduced speed after the high speed has been cut off, or whether they must be construed to include the whole series of mechanical actions necessary to effect a reduced speed, which, of course, must include the elimination of the high. That they cannot be properly given the construction that the plaintiff contends for seems to me clear. It will be borne in mind that the throwing out of high and the throwing in of the low in the machine of the patent, as described in the specifications, is accomplished wholly by the action of the cam on the driven member, whereas in defendant's machine the cam has nothing whatever to do with throwing out of the high speed; this being accomplished entirely by the operator, as in the Richardson patent. It is true that in the defendant's machine, if the operator completely removes his foot from the pedal at the same time that he disengages the high speed, the low speed will automatically take effect, as soon as the bolt registers with the socket on the two-armed lever, which carries the cam roll, and the latter has come in contact with the inclined part of the groove. In that sense the introduction of the low speed does not depend upon the action of the operator, but it is equally true that until the operator allows the bolt to rise and register with the socket the low speed will not take effect. It is clear, therefore, that

if the claims are to be construed as covering a mechanism substantially that described in the specifications, the stop mechanism of the defendant's machine is radically different from that of the patent. Plaintiff contends, however, that the claims should not be so limited, because the stop mechanism there described is that applicable only to a buttonhole sewing machine, which, as before stated, makes a predetermined number of revolutions, and that when applied to a machine which does not have that feature (the patent, by its terms, being applicable to any other form of sewing machine) it would manifestly require some action on the part of the operator to set the stop motion in operation, and hence that a construction should be given which will embrace the latter type of machine. With this construction I am in accord, providing it is possible to so construe the claims, and not at the same time cover an invention which the patent does not disclose. Merely because the specifications of a patent claim that the invention is applicable to machines other than that specifically mentioned does not make it so. It may be observed at the outset that it seems impossible to conceive of a stop mechanism which does not include a means for the throwing out of the high speed; for until the high speed is eliminated no stop motion can be put in operation. The throwing out of the high speed may be done automatically by the machine, as described in the specifications of the patent in suit, or by the action of the operator in releasing the pedal, as in the defendant's machine. As before shown, the claims of the patent require that the introduction of the low speed shall be automatic. Can the claims, however, in the light of the specifications, the prior art, and the patentee's own interpretation of the meaning of the word "automatically," as used therein, when prosecuting the claims before the Patent Office, be construed as entirely eliminating the high-speed throwout? Such a construction would disregard the "speed-shifting" feature, which is the very thing which the patentee contended before the Patent Office was, in his mechanism, automatic, and which in Richardson was under the control of the operator. In his last argument he said "the speed-shifting means is controlled by the driven member" and thus "the definition of 'automatic' is made very clear." Speed shifting necessarily implies a change from one speed to another. Such change, according to the patentee, was to be automatic—i. e., controlled by the driven member. A change of speed which does not eliminate one speed before introducing another is inconceivable. Further, in defining why the Richardson machine is not automatic, he said that, if the operator should take his foot off the pedal when the machine was running at a high speed, the stop would be put on before the driven shaft could make a complete revolution, and therefore the effect of the low speed would not be secured. In the machine of the patent, if the operator should keep his foot on the treadle, so that the cam could not work until the treadle was released, and if at the time the cam was in such a position as to immediately release the actuating lever, and thus simultaneously throw out the low speed, there would be the same result as the patentee pointed out in respect to the Richardson patent; for in that case, the machine would be brought to a stop by the disengagement of the high speed without the low having really taken effect at all. It is only when the cutting off of the high speed and the introduction of the low is placed under the control of the machine and taken out of the control of the operator entirely that the machine of the patent will produce the result which the patentee claimed differentiated it from and made it more desirable than the mechanism of Richardson. If the high speed cut-off is no part of the stop motion of the patent, why was "means for driving the member at high speed" included as an element in every claim in which "means for automatically reducing the speed" was not present? Means for reducing speed necessarily presuppose that a high (in a relative sense) speed precedes the reducing process. As before stated, such a process which does not include the elimination of the high speed is not readily imaginable. While I do not find it necessary to hold, as the defendant seems to contend, that the claims should be construed to cover only a mechanism in which the number of revolutions which the driven shaft is to make has been predetermined, therefore excluding any act of the operator after the machine has once been set in operation, still, for

the reasons before stated, I think they must be construed to exclude a mechanism in which the cutting off of the high speed is not accomplished by machine, but directly by the operator. For instance, if in the device of the patent the treadle were released shortly before the cam came in position to actuate the series of levers, the cam would then throw out the high speed, introduce the low, and operate the machine for a certain number of revolutions at a reduced speed, and then disengage the latter. But in such a case the cutting off of the high speed, and so forth, would be automatic in the sense that the cam on the driven member would actuate the machinery necessary to accomplish this result. Such a mechanism would be different from that of Richardson, because in the latter the action of the operator directly disengages the high speed, whereas in the mechanism of the patent he would simply set in operation certain mechanism which, after a given time, would disengage the high speed. There is thus a conceivable distinction, fine though it is, between Richardson and the device of the patent, if the latter is construed to cover a mechanism in which the operator does something more than start the machine in operation. But this very distinction also applies to the defendant's machine quite as forcibly as it does to Richardson. Consequently it seems clear, whether the claims of the patent are to be considered as applicable only to the device described in the specifications or as to one such as I have above supposed, that they must be construed as covering only a mechanism in which the throwing out of the high speed, and hence the introduction of the low is controlled by the machine as distinguished from the operator. As the defendant's stop mechanism is not automatic in that sense, it follows that it does not infringe these claims. The importance which I have attributed to the arguments of the patentee's solicitors, which appear in the file wrapper, is not opposed to the rule that a fair construction shall be given to the claims as actually granted, although limitations have been inserted therein by amendment. Hubbell v. United States, 179 U. S. 77, 80, 21 Sup. Ct. 24, 45 L. Ed. 95. The word "automatic" and the clause "such means being controlled by the machine" or "driven member," etc., were express limitations, and the patent can receive no construction which would nullify them or either of them. I have simply resorted to the file wrapper to ascertain the meaning which should be given them. Certainly a fair construction would not be one at variance with the sense in which they were understood by both the patentee and the Commissioner of Patents. Their meaning as used is certainly ambiguous, especially in view of the plaintiff's contentions. In addition, while the patent in suit is not invalid simply because it is a paper patent, and while it is entitled to the benefit of a fair range of equivalents, yet, being a paper patent, it is not entitled to a construction broader than the claims clearly require or than the invention which is clearly disclosed therein. Bradford v. Belknap Motor Co. (C. C. Me.) 105 Fed. 63, 64; Boston, etc., Rubber Co. v. Pennsylvania Rubber Co., 164 Fed. 557, 90 C. C. A. 84 (C. C. A. 1st Cir.); Lovell v. Seybold Mach. Co., 169 Fed. 289, 290, 94 C. C. A. 578 (C. C. A. 2d Cir.); Westinghouse, etc., Co. v. Toledo, etc., Co., 172 Fed. 371, 372, 97 C. C. A. 69 (C. C. A. 6th Cir.); Kestner Evaporator Co. v. American Evaporator Co. (C. C. E. D. Pa.) 182 Fed. 844, 846. See, also, remarks of Mr. Justice Brown in Deering v. Winona Harvester Works, 155 U. S. 295, 15 Sup. Ct. 118, 39 L. Ed. 153. I have made no reference to either the Shearn patent, No. 728,775, or to the Hartford patent, No. 579,870, which are also relied upon by defendant, and which, I think, are not without some pertinency on the question of construction of the claims. Claim No. 7 was inserted at the time of the last amendment to the other claims. It contains as an element "means for automatically reducing the speed of a machine a predetermined number of revolutions before stopping." Passing the question as to whether the defendant's machine, within the meaning of the patent, reduces the speed "a predetermined number of revolutions before stopping," this claim is not infringed, because, for the reasons before stated, the defendant's machine has no means for "automatically" reducing its speed within the meaning of the patent. The word "automatically" is not found in claim 21, but that claim does contain as elements: (1) "Means for positively rotating the shaft (driving) at the working (high) speed;" (2) "means for

rotating the shaft at a slower speed;" (3) "means for stopping the shaft;" and (4) "the last two means being controlled by the movements of the cam." The cam is not required to be attached to the shaft, but is merely to be "moving in time therewith." It would seem that the last element impliedly includes an automatic speed-shifting feature such as the other claims, although possibly of a more limited nature. That the speed-shifting feature shall not be under the control of the operator is of the very essence of invention. The patent is not entitled to a construction broader or different than the invention disclosed therein. As before pointed out, defendant's machine does not have that feature. Unless the claim is construed in this light, it would seem to be within the Richardson patent. In addition, I think that it is anticipated by the Shearn patent. The latter has all of the elements of the claim. Admittedly claim 31 is not infringed, unless the element of the "lever carrying means for applying the brake" refers to the overhanging end of the lever, of the machine of the patent, which has the notch adapted to engage with the projection on the driven shaft and stop the machine. The specifications make no mention of the overhanging projection of this lever having any braking or other effect whatever. The only "brake" referred to in the specifications is that which arrests the progress of the high-speed pulley, and which is spoken of as a "brake shoe." It would be quite unjustifiable to read into the paper patent, for the purpose of spelling out an infringement, a function of one of the parts to which the patentee made no reference in his specification. Ball & Socket Fastener Co. v. Kraetzer, 150 U. S. 111, 117, 14 Sup. Ct. 48, 37 L. Ed. 1019. In addition, if the construction contended for by the plaintiff is correct, it is indeed strange that the lever would not have been described as having itself a braking action rather than as one "carrying means for applying the brake." The latter expression in itself indicates a separate and distinct piece of machinery. I think it clear, therefore, that this particular element refers, not to this overhanging projection, but rather to the roller, which puts into operation the brake, which, in turn, arrests the progress of the high-speed pulley. But that brake, as the patentee, in his argument before the Commissioner respecting the pertinency of the Mills patent, distinctly said, has nothing whatever to do with the stopping of the machine, but is "a portion of the change speed mechanism." Construed in this light, the defendant's machine has no such element or counterpart. The brake on the defendant's machine has nothing to do with the change of the speed mechanism, but comes into play only after the low speed has been thrown out and for the purpose of stopping the machine.

As before stated, I have not attempted to discuss all of the differences between the defendant's machine and that of the patent which the defendant contends negative infringement, or the arguments advanced on its behalf in respect to lack of novelty, because it seems to me that the case may be properly disposed of on the points heretofore discussed. My conclusion is that the bill should be dismissed with costs.

Rogers, Kennedy & Campbell, of New York City (Livingston Gifford and Donald Campbell, both of New York City, of counsel), for appellant.

Frederick P. Fish, Alfred H. Hildreth, and J. L. Stackpole, all of Boston, Mass., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Reece Shoe Machinery Company, the owner of patent No. 818,159, granted April 17, 1906, to William E. Goodyear, for a stop motion for high-speed machines, charged the United Shoe Machinery Company with infringement. On final hearing that court held infringement was not

established. From a decree dismissing its bill, the plaintiff took this appeal.

Having had the benefit of a full and helpful discussion of this case by competent counsel, and after careful study of the briefs and records, we see no reason to differ from the conclusion reached in the court below. In view of the thorough and painstaking discussion by the judge, an opinion by this court describing the complicated machines involved could but be an effort to state in different language what has been already placed on record in the opinion of the judge below. We avoid useless repetition by reference to that opinion, and limit ourselves to a general statement of the conclusions to which we have been led by our study of the case. Those conclusions may be thus summarized:

First. The general subject here involved is the abrupt stoppage of sewing machines driven at high speed.

Second. In such machines there are two varieties and two modes of operation, viz. a cyclic machine, or one that repeats a certain unvarying routine in each operation, and therefore automatically stops at a predetermined point after sewing a certain number of stitches at uniform speed. The other is a noncyclic machine in which there is no cyclic finish and cyclic repetition, but which sews at varying speed and with varying numbers and lengths of stitches, all at the will of the operator.

Third. In the first type there is a machine-controlled, automatic, predetermined stop. In the other the stop is made when the operator wills.

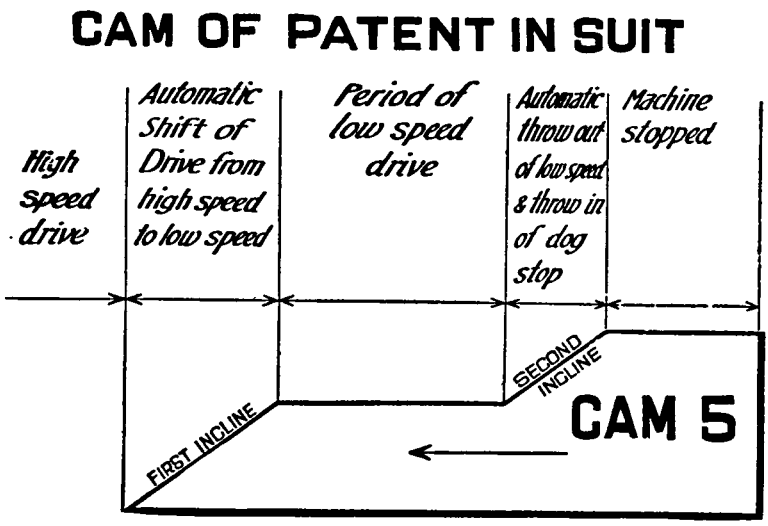
The device of Goodyear was of the former kind, and in his specification he applied it to a machine for sewing the edges of buttonholes. In that respect his specification says:

"The object I have in view is the production of a stop motion for high-speed machines, which will positively stop the mechanism at a predetermined position and without shock. The invention is intended for use in connection with sewing machines, and particularly buttonhole sewing machines, which must be stopped in a certain and definite position. The invention, however, may be applied to other forms of machinery, as is found desirable. * * * It is to be understood that the illustration of this particular sewing machine [E. B. Allen, patent No. 785,061, of March 14, 1905] is solely for the purpose of describing the invention, as the invention of the stop motion may be applied to any other form of sewing machine or to any machine to which the stop motion may be used with advantage."

Showing the cyclic type of the device and the machine-effected, automatic stop, the specification says:

"A cam, *5*, carried by a disk *6*, which is turned by the machine and which makes one revolution while a buttonhole is being completed, is provided. This cam is designed to engage with mechanism for shifting the belt from one pulley to the other and applying the stop motion."

Without entering upon a detail description of the various operative parts, it suffices to say that the cyclic operation centers in said cam, *5*, which is illustrated in this drawing,



—and that by the engagement of a finger with the cam there is in the mount on the first incline an automatic, predetermined shift from high to low speed. This is followed, on the level plane, by a predetermined period of low speed. Then follows, by the mount on the second incline, an automatic, predetermined throwout of the low speed and the automatic throwin of the dog stop at a predetermined, unvarying point. It will thus be seen that the cam and engaging finger produce a continuous, indivisible, mechanical operation by which the machine automatically goes from high to low speed and from low speed to a predetermined, regularly recurrent stop.

In the progress of Goodyear's application through the Patent Office, his claims were rejected on reference to patent No. 710,612, of October 7, 1902, to Richardson, for a shoe-sewing machine. Without describing the mechanism of that machine, it suffices to say it had a high-speed drive, a change from high speed to low under the control of the operator, and thereafter an operative stop at a desired, predetermined position. Goodyear recognized that Richardson embodied his pending claims,[1] and he therefore differentiated his device by showing that Richardson's shift speed was made by the operator while his own was automatic and made by his machine, and narrowed his claims by limitation to automatic action. In that regard the file wrapper shows Goodyear said:

"The first six claims have been amended to specify an automatic arrangement for driving the machinery at the reduced speed. The Richardson structure is not automatic. The shifting from one speed to the other is effected by means of a pedal."

[1] E. g., claim 1: "A stop motion wherein means are employed for reducing the speed of the machine before stopping it and means for positively driving it at a reduced speed to a predetermined stopping position."

Even this amendment, viz. by inserting the limitation automatically, did not satisfy the Office, and to meet its further objection Goodyear added to his claim the limitation "such means being controlled by the machine," saying:

"By including in the claims the specific statement that the speed-shifting means is controlled by the driven member, the driven shaft, or whatever is specified in the claims, the definition of 'automatic' is made very clear."

The result was to make the claim read as follows, the words in italics being those thus added under stress of the Office's insistence:

"A stop motion, wherein means are employed for *automatically* reducing the speed of the machine before stopping it, *such means being controlled by the machine*, and means for positively driving it at a reduced speed to a predetermined stopping position."

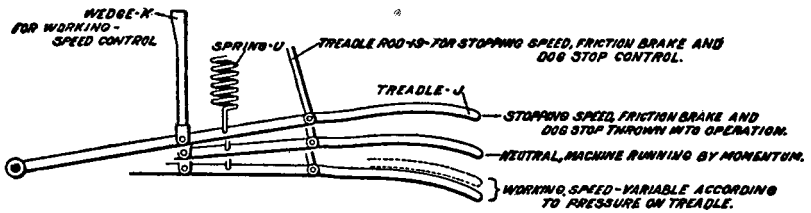
From this it will be seen that Goodyear's machine was a routine, cyclic one, and that means controlled by the machine automatically stopped it at a predetermined point. The particular machine used by Goodyear shows that his type of stop motion was applicable to a buttonhole sewing machine, and the stop requirements of such a machine illustrate generally the scope, character, and limitations of Goodyear's stop motion. As the machine was operated at high speed —some 1,500 stitches a minute—and as the stitches in the buttonhole were confined to a certain number, it is obvious that mechanically the machine was intended to automatically stop when the required buttonhole stitches were made, and the high speed of the machine mechanically required that at that instant the cycle-ending stop be made by the machine itself. To have allowed the sewing to have gone further would have ruined the buttonhole, and to have the stop made by the operator, if indeed it could be made even by a highly skilled operator at such speed, would have been a backward step in the developed buttonhole sewing art.

It will therefore be seen that in the statements of the specification, in the enforced limitation of the claims, and in the everyday working of the art, the Goodyear disclosure was for a stop that was predetermined, automatic, and machine-controlled. Moreover, as Goodyear's device was never used in practice, and left no impress on the art, there was no occasion for the exercise by the court below of that liberality of claim construction made where a highly meritorious invention might otherwise be shorn of patent protection by the literalism of a claim.

Turning, therefore, from this claim-restricted and unused device of Goodyear's to the defendant's sewing machine, we have one that does a type of nonuniform work, namely, the stitching of shoe soles, which necessitates the judgment and absolute control of an operator. It is also to be noted that the machine of the defendant has been in wide, general use, without patent challenge, and it was only after a rival manufacturer purchased the dormant Goodyear patent that this belated charge of infringement is made. Without entering into the details of the defendant's machine, we may say that it is used for sewing the soles of shoes; that such soles differ in size; the sewing is done by a skilled operator who slows down the speed as he turns bends and uses stitches of different length at different parts of the

sole. In the nature of things, there must be operator control, operator skill, and operator volition in defendant's machine. In the nature of things, there can be no fixed number of stitches, no uniformity of speed, and no predetermined place or time of stop. Not only the absence of an automatic, machine-controlled stop in defendant's machine, but the varied character of the work done, precluding the possibility of the use of a predetermined stop, unite to make the defendant's machine of a wholly different type from Goodyear's. The mere fact that defendant's machine goes from high speed to low speed and that the needle stop is made at such low speed does not stamp the stop motion as Goodyear's. He has no claim, and in the nature of things he could have none, for the mechanical step of slow-speeding a machine before dog-stopping it. That is a mechanical practice and truism as old as physics, and which no patentee could monopolize. Of such speed reduction the defendant avails itself to stop its machine without shock, but this it had the right to do. It is also true that its machine is stopped when the needle is out of the fabric, and in that sense the stop is predetermined. But it will be observed that, while the mechanism is such that when the machine does stop the needle shall be in a certain relation, still this fixed condition when the operator chooses to stop it is a wholly different mechanical feature from a machine automatically stopping itself at a predetermined cyclic point. In the one case the automatic, machine-controlled stop is unchangeable; in the other the optional, human-controlled stop is variant. In both there is slow speed and a superfabric needle stop, but Goodyear did not disclose or claim a slow speed stop of a needle in a superfabric position. Confining ourselves to the foot brake mechanism of defendant's machine, its working will appear from the accompanying sketch.

Defendant's Machine
Treadle control.



Starting with the machine at such working high speed as the operator desires, he releases his foot treadle, and thereby disengages a clutch through the engagement of which the high-speed driving device drives the main shaft. But even such disengagement of the high-speed clutch does not per se throw in the low-speed clutch; for the operator may allow the machine to run by momentum. To throw in the low-speed clutch, the operator must release the treadle still further. It will thus appear that, while the throwing out of the

high speed is a condition precedent to throwing in the low speed, it is not the causal agency, but the operator is, of throwing in the low speed. It follows, therefore, that the shift from high speed and the shift to low speed in the defendant's machine have no dominant or servient relation to each other as they necessarily have in the Goodyear cam, but that between the two independent speeds stands the personality and dominant volition of the operator.

After full consideration we are of opinion that, passing the question of validity, on which we express no view, the charge of infringement has not been established, and the decree below must be affirmed.

BUTTERICK PUB. CO. v. PEERLESS PATTERN CO.

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

No. 226.

PATENTS ⇐328—INVENTION—PATTERNS FOR GARMENTS.

The O'Loughlin patent, No. 632,361, for a pattern for garments, having the sheets representing different parts of the garment designated by numbers or other characters, made by perforations, by which they may be transferred to the cloth, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by the Butterick Publishing Company against the Peerless Pattern Company. Decree for defendant, and complainant appeals. Affirmed.

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

This is a suit by the Butterick Publishing Company against the Peerless Pattern Company for infringement of patent No. 632,361, granted to R. S. O'Loughlin September 5, 1899, for an improved pattern for garments. In the complainant's article of manufacture each one of the series of sheets representing the different parts of a garment is distinguished or identified by a perforated mark or symbol "consisting of a letter, number, arbitrary sign, or other character, or of a combination of words, letters, numerals, arbitrary signs, or other characters." By this means the patentee attains "convenient rapid, and accurate classification of the respective parts of the pattern, the avoidance of errors and confusion peculiar or incident to the system of manufacturing and using patterns for garments heretofore in vogue, and the facilitating of a rapid and accurate cutting of material to be used in making garments, and the proper, rapid, and accurate joining and adjustment of the respective parts thereof in the construction of garments."

This explanation of the utility of the device is followed by a statement of its relation to the prior art: "Heretofore the custom has been to endeavor to identify the separate portions of the patterns by designating each separate piece by a technical name. Hitherto, on account of the difficulty and uncertainty of identification, much confusion has been occasioned, considerable delay experienced, and great quantities of material damaged or destroyed. The difficulty of identifying each particular part by means of its technical name is apparent."

The claims are two in number:

"1. As a new article of manufacture a pattern for garments, comprising a series of sheets representing different parts of a garment capable of being assembled together in a definite manner into a garment, each of the said sheets being provided with a different designating character, device, or symbol constituted by perforations in the body of the said sheets the said charac-

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

ters, etc., constituting a definite series, whereby designations on the pattern may be readily transferred to the garment material to which the pattern is applied, so that the material itself when cut to the pattern may be assembled into a garment with certainty."

Claim 2, which is limited to the use of serial numbers, is not in issue.

The contents of the file wrapper are instructive. The application was rejected in the first instance for lack of invention and novelty. The examiner said of the original application: "The double use of a system of characters, such as alphabet letters or numerals, is ancient, and common in various arts analogous to applicant's, such as in building material, wherein separate timbers, stones, etc., are numbered in order to identify their places. The new State House in Boston was built with stones quarried 200 miles distant, cut and fitted in the quarry, and numbered by the workmen in order to find their proper places in the general plan. Solomon's Temple, in Jerusalem, was so constructed, according to the record in the books of Kings and Chronicles. From another point of view there is plainly no invention involved in discarding the names for the parts of a pattern mentioned by applicant and substituting therefor these shorter names—the letters or numerals—to identify them."

The applicant claimed to differentiate by reason of the fact that he not only numbered the different parts of his structure, but also provided a means whereby this numbering may be transferred to the parts of the ultimate structure and the pattern discarded. In reply, the examiner pointed out that simply perforating the letters, instead of printing them, was a very old device, to be seen in any stencil, as, for example, the patent to Fowler, 148,291. The applicant then asserted that it had not been shown to be old to provide a pattern sheet having two functions: First, the function of serving as a guide to cut out the pattern from the fabric; and, second, the function of providing means for applying identifying marks directly to the fabric cut out to designate the said fabric by the numerals or symbols appearing in the pattern, to the end that the parts of the garment may be readily assembled by reference to a chart of instruction accompanying the pattern. To this the examiner replied by citing the patent to Rinder, 1,696, to show that it is old to perforate the designating characters in the body of each part of the pattern series, for applicant's purpose of marking the cloth with such character at the same time with the outlines of the pattern, by dusting chalk therethrough. The applicant rejoined that the patent to Rinder does not clearly show that the numerals are perforated in the pattern, and, even if they were so perforated, they do not constitute a definite series whereby the various parts of the pattern may be identified. But the application was finally rejected by the examiner on June 17, 1899, for failure to disclose patentable invention. Briefly restating the grounds, he pointed out that the British patent to Rinder, 1,696, shows a series of patterns having a perforated designated character for the purpose of sifting powder through upon the fabric to be cut out; and the domestic pattern to Slade, 156,382, shows a series of patterns having each a designating character. In view of this state of the art, he held that all the applicant had done was to substitute for the designating character employed by the British patentee a series of designating characters whereby he could assemble in a certain predetermined order the various sections of a garment, and that this was common in the arts.

On appeal to the examiners in chief the decision of the examiner was reversed. Their decision was substantially this: The applicant's device is an improvement on the ordinary patterns of commerce, in which the separate patterns which together make the pattern of a garment have been differentiated from each other by names given to each part pattern. By distinguishing each part of a pattern by a number, letter, or symbol stenciled in it, the identification of each part relatively to the other parts can be transferred to the position of the cloth beneath the part, and also serves to indicate concisely the parts in a table of instructions for guidance in laying the patterns on the cloth and for assembling the cloth parts of the garment. Slade's patent, in which the contour of the parts is relied on, has not the means for identifying each part relatively to the other. Nor in Rinder's patent is there a mark on each part distinguishing it from every other part. What the applicant has done is to apply by the means disclosed by the Rinder patent to separate

part-patterns different marks which distinguish each from the other. By this novelty the utilities mentioned are secured.

Now, from the additional proof of the prior art presented at the hearing, it appears that the Butterick Company itself made and sold patterns as early as 1872 in which the individual pieces referred to in the printed labels were identified by groups of perforations. One perforation identified the collar, two perforations the sleeve, and so on. Such groups of perforations were certainly symbols within the clear meaning of the claim, and were intrinsically conformed to a definite series, as well extrinsically by reference to the label. The capacity to permit chalking through upon the material, upon which the first claim of the patent in suit relies, is a well-known incident of the use of perforations, and is therefore inherent in these groups of perforations. A number of the prior patents in evidence make it clear that chalking through was well known in the pattern art, as in the patent to Thomas, 109,686, where this is shown both for transferring the outline of the pattern to the cloth and for transferring identifying numerals as well. It is true that a separate numeral is not shown on each piece drawn on the Thomas pattern; but the numerals differ on at least two pieces, and must have been meant as identifying factors for some purpose. Surely it cannot be patentable to identify ten pieces by different numbers, where two have been so identified before. To the same effect is the Slade patent, 156,382. To be sure, the principal plan set forth therein is the identification of the different parts by different colors; but the patent makes it the use of printed distinguishing marks or names in lieu of or in addition to the colors.

This clear disclosure is rendered more forcible by the fact that in the description of the parts of the pattern in the patent itself each is referred to by an identifying letter. There can be no possible difference between identifying the parts of the pattern in the patent and identifying them in the sewing room. In addition, the witness Glick testified that he was a cutter for the Domestic Pattern Company, and that he personally cut into superposed pattern sheets the numerals intended for identification of the parts. The witness Newton corroborates Glick as to the use of numerals for identification purposes on the Domestic pattern, save that he remembers them as used in 1874 or 1875, instead of 1889, as Glick testified. It is probable that the time assigned by Newton is correct, since the witness Pearsall states that the Domestic Company did not use numerals after 1884, which is the earliest date of his acquaintance with the Domestic patterns.

In view of this proof of the prior art, it is apparent that the patent was issued upon a misconception of the prior art. Pattern parts had not been identified theretofore, as the examiners in chief were led to believe, merely by technical names. Moreover, with respect to the use of symbols in "a definite series," upon which much stress is laid, it is to be observed that it is based upon the fact that the symbols used were referred to serially or in definite succession in a label or description which accompanies the pattern. But such label or description is not called for by the claim, or even mentioned in it. If it were, the "article of manufacture" to which the claim is addressed could not include a physically separate device such as the printed description. Even if the complainant's contention were tenable, it is clear that any symbols whatever may be said to form a definite series since in this art a label has been customarily employed in connection with the paper pattern.

I am of opinion that it did not involve invention in 1898 to produce the article of manufacture claimed by the patentee in the claim in suit. In view of the explicit language of the specification and claim the claim cannot be limited to any particular kind of symbol. But, if it be assumed that the issue is whether it involved invention to supply identifying numerals or letters specifically formed by perforations made in the various parts of a garment pattern, assigning a different numeral or letter to each part, the same conclusion follows. The use of two specified perforated numerals, as shown in the Thomas patent and model, left no room for invention in using a greater number of such numerals where more parts were to be identified. Particularly is this true in view of Slade, who used twenty-four letters for twenty-four separate pieces. Since it was old to use a separate symbol of some kind, such as groups of perforations, on each piece of a tissue paper pattern, as used in

Butterick patterns as early as 1872 it was a mere carrying forward of the original thought to adopt the perforated numerals shown as identifying agents for two pieces in the Thomas patent, or the same class of symbol shown in the British patent to Rinder. Since perforated numerals were old, as shown by Thomas, for identifying two different parts of a pattern, it was a mere change in degree to use such numerals for as many as seven or eight different parts, as had been done with the cluster symbols of Butterick. Since in the Slade patent each of the twenty-four cluster pattern parts shown has a separate printed letter for purposes of reference in the patent, and the patent says that any marks may be used, instead of colors to identify the pattern parts, there is no invention in perforating, instead of printing such characters, as has been done for analogous purposes in Butterick's older practice.

Where a patentee is seeking to enforce a monopoly of a seemingly obvious expedient, it is incumbent upon him to show by some kind of evidence that the seemingly obvious change was not so clearly within the domain of the expected skill of the calling as it seems to be. It is true that in some cases apparently obvious changes have been held to be patentable. But in every such case reliance has been placed upon a clear showing, either that there was a new and unexpected result, or that an old problem long unsolved had at length been mastered. There is no evidence in this record tending to show either of these conditions. The nature of the result following from the use of numerals or letters was simple identification, and that is what resulted from the use of the old Butterick clusters, not to mention the numerals of Thomas. So far as commercial use is concerned, it is significant that the New Idea Company, which is controlled by the Butterick Company, has never used the patent, and is able to sell 8,000,000 patterns a year with the cluster of perforations for identification. Furthermore, the evidence shows that the Home Pattern Company, the Pictorial Review Company, and the May Manton Company, all large distributors of patterns, have been able to sell millions of patterns each year without the employment of the so-called indispensable idea set forth in the patent in suit.

The defendant may have a decree.

Kerr, Page, Cooper & Hayward, of New York City (Thomas B. Kerr and John C. Kerr, both of New York City, of counsel), for appellant.

Hardy, Stancliffe & Whitaker, of New York City (Noah A. Stancliffe and Charles J. Hardy, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The patentee states that his object is to provide for the convenient, rapid and accurate identification of the respective parts of a garment pattern and the avoidance of errors and confusion. He shows in his drawings one form of his alleged invention but he says it is understood that other forms and characters may be used. He asserts that prior to his patent the custom had been to endeavor to identify the separate portions of the pattern by a technical name and that confusion arose from this habit. He seeks to remedy this by numbering each piece of the pattern by perforations in the form of figures. He says, "I prefer to use serial numbers for the purpose of illustrating the alleged invention." In the illustration attached to the specification there are twenty-three pieces in the garment pattern which are numbered from 1 to 23 inclusive.

The patent has now expired and no relief other than an accounting can be had. There was nothing new in numbering these parts separately with different designating characters made by perforations, in the body of the sheets, the characters constituting a definite series

whereby designations of the pattern may be readily transferred to the garment materials to which the pattern is applied, so that the material when cut to the pattern may be assembled into a garment with accuracy. It is undoubtedly desirable in making a garment from a pattern containing a plurality of pieces that each of them shall be numbered so that the numbers of the pattern may be transferred to the cloth by rubbing chalk on the pattern in order that the number on the paper pattern may be accurately stenciled on the cloth. If this were done on the cloth resembling the pattern Fig. 23, for instance, the number 23 would be transferred to the cloth and would prevent any confusion occasioned by the mixing up of the various pieces. The same result would be accomplished if the operator marked "23" on the cloth with a piece of chalk.

The first claim is as follows:

"1. As a new article of manufacture, a pattern for garments comprising a series of sheets representing different parts of a garment capable of being assembled together in a definite manner into a garment, each of the said sheets being provided with a different designating character, device or symbol constituted by perforations in the body of the said sheets the said characters, etc., constituting a definite series, whereby designations of the pattern may be readily transferred to the garment material to which the pattern is applied, so that the material itself, when cut to the pattern may be assembled into a garment with certainty."

It will be seen that the claim seeks to secure as a new article of manufacture a pattern for garments comprising a series of sheets which can be assembled in a garment each of the sheets being numbered, lettered or identified in some similar manner. These identifying figures must be transferred to the corresponding pieces of cloth which are to make the completed garment. This is done by making the identifying marks by small perforations which insure accuracy in transferring the proper number to the cloth. There was nothing new in using perforated numbers, letters or other symbols for the identification of separate parts of garments.

Judge Veeder has carefully considered the prior art and we do not deem it necessary to review at length the testimony in this regard. He says:

"A number of prior patents in evidence make it clear that chalking through was well known in the pattern art, as in the patent to Thomas, 109,686, where this is shown both for transferring the outline of the pattern to the cloth and for transferring identical numerals as well."

When we consider the claim in issue we are unable to find invention in the elements of the combination singly or combined. Garment patterns made of paper were old. Paper patterns were identified by marks, figures and letters. These figures and letters were made by perforations and chalk marks on the paper transferred the figures to the corresponding pieces of cloth. No other patent shows the perforations on twenty-four separate pieces but invention cannot be predicated of the number of pieces which make up the pattern. We agree with Judge Veeder when he says regarding the Thomas patent which fails to show identifying numerals on each piece of the pattern:

"Surely it cannot be patentable to identify ten pieces by different numbers where two have been so identified before."

The decree is affirmed with costs.

ECLIPSE MACH. CO. et al. v. HARLEY-DAVIDSON MOTOR CO. et al.

(District Court, E. D. Pennsylvania. August 20, 1917.)

No. 1321.

1. COURTS ⟸347—FEDERAL COURT—PLEADING—JOINDER OF CAUSES OF ACTION.
   Under Equity Rule 26 (201 Fed. v, 118 C. C. A. v), it is no objection to a bill that it joins several causes of action if all are cognizable in equity and are between the same parties.
2. PATENTS ⟸147—REISSUE—VALIDITY.
   A claim allowed under the original application and for which a patent issued, if valid, loses nothing in validity because reincorporated in a reissue.
3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MOTORCYCLE CLUTCH.
   The Ellett patents, No. 982,042 and No. 1,018,890, each for a motorcycle clutch, *held* valid as covering new and patentable combinations, but not infringed.
4. PATENTS ⟸328—VALIDITY—PRIOR PUBLIC USE.
   The Ellett patent, No. 1,071,992, for a motorcycle clutch, *held* void on the ground that the invention was perfected and the device in public use for more than two years prior to the date of application.

In Equity. Suit by the Eclipse Machine Company and Frederick S. Ellett against the Harley-Davidson Motor Company and Alexander Klein. On final hearing. Decree for defendants.

Duane, Morris & Heckscher, of Philadelphia, Pa., Robert W. Byerly, of New York City, C. L. Sturtevant, of Washington, D. C., and Archibald Cox, of New York City, for plaintiffs.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The discussion of the merits of this cause has taken such a wide range and there have been brought into it so many and such various features that there is danger of the mind being swamped by the mass of details. It is further, because of this, difficult to get a firm grasp of the features which present the points really in controversy. The fact that there are three patents involved (one of which has been surrendered and reissued), and that the device as manufactured and used by neither the plaintiff nor the defendant embodies all the patented features of all the different patents, adds to the difficulties of an adequate presentation in small compass of the dispute. The fact is that the device as used is not the device patented by any one of the patents, nor even described in the application except in so far as it is the device described in the third patent application, some features of which are patented. These patented features do not lend themselves to conjoint use in any proper sense of the term.

[1] The complaint of the plaintiff is really three causes of complaint voiced in one bill, and is that the defendants have infringed upon rights granted to the plaintiffs, some by one patent and some by each of the other patents. This is a wholly different thing from the complaint of one trespass upon the rights of plaintiffs granted by three patents capable of conjoint use and conjointly used. We see, however,

no need for the averment in the bill of a conjoint use and no defense in the denial of it by the answer. Before the new equity rules went into effect such a bill as that filed in this case would have been bad for multifariousness. The long list of cases cited by counsel headed with National Manuf. Co. v. Meyers (C. C.) 7 Fed. 355, confirms this, but would not be needed because it is clear that devices made in accordance with these different patents would be wholly different constructions, and that the features of each do not lend themselves to conjoint use. Under rule 26 (201 Fed. v, 118 C. C. A. v), however, a plaintiff may now join (upon proper occasion) as many different causes of action as he may have. The only restrictions are that each cause must be one cognizable in equity; that the different rights of action all belong to the plaintiff, or, if more than one, to the plaintiffs jointly, and that if there are several defendants sufficient grounds for joining them must appear. All these features are present in this bill. Under rule 26, it is difficult to see how a bill can be objectionable merely because several causes of complaint are incorporated in one bill, and, even if it were, the objection could be made only in the way pointed out by rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi). This so far as concerns this court disposes of the question of multifariousness.

[2] There is another branch of the defense which is directed against the first or reissued patent. Reissues are provided for in R. S. 4916 (Comp. St. 1916, § 9461). The question raised is the propriety of the act of the Patent Office in granting the reissue, or more directly the validity of the rights thus in form granted. A view of the obvious purpose of this legislation and its limitations will aid us to see the proper scope of its effects. An inventor may describe his invention and claim such exclusive proprietary rights therein as he may have the right to claim. There is no requirement that he shall claim all which he might claim. If he claims less, two results follow. One is that he gets no more than what is claimed and allowed; the other is that there is a dedication to the public of all which is disclosed and not claimed. The omission of a possible claim may have been deliberate and intentional in fact or in legal intendment. If so, the act is irrevocable. It may have been, however, that the omission was due to "inadvertence, accident, or mistake." For such cases the act of Congress provides by permitting the patentee to surrender the granted patent and to receive a reissue. The proceeding is essentially an amendment, and within the rules applicable to amendments generally. It is a self-evident proposition that the patentee has no exclusive proprietary right beyond what is granted, nor until it is granted, and that the real basis of the validity of the original and of the amended grant is the original application, and this is not affected by the amendment beyond the formal fact of the reissue and the occasion for it. This part of the defense loses all practical value because the claim of proprietary rights made by the plaintiffs might have been based upon the original, if no reissued patent had been granted. A claim allowed under the original application and for which a patent issued, if valid, loses nothing in validity because reincorporated in a reissued patent. Ward v. Weber, 230 Fed. 142, 144 C. C. A. 440.

[3] This brings us to the consideration of plaintiffs' claimed invention. There are, as already stated, three patents issued and now belonging to plaintiffs. They are using a device which is not described in any of the applications, except the third, the claims of which are limited to a specific feature of construction in combination with other elements admittedly old. The defendants' device is likewise protected by a patent, the claims of which are in like manner restricted. There can be no plausible pretense made that the plaintiffs' patentee invented either clutch or motorcycle clutch. Convincing evidence of this is afforded by the first and every of the applications. The invention claimed in each instance is for "improvements in motorcycle clutches." There were motorcycle clutches, as well as clutches for other uses which antedated the entrance of plaintiff's invention upon the field. The defense, broadly stated, is that the plaintiffs did precisely what the defendants did in the exercise of precisely the same right. Each went to the ample store of the prior art, extracting therefrom the ideas which were adapted to his purpose, and through and by the application of mechanical knowledge and skill constructed a device which answered to his needs. There could be in this no room for any possible claim to invention beyond the hitting upon a combination in which some special construction might enter as a novel element. Such were in fact the claims which the Patent Office allowed to each applicant in issuing the patents under which the respective devices of the plaintiff and defendant are manufactured. There is no conflict between these patents, and in consequence no question of infringement involved. If such a defense is made good, the plaintiff has no case. If the plaintiffs' patents are valid, each invention claimed is an advancement upon the prior art. Let us see if this be true and in what the advance consists and wherein the defendants have appropriated the invention of the plaintiffs. The advance from a clutch to a motorcycle clutch is clear enough. The differences between them are real because functional. Features which are not only of merit, but necessary in the one, are or may be of no value and even positive defects in the other. A motorcycle clutch may, because of this, be a new thing when compared with the other clutches. An illustration of what is meant by this is afforded by the slippage feature. In clutches designed for many uses this feature is of no advantage, and in others is positively detrimental to efficient operation. In motorcycle clutches, it is so far from being objectionable as to be an indispensable characteristic. This slipping in the grip of the clutch is, in consequence, eliminated so far as possible in some clutches, but is encouraged in motorcycle clutches. This thought of the advantage of having, and because of this promoting slippage, makes a call for the exercise of a different quality of the mind from that demanded in the application of mere mechanical skill to the problems of construction involved. Moreover, slippage implies friction, and the necessity of guarding against the undue heating and wearing of the parts affected, so that the slippage must be under control and be regulated to meet the changing needs of varying conditions of travel. The designed device must further be kept within the limitations of space and weight and cost of construction which motorcycle

use imposed and yet meet all the demands of strain and speed and durability made upon such machines. There is again in illustration the feature (claimed to be characteristic of plaintiffs' machine) of superposed rotary numbers, resulting in mechanical gains in length of shaft and otherwise. There was room also for judgment in selection and in finding the proper combination of elements. The prior art, for instance, supplied both cone discs and the multiple disc type. Ellett chose the latter as better adapted to motorcycle use. There was also present the necessity of devising not merely a clutch which could be successfully operated, but one which could be so operated when in unskilled hands. The extremes of clutch operation present the phases of engine and wheel shafts being so bound together as that they move as one and being so disconnected as that they rotate independently. The intermediate gradations of connection may be regulated through a pressure exerted by the operator on one or both rotary members or through the maximum pressure being supplied by springs or otherwise and being released by the operator. An after-event examination of the now known devices presents the further features of construction, in that the connection between engine shaft and wheel shaft may rotate with one or the other or be independent of each and thus wholly under the control of the operator. In the multiple disc type of clutch construction the pressure of disc on disc we know now may be regulated by a lever or by a screw and nut or screw cam by which latter the movement of disc on disc may be most delicately measured and controlled and the mechanism made most easily accessible for adjustment.

Neither of the parties to this litigation are in a position to deny the broad fact that the devices with which we are concerned called for invention, because we find each of them successfully asserted before the Patent Office inventive merit in their respective constructions. The question presented is the narrow one of whether the device of the plaintiff was anticipated by prior patents or prior use or whether each of these devices is in possession of a limited field upon which the other does not encroach. The original of the first Ellett patent was No. 982,042, applied for May 27, 1910, and issued January 17, 1911; reissue applied for October 28, 1911, and granted April 15, 1913, No. 13,554. The claims in issue are 1, 4, and 5. These are all combination claims. As in motorcycles the engine shaft is independent of the wheel shaft, engine power locomotion is imparted to the vehicle by the locking of the two shafts. It is, however, at times necessary that one may be running when the other is not, or that each may be running at the same time in entirely independent rotation. This necessity calls for a third member by which the two may be coupled at the will of the driver of the vehicle. To afford the proper control, this third member must not revolve with either of the others when they are not revolving in unison. The driver must be able to engage or disengage the clutch at will and graduate the completeness of the interlocking of the two rotary members. This is accomplished by a screw and nut or screw cam. An instant complete interlocking of the two members when one was rotating at high speed would obviously be objectionable, as would a like instant complete disconnection. To overcome the difficulties

thus presented there is introduced a co-operating clutch device known by the descriptive name of a multiple disc clutch. Ignoring other features, these discs are really two sets of discs each set rotating with, because attached to, its own rotating member. The pressure applied by the driver through giving a turn to the screw brings these discs into the desired closeness of contact until at the maximum the friction becomes sufficient to make the wheel axle move along with the engine shaft. The only difference between these claims is that claim 1 describes the mechanism by which the result is accomplished as the superimposed mounting of the rotary members, the screw and nut mechanism, the multiple discs, and the means by which the movement and pressure of the discs are imparted through the screw and nut contrivance. Claims 4 and 5, on the other hand, describe the operating contrivance not by its mechanism but by its placement in the outer end of the hub.

The second Ellett patent applied for February 16, 1911, is No. 1,018,890, issued February 27, 1912. The claims in issue are 1, 8, 9, 11, and 12. These are likewise all combination claims. The designed clutch which the patentee had in mind was one substantially like the design shown in the Ellett first clutch, but embodied the idea of an advancement, in that instead of the interlocking pressure being applied by the operator up to the maximum, this maximum was normally applied by means of springs, and the pressure was graduated by the operator through a releasing act. The mechanical difference in construction is that the screw cam mechanism in the place of being used to directly exert pressure of disc on disc is used to press back the action of the spring so as to release the pressure which the spring would otherwise cause to exist between the discs. This second patent discloses two ways of accomplishing this improvement. The advancement thought is made clear by an understanding of either.

Next in chronological order of application and issue is the Harley patent under which the defendants manufacture and justify. The date of the application is October 9, 1911; the number of the patent 1,020,199, and the issue date March 12, 1912. The claims of this patent are very limited, and admittedly protect only special forms of construction.

The third Ellett patent was applied for April 15, 1912; bears the number 1,071,992, and was granted September 2, 1913. The only claim in issue is claim 1. This as all the others is a combination claim. The file wrapper discloses the fact that this claim was rejected on the patent to Harley. The objection was met by an affidavit carrying the date of the invention back to a date prior to October 9, 1911, the date of the Harley application. Incidentally there would seem to be an error in defendants' paper book which gives the Harley application the date of April 9, 1911. Without going into any discussion of the differences of construction between the respective devices of the plaintiff and defendant, or between that of the defendant and the design of the devices disclosed by the Ellett first and second patents, but, leaving this where it is left by the experts upon the one side and the other, supplemented by the arguments of counsel, we content our-

selves with a statement of the conclusion reached, which is that all which was left for the claim of an exclusive proprietary right in any inventor was one limited to his special features of construction or special combination of known elements or both. In view of the fact that the claims of the Ellett patents are limited to the combinations described, there can be no infringement unless the combinations involved have a substantial identity. McCormick v. Talcott, 61 U. S. (20 How.) 402, 15 L. Ed. 930.

Our further conclusion is that there is no substantial identity of combination use of what was described by the prior art in the device of the defendant and the devices disclosed by either the Ellett first or second patent. Each inventor did what he had the right to do. He went to what the prior art had in store, making his own selections therefrom and adding any improvements of his own devising which would cement the combination he had formed. This combination became his exclusive property as a combination unless its substantial like had been before found. The conclusion above stated results in a finding of no infringement of either of these patents. Neither this conclusion, nor the resultant finding, applies to the first claim of the third patent. There is in the device the design of which is disclosed in the Harley and the third Ellett patent a more than substantial likeness. These conclusions are consistent with and find some confirmation in the Patent Office experiences of the several applications. The claims of the Harley patent were allowed without the suggestion of an interference or other claim of conflict with the patents before granted to Ellett. Claim 1 of the third patent was rejected because of the existence of the Harley patent. The respects in which the conception of the device which was in the mind of Ellett as described in his application for his third patent was an advancement upon the prior art were that without sacrificing the superimposition of the rotary members, the clutch as an entirety was mounted upon a stationary shaft, and the arrangement of the springs afforded easy access for adjustment purposes.

[4] Before discussing the evidence by which the date of this invention is sought to be carried back of the Harley device a recapitulation of the salient features of the inventive situation may serve to clarify the view of the points of controversy. The prior art left room for invention in the improvement of the then known devices. It would seem that both the plaintiff and defendant are committed to this. They are likewise committed to the corollary proposition that any allowable claims to exclusive proprietary rights must be limited to the special improvement conceived and patented. The thought is easily grasped that the real invention might lie in the conception of some adjunct capable of conjoint use with the elements of any combination already known or subsequently hit upon. An invention which would be patentable might, on the other hand, consist of a novel combination of known elements or one in which some of the elements themselves were new. The designer of such an adjunct could not complain of the designer of another and different adjunct, nor could the patentee of the one combination exclude a second inventor from claim to a patent for

another and different combination. It is conceivable that the difference between a combination and one which had preceded it and been patented might be confined to a single element. If the effect of this one change was to change the character of the whole combination, the second would not be an infringement of the patent. If however, the effect of the change was to leave the patented combination substantially unchanged, infringement would be clear. It is further conceivable that a patented device might be improved by the addition of a novel adjunct adapted to be used in conjunction with the combination of elements which had been patented. Such use would be a real conjunctive use. If, however, the improvement could not be used with the elements of the prior device, but only as a substitute for some essential part of the old combination, so that the first combination was wholly destroyed, and a substantially new combination was formed, the patented device and the new one could not be said in any real sense to be capable of conjoint use. The two devices are different things and the inventions different inventions, because each is of a combination not substantially like, but different from, the other. A younger device might be an infringement of either, but could not infringe both combinations, or it might be a still different combination and not infringe either of the older ones. The latter is the conclusion reached under the facts of this case.

The point made that the allowance of the Harley claims upon an application pending at the same time as the Ellett reissue and second patent is an adjudication of the question, and a prima facie finding in favor of the defendants is more seeming than real, because the mere issue of the patent is consistent with the allowance of a very narrow claim. We do have, however, the prima facie finding that the claims of the Harley patent and claim 1 of the Ellett third patent are in conflict, nor is the plaintiff in a very strong position to deny the propriety of the allowance of this claim. On the face of the patent situation the Harley invention is prior in time. In supporting his claim to priority of invention in fact Ellett, unfortunately for himself, has created an obstacle to a finding of the validity of his patent. His proofs disclose the invention to have been perfected and the device put into use, not only before the Harley filing date, but so long before his own application that the time given him within which to apply that he prima facie has lost his right to a patent. Abandonment to the public, or such dedication to be inferred from public commercial use, is inconsistent with the claim of an exclusive proprietary right, and is sufficient ground for the denial of the grant of a patent. When more than two years elapse after the invention is made, the inventor must assume the burden of excusing the delay and overcoming the presumption of dedication from commercial use. The duty of making clear the right is emphasized when the rights of others have intervened. One who with free access to the prior art, including what is in public use, invents an improvement and promptly follows this up with an application for a patent cannot, without clear proofs of a prior right in another, be deprived of the rights thus acquired, nor by a belated pat-

ent application. Without such proofs the issue of a patent after a grant to another comes too late. No finding of priority of invention can be here made without a finding that the date of the invention was at least over two and probably four years before letters patent were asked to be issued. This delay stands unexcused and unexplained to that degree of satisfactory clearness which the rules of law require. It may be that this finding works a real injustice to Ellett. There is room in this case for the suspicion which every inventor is prone to entertain that another has availed himself unfairly of information which the inventor supplied. This explains the entertainment of the suspicion whether well or ill founded. The rules of law, however, cannot with safety be made to yield to cases of individual hardships or to any of the considerations here advanced. A special exclusive, and because of this valuable, privilege is given to inventors. It is necessarily hedged about with conditions. One of these is that application for the grant of it must be made within a limited time. The failure to so apply leads others into expenditures and lawful ventures of the benefits of which it would be unjust to deprive them.

The bill of complaint is accordingly dismissed with costs.

WOLF v. NATIONAL PARLOR SUIT CO.

(District Court, E. D. New York. July 25, 1917.)

1. PATENTS ⟸66—ANTICIPATION—PRIOR PATENT ISSUED ON LATER APPLICATION.
   A patent is not available as an anticipation of another patent upon the device of which it is expressly claimed to be an improvement, and which, although of later issue, was first applied for.
2. WORDS AND PHRASES—"ENGAGE."
   "Engage," as used in a patent claim, does not necessarily mean "gear or mesh with." Two plates can only engage by putting them in some bearing contact with each other, but an engagement may exist between two surfaces without the plurality of engagements going to make up a gear or mesh.
3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CORNER LOCK FOR BEDSTEADS.
   The Wolf patent, No. 1,120,638, for a corner lock for bedsteads, *held* valid, and claims 2 and 3 infringed. Claims 1, 11, and 12 *held* not infringed.
4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CORNER LOCK FOR BEDSTEADS.
   The Wolf & Governale patent, No. 1,143,796, for a corner lock for bedsteads, *held* valid, but not infringed.

In Equity. Suit by Aaron Wolf against the National Parlor Suit Company. On final hearing. Decree for complainant in part and for defendant in part.

Irving M. Obrieght and Clair W. Fairbank, both of New York City, for plaintiff.

Munn & Munn, of New York City, and W. S. Duvall, of Chicago, Ill., for defendant.

CHATFIELD, District Judge. The plaintiff is connected with the Metallic Flexible Hose Company, which is in the business of making corner locks for metal and wooden beds, and uses the patent rights of the plaintiff therefor. He shows title either as patentee or assignee to the patents in suit, and sufficiently supports his claim as coinventor, in some of the patents which will be hereafter set forth, although the defendant has intimated in the record that the invention was that of the copatentee or some workman.

It is unnecessary to state in detail the general scope of the prior art and the development of corner locks for bedsteads, except as some particular feature of the prior art patents enters into the present case.

The general form of a wedging or dovetailed connection between iron parts attached to the sides and head of a wooden bedstead, the changes occurring when iron and brass bedsteads made the use of slats unnecessary, and the form of large iron castings which encircled the corner posts, with apertures in the solid casting for insertion of the wedging parts, are matters of common knowledge. These large castings were heavy, easily breakable, and uneven in size, unless expensively prepared to give uniformity.

A number of patents have been introduced beginning with Ball, No. 2,562, of April 16, 1842, and Bostwick, No. 166,961, of August 24, 1875, both of which present wedging or dovetailing iron pieces to hold together the side slat and the end of a wooden bedstead. The patents to Barcalo, No. 536,368, March 26, 1895; Mellon, No. 554,132, February 4, 1896; Newman & Bothwell, No. 576,224, February 2, 1897; Dyer, No. 591,960, October 19, 1897; Walton, No. 644,481, February 27, 1900; Williams, No. 691,427, January 21, 1902; Newell, No. 714,733, December 2, 1902; Strobel, No. 732,133, June 30, 1903; Benjamin, No. 733,127, July 7, 1903; Nelson, No. 789,869, May 16, 1905; Nelson, No. 794,039, July 4, 1905; Nelson, No. 800,006, September 19, 1905; Murphy, No. 822,682, June 5, 1906; Kutz, No. 853,927, May 14, 1907; Berry, No. 921,349, May 11, 1909; Merriweather, No. 953,480, March 29, 1910; Duke, No. 954,563, April 12, 1910; Fox, No. 1,055,392, March 11, 1913—all illustrate the progressive application of a cast-iron corner post to a metal bed and the use of various forms of wedging joints therewith.

In the patents to Mellon and Nelson (789,869) a bolt with a winged nut is substituted for the wedge, and the parts are brought into contact upon more than one surface so as to insure the tight fastening produced by the wedge.

In Dyer, Williams, Merriweather, and Duke the wedging action is obtained in connection with a tenon like a bolt head.

In Mellon, Newman, Benjamin, Berry, Merriweather, and Nelson (789,869) the fastening is accomplished by using for the wedging or tightening action the various faces of the angle iron forming the end of the side rail.

In some of these patents, as in Mellon, the end rail is inserted in an opening in the block, while the angle iron side rail is applied on the outside of the block for holding by a winged nut. In other patents, as in Berry, in an English patent, No. 2,371, of 1897, to Samuel Bott,

and in Benjamin, the angle iron of the side rail is inserted in an opening within the casting or block forming the corner lock.

In the patents to Walton, Duke, Nelson (789,869), and Okun, No. 1,001,882, use is made of two bolts or tenons through openings in the side rail to fasten it firmly, by lugs or screws, while in Williams, Fox, and Merriweather the use of one fastening upon each flange of the angle iron, in order to secure rigidity by means of two points of connection, is plainly shown.

In a number of patents the presence of the necessary shoulder or part to which attachment is desired (wherever that may be required) is secured by adding to the casting or creating in the casting a metal surface which shall present the proper shape for the use intended.

In a metal bedstead an end bar is necessary to hold the corner locks rigid as a part of a frame in lieu of the solid board furnished by the head of the wooden bedstead.

The patents cited show the employment of similar methods of furnishing contact for attachment of these end bars to the corner locks to those used for the joints between the side bars and the corner blocks. But it is evident that in most instances the connection between the corner block and the end rail is made permanent, and need not be so easily separable as in the case of the side rails, which are intended to be removed when the bedstead is taken apart.

The problem is to make this joint so that the setting up and taking down of the bedstead shall be easy without the use of tools, and yet that the joint shall be as rigid and strong as that furnished by the fixed attachment of the end rail itself. No mechanical invention would be shown in applying to a side rail the form of surface which had given a rigid joint, when used with an end rail in an earlier patent, if the only change was in the substitution of a wedge or bolt for a rivet: Nor would the obvious requirements and methods of making a corner block from sheet metal instead of cast metal of themselves constitute patentable novelty. The stamping or bending out of lugs in the place of casting a part in the same position was old in the art before Wolf's time, and all ideas of tightening by a wedging contact which had been made plain in the cast iron corner blocks were open to those who sought to use a different material or to gain lightness and commercial advantage with strength of construction by the substitution of a hollow sheet metal fastening. Nor would the use of sheet metal in the place of cast metal of itself be patentable so long as we are concerned with the form and combination of parts of the device.

These patents are not process or method patents, and the claims of invention or originality depend upon the combination of mechanical ideas shown by the device produced as a combination, when considered from the standpoint of the mechanical accomplishment which each part of the device furnishes. Economy of weight, price, or breakage would not of themselves present any difference in the mechanical use of the part substituted for the purpose of effecting the saving. Inventive novelty might be introduced by the use of the necessary parts to meet the needs presented by the difference in material. But, if the need is the same as that shown by the former material, the application of the old shape or form to supply the same need in a different part

of the structure, when made out of the new material, could not be made the basis of a claim of invention.

When the idea of using sheet metal or stamping the material for corner locks came into use as is illustrated in the Shapiro patent, No. 947,858, February 1, 1910, granted upon an application filed October 9, 1909, the advantages were plainly apparent. The idea of shortening the side bar for purposes of shipping was shown in Newman & Bothwell, No. 576,224, in 1897, while the year before Mellon, in patent No. 554,132, disclosed the idea of turning the side rail or reversing it so as to make the channel iron available for holding slats. Several of the patents, such as Williams, 1902, Benjamin, 1903, Kutz, 1907, and Berry, 1909, have the same feature. The idea of adjusting the length of the side rail by making the attachment closer or further from the end of the rail is obvious, and is used by Okun, but not by the plaintiff.

But failure to secure strength and rigidity with simplicity of construction and operation and without great weight or size is shown by the record to have been the result, until the plaintiff, with one A. Governale, began to file a series of applications in the Patent Office showing the use of a sheet metal housing, stamped from a single piece, of such shape that the difficulties were overcome.

The idea of making the structure by stamping from sheet metal was old. Shapiro, supra; Okun, No. 1,001,882, of August 29, 1911. The general idea of stamping the blank so that it could be folded to bring various parts into the position desired was well known in the paper box and pattern art, as well as in metal adaptations of the same idea. The inventors, Wolf & Governale, attempted to plan a combination which would give the wedging and locking effects of the prior art by the use of parts which could be presented after folding up a blank so as to furnish the bearing and supporting surfaces where needed. Their solution of the problem, like that of the defendant, was aimed at a practical, satisfactory, and cheap plan or pattern for the blank, and a strong, simple combination of the three or four essentials in each structure. The insertion of lugs or plates, through openings in which a wedge or bolt could be driven to fasten the lock to the hollow metal post or flat rail, was old, and no novelty was presented by the use of these ideas.

The record shows that Wolf & Governale succeeded in making a lock which met the need in most ways. They described this in an application filed June 11, 1912, but which was not finally allowed by the Patent Office until June 22, 1915, under patent No. 1,143,796. Suit is brought upon this patent on claims 5, 6, and 7. Of these claims 6 and 7, which do not specify the housing as tubular, were submitted as amendments in the Patent Office as late as April 12, 1915.

It is hence charged that the plaintiff was able to draw its claims with reference to the defendant's construction at a date long after the filing of the plaintiff's application, and the argument is drawn that the plaintiff thereby sought to cover and to render infringing the defendant's device.

But in the meantime Wolf filed an application on August 2, 1912, resulting in patent No. 1,148,256, and another one upon the 14th of

June, 1913, which appears to have been allowed as an improvement over his patent No. 1,048,256. Upon the application of June 14, 1913, he was allowed patent No. 1,120,638, upon the 8th day of December, 1914, which is one of the patents in suit. Thus not only was the improvement patent issued first, but it recites that it relates to an invention of the general type shown in the other Wolf & Governale patent, which was issued December 24, 1912, No. 1,048,256, upon the application filed subsequent to that for patent No. 1,143,796, the first patent in suit.

It also appears from the record that Governale then, with another person of the same name, ceased his general work with Wolf, and upon the 15th day of January, 1913, filed an application for a patent which was finally issued on the 29th of April, 1913, under No. 1,060,180, for a corner lock embodying many of the features shown in the Wolf & Governale lock, but with different methods of holding and fastening the parts.

It is unnecessary to consider whether this was valid as an improvement patent or valid as an independent patent, and the record shows that the structure is complicated so that commercially the art has developed in the direction of the Wolf patents as distinguished therefrom.

The present suit involves claims 1, 2, 3, 11, and 12 of the Wolf patent No. 1,120,638, which, as has just been stated, was subsequent in application, but prior in point of issue to the other patent in suit, No. 1,143,796.

[1] The defendant has based much of its argument in its brief upon supposed anticipation by the Wolf & Governale patent, No. 1,048,256, issued December 24, 1912; that is, prior to the issuance of both of the patents in suit. This patent, as has been stated, was based upon an application filed August 2, 1912, and is expressly claimed as an improvement upon the application resulting in patent No. 1,143,796, and is not available as an anticipation against that patent. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Suffolk Co. v. Hayden, 70 U. S. (3 Wall.) 315, 18 L. Ed. 76; Ide v. Trorlicht et al., 115 Fed. 137, 53 C. C. A. 341; Century Elec. Co. v. Westinghouse E. & Mfg. Co., 191 Fed. 354, 112 C. C. A. 8. The defendant is not a manufacturer, but it makes and sells bedsteads and procures the bedstead corners from a company known as the Seng Company, which, according to the plaintiff's testimony, is the only business competitor having a successful sheet metal bedstead corner lock which has been upon the market since Wolf brought out his form of device.

It appears from the record that the Seng Company and its counsel are actually conducting this suit for the defendant, and the alleged infringing device is made in accordance with a patent to one Morris B. Okun, issued under No. 1,126,068, upon the 26th of January, 1915, on an application filed February 28, 1914. This Okun patent, which, as has been pointed out, was granted prior to the Wolf patent, No. 1,143,796, makes use of the idea of turning end for end and hence reversing the channel iron side rail, of making the length of the bed adjustable by furnishing two notches at each end of the side rail, either

of which can be used for the insertion of the wedge part, and employs a bolt with a winged nut to clamp together the locking structure. This Okun patent is the property of the Seng Company, and there have been introduced in evidence three other patents to Okun. No. 1,001,882, August 29, 1911, describes a fastening generally consisting of a notch or socket to receive a tenon or knob firmly affixed to the side rail. The second Okun patent was issued under No. 1,076,838, upon the 28th day of October, 1913, and shows another form of corner with a different shaped slot for the receipt of a tenon, similar to that in the previous patent. This patent makes use of a sheet metal housing. The third Okun patent, No. 1,083,938, issued upon the 13th of January, 1914, shows a metallic blank folded after stamping into such form and shape as to furnish parts for the attachment of the side rails and end rails, and these rails are in turn fastened by a bolt with the winged nut used in the fourth or latest Okun patent.

The third Okun patent, granted upon an application filed August 1, 1913, shows a horizontal and a vertical lug stamped out and bent back from a blank forming the lock, in such positions as to come in contact with the sides of the end rail, while forming a right angle with each other. This particular arrangement is also shown in the last Okun patent under which the alleged infringing device is manufactured, and the defendant seeks to distinguish this feature from the Wolf patent in suit, No. 1,120,638, by pointing out that in the Patent Office Wolf contended for originality and patentability in making these two lugs engage or come in contact with each other so as to form a rigid support. It is evident that, if riveted to a solid iron rail, the Okun structure would be rigid, as the lugs could not be bent down toward each other, even though not in contact at the outset, and both Okun and Wolf show the same improvement over Shapiro which was finally allowed by the Patent Office.

In the Shapiro patent, No. 947,858, of February 1, 1910, the two lugs are cut from opposite or parallel sides of the corner lock, and rigidity against bending is secured by inserting the end of the head rail into the structure of the corner lock itself. In another form of Shapiro a single lug is used, extending vertically instead of horizontally, but with two rivet holes in the lug, as in Walton. This would insure against twisting of the rail upon the lug, that is, upon the pivot which Wolf testifies was one of the commercial grounds for criticism in his first patent in suit, No. 1,143,796, and we thus find that the second Wolf patent was an improvement over earlier Wolf patents and over Shapiro in the same sense in which Okun seeks an improvement by a change similar in result, but with a slight difference in construction.

The only evidence as to priority of invention between Wolf and Okun is furnished by the date of application. On August 2, 1912, when the application for patent No. 1,048,256 was filed, Wolf was still using the single lug. On January 13, 1913, Okun had not found out the use of a double lug, and in fact was not using the boxlike corner lock, but, as shown in application for patent No. 1,076,838, was constructing his corner lock of different sections of angle iron. But on June 14, 1913, Wolf applied for the patent No. 1,120,638, and was immediately

followed on August 1, 1913, by Okun, who then used the box-shaped stamped housing or metal lock with the pair of lugs placed at a right angle to each other for the support of the end rail.

But Wolf did not get his patent at once. The Patent Office rejected this several times after January 13, 1914, when the Okun patent, No. 1,083,938, was actually issued, and Wolf, while distinguishing from Shapiro, by claiming benefit from having two lugs at right angles and engaging so as to furnish rigidity, was evidently aware of the advantage of so wording his claims as to cover the device in which the two lugs were at right angles, but not in contact.

If an interference had been declared between Wolf and Okun on this question, priority of invention might have been determined in the Patent Office, but the Okun patent having been issued, the Patent Office contented itself with allowing the Wolf claims in the broader form, and claims 1, 2, 3, and 12 of patent No. 1,120,638 are not limited to a structure in which the two lugs are in contact, while claim 11 expressly specifies that the two lugs engage with each other.

[2] It is unnecessary to consider the contention raised by the defendant that the word "engage" means "gear or mesh with." Two plates can only engage by putting them in some bearing contact with each other. An engagement may exist between two surfaces without the plurality of engagements going to make up a gear or mesh.

[3] It will be held, therefore, that Wolf shows earlier than Okun the idea of stamping out and folding over the rigid right-angle support for the end rail, and the device in suit must be held to infringe claims 2 and 3 of the Wolf patent, No. 1,120,638, if these claims are valid as broad basic claims for this form of housing. Both Wolf and Okun thus must be held to show the same invention. Okun cannot claim as new his method of arranging the lugs, which are the mechanical equivalent of the structure of prior date in the Wolf application.

[4] There remains the more serious question as to the general form of the housing or boxlike structure made from the blank metal stamp. As has been already said the Shapiro patent, which the record shows is owned by the Seng Company, manufacturer of the alleged infringing device, disclosed as early as February 1, 1910, the use of the housing or box stamped from a sheet of metal and folded like a pasteboard box into such form as to bring the desired parts into place. Shapiro also showed a box tubular in character, in the sense that it made use of the four side supporting walls formed by folding up the stamped blank, and left the ends open, as no use was to be made therefrom. But Shapiro attached his angle iron rail upon the outside of this box, while Wolf & Governale employed the tubular box for the purpose of receiving the rail inside the box. The particular idea of inserting the rail was not of itself patentable novelty. In addition, this was shown in the English patent to Samuel Bott, of which copies have been on file in the United States since 1897, this patent being British patent No. 2,371, of 1897, and also the Dyer patent, No. 591,960, of October 19, 1897, and other patents of the cast iron art.

But Wolf & Governale applied the sheet metal tubular box as an outside casing for the structure within which they were to lock the

parts holding the side rail of the bed, and also to bend out the parts to which the end rail would be attached. This idea is made use of in the Okun patents, Nos. 1,083,938 and 1,126,068; but Okun seeks to avoid infringement by describing an irregular-sided metal box which could not be called a tube, from its shape in the direction in which the side rail is inserted. In fact, the Okun device has more sides, when viewed from any standpoint, than could properly be located in a purely tubular structure. In this sense Okun undoubtedly avoids the charge of infringing those claims of the Wolf & Governale patents which specify the tubular box. These claims got through the Patent Office by emphasizing the economical and simple arrangement in which unnecessary parts were avoided. Okun could not form the parts which he requires from a blank which would give a housing tubular in shape. It is therefore evident that the Wolf patent, the Wolf & Governale patents, and the Okun patents have patentable improvements over the prior art, but Okun certainly does not infringe claims 1, 2, and 5 of patent No. 1,143,796, nor claim 1 of patent No. 1,120,638, which are limited to the tubular member. Claims 2, 3, 11, and 12 of patent No. 1,120,638 are not broad claims for the general form of device. This had been presented in the application for patent No. 1,143,796. If these claims of No. 1,120,638 are not to be limited to the exact improvement shown in the claims, they were anticipated by the disclosures of No. 1,048,256. Both of these patents were claimed as improvements on the earlier application, and must be so construed. Otherwise the claims of the generic patent would be invalid for double patenting. Apart from the generic idea, the structure of No. 1,120,638 is not shown by No. 1,048,256.

When, therefore, Wolf & Governale seek to show a broad claim for "a member formed from a sheet metal blank * * * having an opening in the end thereof * * * into which a side rail may slide endwise, * * * with a fastening member extending vertically through said first mentioned member," as set forth in claims 6 and 7 of patent No. 1,143,796, it would be necessary to conclude that they did not mean what they said when they limited claim 6 and claim 7 by making one part or side of the member (which was tubular in form but which was not so described) present a "transversely extending edge for engagement with the under side of said side rail," as in claim 6, or as in claim 7, "a supporting member * * * for engagement with the lower side of the end portion of said side rail." This Okun and the defendant do not show.

Thus Wolf & Governale, while they finally used in claims 6 and 7 language broad enough to cover a five-sided box instead of a four-sided tubular member, nevertheless have plainly so limited themselves in their specifications and drawings and in the meaning of the words expressed in claims 6 and 7 as to make impossible the absolutely basic claim for any kind of a blank metal box into which the side rail could be slid endwise.

The Okun patents, Nos. 1,083,938 and 1,126,068, show the use of the blank metal box structure which was old in Shapiro, but with a use of that structure similar to the use made by Wolf & Governale. But the adaptation of this boxlike structure to this general use was not

patentable novelty. The patentable combination allowed to Wolf & Governale, while valid, should not be so extended as to include every form of stamped metal box or housing.

There should be a decree that the claims of the patent No. 1,143,796 and claims 1, 11, and 12 of patent No. 1,120,638 in suit are valid, but not infringed. Claims 2 and 3 of patent No. 1,120,638 will be held valid and infringed.

ÆOLIAN CO. v. CUNNINGHAM PIANO CO.

(District Court, E. D. Pennsylvania. August 3, 1917.)

No. 1715.

PATENTS ⊂⊃297—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A patentee the validity of whose patent has been determined by adjudication or its equivalent is entitled to a preliminary injunction against its infringement in the absence of a showing of some defense which makes his right doubtful.

In Equity. Suit by the Æolian Company against the Cunningham Piano Company. On motion for preliminary injunction. Motion granted.

George D. Beattys, of New York City, and Joseph C. Fraley, of Philadelphia, Pa., for plaintiff.

Michael D. Hayes and Francis M. McAdams, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The person to whom letters patent have been issued has a prima facie right of property in his invention. The right, however, is open to challenge, and the validity of the patent, if challenged, must be established before the patentee has a right to its enforcement. When, however, the question of validity has been in good faith determined in his favor, the right conferred by law is no right unless the law also upholds the owner in its exercise. The right may thus be determined by adjudications or by their equivalent in general acquiescence. No one except parties and privies are bound by the one, and no one by the other. All other disputants of the right have on their side the right to have the question determined as against them. At the stage at which the parties in the instant case have arrived, the question is not one of the rights of the parties as they will be determined on final hearing, but the present status with respect to the rights asserted and denied. That of which we are in search is a modum vivendi during litigation. The rights of the parties under the ad interim conditions are just as much rights as those accorded them after final hearing and just as dependent upon equitable considerations and legal principles. A patentee who claims the right to forbid another to make, use, or vend a device must establish the validity of his claim before the law will enforce the prohibition. One who asserts a right to appropriate that which has by law been determined to be the property of another must

respect such right of property until his right of appropriation has been established. This is merely "a working rule," and demands submission to any practical hardship which may result, compensation for which is made by the one in whose favor in the first instance the rule works being made answerable to the other who is finally found to have been in the right. The rule is only invoked when one of the litigants or the other must be left in possession pendente lite. Which it shall be is to be determined as is any other question. One recognized principle is that of the prima facie right. Another is the preservation of what is known in law Latin as the "statu quo." Still another is the existence of a substantial doubt of the right of plaintiff. All these and other expressions to be found in the adjudged cases are nothing more than the features which in different cases have been emphasized. The real conclusion reached in awarding an interlocutory injunction is that under all the facts and equities so far appearing in the cause the plaintiff should be left in the undisturbed assertion of his claimed right until it is determined that his claim is groundless, subject to his liability to make good any loss thereby sustained by others. A patentee the validity of whose patent has been determined by adjudication or its equivalent may invoke the benefit of this rule with peculiar force. On general considerations the writ now asked for should be granted. The only inquiry left is whether anything has been made to appear which takes this case out of the general rule. It has been urged upon us with earnestness and force by counsel for defendant that these differentiating features do exist. The observation that in view of the prior art the defendant's use of its mechanism is sanctioned by what has long been done is prima facie met by the admitted fact that for 15 years the piano trade has recognized and admitted the claimed exclusive property rights of the plaintiff. The further suggestion that the defendant is within the rule followed in Ney v. Drill Co. (C. C.) 56 Fed. 152, Welsbach v. Incandescent Co. (C. C.) 100 Fed. 648, Williams v. McNeely (C. C.) 56 Fed. 265, Blakey v. Mfg. Co., 95 Fed. 136, 37 C. C. A. 27, and other cases, in that it also is manufacturing under an issued patent, is met by the double fact [not only] that the right of the defendant to all the rights granted by its patent is not disputed, but that in the very application for this second patent a claim to a property right in plaintiff's invention was rejected by the Patent Office, and the rejection accepted by the second patentee on the express ground that the invention belonged to the plaintiff by a prior grant. The rule invoked on the strength of Electric Co. v. Hall, 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96, Cawood Patent, 94 U. S. 695, 24 L. Ed. 238, McCormick v. Talcott, 61 U. S. (20 How.) 405, 15 L. Ed. 930, and many other cases that a mere result cannot be patented and that one man may use in combination elements taken from the prior art to accomplish a result without trespassing upon the proprietary rights of another man who had previously hit upon another combination for producing the same result, is of no aid to the defendant for the like reason that it has been decreed that the plaintiff has a proprietary right in the use of a mechanism which is in conflict with the mechanism which the defendant is using or one like it. It is not necessary to find now

that the plaintiff has the right claimed nor to deny to defendant its privilege to seek to establish the counterclaim of right set up by it, but it is found that the claimed right of plaintiff in so far established that it should be left undisturbed in its assertion until final decree. The correlated principle for which Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723, and other cases are cited that as between two improvers (no pioneer invention being involved), each claiming a combination, there is no infringement if the combinations are not the same, or, in other words, may be differentiated, is inapplicable to this case because the claimed application is based upon the admitted fact that all but one of the elements in plaintiff's mechanism are old, ignoring the appearing fact that the one is novel, and this one is of the essence of plaintiff's invention and of defendant's infringing mechanism. The distinction between the case at bar and the cases of combination claims cited by defendant's counsel is well illustrated by the action of the Patent Office in allowing the claims of the Kennedy patent application so far as not in conflict with the claims of the Young previously granted patent. The error of the defendant in its reliance on the Kennedy patent and its denial of the patentability of the Young invention rests substantially upon viewing the Kennedy patent as if it included the claims which were rejected and treating the Young patent as if its claims had been disallowed. It may be assumed for our present purposes arguendo that defendant will succeed upon final hearing in having the Young patent found to be invalid. As to this we express no opinion, contenting ourselves with a statement of the conclusion reached, as before stated, that the Young patent did in fact issue, and that it has (in equivalency) been adjudged valid and that the plaintiff is entitled to be protected by preliminary injunction in the status of its rights as thus established until final decree. Infringement of these prima facie rights being also found, and indeed in practical effect not denied, an injunction may issue as prayed on the present motion upon the giving of the usual bond. A formal decree to this effect may be submitted, its special terms and the amount of the bond to be settled by the court if not agreed to by the parties.

THE DAVIDSON. THE GASTON. THE ANNA.

(District Court, E. D. Virginia. June 29, 1917.)

COLLISION ⇐95(4)—STEAMER AND MEETING TOW—EXCESSIVE SPEED.

A collision between a steamer passing down Elizabeth river at Norfolk in the evening at a speed of 12 miles an hour and a barge in tow of a tug passing up to the anchorage grounds on the east side of the river, both carrying proper lights, *held* due solely to the fault of the steamer in going at too high speed in a crowded harbor, and for failing to exercise proper care to observe the lights of the tug and tow, which were the privileged vessels, in time to avoid collision.

In Admiralty. Suit for collision by the owner of the barge Davidson against the steamer Gaston, with the tug Anna impleaded. Decree for libelant against the Gaston alone.

Hughes & Vandeventer, of Norfolk, Va., for The Davidson.
Loyall, Taylor & White, of Norfolk, Va., for The Gaston.
Hughes, Little & Seawell, of Norfolk, Va., for The Anna.

WADDILL, District Judge. This litigation involves a collision which occurred on the 17th of January, 1917, about 10:30 at night, in the Elizabeth river, Norfolk, Va., slightly to the southward and eastward of the Lambert's Point piers.

The barge Davidson, loaded with lumber, was in tow of the tug Anna, coming up the river, and at a point off the upper merchandise pier of the Norfolk & Western Railway the tug made her departure for the anchorage grounds for barges of the size of the Davidson, on the flats to the eastward of the river, just above Lambert's Point, and in the vicinity of the Black Buoy. The steamer Gaston, of the Old Bay Line, was proceeding down the river en route for Baltimore, and collided with the Davidson, striking it on the starboard side, forward of amidships, causing considerable damage.

The Davidson filed its libel against the Gaston for the damage sustained, and the latter appropriately brought in the tug under the Fifty-Ninth admiralty rule. The Gaston is a freight steamer, in service between Norfolk and Baltimore, 212 feet long, 31.5 feet beam, 19 feet deep, and 600 indicated horse power; and the barge, also engaged in bay service, 197 feet long, 23 feet 10 inches beam, and 12 feet deep, on a hawser 225 feet long, in tow of the Anna, a small harbor tug, 55 feet long, 14.5 feet beam, and 6.8 feet draft.

The Anna insists that when about opposite the merchandise pier, having a disabled tug and tow of the New York, Philadelphia & Norfolk Railroad Company between her and the pier on her port, inward bound, and having shortly before passed another tug and tow of the same company to starboard, going out, she made her departure while slightly to the eastward of mid-channel, for the anchorage grounds to the eastward of the river, to anchor the Davidson; and when near the Black Buoy she observed the Gaston coming down on her starboard, then about a mile away, off the merchandise pier at Pinner's Point, to which she gave two whistles, indicating her purpose to pass to starboard; that her signals were not answered, and that, when well to the eastward of the channel, a little beyond the Black Buoy, the Gaston, then about abreast of her on her starboard, gave a signal of one whistle, quickly followed by danger signals, and crashed into the Davidson while running at a high rate of speed; that at the time the tug's running and towing lights, as well as those on the barge, were properly set and brightly burning.

The Gaston contends that, upon going down the harbor well to the eastward of the channel, she passed on her port two tugs and tows proceeding up the channel; that she observed, down the channel, two other tugs and tows in the vicinity of and off Lambert's Point; that she first observed the red light of the Anna, when about 300 yards away on her port, when she blew one whistle and ported her wheel, to indicate her purpose to go to starboard, passing port to port; that suddenly the tug shut in her red light, and showed her green, and in a few moments the

barge showed its green light, when the Gaston gave danger signals and reversed her engines, but too late to avoid the collision.

The master of the Gaston testified that she was making about 12 miles an hour, and the mate about 8 or 9 miles; that the barge was not following in the wake of the tug; that no whistle of any sort was heard from the tug, nor did the Gaston observe the towing lights of either the tug or the barge, but only the red light of the tug before it changed its course, and the green light of the tug and barge afterwards.

Upon this state of facts, the case turns upon whom the loss must fall for the damage caused by the collision. That the barge is free from fault is manifest, unless it failed to have up proper lights, running as well as towing, or failed to properly follow the tug. There is no substantial evidence to sustain the latter position, and the court, after full consideration of all the testimony, including that of quite a number of experienced and intelligent navigators, of whom four were officers from the New York, Philadelphia & Norfolk Railroad fleet of barges then near the scene of the accident, is convinced that both the tug and tow had up their regulation running and towing lights, and that they were properly set and burning brightly.

Considering the question of liability as between the tug and the Gaston, holding the tug's lights as properly set and burning, it is difficult for the Gaston to escape liability, being the vessel charged with the duty of avoiding, as well the collision as the risk thereof, with the tug incumbered with a tow. The Georgetown (D. C.) 135 Fed. 854, 858.

With the channel straight for more than a mile, and largely crowded with shipping, two tugs and tows having passed within a mile, and two others immediately beyond the scene of the collision, admittedly seen, there was no good reason why, had those in charge of the Gaston been properly observant and attending to their duties, they could not have seen this tug and tow, however it was proceeding, whether to starboard or port, in ample time to have avoided a collision; and the Gaston cannot, in any event, escape responsibility for her failure to greatly reduce her speed in navigating in this crowded channel in its then condition.

The Gaston claims that, conceding the lights to have been properly set and burning, the tug is nevertheless responsible for having suddenly changed her course to port across the bow of the Gaston, after the latter had given the proper signal of her purpose to go to starboard and pass port to port. That the tug would have made this maneuver, assuming the facts to be as contended for by the Gaston, is highly improbable; moreover, the court does not believe that the preponderance of the testimony establishes that the tug attempted the maneuver indicated, nor is it inclined to accept the view that the Gaston, in the crowded condition of the harbor, would have attempted at that time to navigate still further to the eastward of the channel.

After a full consideration of the whole testimony, the court's conclusion is that the Gaston is solely responsible for the collision, as well because of proceeding at too high a rate of speed as the failure to exercise the care required of her to see and observe the lights of the approaching tug and tow, in time to avert the collision.

A decree carrying out these views will be entered on presentation.

In re CHARLES WACKER CO.

(District Court, D. Maryland. August 6, 1917.)

SALES ⊂=1(4), 10(4)—UNCERTAINTY AND LACK OF MUTUALITY—PRICE GUARANTY.

A contract whereby a canner of tomatoes agreed to deliver in the succeeding packing season tomatoes to be packed therein, which contract guaranteed prices against decline of specified reliable packs of standard tomatoes to date of shipment, was not so uncertain and lacking in mutuality on account of the price guaranty clause that it was unenforceable and void.

In Bankruptcy. In the matter of the Charles Wacker Company. On review of an order of the referee ruling that a provision of the bankrupt's contracts with claimants was so uncertain and lacking in mutuality that the contract was unenforceable and void. Order reversed, and claims allowed.

Alexander Hardcastle, Jr., and Bartlett, Poe & Claggett, all of Baltimore, Md., for claimants.

Richard S. Culbreth, of Baltimore, Md., for trustee.

ROSE, District Judge. The bankrupt was a canner of tomatoes. It, and many others in similar lines of business in Baltimore and vicinity, had been in the habit in the winter and early spring of entering into contracts to deliver in the succeeding packing season tomatoes to be packed therein.

In the first quarter of 1916 the bankrupt made such contracts with the claimants. It did not perform any of them and on or before the 8th day of November, 1916, and after the close of the packing season, notified each and every one of the claimants that it would not be able to make any deliveries. The price of tomatoes had risen steadily from the time the contracts were signed until they were broken. The aggregate damage suffered by the claimants by their breach was between $20,000 and $25,000. Each of them contained the following clause:

"Prices guaranteed against decline of the following reliable packs of standard tomatoes to date of shipment: Roberts Bros.' Big R. Brand; Langrall's Maryland Chief brand; McGrath's Champion brand; Foote's Compass brand; Numsen's Clipper brand; Schall's Terrapin brand; Torsch's Peerless brand; Booth's Oval brand."

The trustee says that this provision was so uncertain and so lacking in mutuality that any attempted contract of which it formed a part was unenforceable and void.

The referee so holding, the claimants have brought his ruling here for review.

The trustee and the learned referee rely upon Gelston v. Sigmund, 27 Md. 334; Parks v. Griffith & Boyd Co., 123 Md. 233, 91 Atl. 581; United Press v. N. Y. Press Co., 164 N. Y. 406, 58 N. E. 527, 53 L. R. A. 288; Stout v. Hardware Co., 131 Mo. App. 520, 110 S. W. 619. These cases are easily distinguishable from the one at bar. In

some of them one of the parties reserved to himself the right to alter the contract. Such an agreement is obviously lacking in mutuality. In others as in Stout v. Hardware Co., supra, the court thought the method of price determination provided for was so difficult and uncertain that the contract was unenforceable.

In the contracts before the court neither party retained any power to alter any of the terms. There is no legal and not much practical difficulty in ascertaining whether there was during the packing season any decline in the price of any of the eight brands mentioned and, if so, how much.

In many lines it is necessary, or at all events highly expedient to contract for goods months before they are to be delivered. Under such circumstances the seller frequently guarantees to protect the buyer against a decline in the price of some leading producer or producers. Many millions of dollars of business are annually done under contracts containing such guaranties. There is nothing immoral in them nor are they contrary to any public policy. Business men have use for them, and the courts should sustain them if legally possible. Under the facts here presented there is no difficulty in so doing. The order of the referee must be reversed, and the claims allowed.

THE CLEMATIS.

(District Court, E. D. New York. August 1, 1917.)

SEAMEN ⊂=24—WAGES—RIGHT TO PART PAYMENT AT INTERMEDIATE PORT.

Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322), providing that every seaman shall be entitled to receive on demand one-half the wages he shall have then earned at every port where the vessel shall load or deliver cargo before the voyage is ended, is not to be construed to entitle a seaman to receive at intermediate ports any more than together with prior payments, will equal one-half the wages then earned.

In Admiralty. Suit by Thomas Baxter and others against the steamship Clematis. Decree for respondent.

Silas B. Axtell, of New York City, for libelants.

Kirlin, Woolsey & Hickox, of New York City, for claimant.

CHATFIELD, District Judge. This case involves two propositions which must be considered at the present time. A number of other exceptions to the libel have been argued which will be dismissed without particular or specific mention.

The two propositions which must be considered arise from the fact that the Clematis is a British vessel, upon which the libelant Baxter shipped, signing articles at Havre, France, on September 14, 1916. The vessel arrived in New York on January 20th, and on January 25th and 26th the libelants respectively demanded one-half of the amount of wages then unpaid. They had already received a sum equal to one-half of the amount then due. As has been held in The Jacob N. Haskell (D. C.) 235 Fed. 914, and The London (D. C.) 238 Fed. 645,

and The Meteor (D. C.) 241 Fed. 735, they were entitled to no more wages, and were properly marked off, and were not entitled to double damages for waiting time because they were dismissed from the vessel under section 4529, R. S. (Comp. St. 1916, § 8320).

The libel is dismissed, without costs.

EQUITABLE TRUST CO. OF NEW YORK v. WESTERN PAC. RY. CO.

SAME v. DENVER & R. G. R. CO. et al.

(District Court, S. D. New York. May 17, 1917.)

1. RAILROADS ⟸154—CONTRACTS—CONSTRUCTION.

The Western Pacific Railway Company, which owned a right of way, to provide for construction of its road, made an issue of bonds secured by a mortgage to complainant trust company as trustee. As a part of the same transaction a number of contracts were made. One of them, to which the Pacific Company, complainant, and two other railroad companies (afterwards merged in defendant company) were parties, provided that defendant should purchase the promissory notes of the Pacific Company each six months in such amounts, if any, as might be required, together with the earnings of the Pacific Company applicable thereto, to meet the maturing interest on the bonds and sinking fund payments required by the mortgage, the purchase money to be paid to complainant; that such obligation should run with defendant's road and the contract should remain in force until the principal and interest of the bonds were paid in full; also defendant waived execution of the notes in advance of such payments, and, being the owner of practically all of the stock of the Pacific Company, agreed to keep its stock issue sufficient to legalize the notes. *Held*, that the paramount purpose of such provisions was to pledge the credit of defendant as additional security to the purchasers of the bonds, and that the fact that default was made in the payment of interest, the mortgage was foreclosed, and all of the property of the Pacific Company sold, so that it could no longer execute valid notes, did not relieve defendant from liability to the trustee on the contract.

2. RAILROADS ⟸154—CONTRACTS—CONSTRUCTION AND OPERATION.

The default in the payment of interest on the bonds which resulted in the foreclosure having been due to the failure of defendant to make the advances agreed upon, such failure constituted a repudiation of the contract which absolved the Pacific Company from the further delivery of notes thereunder.

3. RAILROADS ⟸154—CONTRACTS—CONSTRUCTION AND OPERATION.

While the contract required the Pacific Company to apply all its gross earnings and income to certain specified purposes, including payment of interest and the notes given defendant, and provided that such covenant should run with its road into whosoever's hands it might come, it further provided that in case of default whereby a right of foreclosure should accrue, continuing for six months, the trustee might declare the principal of the debt due and sell all of the property of the Pacific Company, and might also terminate the contract, except those provisions by which defendant gave further assurances to the bondholders which should remain unaffected with the right in the trustee to enforce their specific performance. Such a default did occur, the mortgage was foreclosed, and all the property of the Pacific Company was sold, including its rights under the contract, but reserving those of the trustee, and the purchaser refused to assume any liability under the contract. *Held*, that such facts, under the clear terms of the contract and in view of the fact that defendant was

in full control of the mortgagor, did not release defendant from the future performance of the obligations it assumed to the trustee for the benefit of the bondholders.

4. RAILROADS ⟸154—CONTRACTS—VALIDITY—ULTRA VIRES.
The provisions of the contract by which defendant assumed obligations to the bondholders of the Pacific Company were not ultra vires, although they involved the purchase of notes before their issuance, taking into consideration the fact that defendant was virtually the owner of that company and in a position through stock control to enforce their issuance, and also the continued existence and operation of that company.

5. RAILROADS ⟸154—CONTRACTS—BREACH.
At the time of its last payment to the trustee under the contract defendant, through its board of directors, caused a notice to be published in the public press, in effect that it would pay no more deficiencies of the Pacific Company unless the bondholders would consent to some arrangement by which their legal demands under the contract would be abated. No such arrangement having been made, it ceased making the payments, and at no time during the foreclosure suit did it manifest any intention of assisting the Pacific Company, although it owned five-sixths of the stock. *Held*, that such repudiation and subsequent action constituted a breach of the whole contract and gave an immediate right of action to recover full damages for the breach.

6. RAILROADS ⟸154—CONTRACT OF GUARANTY—TERMINATION—DAMAGES FOR BREACH.
The contract, having provided that it should "continue in full force and effect until all of the bonds shall be fully paid, principal and interest," was not terminated by the acceleration by complainant of the maturity of the principal under the terms of the mortgage, but remained in force as to the deficiencies on installments of interest maturing before the sale of the property, after applying the earnings of the road, and thereafter as to the interest on so much of the mortgage debt as remained unpaid after the foreclosure sale, the amount to be determined by taking its present or actuary value.

7. RAILROADS ⟸154—CONTRACT OF GUARANTY—MEASURE OF LIABILITY—VALUE OF PROPERTY ESTABLISHED BY FORECLOSURE SALE.
The price at which the property of the Pacific Company was sold at public auction must be accepted as establishing its value for the purposes of the contract, and defendant was not relieved from full liability on account of the balance remaining due on the mortgage debt by the fact that such price was the upset price fixed by the court on application of the majority bondholders or the fact that they became the purchasers.

8. INTEREST ⟸28, 37(1)—RATE AFTER MATURITY OF DEBT.
On recovery of damages for breach of a contract to pay money the interest recoverable after default is governed by the law of the state of suit, and in New York the rate is the legal rate, regardless of the contract rate.

In Equity. Suit by the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, and same against the Denver & Rio Grande Railway Company and the Western Pacific Railway Company. Decrees for complainant.

See, also, 231 Fed. 478; 233 Fed. 335; 236 Fed. 813, 814.

This cause comes up upon final hearing on a dependent bill in equity, ancillary to a bill of foreclosure which was itself ancillary to an original bill in foreclosure depending upon diverse citizenship. On the 2d day of March, 1915, the plaintiff filed the original bill of foreclosure in the District Court of the United States for the Northern District of California against the Western

Pacific Company for the foreclosure of a mortgage hereinafter mentioned, and on the 27th day of May, 1915, the ancillary bill of foreclosure was filed in this district for foreclosure of the same mortgage upon assets located in this district. This bill, which was filed on the same day, was to secure an adjudication upon a contract entered into between the defendant in the original bill, the Western Pacific Railway Company, the Rio Grande & Western Railway Company, the Denver & Rio Grande Company, and the plaintiff's predecessor in title. It was superseded by the filing of an amended and supplemental bill verified on the 4th day of January, 1917, and filed January 6, 1917, on which the hearing was had, and to which alone reference need be made.

The gist of the bill is that on June 23, 1905, the defendant Western Pacific Railway Company, a California corporation, executed a mortgage dated September 1, 1903, of all its assets to the Bowling Green Trust Company, a New York corporation, of which plaintiff is the successor. At that time the Western Pacific Railway Company had only acquired a right of way for a railway in the state of California, and the mortgage was for the purpose of an issue of $50,000,000 of 5 per cent. bonds due on the 1st day of September, 1933. In the year 1905 the predecessors of the defendant the Denver & Rio Grande Railway Company (known as the New Denver Company), which were two railroads, the Rio Grande & Western Railway Company and the Denver & Rio Grande Railway Company (known as the Old Denver Company), took up the question of purchasing the rights of the Western Pacific Railway Company and issuing a sufficient number of bonds under the aforesaid mortgage to construct the railroad therein contemplated. In pursuance of such purpose, and for the purpose of better securing bonds to be issued thereunder, the Old Denver Company and the Rio Grande & Western Railway Company entered into certain contracts with the plaintiff and with the Western Pacific Railway Company, known as contracts A, B and C, the general upshot of which was that the Old Denver Company and the Rio Grande & Western Railway Company (called the Western Company) should acquire together one-half of the $50,000,000 of the existing stock of the Western Pacific Railway Company, and $25,000,000 added stock which was to be issued. The second of these contracts, known as contract B, made certain provisions touching the payment of interest and a sinking fund upon the first mortgage bonds of the Western Pacific Railway Company, hereinafter to be set forth in detail.

Under this contract some $47,000,000 of added bonds were issued to the public generally, and the mortgage of September 1, 1903, became effective to secure the same. These bonds all carried semiannual coupons, and the same were paid in part by the earnings of the Western Pacific Railway Company itself, and the balance by the defendant until March 1, 1915, at which time the Western Pacific Railway Company defaulted, and the defendant, who had meanwhile at its organization in 1908 assumed the engagements of the Old Denver and the Western Companies, failed to supply the necessary balance of funds to redeem such coupons. Thereupon the suit in foreclosure in California, as already stated, was commenced, and on the 18th of December, 1915, the default continuing, the trustee declared the whole principal of the bonds to be due in accordance with the provisions of the mortgage. The foreclosure suit proceeded to decree of sale, and the property of the Western Pacific Railway Company was struck off to a reorganization committee consisting of bondholders for the sum of $18,000,000. No deficiency judgment was taken, but the bid was assigned to a new railroad known as the Western Pacific Railroad Company, which declined to be bound by the contracts executed as aforesaid on the 23d of June, 1905.

The bill prays that contract B, on which the obligations of the defendant Denver & Rio Grande Railroad Company are asserted to depend, be construed, and that it be declared to constitute a charge and lien upon the railroad of the defendant the New Denver Company; that the court declare the amount due thereon and declare the same to be a charge on its assets; and for other incidental relief.

At the outset an order was obtained enjoining the New Denver Company from paying over certain moneys which were within the Southern district of New York, and this was also made the basis of the equitable jurisdiction of

this court. The question of the court's equitable jurisdiction, however, was not raised, as neither party desired a jury trial, and the case was heard upon the assumption that whatever relief plaintiff was entitled to, if any, should be awarded in this suit, regardless of whether strictly it had any equitable jurisdiction or not. It will serve no purpose further to detail the pleadings in the cause, but directly to proceed to a statement of the facts, which were either documentary or stipulated.

The Old Denver Company, a Colorado corporation, in 1905 operated a railroad from the city of Denver, Colo., westerly to the city of Crevasse, in Colorado, at which point it was joined by the Western Company, a Colorado and Utah corporation, which continued to Salt Lake City and Ogden, both in the state of Utah. The Old Denver Company owned all but a very few shares of stock of the Western Company, and for the purposes of this case the latter company need not be distinguished from the Old Denver Company. Indeed, in the year 1908 the New Denver Company, which is the defendant herein, was organized from the two and assumed their obligations, including specifically that arising under contract B here in question. These two roads had up to the year 1905 obtained a western outlet at Ogden and Salt Lake City by the Oregon Short Line with its terminus at Portland, and the Central Pacific with its terminus at San Francisco. In that year, however, owing to the acquisition by the Southern Pacific Railroad of the Central Pacific & Oregon Short Line, and the then existing legal incapacity of the Interstate Commerce Commission effectively to provide for the case, this outlet was abruptly cut off, and the earnings of the Denver Companies at once showed serious impairment. This made it a matter of final importance for the Denver Companies to procure a western outlet of their own, and the only feasible right of way then in existence, or indeed obtainable at all, was a substantially parallel right of way already owned by the Western Pacific Company, whose mortgage of September 1, 1903, had not yet been executed, although it had expended $3,000,000 in development. It was recognized as likely that more than the face of that mortgage, $50,000,000, would be necessary to complete the road, but in order to sell those bonds through the mediation of a bankers' syndicate, with whom negotiations had been opened, at a price of 92½, it was thought necessary to give some further security than the mere mortgage itself to the bondholders, and after various negotiations, which it is unnecessary to consider, as they were subsumed in the definitive contracts, a preliminary contract was entered into on the 22d of June, 1905, for the requisite security. This contract was between the two Denver Companies and the Western Pacific Railway Company, and provided that the Denver Companies should as further security at once execute to the Pacific Company three contracts: (a) An agreement by the Rio Grande & Western Company to purchase from the Western Pacific Railway Company $25,000,000 of second mortgage bonds at 75, these being correctly thought necessary to complete the line from Salt Lake City to San Francisco; (b) the contract here in suit; (c) a traffic contract between the Missouri Pacific Railway Company and the Old Denver Company providing for the maintenance of a joint line of transportation over their lines to the benefit of which the Western Pacific Railway Company should be entitled. The Western Pacific Railway Company on its part agreed to deliver to the Old Denver Company 100,000 full-paid shares of its stock, and to the Rio Grande & Western Company 150,000 shares of its stock, constituting one-half of its existing stock, and also to increase its stock from $50,000,000 to $75,000,000, all of which was to be distributed between the two Denver Companies.

On the next day the parties as part of a single transaction executed the mortgage and the three contracts mentioned in the contract of the day before of which it will be necessary, however, further to consider only contract B. To this contract the parties were the Denver & Rio Grande Railroad Company, therein called the "Denver Company," and the Rio Grande & Western Company, therein called the "Western Company," as parties of the first part, the Western Pacific Railway Company, therein called the "Pacific Company," party of the second part, and the Bowling Green Trust Company, the plaintiff's predecessor, therein called the "trustee." It was divided into six articles.

The first article defined certain terms to be used thereinunder and formal matters not necessary to mention.

The second article provided for a traffic agreement between the Pacific Company and the Western and Denver Companies designed mutually to secure the shipment of freight from Denver to San Francisco and intermediate points, and then in sections 4 and 5 set forth certain engagements of the Denver and Western Companies, which are the crux of this litigation. These companies promise "to purchase semiannually beginning with the date hereof, except as otherwise expressly stated, promissory notes of the Pacific Company bearing interest at the rate of 5 per cent. per annum and payable on demand, to the amount of face value by which the gross earnings and income of the Pacific Company during the preceding fiscal half year shall be insufficient to meet the sum of the following: (1) Its operating expenses, including rentals payable under leases, and particularly any lease of terminals at Salt Lake City, also current payments upon claims for damages to persons or property, and its ordinary, including all necessary, expenses of maintenance; (2) its taxes, including all assessments and other governmental charges against it or that may become a lien upon any of its property; (3) from and after the 1st day of September, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, all interest falling due during the then current calendar half year upon the Pacific Company's fifty million dollars ($50,000,000), face value, of first mortgage 5 per cent. thirty-year gold bonds; (4) the Pacific Company's annual contribution to the sinking fund provided for in its said first mortgage, if the same be payable during the then current calendar half year; (5) any other charge or expense that it may be necessary that the Pacific Company shall pay in order to assure the continued and efficient operation of its property and to protect unimpaired the lien and priority of its said first mortgage; (6) any tax or taxes which the Pacific Company may be required by law or permitted to pay upon or deduct from the principal or interest of its said first mortgage bonds, so that the holders of such bonds shall, under all circumstances, receive the principal and interest thereof without deduction for any tax or taxes; (7) all interest for such current calendar half year upon all indebtedness of the Pacific Company, other than its said first mortgage bonds. Provided, however, that any payments made to the trustee as provided in paragraph (b) of this article shall be deemed to constitute and shall be credited as payments of the purchase price of promissory notes of the Pacific Company to be purchased by the parties of the first part, pursuant to the foregoing terms of this paragraph (a).

"(b) The Denver Company and the Western Company further jointly and severally covenant and agree semiannually, at the dates and in the manner hereinafter provided, out of the purchase price of the notes to be purchased by them as provided in paragraph (a) of this section, to pay unto the trustee: (1) From and after September 1, 1908, or the earlier acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, such amount as will, together with the amount actually and lawfully appropriated by the Pacific Company out of its earnings and other income and by it paid over to its fiscal agent in the city of New York (which may be the trustee), or its fiscal agent in the city of San Francisco, or both of them, for the purpose of paying the interest to fall due during the then current calendar half year upon the Pacific Company's said first mortgage bonds upon which interest shall be payable, be sufficient to pay all such semiannual installment of interest; (2) such amount as will, together with the amount actually and lawfully appropriated by the Pacific Company out of its earnings and other income and by it paid over to the trustee for the purpose of meeting the sinking fund payment, if any, required by said mortgage to be made by the Pacific Company during the then current calendar half year, be sufficient to meet such sinking fund payment."

Section 4 (e) of this article then proceeded to state that the Denver Companies on or before the 26th of February in each year would pay to the Pacific Company the amounts provided in clauses 1, 2, 5, 6, and 7 above mentioned,

and similarly on the 29th day of August and thereafter. The section concluded as follows:

"(d) The parties of the first part, on or before the 26th day of February and on or before the 29th day of August in each year, beginning with February, 1909, or with the February or August prior thereto next succeeding the acquisition and completion of the Pacific Company's main line of railroad from San Francisco to Salt Lake City, will pay to the trustee under said first mortgage of the Pacific Company the amount required to be paid by them in pursuance to the provisions of paragraph (b) of this section, to supply, with the amounts then already paid by the Pacific Company to its said fiscal agents or to either of them, the amount necessary to pay the semiannual interest upon the first mortgage bonds of said company to fall due upon the 1st day of the next succeeding month, and they will on or before the 29th day of August in each year from and after and commencing with the year 1911, pay or cause to be paid unto said trustee unto said first mortgage such additional amount as will, together with the amount then already paid unto the trustee by the Pacific Company, for that purpose, constitute and make up the full amount of the payment for the benefit of the sinking fund to be made by the Pacific Company for the then current year in accordance with the terms of its said first mortgage. All amounts paid or payable to the trustee under this agreement for the purpose of providing for the payment of interest shall constitute a trust fund for the payment of interest due or thereafter to become due upon the Pacific Company's first mortgage bonds, and shall be by the trustee made available at the fiscal agencies of the Pacific Company as hereinafter provided, but only for the payment of interest upon said bonds then due or thereafter to fall due as the same shall mature and payment thereof shall be demanded. Neither the Pacific Company nor any one claiming under it, save only such persons or corporations as may be entitled to receive the interest upon said first mortgage bonds, shall be entitled to or possess any interest in, lien upon, or claim to said fund, or any part thereof.

"(e) The Denver Company and the Western Company, parties of the first part aforesaid, hereby waive, and each of them hereby waives, any right which they or either of them might otherwise have to demand the delivery of any of the promissory notes to be purchased by them as provided in paragraph (a) of this section before or coincidentally with the payment by them of the purchase price of any such notes as provided in paragraphs (a), (b), (c), and (d) of this section, and the said parties of the first part and each of them will promptly pay the purchase price of all notes that they or either of them shall be under obligation to take hereunder at the times and in the manner herein provided, although the Pacific Company shall not at the time of any such payment have ready for delivery, or shall not have taken the steps necessary to authorize the delivery of, or for any other reason shall fail to deliver, any of such promissory notes; but neither of the parties of the first part shall be deemed by reason of the making of any payment prior to the receipt of the notes thereby paid for, or by reason of anything in this paragraph contained, to have waived or otherwise prejudiced the right of said parties or either of them to receive or to enforce the delivery by the Pacific Company of such or any notes that the parties of the first part or either of them shall pay for or shall have paid for hereunder.

"(f) The parties of the first part further jointly and severally covenant and agree that, in case the Pacific Company at any time when by the terms of this agreement the parties of the first part are under obligation to purchase from it any promissory note or notes by reason of the fact that its capital stock outstanding and subscribed shall not be sufficient in amount to authorize the issuance by the Pacific Company of such note or notes, the parties of the first part, or one of them, will subscribe for an amount of the unissued capital stock of the Pacific Company sufficient to render the issuance of such note or notes of the Pacific Company authorized and lawful."

Section 5 of article 2 bound the Denver Companies to pay to the trustee any taxes which the Pacific Company might be required to pay and to deduct from the principal or interest of the first mortgage bonds.

The third article, containing the engagements of the Pacific Company, provided that with all haste it should complete its main line of railway as provided and specified and turn over all its east-bound traffic to the Western Company and forward all west-bound freight from the Western Company, with certain provisions not necessary to mention, touching regulation and fixation of such rates, and that it would co-operate in maintaining a passenger service, with what might be incidentally necessary; further, that the Pacific Company should at the time of any payment by the Denver Company of any amount required under section 4 of article 2 execute the necessary promissory notes, so far as it legally might, and if it could not do it at once, that it would do so as soon thereafter as possible, and take such corporate action as might be necessary to give validity to such notes. The Pacific Company further agreed to apply all its gross earnings and income as the same should accrue to the same purposes set forth in section 4 of article 2, already quoted, and in addition out of the balance to pay the promissory notes provided for in that section. The Pacific Company further agreed on the 20th of February and the 23d of August of each year to pay the amount required for the installment of interest then due upon its first mortgage bonds to its fiscal agents in New York and San Francisco, and to cause its said agents to notify the trustees of such deposit, and likewise not later than the 23d of August in each year "actually to pay over to the trustee the amount to be paid by it for the purpose of making the sinking fund payment to fall due during the year expiring on the last day of the current month as required by the Pacific Company's said first mortgage."

Article 4 requires no description, and in article 5 the trustee agreed to hold the moneys received by it and to apply them to the purpose of the mortgage as therein provided, and from time to time upon request of the bondholders to enforce the provisions of article 2 touching payments to it, the trustee, and any modifications thereof.

Article 6 contains nothing necessary to mention in the first six sections thereof. The seventh section provides that the trustee shall notify the other parties semiannually of the amount of money held by it to pay the interest on the bonds and the amount required in addition to make the coming payment. Section 8 provides that the trustee shall make "available" to the fiscal agents of the Pacific Company all sums received by it from the Denver Company. Section 9 requires no comment. Section 10 provides that the failure of the Pacific Company to perform any of the covenants shall not be ground for rescission by the Denver Companies, who are relegated to specific performance or damages. Sections 11 and 12 require no notice. Section 13 provides that the agreement shall continue in full force and effect until all of the bonds "shall be fully paid, principal and interest, or until said bonds shall be called for redemption and provision made thereof for payment in full, principal and interest, * * * and shall run with the railways of the said several railway companies parties hereto into whosesoever hands the same may come, and this agreement and the provisions thereof shall be so construed that any person or persons, corporation or corporations, which may at any time acquire in any manner any of the said several railways of the parties hereto shall be held and be deemed to have expressly agreed by virtue of any act or acts, deed or deeds, or other instrument or transaction * * * through which the said persons * * * may * * * have acquired the said several railways, * * * to observe and perform all the terms required by this agreement to be performed or to be observed by the party hereto from whom * * * the said persons * * * may have acquired the said railways. * * * And the said person * * * shall be held to be bound by an express contract with the parties hereto and by and upon an express trust to perform and observe as aforesaid all the terms hereof;" further, that each of the railway companies agreed that, if it should part with any of the property herein. any instrument conveying the same should contain a covenant that the conveyance was subject to all the provisions of contract B, and that the grantee should by acceptance of the same become bound to perform its terms.

Section 14 provided that the obligation of the Denver Companies to make any of the payments provided in paragraphs 4 and 5 of article 2 should not be abrogated "until all of the bonds secured by the Pacific Company's first mortgage shall be fully paid principal and interest." It further provided that any of the provisions of the agreement except those contained in paragraphs 4 and 5 of article 2 could be modified in a way therein set forth. It further provided: "In case the Pacific Company * * * shall make default in the due payment of the principal of or interest agreed to be paid upon these bonds, * * * whereby a right of foreclosure shall thereunder accrue to the trustee, * * * the trustee shall * * * become vested with the right * * * to terminate this agreement (save and excepting always the provision for payments of interest, sinking fund contributions, and taxes contained in paragraphs 4 and 5 of article 2 hereof), * * * and upon the expiration of 30 days * * * this agreement and all other agreements * * * shall terminate, * * * but such termination of this agreement shall not be deemed to * * * release the rights of the trustee or of the holders of the first mortgage bonds * * * to the benefits of the agreements of the * * * party of the first part to make the payments provided for in sections 4 and 5 of article 2 hereof. * * * Nothing herein contained shall be taken to authorize or to result in the termination of this agreement in any event or contingency (prior to the payment or provision for payment of all said first mortgage bonds, principal and interest, as aforesaid), except upon the election of the trustee made with the written approval of the holders of two-thirds in amount of the outstanding bonds. * * * But, whether before or after default, as aforesaid, the trustee * * * shall be entitled to specific performance of the same or of any agreement substituted therefor and to enforce the same by suits in equity or actions at law or otherwise as may be appropriate."

The mortgage of the Western Pacific Railway Company was of the usual kind, and need not be considered in detail, except as set forth below. It contains many references to contract B, and was drawn with the same in mind.

Article 5 of the mortgage set forth the remedies of the trustee and bondholders, and in section 2 provided that in case of default of any semiannual installments of interest for six months the trustee may "declare the principal of all bonds hereby secured then outstanding to be due and payable immediately." Section 3 declared that in case of default the trustee should be entitled at once to sell at public auction all the property of the road, "except only the right of the trustee * * * [under contract B] to require [the Denver Companies] to make any payment * * * of money to the trustee and to recover damages from said companies, * * * which said rights and all rights secured by said agreement necessary to the enjoyment and enforcement of said rights or remaining in and surviving to the trustee shall * * * survive to the trustee * * * despite any * * * sale made by virtue of this indenture, whether under the power of sale hereby granted or conferred or pursuant to judicial proceedings. * * *" Section 9 likewise provides that upon judicial sale the trustee shall not deliver contract B to the purchaser so long as the Denver Companies remain bound by the same.

Article 8 of the mortgage, the sinking fund provision, required the Pacific Company to create a sinking fund by setting apart out of the net income derived by it from the premises $50,000 a year, commencing with September 1, 1910, and thereafter until all said bonds, principal and interest, should be redeemed or paid.

Construction was begun upon the road which proceeded, and in August, 1910, was open for operation, though not formally turned over to its operating department until July 1, 1911. It had cost more than the proceeds of the first mortgage; the second mortgage bonds $25,000,000 being all sold at 75. This was indeed the occasion of the formation of the New Denver Company in 1908, which took all the second mortgage bonds and issued a mortgage of its own to finance the issue. Up to and including September 1, 1914, the New Denver Company paid the deficiencies in the net revenues of the Western Pacific Railway Company, amounting in the aggregate to over $13,000,000. No

installment of the sinking fund had ever been paid, because that fund was payable only in case the Western Pacific Railway Company during the current fiscal year had made some net earnings, and that condition had never arisen.

In August, 1914, and at the meeting at which it was decided to pay the September coupons, the board of directors caused a statement to be printed in the public press to the effect that, although the directors had authorized them to pay the September coupons, yet if the New Denver road was to continue to support the Western Pacific, some adjustment of its finances must be made, and that a call for the deposit of the Western Pacific bonds would be put forth looking to the adoption of a plan which would lighten the burden of the New Denver Company. No such arrangement was made, and in accordance with the declaration therein contained default was made on the coupon of March 1, 1915. At once the trustee filed its bill of foreclosure mentioned above and obtained the appointment of receivers. During the progress of the California foreclosure suit the receivers and the judge concluded that it was advisable to stay the entry of a decree in foreclosure until the receivers should bring suit under contract B against the New Denver Company, and for that purpose it was decided to assume jurisdiction over that company to take a decree against it in personam and to declare a lien upon its assets for the payments stipulated. Both the trustee and the New Denver Company, however, objected to this course, although the New Denver Company was not itself a formal party to the proceedings.

As before stated, the principal of the bonds before or during this had been declared due on December 18, 1915, and a reorganization committee much desired to put into effect a plan of reorganization which had been proposed, and in accordance with which a large majority of the outstanding bonds had already been deposited with the committee. The judge of the Northern district of California on February 28, 1916, made an order, however, enjoining the further prosecution of that suit and requiring the New Denver Company to be made a party thereto. From this decree an appeal was taken and a prohibition asked from the Circuit Court of Appeals of the Ninth Circuit. The matter was brought on for a hearing, and the Circuit Court of Appeals decided (Re Equitable Trust Company, 231 Fed. 571, 145 C. C. A. 457) that the decree of foreclosure should pass, and that the litigation under contract B should not take place in the foreclosure suit. Thereupon the decree of foreclosure was entered, fixing an upset price at $18,000,000. This price the court fixed after a hearing between the reorganization committee, on the one hand, and certain minority bondholders, on the other, in which testimony was taken and an attempt made to fix as fair a value as was possible under the circumstances for the property at judicial sale. Of all of these proceedings the New Denver Company had actual notice, though not a party.

The decree provided for the sale along with its other property of the Western Pacific Railway Company's rights in contract B, but excepted the rights of the trustee under that contract, which were to remain unaffected by the sale, except in so far as they might be diminished by the payments upon the bonds. It provided that the bondholders might bid upon the sale, and that the amount of their bid should be credited upon their bonds. It likewise provided that the purchaser upon the sale should have the right within six months to assume any contract which was part of the property sold, whether made by the Western Pacific Company or its receivers, and should disclaim or reject the same if it did not wish to accept it.

The bid was assigned and the deed delivered to a new and reorganized railroad, the Western Pacific Railroad Company, which in December, 1916, filed a paper under the decree in the foreclosure suit in which it at once claimed the right to assert any rights formerly held by the Western Company in contract B, but not to assert any right in contract B the assertion of which would raise any liability on the part of itself under contract B. The supplemental or amended bill was filed within a few days after this election to assume such rights.

During the foreclosure proceedings the Western Pacific Railroad Company was represented by counsel selected by its officers. Its officers at the time had

been chosen through the voting power of the New Denver Company, which then controlled five-sixths of the stock of the Western Pacific; they were in part the same as the officers of the New Denver Company. One of the issues in the case was whether the attitude of the New Denver Company throughout the foreclosure proceedings estopped it from complaining of the action of the trustee in that proceeding, and in so far as this matter is relevant to the issues in question it is treated in the opinion below. It is not necessary at this place to set out any of the facts in detail.

The positions of the defendant are as follows:

I. That the obligation of the Denver Companies under contract B was only to provide for a fund consisting of the purchase price of promissory notes of the Western Pacific Railway Company; that it was therefore a conditional agreement, and under no circumstances could any liability arise unless the Pacific Company continued in position to execute the promissory notes required under the terms of that contract.

II. As a corollary of this position, since the giving of such notes and the application of the income of the railway were conditions to any liability on the part of the Denver Companies, it followed that the foreclosure of the first mortgage of the Pacific Company, coupled with the repudiation of contract B by the reorganized company, made impossible the fulfillment of this condition precedent, and that the liability therefor forever determined.

III. That the Denver Companies were in no sense responsible for the foreclosure, and that it could not therefore be held responsible for making impossible any performance of the condition upon its obligations under sections 4 and 5 of article 2; especially that, even though the trustee could have exercised its remedy of foreclosure without terminating the obligations of the New Denver Company, it was not essential to that remedy to declare the whole principal due in advance, and that the trustee's choice in so doing was in no sense to be attributed to the default upon a single coupon of the Denver Company; furthermore, that the Denver Company did no more in the foreclosure than protect its own interests, and had no power to control the trustee's conduct; therefore it was not called upon to take any position in respect of such conduct and could not be estopped.

IV. That if contract B was anything but a contract for the purchase of promissory notes of the Western Pacific Railway Company or of any company succeeding to its ownership, it was ultra vires the powers of the two Denver Companies.

V. That in any event the trustee might not elect to treat the default of the Denver Company of March 1, 1915, as a repudiation of all its liabilities under the contract in question and an anticipatory breach of the same, and therefore, even assuming it might sue for a single breach and recover damages, it must be content to avail itself in some form of its successive rights as they became due semiannually.

VI. That the maturity of the bonds on December 18, 1915, by the trustee's election forbade the conclusion that any future installment of interest could thereafter fall due upon them, and made any such interest sound in damages, and not in contract. The Denver Companies could not be held liable after the interest ceased under the tenor of the bond, for that was the term of their engagements.

VII. That in no event could there be any liability under the sinking fund provisions, since the sinking funds were to be paid in any event only out of the net earnings of the Western Pacific Railway Company, and that the termination of its existence prevented any net earnings from coming into existence, and even the determination of whether there could ever be any net earnings.

VIII. That the action and acquiescence of the trustee in securing the minimum upset price and the acquisition of the property at that price by the reorganization committee released the Denver Company from any further liability.

IX. That contract B created no equitable lien on the property of the New Denver Company.

Murray, Prentice & Howland, of New York City (George Welwood Murray and Franklin W. M. Cutcheon, both of New York City, and John F. Bowie, of San Francisco, Cal., of counsel), for complainant.

Chadbourne & Shores, of New York City (John G. Milburn, and A. J. Shores, both of New York City, and Henry McAllister, Jr., of Denver, Colo., of counsel), for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] This being a suit based upon the direct contractual obligations of the Denver Companies to the trustee and indeed having been already held to be such in Re Equitable Trust Co., 231 Fed. 571, 145 C. C. A. 457, the first question is to inquire from the contract itself what provisions create any such obligations. Both parties agree that they are sections 4 (b) and 5 of article 2. The Denver Companies already in section 4 (a) had promised to purchase promissory notes of the Pacific Company equal in amount to the yearly deficiency of the Pacific Company's income to meet certain charges upon that income, among which were the installments of interest and the sinking fund. Clearly the provisions of section 4 (a), at least up to the proviso with which section 4 (a) closed, required the tender of the requisite notes before the condition of the obligation was performed. Moreover, section 4 (b), so far as it was couched in the same language as section 4 (a), while it did create an obligation direct to the trustee, required as performance only the same acts as were required by the promise to the Pacific Company, and any condition upon the one obligation must have been equally a condition upon the other. Some point is made touching the change in language between section 4 (a) and section 4 (b), the first being an out and out purchase, while the second is an undertaking to pay "out of the purchase price." Were there nothing more in the contract, I should hardly treat this difference in terms as indicating any purpose to compel the Denver Companies to pay to the trustee unconditionally. Without other language it seems to me that the promise to pay "out of the purchase price" would be conditional upon the same tender as was the promise to the Pacific Company itself. The other language in the contract, however, removes any doubt about the purposes of the parties.

The proviso of section 4 (a) itself recites that the payments made to the trustee shall be deemed to constitute payments of the purchase price of notes "to be purchased" by the Denver Companies, thus perhaps indicating that the payment in some cases will precede the delivery. Section 4 (e) with unnecessary amplitude stipulates that the delivery of the notes shall not be a condition precedent upon the obligation of the Denver Companies to make not only those payments covered by section 4 (b), but also those covered by section 4 (a). Section 4 (f) provides for the issue of stock to allow the issuance of the necessary notes. The purpose of section 4 as a whole is too clear for question. The Denver Companies were to insure the continuance of the Pacific Company as an operating railroad in return for its promissory notes. If for any reason the Pacific Company could not legally, or indeed would not (though the control over it was absolute), make

and deliver the notes, it was to be no excuse, for the determining motive, as must always be remembered, was the security of the bonds, and that security depended, as every one knew, upon the continued operation of the road. The whole purpose of the contract was to give the assurance of the Denver Companies' credit to the proposed issue. Therefore by the most explicit language, as well as by the most obvious deduction from the general purpose of the enterprise, it appears that the delivery of the notes was in no sense a condition upon the performance of the successive promises contained in section 4 (b), and I must confess that I cannot understand how any casuistry can for a moment throw any doubt upon the conclusion.

[2] Now, in the view that I take of the default of the New Denver Company on March 1, 1915, I do not think that the question is important as to whether the delivery of the notes was a condition precedent to the payment of any particular semiannual payment, because I regard that failure, coupled as it was with the expressed purposes of the Denver Companies, to constitute a repudiation which absolved the Pacific Company from any further delivery of the notes to be purchased by it. The construction of the promises in sections 4 and 5 of article 2 does, however, involve a much more important and serious consideration than this, since the New Denver Company now claims that the conduct of the trustee and the reorganized company upon the foreclosure and sale of the property was such as to deprive the New Denver Company of rights guaranteed it under the contract, and so to disable the trustee from claiming any future damages under the breach. Strictly speaking, this matter affects rather the amount of the damages to which the trustee is entitled, going as it does to what took place after breach; yet, since it fits appositely into the interpretation of the contract and involves the question of whether the obligations remained in existence after a foreclosure, if, for example, there had been only a default in the payment of a single coupon, I shall take it up now.

[3] The defendant's theory is that section 13 of article 2 provided that in any event the property of the Pacific Company should at all times remain subject to its promises to devote the income to the purposes mentioned in section 4 of article 2, and that any successor must continue so to devote that income and to give promissory notes to the Denver Companies for whatever advances they might be required to make. The conduct of the trustee in ending that possibility would therefore end the obligations if they ever became the subject of future suit, and would prevent their consideration in assessing any damages if there was a total repudiation. The defendant's theory is further that, regardless of the question whether the successor corporation was bound by promises of the Pacific corporation, the performance of those promises was a condition upon the New Denver Company's continued performance under sections 4 and 5 of article 2, since it is not possible that the Denver Companies meant to charge themselves with future installments of interest over an indefinite period when by no possibility could they receive the performance for which they bargained and when they must therefore be deprived, not only of the earning power of, but also of recourse against, the Pacific Company, upon

which they depended. The repudiation by the successor corporation of these promises at the least, therefore, excused the Denver Companies from future performance and for the purposes of such a suit as this terminated the contract, except for existing defaults.

It is necessary first to see what possibilities were open to the trustee upon a default. Certainly it could have foreborne the exercise of its rights of foreclosure, and could have brought successive actions at law under section 4 (b) of article 2 to recover damages for each breach. Conceivably, to avoid a multiplicity of suits, by recourse to a suit in equity, it might have obtained a decree at the foot of which successive applications could have been made as each six months expired. There can, however, be no doubt that the trustee was not limited under the contract to such remedies, because in section 14 of article 6 it is provided that in case of a default in payment of principal and interest, "whereby a right of foreclosure shall thereunder accrue," the trustee may terminate the contract, except sections 4 and 5 of article 2, and all rights of the Denver Companies not only in the property of the Pacific Company, but in its "income," should cease, without releasing, however, the rights of the trustee under those sections. Not only is the language wholly unequivocal, but such a right, even if less clearly put, could have no purpose were it not to free the title from any engagements of the Pacific Company, no one of which is contained in sections 4 and 5, and there could have been no reason to free the title except that the trustee when it came to sell the property in foreclosure should have the advantage of an estate unclogged by any incumbrances. Turning to the mortgage, it is apparent that the same purpose existed there; for among the remedies of the trustee, it is specifically provided, as already set forth, that the rights arising from those sections shall survive any foreclosure. In the face of all this, it is difficult to see with what color it can be urged that the trustee foreclosed at the peril of the continued existence of those sections.

Nor, if we look at the essence of the situation, could any other result have been intended, because, if it were not so, the right of foreclosure would be substantially, and indeed altogether, destroyed. The trustee's foreclosure would place it in the position either of abandoning the right of recourse against the Denver Companies, or of requiring any purchaser to accept a title subject to the condition of devoting all the income of the railway to the payment of the interest and the sinking fund, until the bonds were paid, and, if the income were not enough to pay interest, then to incumber the property with obligations to the Denver Companies for the balance. Indeed, all that would be accomplished by a foreclosure would in that case be to discharge the property of the principal of the debt. Now, it is, of course, the object of a foreclosure to relieve the mortgaged property from the debt, whether one regards the mortgagee's right as a legal title or only a lien, because only so can the debt be paid. The effect of retaining a part of the lien is merely to subtract from the purchase price that which the purchaser must continue to pay; it is, in short, to constitute that part of the debt which remains a lien prior to the part which is paid—a wholly anomalous situation. Indeed, in the last recital of con-

tract B it is said that the Pacific Company intended the agreement to be in all respects subordinate to the mortgage and as part of its security, so that the bonds may be more advantageously sold. The suggested result contradicts both these purposes; it makes the mortgage pro tanto subordinate to the contract, and it would most seriously impair the value of the bonds as such. The purpose was to add to the mortgage the security of the Denver Companies' credit; they being the parties chiefly interested in the enterprise and in absolute control of the mortgagor.

Those passages in section 13 of article 6 upon which the defendant relies do, if taken verbally, cover the contingency of a sale of the railroad in foreclosure, but their obvious purpose was of a wholly different kind, for they were intended to prevent any successor to the equity of redemption, or to the railroads of the Denver Companies, from abandoning their obligations to the trustee. To impose them upon the trustee is to misconceive the whole plan of the transaction, and to make it a trap for unwary bondholders.

Such being the proper interpretation of the instruments, the question remains whether the trustee was limited to a foreclosure simply for coupons due, or whether it might under the provisions of the mortgage accelerate the principal and take both principal and interest out of the purchase price. It will appear upon reflection that it makes no difference in substance whether or not the principal be accelerated. By section 6 of article 5 of the mortgage it is provided that the whole of the property shall be sold, either as an entirety or in parcels, and there is no warrant for a sale of a part only, reserving the lien upon the rest. Such a provision would be absurd in the case of a railway, which must be operated as a unity. Hence, though the sale were only for one or more coupons, it must still be of all the mortgaged property, and the surplus would necessarily remain subject to the lien of the principal and future interest. Yet if, as I have shown, any sale must free the purchaser from the engagements of the mortgagor, the only means of meeting the future installments of interest would be the interest derivable from that surplus. Under any conceivable circumstances it would be to the advantage of the Denver Companies that the surplus should be at once available upon the principal of the debt, which by implication involves an acceleration of its maturity, rather than that that debt should continue to carry interest according to the tenor of the instrument, leaving as a charge upon the Denver Companies not only full interest upon so much of the principal as the surplus would not pay, but also the inevitable difference between what the surplus could earn and the 5 per cent. stipulated. Such a purpose is so far out of the range of probable expectations as to be safely disregarded, and there is therefore every reason to suppose that the provisions for acceleration stipulated in the mortgage were not intended to have any effect upon contract B, other than if the foreclosure took place only for one or more coupons.

The supposed hardship upon the Denver Companies of such a result is unreal; they had it in their power always to prevent the termination of the Pacific Company's earning power by performing their

obligations. They were bound to the limit of their financial power to support that company, and their refusal was dictated by no more respectable consideration than a naïve unwillingness to keep on paying their debts. If they had indeed come to the end of their resources, it would mean that the whole enterprise was bankrupt, but they, of course, undertook, like every other promisor, to continue performance until that event. Then it would become a question of marshaling the two properties as the relative claims demanded.

I conclude, therefore, that under contract B, the trustee was entitled to exercise the remedies provided in the mortgage, and that the purchaser's assumption of the promises of the Pacific Company was not a condition upon the promises of sections 4 and 5 of article 2, whether or not the trustee had accelerated the principal as provided in the mortgage.

[4] The next question is of the validity of the contract construed as I have construed it; was it ultra vires the Denver Companies? It may be assumed for argument that the powers of these companies were limited to the purchase of promissory notes, and that an agreement simply to lend money to the Pacific Company for the purpose of meeting its obligations would have been ultra vires. First, it must be remembered, that the promises in sections 4 and 5 of article 2 at worst amount to no more than an engagement to pay the purchase price in advance of the delivery of the notes. Under section 4 (e) of article 2 such a contingency is distinctly provided for, and under section 4 (f) of article 2 the method by which the notes may be subsequently issued is stipulated, and the Denver Companies are committed to the necessary subscriptions. They were about to step into absolute control of the Pacific Company at the time of the contract, and certainly contemplated a continuance of that control. Had they likewise continued to perform their undertakings, they would not therefore have been called upon to do anything beyond their powers, unless the right to purchase obligations of a connecting road is limited to a purchase in which delivery is coincident with payment. That a provision like section 4 (e) of article 2 may be made the means of evading the statute is true enough, but no one asserts that it was so intended here. That provision was to insure the prompt payment of the current charges upon the Pacific Company's income without possible delays due to the necessities of corporate action in increasing the stock, but the notes were intended in good faith always to follow, and the payment of the purchase price would, even without the stipulations of section 4 (e), have entitled the Denver Companies at any time to compel the Pacific Company to execute the necessary notes. It seems to me scarcely arguable that the advances in payment were ultra vires.

As to the question of the Old Denver's being a "connecting" line under the Colorado statutes (Mills Annotated Statutes 1905, section 612 [a]), it is met not only by the case of Mo. Pac. R. R. Co. v. Sidell, 67 Fed. 464, 14 C. C. A. 477, but by the actual language of that section, which is that a railroad may buy the securities of any road connecting not only with itself, but with any road which shall connect directly or by means of any other line, which such company shall have the right, by contract or otherwise, when constructed, to use or operate.

However, it is urged that whatever the powers of the railroads to buy the notes of the Pacific Company while it continued to operate, if the contract continued after foreclosure, and so possibly covered a period when there was no Pacific Company properly so called at all, it was ultra vires under any theory. Now the only way in which the Pacific Company could cease to be an operating railroad, and so the only way in which the condition could arise, was for the Denver Companies to default in their own obligations, because they had in effect promised to continue its operation no matter what was its income. The argument is then pleasantly ingenuous, for it amounts to saying that the corporation was without power to make the contract, because it might refuse to keep it, and if it did, it might then have to do something else which was beyond its powers. It is the act of making the promise which is within or without the corporate powers, not the act of breaking it with its necessary consequences. The making of the promise is a valid act if it contemplates intra vires conduct; there can be no intra vires breach, and the results of any breach are the creatures of law alone. So it is quite irrelevant that the defendant, after breaking its contract, might be faced with a necessity which it could not have validly undertaken originally, quite as irrelevant as the possible necessity of submitting to a seizure of its corporate assets for breach of any other contract. The point raised thus involved a confusion of understanding of the purpose of the doctrine, and I therefore conclude that the contract was intra vires.

[5] Such being the character of the obligations, the next question is of breach. Had the New Denver Company defaulted upon one coupon only, clearly there could have been no recovery for more than that one. This default did not, however, stand alone; it was followed by a second default on September 1, 1915, and, after the principal had been accelerated (an act in itself revocable by the trustee), by a still further default on March 1, 1916. Until the sale on June 28, 1916, the defendant had made not the slightest move to indicate that it or its creature, the Pacific Company, meant to go on with further performance. It had taken no steps to re-establish the status quo or to put back the Pacific Company, then upon the conceded verge of financial dissolution, into a posture to operate and to earn its way. If there had been nothing more, this alone showed an intention to abandon the whole enterprise by a permanent withdrawal of the support which had been so elaborately pledged to the bondholders.

But the defendant's purpose was not left to inference merely, because it expressly declared what it meant to do. That declaration, the formal act of the New Denver Company, was published in the newspapers, and was directly communicated to those bankers who were known to be concerned with the interests of the bondholders. It was certainly intended to become known to the bondholders and to be the subject of their action. Obviously it was not convenient, and indeed it was impossible to tell each of them separately, and there could have been no conceivable purpose for the methods employed if it were not meant to advise the bondholders of what the New Denver Company proposed for the future.

What did it propose? Not to pay any more deficiencies of the Pacific Company unless the bondholders consented to abate their legal demands, and to that end unless they would deposit their bonds with the bankers so as to effect some compromise. To say that you will not pay as bound, unless the promisee makes some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue. It is true that no direct repudiation was communicated to the trustee, but that was not necessary. The bondholders were the primary creditors, and the New Denver Company communicated as best it could to them. Their trustee could represent them in electing to accept it, and it did so when it brought suit while the repudiation remained unretracted.

Generally the mere declaration of a purpose to repudiate is enough, but here there was such an expression followed by appropriate inaction. In re Fitz George [1905] 1 K. B. 462, the creditor collected the several installments till the guarantor's bankruptcy, and that was treated as a total breach. It did not appear that the guarantor had repudiated till then. Repudiation is, however, a more certain breach than bankruptcy; at least, it has taken longer finally to establish bankruptcy as ground of suit for entire damages. Central Trust Co. v. Chicago Auditorium Hotel, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580.

But it is said that such a result implied the possibility of the anticipatory breach of an obligation merely to pay money, and that the doctrine does not go so far. Washington Co. v. Williams, 111 Fed. 801, 49 C. C. A. 621; McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208; Werner v. Werner, 169 App. Div. 9, 154 N. Y. Supp. 570. There are dicta to the same effect in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; Nicolls v. Scranton S. Co., 137 N. Y. 471, 33 N. E. 561; Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661; Moore v. Security Trust & Life Ins. Co., 168 Fed. 496, 93 C. C. A. 632. In these cases it is generally stated that the doctrine only applies to cases which are mutually executory, but that must be deemed authoritatively overruled by Central Trust Co. v. Chicago Auditorium, 240 U. S. 581, 36 Sup. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B, 580, in which the promisee had wholly performed. In this court, at least the limitation of mutuality cannot therefore apply. Furthermore, if performance remains mutually executory, the doctrine still applies, even though the promise is only to pay money, because that is the situation in the ordinary contract of sale repudiated by the buyer, Roehm v. Horst, supra. Lovell v. St. Louis Mutual Ins Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, is another case where the promise was only to pay money. If the doctrine has any limits, they only exclude, and that arbitrarily enough, cases in which at once the promisee has wholly performed, and the promise is only to pay money.

Assuming what I do not mean to admit, that it has such limits, they result because the eventual victory of the doctrine over vigorous at-

tack (e. g., 14 Harv. Law Rev. 428; Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384) has not left it scathless. Its basis in principle is that a promise to perform in the future by implication includes an engagement not deliberately to compromise the probability of performance. A promise is a verbal act designed as a reliance to the promisee, and so as a means to the forecast of his own conduct. Abstention from any deliberate act before the time of performance which makes impossible that reliance and that forecast ought surely to be included by implication. Such intermediate uncertainties as arise from the vicissitudes of the promisor's affairs are, of course, a part of the risk, but it is hard to see how, except by mere verbalism, it can be supposed that the promisor may within the terms of his undertaking gratuitously add to those uncertainties by announcing his purpose to default. Even the opponents of the doctrine concede that, if there be such an implied promise, its breach may drag in the damages upon the main promise. 14 Harv. Law Rev. 434, 435.

Whatever the lack of logic in refusing to apply the doctrine to notes or bonds or the like, there can be no valid distinction between an ordinary contract of sale or of insurance, which the buyer or the insurer repudiates, and a contract like this, because this was not a contract unconditionally to pay fixed sums at fixed intervals. Rather, as the defendant is so fond of insisting, it was, at least in form, a contract of purchase, and no one has suggested that it makes any difference whether you buy hops or notes so far as this point goes. At least this consideration applies unconditionally to any repudiation of the New Denver Company to the Pacific Company. Not only in form was this a contract of purchase, but the Pacific Company had continuing obligations to perform while it continued. I agree that the same is not so true of the promises to the trustee which are here in suit, i. e., 4 (b) of article 2; yet I should, even if the trustee had no duties, be unwilling to make so arbitrary a cleavage in the doctrine at the expense of every consideration not only of principle, but of justice. For, if it were held that the doctrine applies as between the New Denver Company and the Pacific Company, but not between the New Denver Company and the trustee, this would be the result. Suppose that A. agrees with B. and C. to purchase a series of notes of B. and pay part of the proceeds serially to C., and he repudiates the whole enterprise midway in its performance. B. may sue at once, and recover damages for the future installments, but C. may not, because C. is bound to no further performance. It is safe to say that the law is not so whimsically capricious as that; yet that by hypothesis is precisely this case.

However, the hypothesis does not accord with the facts, because C. of the supposititious case, who is in fact the trustee, was bound to continue performance while the contract endured; for contract B required constant co-operation between all the parties, and no one could perform independently of the others. The plan was for the Pacific Company to pay to its fiscal agents out of its income enough to pay the semiannual interest. Section 5, article 3. If this proved insufficient, the trustee was to advise the Denver Companies four days beforehand how much was lacking from the amount required from it. Section 7 of article 6. The Denver Companies were to pay this to the trustee

(section 4 [b] of article 2), which was then to make it "available" to the fiscal agents of the Pacific Company (section 8, article 6). It is true that the failure of the trustee to notify the Denver Companies was to be no excuse for performance by the Denver Companies, but it was none the less bound to give the notice, and notification was part of the interrelated machinery. To say that this involved no coordinated performance, is simply to disregard the frame of the contract; to assimilate such a contract to a bond or a note rather than to a contract of purchase is to turn away from the nearer analogy. If there be any rational theory of anticipatory breach, it should cover the total repudiation of a standing arrangement of this character requiring the constant concord of all the parties.

Hence I conclude that the New Denver Company's repudiation was a breach of the whole contract and gave an immediate right to full damages. Justice certainly accords with principle in such a result; for the repudiation was without even color of justification, an undisguised and candid disregard of the most deliberate undertaking, put forth to be relied upon by the public at large.

[6] Thus arises the question of the remedies to which the trustee is entitled, and with it the extent of the relief. The default on March 1, 1915, resulted in no more than damages for the unpaid balance of that coupon. The same is true of the default on September 1, 1915. Before the third coupon came due the whole principal had been accelerated. The argument is that no further coupons could then become due, and that any interest upon the bonds necessarily arose thereafter by way of damages, and not according to the tenor of the instrument. In consequence it is said that contract B, which was only to pay interest upon the bonds, and not damages for failure to pay the principal on maturity, must terminate at that time. Had the obligation of the Denver Companies been until the maturity only of the bonds, this would have been a difficult question; for I cannot agree with the plaintiff's position that those provisions of the mortgage authorizing the trustee to accelerate "the principal of the bonds" left the coupons available as separate specialties. Moreover, it is extremely doubtful, to say the most, whether an agreement to pay interest till maturity carries any obligation after maturity. Re Fitz George [1905] 1 K. B. 462, was not such a case, because the guarantor agreed, as here, to pay interest until the principal was paid, not until it was due. King v. Greenhill, 6 M. & G. 59, turned in part, anyway, upon the short period which the guaranty would cover if so construed and the improbability that the parties had so intended. Hamilton v. Van Rensselaer, 43 N. Y. 244, and Melick v. Knox, 44 N. Y. 676, are the other way and directly in point. I should tend to follow them if the question was raised in this case, but it is not. The scrivener of contract B put the matter beyond any question in sections 13 and 14 of article 6 in language which by its very explicitness seems to have raised some question of its meaning. Moreover, it is perhaps not without significance that the engagements are always to pay "interest," and not "coupons." Such a promise was held to cover interest after maturity in Re Fitz George, supra, and indeed, upon the guarantor's bankruptcy, to justify a commutation of the future payments

into the unpaid balance of the principal. In the case at bar I cannot see how the purpose of the parties could be put more clearly, and it seems to me therefore irrelevant whether the principal matured in 1933 or in 1915. In either case the obligation to make up for the deficiencies of income remained what it was.

It is objected that so to construe the contract converts it into a promise to pay the whole balance due under the contract, and indeed in the outcome that is true. It was in fact the result in Re Fitz George, supra, where Lord Mersey awarded exactly that relief upon the guarantor's insolvency, and in Central Trust Co. v. Chicago Auditorium, supra, the Supreme Court seems to have awarded the present actuarial value of the future installments under the same circumstances. It is true that there the contract was terminable in time, but I cannot see that that makes a controlling difference in principle. The only difference is that in one case the payments are determined in number by the convention of the parties, while in the other by the same rule they are indeterminate. To agree to pay such a series until a time which may never come is to agree possibly to pay them forever. The result may be serious, but it is involved in the premises, and any rule of damages which allows the present valuation of a limited series of such future installments seems by implication to allow an indefinite series. It is quite true that the creditor gets his discounted future installments now in hand, which is something other than getting the full value later, but that is a necessary concession to some present disposition of the controversy, as near a remedial approximation as the circumstances permit. It is true also that the indemnitor's obligation is changed from a series in the future to a gross sum down, but that is a consequence not following merely from the original convention, but from his breach, which is a wrong and within his own choice. Damages sound in remedy and are by no means the equivalent of performance. Were it so, specific performance would be the only possible remedy, and even that not literally such. This is obviously the result when the indemnitor becomes insolvent, and it would be a strange rule which favored a frank repudiator over an obligor overtaken by bankruptcy.

[7] The next question is whether the sale in foreclosure injured the defendant and prevents a full recovery. I do not understand that the trustee's conduct is challenged beyond its "sympathy" with the majority bondholders in committee. I pass injured susceptibilities. The theory is that the majority, being about to buy, tried to fix the upset price as low as they could, which is the fact. The minority opposed them, as the defendant could have opposed them by intervention, had it not chosen to let the minority bondholders fight its battle. Formally, the majority's right to do so was unimpeachable. The sale establishes the value, and any upset price whatever is a concession to the known uselessness of an auction in such cases. If the upset price be too low, any creditor must protect himself by bidding, a possibility practically more available to such a party as the defendant than to individuals. So far as it has gone, the law has devised no other way to protect against what indeed in practice amounts to a strict foreclosure, except for the upset price. That judicial sales in such cases are of small value to creditors I cannot help; it results from applying the same

procedure to the sale of a quarter section and of a system of national transportation. Some form of valuing the property there must be, and we must work with what we have. Cases like Nor. Pac. Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, Kan. City Ry. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579, and Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, do not help the defendant. Here no stockholders slipped in ahead of the creditors; indeed, the second mortgage bondholders were excluded.

In the contest over the upset price, what were the majority to do? The issue was a real one to them, both as against the minority and under this very contract. Must they let it go by default, even though the court might on the minority's experts' evidence fix a price above any fair value? They did nothing but present their side to a court whose duty it was to decide justly. Must they assume that it would fail? It was not a case where by chilling the bids or maneuvering the time and place they prevented the realization of whatever the property could bring. All they did was to help in finding out the truth. I cannot see how they should have done less. When the price was fixed, if there was no other legal way to liquidate the security, the trustee was bound to sell it. If it had adopted any other way, the defendant would have challenged its propriety, because sale by foreclosure was the way indicated in the contract and in the mortgage. No other way suggests itself, except a judicial valuation of the road, which was indeed attempted, with as little satisfaction to the defendant. Therefore I conclude that the selling price of the road established its value for the purposes of contract B, and must be accepted as such.

Upon the question of the defendant's estoppel in pais during the foreclosure I need say nothing. The trustee and the majority did not step outside their rights, and there was nothing to waive. It is of no moment whether or not the defendant should have declared its position while the foreclosure was pending.

There remains the question of damages. At the time of the published declaration in August, 1914, the defendant repudiated the contract, and the trustee was free to treat each of the indefinite series of future deficiencies as due at its then actuarial commuted value. However, the Pacific Company still held the property and had its income, and the deficiency upon no single future installment could be ascertained; it remained contingent in amount and even in existence; no damages could then be determined. This posture continued until July 1, 1916, the date of the master's deed and the date upon which the purchaser became entitled to possession under the decree in foreclosure. One more coupon had fallen due meanwhile, and an installment of interest on March 1, 1916. It follows from the view I take of contract B that the maturity of the principal on December 18, 1915, did not affect the situation at all in respect of that installment; the interest continued as before. The deficiencies of March 1 and September 1, 1915, and of March 1, 1916, must be ascertained from the actual income of the road, and for that purpose the income earned by the receivers must be treated as income applicable to pay interest under section 4 (a) of article 2. Each of these three installments became due at

the time stipulated; the deficiency upon each thereafter was a debt due from the defendant to the trustee as of that date.

On July 1, 1916, it became certain that there would never be any further income available on the bonds, and the future deficiencies became fixed in amount and in existence. Some of the debt was paid as of that date, but the balance remained and must remain forever unpaid. By virtue of the repudiation each deficiency of the series became due at its then commuted value, if the trustee so chose, under Re Fitz George, supra, subject to limitation in the aggregate by the unpaid balance of principal. The unpaid balance is to be determined by deducting from the principal the purchase price realized upon the sale of the properties, $18,000,000, less such amounts as are properly chargeable in foreclosure, leaving a balance of $17,727,725.55. This subtracted from the principal of $50,000,000 is $32,272,274.45.

It will be asked what was the date of the breach, what that of the election to accept the breach, and which date counts in the ascertainment of damages. The repudiation of a contract opens to the promisee two courses of conduct, either to accept it at once as a termination and to sue for damages, or to wait and sue as the time for performance arrives. The latter course allows the repudiator to recant and to perform, and the promisee's delay subjects him to that possibility. The breach, however, remains the act of repudiation. The announcement in August, 1914, that the defendant would pay no more coupons therefore entitled the trustee to treat the whole contract as at an end, but for the reasons already given it would have been impossible at that time to prove any damages. The trustee did not, however, do anything upon the defendant's repudiation until May 27, 1915, when it filed its first ancillary and dependent bill in this court upon contract B. In the bill, article 16, it recited the power to declare the principal at once due and alleged its expected exercise of that power and of the right to sell the property for the full principal. In article 17 it alleged its inability to know the amounts due under contract B, and in the prayer for relief it asked for an accounting for the amount which should remain payable upon the principal and interest after the sale in foreclosure.

It seems to me to make no difference practically whether the filing of the first bill or of the second on January 6, 1917, be deemed an election to treat the conduct of the defendant as a repudiation. I shall assume that the first bill was such. At that time it is true that there could have been recovered only the unpaid balance of the coupon of March 1, 1915. If the suit had been at law, it would have been necessary to bring successive actions on September 1, 1915, March 1, 1916, and July 1, 1916, but that was not necessary in equity. By the supplemental bill it was permissible to set up the intermediate facts and the relief will be adapted to the situation disclosed at the time of the decree, Randel v. Brown, 2 How. 406, 423, 11 L. Ed. 318. Therefore the questions asked as to the time of the election are of no determining moment in the case at bar.

It is further said that the trustee had no power to elect to treat the repudiation as such, because it would result in a modification of the contract, and that could be done only as prescribed in section 14 of

article 6. The objection misconceives the effect of the repudiation and of the trustee's election. These did not constitute a modification of the contract. The repudiation was a breach of the contract, of that term in it which forbade the obligor to declare that it would be no longer bound by its stipulations. The remedy arose from that breach of suing for any future installment at once, and, if the defendant did not recant meanwhile, the right so to sue endured. Its election was no more than an expressed decision to sue, and that it evinced either on May 27, 1915, or January 6, 1917, I see no reason to decide which.

I have purposely omitted to refer to the sinking fund: First because, in the view I take of the rights arising under section 4 of article 2, the whole balance of the principal is in any case to be recovered; and, second, because by its terms it is due only out of the net earnings of the Pacific Company. Until July 1, 1916, there were no net earnings, and thereafter there could be none. It is true that it was because of the default of the defendant that this condition arose, but their wrong cannot make absolute what was otherwise contingent. There is no way of knowing when any sinking fund would become due or how much before the bonds matured in 1933.

The only other question which remains open is whether the promises under sections 4 and 5 of article 2 were liens upon the property of the Denver Company. I decline to determine this question, because no determination could be other than academic. That the payments were obligations is certain enough; they make the trustee a general creditor of the defendant, and as such they precede the rights of all stockholders. It could add nothing to their character to determine that they were liens, unless I had before me in this suit other possible lienors upon the property of the defendant. These cannot be joined without losing jurisdiction, and any expression of mine touching the priorities between such other lienors and the trustee would be brutum fulmen.

Finally the trustee asks for the instructions of this court as to what relief, short of a decree for the gross sum, it may properly accept. I have great question as to the power of this court, strictly speaking, to assume any general equitable jurisdiction over the conduct of the trust created, as well as the propriety of such an instruction in a suit inter partes, like this. However, it is quite true that this is a court of equity, and that its directions do not interfere with the disposition of a fund already within the jurisdiction of another court. In a proper case perhaps it might have the power to advise a trustee upon application by bill. The trustee must take its chances of protection under any advice I may give it, but I see no impropriety in saying that the immediate enforcement of a decree for so large a sum might well imperil the security of the decree itself. It seems to me, therefore, a reasonable exercise of that judgment which it is entitled to use to withhold process, and collect semiannually by way of interest upon the decree so much as will re-establish the relations which arose under contract B. It has certainly been suggested that the immediate enforcement of so large an amount would be impossible, and must result disastrously to the defendant. If so, it cannot be the duty of the trustee to cause the financial collapse of the debtor upon whose stability it must rely. As

to further litigation designed to ascertain the priorities between the trustee's decree and other lienors, I must leave it to its own devices.

[8] It is possible that questions will arise for determination before a decree can be determined. I can at present think of none, except the rate of interest which will accrue upon the unpaid balance of the three installments and upon the balance of the principal. In New York the rate of interest upon default is fixed at the legal rate regardless of the rate before maturity, Pryor v. City of Buffalo, 197 N. Y. 123, 90 N. E. 423, and the matter is one of state law, Ohio v. Frank, 103 U. S. 697, 26 L. Ed. 531. It seems to result, therefore, that the interest must be calculated at 6 per cent., which rate with reluctance I feel obliged to fix.

As to the sum of money impounded by injunction at the outset, the trustee may have process of execution under the eighth rule as soon as the decree passes. I can at present see no warrant for supposing it subject to the lien of engagements of the defendant. Its origin has not been disclosed, and whether or not there is a lien upon the railroad of the New Denver Company, there can hardly be said to be any lien upon its general funds. A modification of the injunction order prior to the entry of decree and to opportunity for execution seems hardly proper, however, as it might result in depriving the court of any means of enforcing its decree. That matter the defendant may, if it chooses, bring up upon notice.

Should it be necessary to have any extended hearing to determine the form of the decree, the matter may come on before Philip L. Miller, Esq., as special master. Otherwise the decree may be noticed for settlement at chambers on any day. The plaintiff will have its costs. So far as I am now aware, the foregoing disposes of all the questions raised.

SHREDDED WHEAT CO. v. HUMPHREY CORNELL CO. et al.

(District Court, D. Connecticut. May 2, 1917.)

No. 1436.

1. TRADE-MARKS AND TRADE-NAMES ⇐11—UNFAIR COMPETITION—IMITATION.

Plaintiff manufactured a shredded wheat biscuit of a peculiar size, form, color, and appearance, which had become well known to the public. It owned patents covering an article of food consisting of threads or filaments of wheat or similar grain having the outer nutrition bran and gluten of the entire berry visibly mixed with the interior starchy portion thereof, and also a process patent covering the method of preparing the grain or berry. A design patent covered the form and configuration of the biscuit; the specification stating that the design consisted in a biscuit presenting a fibrous interstitial appearance, with interlacing threads or filaments, and that the general form of the biscuit shown in the drawings was as stated therein. *Held*, that these patents did not take the case out of the law of unfair competition, so as to give defendant the right, upon the expiration of the monopoly, of using the size, shape, and color of plaintiff's product, with its identifying name and dress.

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

2. TRADE-MARKS AND TRADE-NAMES ⟸79—INJUNCTION—PURPOSES.

The purpose to be effected by an injunction in cases of unfair competition is not primarily to protect the purchaser, but to secure to the manufacturer the profit to be derived from the sales of his goods to all those desiring and intending to purchase them; it being the liability to injury and an actual infringement which the remedy may be invoked to prevent.

3. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—IMITATION.

Where plaintiff was manufacturing a shredded wheat biscuit of peculiar size, form, and appearance, which had become well known to the public, and defendants were selling a similar biscuit in cartons bearing a pictorial representation of a shredded wheat biscuit, which was an exact copy of plaintiff's biscuit, so that one was apt to be mistaken for the other, though on comparison of the two cartons substantial differences would be found and careful buyers might not be deceived, defendants would be enjoined from the use of such pictorial representation on their carton.

4. TRADE-MARKS AND TRADE-NAMES ⟸69—UNFAIR COMPETITION—GOOD FAITH AS DEFENSE.

Defendants' good faith in using a pictorial representation of plaintiff's shredded wheat biscuit on the carton containing its biscuits is immaterial.

5. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION—IMITATING NAMES OF ARTICLES.

Where the names "Shredded Wheat" and "Shredded Whole Wheat," though in a way abstract in character and descriptive, had become associated with plaintiff's goods in particular, and had come to mean its goods alone, the court will enjoin defendant from using such words in connection with the sale of a similar biscuit, unless they marked their packages and product, so as to clearly and unmistakably specify that it was their own product, and not that of plaintiff.

6. TRADE-MARKS AND TRADE-NAMES ⟸93(1)—UNFAIR COMPETITION—PRESUMPTIONS.

The natural presumption is that one adopting a name for its product, which has become associated in the public mind with a product of another, expects to derive benefit from the name, and to secure buyers from among those who have bought and used the product of such other, and it may be justly assumed that they intend to mislead, and that their acts are likely to accomplish this intent.

7. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION—IMITATION.

Where plaintiff manufactured a shredded wheat biscuit of a peculiar form, shape. size, and color, and defendants' product was copied therefrom in its entirety, the court will enjoin defendant from manufacturing or selling whole wheat biscuit in the form, shape, size, and color of plaintiff's biscuit, or any imitation thereof, without marking on each biscuit words clearly and unmistakably specifying its origin.

8. TRADE-MARKS AND TRADE-NAMES ⟸75—UNFAIR COMPETITION—DECEPTION OF PUBLIC.

The vital question in cases of unfair competition is not whether dealers are liable to be deceived in buying from the manufacturer or wholesaler, but whether the user is liable to be misled in buying from the retailer.

9. TRADE-MARKS AND TRADE-NAMES ⟸98—UNFAIR COMPETITION—RIGHT TO ACCOUNTING.

Where, in a suit for unfair competition, it appears that defendants' sales were small and its profits negligible, and that the profits and damages together would be too small to justify the expense of taking an account, no accounting will be ordered.

In Equity. Suit by the Shredded Wheat Company against the Humphrey Cornell Company and another. Decree for plaintiff.

Charles K. Offield, of Chicago, Ill., William C. Breed and Frederick I. Allen, both of New York City, and George D. Seymour, of New Haven, Conn., for plaintiff.

John R. Nolan and James H. Griffin, both of New York City, David Tice, of Lockport, N. Y., and Arthur Keefe, of New London, Conn., for defendants.

THOMAS, District Judge. This is a suit in equity, charging the defendants with unfair trading, and is now before the court on final hearing upon pleadings and proofs.

The gravamen of the bill is contained in the fourth and fifth paragraphs which reads as follows:

(4) "That from the beginning of the manufacture of whole wheat biscuit by your orator's predecessors and continuously to the present time your orator has manufactured for sale and consumption such biscuit in a particular and peculiar shape and form; that such biscuit was produced and baked so as to present a distinguishing eye appearance, at once recognized by the configuration of such biscuit, from any other form of food product ever before manufactured either from wheat or any cereal of similar or allied purpose; that the whole wheat biscuits of your orator were composed and built up of wheat fashioned in peculiar form, laminated in structure and appearance, and to which your orator has attached the fanciful name of 'shreds'—the biscuit as completed in final form being a rectangular flattened oval, with rounded sides or edges and sharply severed ends being a biscuit browned in appearance as to its upper face and rendered crisp and palatable as to its separate parts in baking."

(5) "That during nearly a quarter of a century that your orator has formed and baked its whole wheat biscuit product in the form and conditions above recited and identified, said biscuits have become known for a long period of years past to the using and purchasing public by reason alone of the particular form, shape and structure of the individual biscuit itself as above described; your orator averring that for many years past such whole wheat biscuit of your orator has come to have and now has a secondary significance and meaning to the purchasing public by reason of the facts above set forth, and to thus mean and signify only the product and biscuit output of your orator, your orator averring that, when your orator's said biscuit product is separated from your orator's carton and advertising matter, and standing alone without other means of identification, your orator's said biscuit has come to have the meaning and significance of the product and output only of your orator's plant."

The defenses pleaded at length may be summarized as follows:

(1) "That the form, size, color, and appearance of the biscuits (plaintiff's and defendants') involved in this controversy result from, and are essential to, the economic manufacture of a commercial biscuit from shredded whole wheat. * * *"

(2) "That the defendants' biscuit is composed of shredded whole wheat, the physical characteristics of which are such that the biscuit cannot be directly branded or stamped with the name or trade-mark of the maker."

(3) "That to inclose the individual biscuits of the defendants in an envelope or wrapper would be commercially prohibitive, by reason of the increased cost of that procedure."

(4) "That the defendants' biscuit is not labeled or dressed in simulation of plaintiff's product; but, on the contrary, the dress of the defendants' product is most decidedly individual and distinctive."

(5) "That the defendants' biscuit is a patent-expired product."
(6) "That the size, form, shape, color, and appearance of plaintiff's biscuit were not adopted or selected for the purpose of pointing to the origin or ownership of the article, but are the natural characteristics of a shredded wheat biscuit, made in full accordance with the patent-expired machines."

So that the issue to be here determined is this: Are the defendants guilty, in view of the facts in the case, of unfair competition in trade in selling a biscuit of substantially the same size, form, color, and appearance as that of the plaintiff?

The bill of complaint, as it was originally filed, named five defendants—the Ross Food Company, a New York corporation, Andrew Ross, Ralph Valentine, the Humphrey Cornell Company, a Connecticut corporation, and Frederick H. Towne. Of these defendants, the first three have been dropped on motions challenging the jurisdiction of the court, and the action has been continued and is now pending against the defendants the Humphrey Cornell Company and Frederick H. Towne, as to both of whom the court has retained jurisdiction. Although the defendants named in the bill as originally filed, other than the Humphrey Cornell Company and Towne, are not parties to this action, they must, by reason of their subsequent participation in the trial with the knowledge of the court and of all the parties to the record, as was the case here, be held to be privies to any judgment which may be recovered herein, and will be fully bound thereby. Souffront v. Compagnie Des Sucreries, 217 U. S. 475, 486, 30 Sup. Ct. 608, 54 L. Ed. 846; Washington Gas Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

The facts as developed by the evidence are as follows:

The plaintiff is the successor in business of the Cereal Machine Company, a Colorado corporation organized in 1893 by Henry D. Perky, the founder of the business. The shredded wheat product, so called, of the plaintiff, is now, as it always has been, made from whole wheat of the highest grade and quality, and with great skill, in the plaintiff's plant in Niagara Falls, N. Y., the sanitary and mechanical methods of which, in all of their appointments, are of superlative excellence. The product retains the body and substance of the whole wheat in final biscuit form, and is at once recognized by the configuration of the biscuit from all other forms of food products ever before manufactured from wheat or any cereal of similar or allied character.

The whole wheat berry is thoroughly cooked by boiling without destroying the berry form, and then all parts of the individual berry are swaged and commingled together by passing through grooved rollers, from which they are discharged in the form of long, fine filaments or threads of porous character having a rough exterior, so that they are adapted to and do adhere together when being massed to form loaves or biscuits, and the food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. After it is discharged from the rolls it is baked a golden brown, 12 biscuits are packed in a carton, 36 cartons in each case, and the product is shipped to the wholesale grocer, who in turn sells it to the retail grocer, and he to the ultimate consumer.

The plaintiff's product was protected by two patents—one for bread and the method of preparing the same, No. 548,086, dated October 15, 1895, and which accordingly expired October 15, 1912; and the other a design patent, No. 24,688, dated December 17, 1895, for 14 years, and which accordingly expired December 17, 1909. Since the expiration of these patents, with the exception of the defendants and those in privity with them, the plaintiff has been the only person using this particular form, shape, color, and size of shredded wheat biscuit, all of which features have been appropriated by the plaintiff.

An enormous trade in these biscuits has been built up and established all over the world by the plaintiff as the result of a long campaign covering a period of about 15 years by vigorous and expensive advertising. So great has been the advertising expense that in 1914 between $800,000 and $1,000,000 was expended. The business has steadily and consistently increased from year to year. In 1901 the number of individual biscuits produced and sold amounted to 175,000,000, and this production constantly increased until in 1915 it amounted to approximately 500,000,000 biscuits. In other words, the gross business increased from about $1,250,000 in 1901 to over $4,000,000 in 1915.

The ultimate consumer, whether in private homes, boarding houses, or at hotels and restaurants, only knows the individual biscuit to which he has become accustomed, and never sees the package in which it is offered for sale by the retailer.

Some six years after the expiration of the design patent, Ross, Towne, and Valentine, who had been in the employ of the plaintiff and were familiar with the manufacturing processes and business and advertising and trade policies of the plaintiff, organized the Ross Food Company, a New York corporation located at Batavia, for the purpose of entering into competition with the plaintiff, although there was then, and for quite a time previous thereto had been, other forms of shredded wheat biscuit, which could be and were easily identified from the product of the plaintiff and its predecessor.

Towne, who is a stockholder in and the New England agent for the Ross Food Company, thereupon solicited the Humphrey Cornell Company, a wholesaler and jobber in this district, to distribute the product of the Ross Food Company throughout Connecticut, Rhode Island, and parts of New York, which the Humphrey Cornell Company undertook to do and did do, and the defendants' product was sold by the Humphrey Cornell Company and Towne to the retail trade in the territory named, but in very small quantities.

The visual appearance of the defendants' product, as it is made and served, is exactly like that of the plaintiff in shape, size, color, and form, all of which were adopted by the plaintiff, not because of any inherent or functional advantage or value resulting therefrom, but purely as a matter of accident, resulting from the size and shape of the rolls of the plaintiff's machinery from which it was discharged ready for use. Indeed, there is an apparent disadvantage in the shape and size of the product as made by the plaintiff and copied by the defendants, as a circular biscuit would be much more adaptable to a saucer or bowl than is one of oblong form, and a very different gen-

eral appearance would be just as advantageous as the defendants' unless they desired, in copying it exactly, to get away the plaintiff's customers.

Although the carton or package containing the defendants' biscuit is of an entirely different shape and color from that of the plaintiff's carton, there is, nevertheless, printed upon the face of defendants' package a picture of a shredded wheat biscuit which is an exact reproduction of plaintiff's product, and although the defendants characterize their product as "Ross's Whole Wheat Biscuit," they do not in any other way show or attempt to show that their product is not that of the plaintiff, and the individual biscuit of the defendants, when disassociated from the carton, bears no mark, stamp, brand, or tag whereby the individual consumer can be informed that it is not the plaintiff's product. The machinery used by the Ross Food Company in the manufacture of its product is substantially copied from that used by the plaintiff in building up and carrying on its trade. Moreover, the plaintiff's product has been particularly recognized solely by reason of the form, shape, size, and color of the individual or unit biscuit, and through the personal efforts of the plaintiff's officers and salesmen the plaintiff's business has been so directed and conducted as to definitely fix and impress this fact upon the public.

[1] The vital, and indeed the sole, question of defense is: Have the plaintiff's patents taken the case out of the law of unfair competition, and are the size, shape, and color of the plaintiff's product, together with the identifying name and dress, open to the public upon the expiration of the monopoly granted by these patents? If this were a case of a technical trade-mark purely, it would be controlled by the authority of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, Centaur Co. v. Heinsfurter, 84 Fed. 955, 28 C. C. A. 581, and Linoleum Manufacturing Co. v. Nairn, 7 Ch. Div. 834. But it is not. It is exclusively a case of unfair competition, which involves something more than a generic name, by which the object has become known to the public, and which also involves rights not covered by or included in the monopoly of either of the patents relied on. The invention of the patent for the bread and its method of manufacture relate exclusively, as the specification states, to—

"the production of an article of food or bread, consisting of externally rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain berries and their rough and porous threadlike or shredlike form to constitute, without other shortening or aeration, bread of especially light and wholesome character."

And it consists—

"in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread."

Its feature of patentable novelty, wherein it is distinguished from the prior art, lies in the fact that the wheat is taken in the whole berry

form, and, after being cleaned and thoroughly washed, is boiled until cooked without destroying the whole or individual form of the berry, and the sinuous form and rough or jagged exterior shape of the filaments are designed to provide small interstices throughout the mass whereby the bread is thoroughly aerated and made very light, and the food is discharged from the rolls ready for use without further cooking, or it is shaped for baking in various ways, is pure wheat, and the parts of the berry are given to the consumer in attractive form, without the chemical change set up therein by the use of ferments or other foreign ingredients. Moreover, the claims of the patents are strictly limited to the features recited. Claim 1, which is for the product, is:

"1. A food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising materials, or their products."

Claim 2, which is for the process, is:

"2. The process of reducing cereals for food, consisting first, in cooking the grain with salt, after it has been thoroughly cleaned, without destroying the whole berry form; second, partially drying the grain with constant agitation until its interior and exterior portions are of substantially the same consistency; and finally, compressing the grain to intimately commingle the outer or bran coats, gluten layers, and starchy, interior portions in the form of porous, rough filaments or threads, substantially as described."

It will be seen, from a careful reading of the specification and claims of this process patent, that it has nothing to do whatsoever with the form or shape or size of the biscuit, and, so far as this patent is concerned, it was open to the defendants upon its expiration, to make and sell a whole wheat biscuit without copying in any way the form, shape, size, or color of the plaintiff's biscuit as disclosed in the process patent.

The design patent, as the specification states—

"has relation to a certain new and original design for biscuits; and it consists in the novel form and configuration thereof, as hereinafter described, and shown in the accompanying drawings."

The specification then goes on to state that:

"The leading feature of the design consists in a biscuit, which presents a fibrous interstitial appearance, showing superimposed layers or irregular interlacing threads or filaments, which are wound or disposed in such loose relation to each other that the threads or filaments of the inner layers are visible from the surface to a greater or less degree through the interstices of the outer layers. The general form of the biscuit shown in the drawings, when viewed in plan, is that of a parallelogram, and when viewed in end elevation or cross-section is a flattened oval, with slight creases along the longitudinal edges; its distinguishing characteristic being mainly, as above stated, its fibrous interstitial appearance."

The design patent has nothing to do with the form, shape, or size of the biscuit, and the distinguishing characteristic of the design was "its fibrous, interstitial appearance." I am therefore impelled to the conclusion that neither of these patents, nor, indeed, any of the other patents offered in evidence, and which are purely mechanical, take

the case out of the law of unfair competition. The fact is beyond cavil that the carton and the shape, size, and color of the plaintiff's product, together with the words "Shredded Wheat" and "Shredded Whole Wheat," have been used so long and so exclusively by the plaintiff as to designate, with reference to the plaintiff's product, in the trade and to the purchasing public, that the carton, the words, and the article itself have each and all come to mean that the article made or sold as "Shredded Wheat" or "Shredded Whole Wheat" is the plaintiff's product. Hence the case falls directly within the ruling of Lord Herschell in Reddaway v. Banham [1896], L. R. Appeal Cases, 199, of a descriptive word used so—

"as to induce in purchasers the belief that they are getting the goods of the manufacturer who has heretofore employed it as his trade-mark."

And if that is the case the law clearly imposes upon the defendants the burden of being required to use the carton, and the words, and the article itself with sufficient distinguishing marks to prevent the purchasing public from being deceived into buying the defendants' product as and for the plaintiff's product.

There is nothing in the Singer Case, or in any of the other authorities, which is in any way inconsistent with this conclusion. In the Singer Case, where the right of the defendant to use the name "Singer" in relation to sewing machines was established, it was coupled with the restriction that in so doing it must be made clearly and unmistakably to appear that the machines were manufactured by others than the complainants. Although the right to manufacture Singer sewing machines had become public property by the expiration of the patents, nevertheless the right of the original manufacturers to be protected from fraudulent imitation of the indicia by which Singer machines made at their establishment had been known to the trade was upheld, without regard to the fact whether these devices had been adopted during the life of the patent or after its expiration. Mr. Justice White, in delivering the opinion of the court in Singer Mfg. Co. v. June, 163 U. S. 169, 197, 16 Sup. Ct. 1002, 1013 [41 L. Ed. 118], quotes with approval from Pouillet, Brevets d'Invention, Nos. 327, 328, as follows:

"The expiration of a patent has for its natural effect to permit every one to make and sell the object patented; and it has also for effect to authorize every one to sell it by the designation given it by the inventor, but upon the condition in every case not, in so doing, to carry on unfair competition in business (concurrence de loyal) against him. * * *"

And the closing paragraph of his opinion in Singer Mfg. Co. v. Bent, 163 U. S. 206, 16 Sup. Ct. 1016, 41 L. Ed. 131, is as follows:

"There is no doubt that the marks were imitations of those used by the Singer Company, and were intended to deceive, and were made only seemingly different to afford a plausible pretext for asserting that they were not illegal imitations, although they were so closely imitative as to deceive the public. The defendant, therefore, must be treated as if he had actually used the Singer marks. So treating him, however, we should be obliged to allow the use of the name 'Singer,' since that name, as we have already held in the case just decided, fell into the domain of things public, subject to the condition on the one who used it to make an honest disclosure of the source of manufacture."

In Centaur Co. v. Killenberger (C. C.) 87 Fed. 725, it was held, notwithstanding the rule laid down in the Singer Cases, that distinctive labels long used on patented articles do not become free to the public on the expiration of the patent, and that, where plaintiff's package and label is not exactly imitated by defendant, but is made so nearly like it in general appearance that one is apt to be mistaken for the other by intending purchasers, and that a close inspection is necessary to distinguish them, the use of the label by the defendant, or of one substantially similar thereto, will be enjoined. To the same effect is Centaur Co. v. Neathery, 91 Fed. 891, 34 C. C. A. 118, in which it was held that, while the right to manufacture "Castoria" according to a patented process or formula, and the right to sell the manufactured article under the name "Castoria," is free to the world since the expiration of the patent, yet, in placing it upon the market, the new manufacturer must clearly identify his goods, and not engage in unfair competition, nor do anything which will tend to deceive the public, and induce it to purchase his goods under the belief that they are those it has been accustomed to purchase under the same name.

This view of the law, and particularly in its aspect pertinent to the case at bar, is admirably stated in G. & C. Merriam Co. v. Saalfield, 198 Fed. 369, 117 C. C. A. 245, by the Circuit Court of Appeals for the Sixth Circuit. It was there distinctly held that, on the expiration of a patent or copyright, the situation arising with respect to the use by others of the name of the patented article or copyrighted book cannot be differentiated from that arising with respect to the use of any other descriptive word, and that, while any subsequent maker of the article or publisher of the book has the right to use the name, because it has come to be a word of apt description, if, by reason of its long and exclusive use by the original maker or purchaser, it has come to be indicative of his product, and he continues its use, he is entitled to protection against unfair competition in such use, and the right of another to use it is qualified by the requirement that he must accompany it with an explanation which will unmistakably inform the public that the article or book is of his production.

In the same case—Merriam v. Saalfield—which again came before the Circuit Court of Appeals on appeal from decrees entered in purported compliance with the mandate contained in 198 Fed. 369, 117 C. C. A. 245, the court reiterated its views in an opinion handed down January 13, 1917, and found in 238 Fed. 1, on page 8, —— C. C. A. ——, and said:

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

the purchaser of 'Stone Ale,' or 'Camel's Hair Belting,' or 'Glenfield Starch,' very likely knew as little as he cared about the personal identity of the maker."

In Jenkins Bros. v. Kelly & Jones Co., 227 Fed. 211, 142 C. C. A. 11, a case of unfair competition arising after the expiration of patents on the plaintiff's goods, it was held that courts do not decide misleading markings on manufactured goods, the patent on which has expired, by the caveat emptor rule of buyer and seller, but on the theory that a buyer who has become accustomed to a particular article is entitled to be unmistakably informed that a person other than the former maker is manufacturing the same, and that the rights of rival makers are not the only thing to be considered. Judge Buffington, delivering the opinion of the court, said (227 Fed. on page 213, 142 C. C. A. on page 13):

"From this it will be seen that the sum and substance of the marking is not the mere literal, physical stamping, printing, or engraving of the maker's name on an article which in the public mind is associated with another's business, but the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will *'unmistakably inform the public of that fact.'*"

I am convinced that the plaintiff is entitled to an injunction, and the only question is as to the extent to which it shall go. In view of the circumstances of the case, taken in connection with the settled practice obtaining in this circuit, the terms of the injunction will be settled before its issuance, and in order to avoid any further argument on this question, the terms of the injunction order, together with the reasons for the same, are set forth at length.

[2] First. The purpose to be effected by an injunction in cases of unfair competition is not primarily to protect the purchaser, but to secure to the manufacturer the profit to be derived from the sales of his goods to all who may desire and intend to purchase them. It is the liability to injury and an actual infringement which the remedy may be invoked to prevent. Williams v. Brooks, 50 Conn. 278, 279, 47 Am. Rep. 642; T. A. Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; N. K. Fairbank Co. v. Luckel, King & Cake Soap Co., 102 Fed. 327, 42 C. C. A. 376.

[3, 4] Second. The plaintiff is entitled to an injunction restraining the use of the pictorial representation of the plaintiff's biscuit on the defendants' carton. While it is true that, upon an examination and comparison of the two cartons, side by side, substantial differences will be found, the outstanding fact is that the defendants have placed upon their cartons a pictorial representation of a shredded wheat biscuit, which is an exact copy of plaintiff's biscuit, so that one is apt to be mistaken for the other, in which case a careful inspection is necessary to distinguish them, unless there are marked thereon words which clearly specify that the product contained therein is the product of the defendants or other manufacturer, and not the product of the plaintiff. Even the good faith of the defendant, if it existed, and I do not believe it did, would be immaterial, and the fact that careful buyers may not be deceived is of no consequence, as such fact would only show that the

injury is less, not that there is no injury. Another class of purchasers may be deceived, and, if they may be, the plaintiff is entitled to an injunction. Collinsplatt v. Finlayson (C. C.) 88 Fed. 693; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; International Silver Co. v. Rogers Corpn., 67 N. J. Eq. 646, 650, 60 Atl. 187, 110 Am. St. Rep. 506, 3 Ann. Cas. 804; Reading Stove Works v. S. M. Howes Co., 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979; Lever v. Goodwin, L. R. 36 Ch. Div. 1; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 41, 21 Sup. Ct. 7, 45 L. Ed. 60; New England Awl & Needle Co. v. Marlborough Awl & Needle Co., 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377. The case is one where no amount of diligence on the part of the plaintiff can or would guard against the injury. Meriden Britannia Co. v. Parker, supra.

As was said by Mr. Justice Bradley in Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94, 97:

"Similarity, not identity, is the usual recourse, when one party seeks to benefit himself by the good name of another."

The controlling principle is well stated by Lord O'Hagan in Singer v. Wilson, 3 L. R. Appeal Cases, 376, in the following words:

"I think we should be cautious in holding that, although a person of intelligence and observant habits might, in a case like this, by exercising reasonable vigilance, escape misleading, there should be no restrictive interference to prevent others from being misled. It is a question of degree, of more or less; there can be no rigid rule, and the special facts must be considered in every case. There are multitudes who are ignorant and unwary, and they should be regarded in considering the interest of traders who may be injured by their mistakes. If one man will use a name, the use of which has been validly appropriated by another, he ought to use it under such circumstances and with such sufficient precautions that the reasonable probability of error should be avoided, notwithstanding the want of care and caution which is so commonly exhibited in the course of human affairs."

Judge Lacombe, speaking for the Circuit Court of Appeals for this circuit in Enterprise Mfg. Co. v. Landers, Frary & Clark, 131 Fed. 240, 241, 65 C. C. A. 587, 588, said:

"A court of equity will not allow a man to palm off his goods as those of another, whether his misrepresentations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor."

The test in all cases of this kind is: Has the ensemble come to be a public guaranty of origin and quality? Enoch Morgan's Sons Co. v. Ward, 152 Fed. 690, 81 C. C. A. 616, 12 L. R. A. (N. S.) 729.

[5] Third. The plaintiff is entitled to an injunction restraining the use by the defendants of the words "Shredded Wheat" and "Shredded Whole Wheat," unless the defendants mark their packages and product so as to clearly and unmistakably specify that the same is the product of the defendant or other manufacturer, and not the product of the plaintiff.

In view of all the circumstances of the case as set forth in the proofs, it seems reasonably clear that the words "Shredded Wheat" and "Shredded Whole Wheat," although in a way abstract in character, have become associated with the goods of the plaintiff in particular, and

have come to mean the plaintiff's goods alone. While it may be conceded that they could not be adopted as a technical trade-mark, because descriptive, nevertheless they necessarily and naturally point to the source or origin of the product, and indicate an identity between the plaintiff and the names in question. The rule on this subject was forcibly stated by Lord Herschell in Reddaway v. Benham, supra, 210, in the following words:

"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B."

[6] The natural presumption is that the defendants expect to derive benefit from the name, and to secure buyers from among those who had bought and used the plaintiff's product, and it may be justly assumed that the defendants by the use of these words intend to mislead, and not in good faith to convey information, and this assumption, carried to its logical conclusion, means that the defendants' acts are likely to accomplish what the defendants intended they should. Wotherspoon v. Currie, L. R. 5 House of Lords, 508; Keller v. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; R. Heinisch's Sons Co. v. Boker (C. C.) 86 Fed. 765. This rule has been generally adopted by the American courts. Herring-Hall Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616; Standard Varnish Works v. Fisher, Thorsen & Co. (C. C.) 153 Fed. 928; Cady v. Schultz, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763; Hansen v. Siegel-Cooper Co. (C. C.) 106 Fed. 691; American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263. And the question in all of these cases is, not whether the plaintiff has a property in the words or name, but whether or not the defendants have sought to prevail on purchasers to buy their goods believing they were getting the goods made by the plaintiff; and if the plaintiff can prove that the term in question has, in addition to its usual meaning descriptive of the kind of goods made by the plaintiff, the further meaning that such goods are the particular goods made by the plaintiff, and that the public understands this to refer only to goods made by the plaintiff, and that the defendant has used the name in order to attract to himself that custom which, without the improper use of such names, would have flowed to the plaintiff, the plaintiff is then entitled to an injunction. Van Horn v. Coogan, 52 N. J. Eq. 380, 28 Atl. 788.

As pointed out in Merriam v. Saalfield, supra, there is nothing abstruse or complicated about this theory, although its application may sometimes be difficult. Judge Denison said (198 Fed. page 373, 117 C. C. A. page 249):

"It contemplates that a word or phrase originally, and in that sense primarily, incapable of exclusive appropriation with reference to an article on the market, because geographically or otherwise descriptive, might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public,

the word or phrase had come to mean that the article was his product; in other words, had come to be, to them, his trade-mark. So it was said that the word had come to have a secondary meaning, although this phrase, 'secondary meaning,' seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning. Here, then, is presented a conflict of right. The alleged trespassing defendant has the right to use the word, because in its primary sense or original sense the word is descriptive; but, owing to the fact that the word has come to mean, to a part of the public, something else, it follows that when the defendant approaches that same part of the public with the bare word, and with nothing else, applied to his goods, he deceives that part of the public, and hence he is required to accompany his use of the bare word with sufficient distinguishing marks normally to prevent the otherwise normally resulting fraud."

In Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, on page 673, 21 Sup. Ct. 270, on page 274 (45 L. Ed. 365), Chief Justice Fuller, in writing the opinion of the Supreme Court, said:

"But it is contended that the name 'Elgin' had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached. In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those, and other, goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not."

Then follows a succinct statement of the rule applicable in cases of unfair competition, which, is particularly pertinent here. The Chief Justice said:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

[7] Fourth. As the defendants' product has been copied in its entirety from that made by the plaintiff, the plaintiff is entitled to an injunction restraining and enjoining the defendants from manufacturing or selling whole wheat biscuit in the form, shape, size, and color of the plaintiff's biscuit, or in any imitation thereof, unless there is marked on each biscuit words which clearly and unmistakably specify that the same is the product of the defendants, or other manufacturer or vendor, and is not the product of the plaintiff.

The evidence shows cases of actual deception, as well as a liability to such deception, and it also shows a particular kind of product attaching to the personality of the maker. George G. Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619, and George G. Fox Co. v. Hathaway, 199 Mass. 99, 85 N. E. 417, 24 L. R. A. (N. S.) 400, are much in point. In these cases the plaintiff was the first to manufacture a particular kind of bread, using in it milk and malt, and applying to it, as a trade-name, the word "Creamalt." The bread was made in an oval loaf, unusual in shape and size, and having a peculiar broken and glazed surface, so as to produce an odd visual appearance. This combination of external characteristics was neither

economical nor necessary, and nothing similar was in use by defendants. The defendants then began to make similar bread, calling it "Crown Malt," and imitating the size and form of the loaf, and then also, with a slight difference, the peculiar appearance of the surface, and a label resembling that used by the plaintiff was attached to the loaf. A band was put around the loaf by both plaintiff and defendant; the former calling his product "Fox's Creamalt," and the latter naming his "Hathaway's Log Cabin Bread." This band was easily removable by retail dealers. It also clearly appeared that the defendants' legitimate business could be conducted properly without giving its wares this distinctive misleading appearance. It was held in the Glynn Case that the plaintiff was entitled to an injunction for the reason that in a suit in equity by one wholesale dealer against another to restrain unfair competition and trade, consisting of an imitation of the plaintiff's trade-name and of the appearance of his goods, it is no defense that the defendant does not mislead, or intend to mislead, the retail dealers to whom he sells, if he knowingly places in the hands of the retail dealers an instrument of fraud with which they may deceive the public. In delivering the opinion of the court, Chief Justice Knowlton (191 Mass. 349, 350, 78 N. E. 89, 91 [9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619]) said:

"But goods often come to be known as of a particular manufacture, and acquire a valuable reputation, by means of a designation that could not be made the subject of a trade-mark, because others may have occasion to make some use of the words or marks chosen. It is important to every one who has acquired a valuable good will in his business in that way, to have it protected, as his other property is protected. *It is also important to the public to be able to recognize articles of manufacture as produced by a known and trustworthy maker, through the appearance by which they have come to be known.*"

In the Hathaway Case the facts relied upon by the plaintiff to prove its case were substantially as they were stated in the Glynn Case, although it was claimed by the defendants that their loaf was without the label, and was therefore easily distinguished from the plaintiff's loaf, inasmuch as the two loaves were conspicuously distinguished by their labels. A small label bearing the name "Creamalt" was pasted upon the plaintiff's loaf, and a broad paper band bearing the names "Hathaway's Log Cabin Bread, Malted," encircled the defendant's loaf. It was held that the principles which were stated in the Glynn Case were applicable, and that the use by the plaintiff of the combination of the size, shape, color, and conditions of the surface to produce a general visual appearance for its loaf of bread made in part of malt and milk, gave it substantial rights, particularly as there were no intrinsic advantages in the combination which produced this general visual appearance, and that a very different general appearance would be just as advantageous to the defendants, unless they wished, by deceit, to get away the plaintiff's customers. In the opinion (199 Mass. page 102, 85 N. E. page 418 [24 L. R. A. (N. S.) 400]) the court said:

"The plaintiff had no exclusive right in any one of the features of the combination, and if the defendants had acquired the use of this combination for the successful prosecution of their business, they would have had a right

to use it, by taking such precautions as would prevent deception of the public and interference with the plaintiff's good will. But the evidence shows that the defendants had no occasion to use this combination, and therefore they were not justified in producing an imitation of the plaintiff's loaves, the natural effect of which would be to deprive it of a part of its trade through deception of the public. There are numberless shapes and sizes in which loaves of bread may be produced, and various peculiarities of appearance in color and condition of surface. These that the defendants adopted had been combined to distinguish the plaintiff's Creamalt bread, and it was the duty of other manufacturers to recognize this fact. Not, indeed, to the abandonment of their right to do what was reasonably necessary to success in the management of their own business; but to the extent of so conducting their business as not unreasonably and unnecessarily to interfere with the plaintiff's business through deception of the public."

If the shape and form of the plaintiff's product, and which the defendants have copied, were purely functional (that is, if they had certain elements of value for use and sale, which were peculiar to that form), a different question would be presented; but no such condition or features attach to the plaintiff's or defendants' product, and, as has been pointed out, the form of the biscuit made by the plaintiff was, at the outset, a matter of accident, and, indeed, a much more convenient form could have been chosen.

[8] The vital question here—as in all cases of like kind—is not whether dealers are liable to be deceived in buying from the manufacturer or wholesaler, but whether the user is liable to be misled in buying from the retailer. This distinction is well borne out and sustained by the Circuit Court of Appeals for this circuit in Enterprise Mfg. Co. v. Landers, Frary & Clark, supra; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149; Rushmore v. Manhattan Screw & Stamping Works, 163 Fed. 939, 90 C. C. A. 299, 19 L. R. A. (N. S.) 269; Rushmore v. Badger Brass Mfg. Co., 198 Fed. 379, 117 C. C. A. 255; Rushmore v. Saxon, 170 Fed. 1021, 95 C. C. A. 671; and by Mr. Justice Bradley in Putnam Nail Co. v. Bennett (C. C.) 43 Fed. 800, in an opinion which is quoted from with favor by the Supreme Court in Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. Another well-considered and instructive case sustaining this view is Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704.

[9] The evidence shows sales by the Humphrey Cornell Company of a very small amount of the defendants' product, on which the profits were negligible. Although the plaintiff would be entitled to an accounting to recover, not only the amount equivalent to defendants' profits, but also any losses to its own business resulting from the unfair competition, if such losses could be shown, I am inclined to the view that the profits and damages together will be too small to justify the expense of taking an account, and upon the authority of Saxlehner v. Eisner & Mendelson Co. (C. C.) 88 Fed. 61, and National Distilling Liquor Co. v. Century Liquor & Cigar Co., 183 Fed. 206, 105 C. C. A. 638, there will be no reference to a master.

After oral arguments and submission of briefs, counsel for defendants further cite Miller Rubber Co. v. Albert Behrend et al., 242 Fed. 515, — C. C. A. —, decided by the Circuit Court of Appeals for the Second Circuit in February, 1917, and reported in the New York Law

Journal under date of March 10, 1917, and Diamond Expansion Bolt Co. v. U. S. Expansion Bolt Co., 164 N. Y. Supp. 433, decided by the Appellate Division of the Supreme Court of the state of New York, reported in New York Law Journal under date of April 23, 1917; but the cases cited are in no way inconsistent or in conflict with the conclusions herein reached.

Let an injunction issue in accordance with the views herein expressed. Decree accordingly, together with costs.

UNITED STATES v. DAVIDSON.

(District Court, N. D. New York. August 30, 1917.)

1. POST OFFICE ⟸31—NONMAILABLE MATTER—WRITING ON ENVELOPE.
Under Cr. Code, § 212 (Act March 4, 1909, c. 321, 35 Stat. 1129 [Comp. St. 1916, § 10382]), declaring an envelope containing any epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, or defamatory character, or calculated by its terms and obviously intended to reflect injuriously on the character or conduct of another, to be nonmailable, the depositing of a postpaid envelope addressed to "Mrs. W. Martin, Pros., Care Mrs. Freeborn, 14 Walworth Street, City," which abbreviation was known to the writer and to the recipient, as disclosed by the contents of the letter and of a subsequent letter, to mean "prostitute," and to charge immorality, but which abbreviaion as to all others might have a proper and innocent signification, was not an offense, as it was not obviously intended to reflect injuriously upon another's character or conduct.

2. POST OFFICE ⟸32 — NONMAILABLE LETTER — OFFENSE — "INDECENT" — "FILTHY"—"LASCIVIOUS."
Under Cr. Code, § 211 (Comp. St. 1916, § 10381), declaring every obscene, lewd, or lascivious, and every filthy letter of an indecent character unmailable, and defining the term "indecent" to include matter tending to incite arson, murder, or assassination, the mailing of an inclosed letter stating that, as soon as the recipient's bastard daughter was old enough to understand, the writer would write her an account of her prostitute mother, that recipient's husband was ashamed of her, and that the writer would write him about his wife, and that she was surrounded by a bunch of bastards and prostitutes, was an offense; the word "indecent" meaning grossly vulgar, offensive to modesty, obscene, lewd; the word "filthy" meaning morally foul, polluted, nasty, etc.; and the word "lascivious" meaning tending to excite voluptuous emotions, luxurious.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indecent; Lascivious.]

3. INDICTMENT AND INFORMATION ⟸129(1)—OFFENSES—JOINDER OF COUNTS.
A count in an indictment charging a violation of Cr. Code, § 211, by sending nonmailable matter in the form of a closed and directed letter, was properly joined with a count, under section 212, for depositing in the mail an envelope on which nonmailable matter was written, both of which acts were directed against the same person.

Minnie Davidson was indicted for sending a nonmailable letter through the mails, and for depositing in the post office an envelope the outside of which contained nonmailable matter. Demurrer to the first count overruled, and demurrer to the second count sustained, and that count dismissed.

Demurrer to indictment filed June 19, 1917, and which contains two counts, one for a violation of section 211 of the Criminal Code by sending nonmailable matter in the form of an inclosed and directed letter through the United States mails, April 21, 1917, and the other for a violation of section 212 of said Criminal Code by depositing in the post office of the United States, April 12, 1917, for mailing and delivery, an envelope and contents on the outside of which envelope, says the indictment, "was written an epithet, term, and language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, and defamatory character, calculated by the term, manner, and style of display to reflect injuriously upon the character and conduct of another, to wit, the character and conduct of one Mrs. ———, the said envelope being hereto attached and made a part hereof," etc. Both of these, the letter and the envelope complained of, with contents, were directed to the same person, but mailed at different dates and at the same post office. The demurrer is to both counts, on the ground the same are not sufficient in law to charge a crime or offense, and that the two counts or charges are improperly united in the same indictment.

Dennis B. Lucey, U. S. Atty., of Ogdensburg, N. Y.
Benj. P. Wheat, of Saratoga Springs, N. Y., for defendant.

RAY, District Judge (after stating the facts as above). For the purposes of the demurrer and of determining the sufficiency of the indictment, assuming the facts stated to be true, on the 21st day of April, 1917, the defendant, at Saratoga Springs, N. Y., and within the Northern District of New York, deposited in the post office for mailing a letter inclosed in a post-paid envelope, duly addressed and directed to Mrs. ———, and which letter or writing reads as follows:

"You have'nt stoped him from takeing the lady out have you? Just as soon as the bastard is old enough to understand I'll write her a full account of her prostitute mother and believe me I won't leave out anything not even the proof and just as soon as I know and address that will reach Fred without your geting it first I'll send him a letter that will tell him a few things about you that he don't know and if I know of your geting acquainted with any one I'll tell them about you to. It ought to be satisfaction enough to know that you are tied for life to a man that is ashamed of you and someone else is giving you just what you gave Mrs. Martin only you have to stand for it. She did not first—he asked her to marry him—you made him marry you. She had money and could do as she liked, you can't. She had decent friends and a name back of her—all you have is a bunch of prostitutes and bastards. So Ruby you keep on digging and stay out of sight and I'll keep telling your history to any one you get acquainted with also Fred and his friends."

[1] The second count charges the deposit in the post office April 12, 1917, of a post-paid envelope, with contents, on the outside of which envelope was written the following: "Mrs. W. Martin, Pros., Care Mrs. Freeborn, 14 Walworth Street, City." The letter or abbreviation, if it be such, "Pros.," followed the name of the addressee, and was placed about three-fourths of an inch therefrom. By reason of its location, it was calculated to attract attention. "Pros." was undoubtedly intended as an abbreviation, and when we read the letter inclosed and the subsequent letter sent the addressee, April 21, 1917, we must reasonably conclude what was intended by the one who addressed the envelope. The proof on the trial would undoubtedly show that the letters "Pros.," so written on such envelope, were intended by the writer thereof as an abbreviation of the word "prostitute," but with-

out such knowledge gained by reading the two letters the reader of such words and letters "Pros." on such envelope would have no means of knowing or forming a correct conclusion as to their meaning, except such as is warranted by reference to our dictionaries of the English language. The Century Dictionary defines "Pros." as "an abbreviation of prosody," and also "Pros." as "a prefix in words of Greek origin or formation, meaning 'to,' 'towards,' 'before,' etc." This is familiar knowledge to the close student of English and also to those who have studied the Greek language. Of itself, "Pros." does not suggest, even remotely, anything either indecent, lewd, lascivious, obscene, libelous, scurrilous, or of a defamatory character. Taking and applying the ordinary and natural meaning to this abbreviation found on this envelope, and the addressee was described as a singer, or speaker, with modulation of voice, especially as to tone or accentuation, or as one versed in the science or quantity of syllables and pronunciation as affecting versification. See "Prosody," Century Dictionary. The di-derivatives of napthaline are "sometimes distinguished by prefixes, as 2.6 amplin, 2.7 pros.," etc. See Webster's New International Dictionary.

The question then arises, does it constitute an offense against the statute (section 212, Criminal Code) to place on an envelope an abbreviation known to the writer and to the recipient of the inclosed letter, as disclosed by the contents of such letter to the recipient thereof and to no one else, to charge immorality, etc., but which abbreviation to all others would have only a proper, innocent, and even flattering signification? I think not. This envelope is attached to, is referred to in, and forms a part of, the second count of the indictment and speaks for itself. The letter inclosed in such envelope is neither attached to, nor referred to in, the indictment. There is no allegation in the indictment that the abbreviation "Pros." had other than its ordinary meaning as generally understood and defined in the dictionaries, or that it had any other meaning as understood by the writer and by the person to whom addressed. While the indictment charges in count 2 that the words or letters "Pros." on the envelope were of an indecent, lewd, lascivious, obscene, libelous, scurrilous, and defamatory character, etc., the envelope itself, which forms a part of this count of the indictment, shows that they were not of that character, but innocent in and of themselves, and as generally understood and according to their ordinary and natural and well-defined meanings. Section 212 of the Criminal Code (U. S.) reads as follows:

"All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe. Whoever shall knowingly deposit or cause to be deposited, for mailing or delivery, anything declared by

this section to be nonmailable matter, or shall knowingly take the same or cause the same to be taken from the mails for the purpose of circulating or disposing of or aiding in the circulation or disposition of the same, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

I think that, to be nonmailable, the delineations, epithets, terms, or language on the envelope must, of itself or of themselves, be of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or of themselves calculated, by the terms or manner or style of display thereon, and *obviously* intended, to reflect injuriously upon the character or conduct of another. It would seem that a statute of this character, to prevent the abuse or improper use of the United States post office establishment and mails, is intended for the protection of the government and general public and not the redress of private grievances. In United States v. Jarvis (D. C.) 59 Fed. 357, the address on the envelope was "Room 32, Pease House, Front St., City. The Notorious;" and it was held that this was not defamatory per se, and not calculated to reflect injuriously on any one, whether referring to the addressee of the letter and envelope or to the Pease House or Hotel. The judge said:

"From the style of the superscription it is not obvious that the words 'The Notorious' were intended to characterize the person addressed, or any person. On the contrary, the Pease House would appear to have been intended to be designated as 'The Notorious.' But, assuming that the epithet applies to the person addressed, the words themselves do not necessarily reflect injuriously. Applied to a person without notoriety, they are meaningless. A man may be a notorious wit. Those who possess and exercise superior powers as orators, singers, or actors gain celebrity, and the holders of exalted positions are referred to as noted persons. Applied to persons of such character, the epithet would be considered by those acquainted with their reputations as being in bad taste, but not as implying any bad imputation."

So here the abbreviation "Pros." is not *obviously* intended to reflect injuriously upon the character or conduct of any person or persons. The injurious and slanderous meaning concealed from the general public and unknown to it, and only known to the writer and recipient of the envelope and inclosed communication, cannot bring the case within the statute quoted.

The second count of this indictment is insufficient to charge an offense, and as to same the demurrer is sustained and the count dismissed.

[2] Returning to count 1 of the indictment, we have a private letter sent under seal through the post office to the addressee, and which letter says, referring to some one's child, "Just as soon as *the bastard* is old enough to understand, I'll write her a full account of her *prostitute* mother, and," etc. Later it refers to the husband, and states he is ashamed of this mother; and, later, referring evidently to the first wife, says: "*She* had decent friends and a name back of her. All you have is a bunch of prostitutes and bastards." This communication starts off with, "You haven't stopped him from taking the lady out have you? It is impossible to tell certainly who "the lady" re-

ferred to is or who "him" is. The language I have quoted plainly imputes want of chastity to a woman, the addressee I think, by stating her child is a bastard, a child begotten and born out of wedlock, and that the mother is a prostitute, one who gives herself to promiscuous sexual intercourse. This, if published, is slanderous and libelous. There is nothing in the communication that would incite or excite sexual desires or passions in the reader or tend to. Is it obscene, lewd, or lascivious? Is it a *filthy* letter or writing of an indecent character? Is the tendency of this letter to deprave or corrupt the minds of those open to lascivious influences? Is there any chance that reasonable men would hold it obscene, lewd, or lascivious? It has been held that this section of the law applies to a postal card imputing illicit sexual intercourse to a person *other than the addressee.* United States v. Pratt, 2 Am. L. T. Rep. (N. S.) 238, Fed. Cas. No. 16,082. It has been held also that the section does *not* apply to a sealed letter charging the addressee with adultery with her son-in-law. United States v. Wroblenski (D. C.) 118 Fed. 495. In this case the letter charged the addressee with having committed adultery with her son-in-law. This, of course, charged sexual impurity, but it was held it could not in any way corrupt the mind or morals of the recipient. If the decision of that case was correct, then this letter in the instant case is not within the statute cited, as it charges the recipient with being the mother of a bastard; and a prostitute, and with having a bunch of prostitutes and bastards about her as her only backers and associates. The letter would excite the anger and indignation and resentment of the recipient rather than have a corrupting influence on her or any one who might read it. Clearly, it would not excite sexual desires or passions. In the act of July 12, 1876 (19 Stat. 90, c. 186), the word "letter" was not included, and it was held in United States v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, 34 L. Ed. 117, that an obscene, lewd, and lascivious *letter* was not covered by the word "writing," and hence was not within the statute. In 1888 the statute was amended (Act Sept. 26, 1888, c. 1039, 25 Stat. 496) to expressly cover a letter of the character indicated; and in Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023, it was expressly held that a private, sealed letter, after the amendment of 1888, containing obscene, etc., matter, is within the statute. The court held:

"The mailing of a private sealed letter containing obscene matter in an envelope on which nothing appears but the name and address is an offense within the statute."

In Swearingen v. United States, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765, repeatedly cited and approved, it was held that "lewd, lascivious, and obscene" and other writing "of an indecent character," signify "that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel." The court also said:

"The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people."

Amongst the things contained in the article considered and under examination in that case was the following:

"This black-hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion. He is a contemptible scoundrel and political blackleg of the lowest cut. * * * He has been known as the companion of negro strumpets and has reveled in lowest debauches. * * * He is lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night."

Here was a plain charge of sexual impurity with negro strumpets. Of all this the court said:

"Referring to this newspaper article, as found in the record, it is undeniable that its language is exceedingly coarse and vulgar, and, as applied to an individual person, plainly libelous. But we cannot perceive in it anything of a lewd, lascivious, and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."

The statute we are considering, so far as material here, reads:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, *letter*, writing, print or other publication *of an indecent character*, * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails," etc.

In Knowles v. United States, 170 Fed. 409, 95 C. C. A. 579, it was held that the "true test to determine whether a writing" is nonmailable under the section as it now reads "is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires." Of the language used in the writing complained of, the court said:

"Looking at the article in question, we entertain no doubt that its character and effect were questions for the determination of the jury. It glorifies fornication, and places it under the blessing of God. It designates the offspring of such intercourse as 'love children'; and declares that the 'army of genius has been largely recruited from the ranks of illegitimates.' Whether such language as this, when presented to the minds of ardent youths and maidens, would have a tendency to arouse impure and lascivious thoughts and desires we should say was at least a question of fact for the determination of a jury."

This is quite different from berating a woman for being a prostitute and the mother of a bastard child and threatening to spread the information.

In United States v. Wyatt (D. C.) 122 Fed. 316, the court (Bradford, D. J.), in charging the jury, said:

"A letter need not be obscene, lewd, or lascivious in each of its sentences or in all its parts in order to be an obscene, lewd, or lascivious letter within the meaning of the statute. If it be obscene, lewd, or lascivious in one or more parts or sentences or portions of sentences it is an obscene, lewd, or lascivious letter within the meaning of the statute. The contents of a letter may be coarse, vulgar, and indecent, and yet the letter not be obscene, lewd, or lascivious within the meaning of the statute. It does not follow, from the mere fact that the contents of a letter are coarse, vulgar, and indecent, that

such letter must be obscene, lewd, or lascivious within the meaning of the statute. The words obscene, lewd, and lascivious, as used in the statute, have reference to that form of immorality which relates to sexual impurity; and a sealed letter, to be obscene, lewd, and lascivious, must contain matter offensive to the sense of chastity, and naturally calculated or tending to suggest to or create in the mind of the addressee of the letter libidinous thoughts, or to excite or give rise to sexually impure desires in the addressee. Such a letter must have a tendency to deprave the moral senses by suggesting or appealing to sexual lust, and the objectionable language must not have been used in the proper exercise of professional duty or of any legitimate calling rendering the use of such language necessary."

In both United States v. Benedict (C. C.) 165 Fed. 221, and United States v. O'Donnell (C. C.) 165 Fed. 218, the rule is reiterated that the sealed letter mailed must contain language which will have or which may have "an immoral effect, in a sense relating to sexual impurity, upon those into whose hands the writing may come." The communication in the instant case is vulgar, abusive, insulting, and one calculated to arouse angry passions and resentment, but not sexual passions or desires. It amounts to nothing more than an accusation in writing that the addressee is a prostitute and the mother of a bastard child, and is surrounded by prostitutes and bastards, and this is accompanied by a threat to inform people generally of such addressee's history and true character, and thereby ruin her socially and in the estimation of "Fred," her husband. The language is not within the definition of obscene, lewd, or lascivious or "filthy letter of an indecent character," unless every letter to another accusing such person of sexual immorality is filthy and "of an indecent character," within the meaning of "filthy" and "indecent' 'as used in the statute. In the ordinary meaning of "indecent," this letter is within the statute. See Century Dictionary, where "indecent" is defined as meaning "unbecoming, unseemly, violating propriety in language, behaviour, etc.; grossly vulgar; offensive to modesty; obscene, lewd." But it must also be a "filthy" letter, and filthy means "morally foul; defiled by sinful practices; polluted; containing or involved in filth; foul, dirty; noisome; nasty; low; scurvy; contemptible; mean." And "filth" is defined as "anything that soils or defiles; foul offensive matter; anything that sullies or befouls the moral character; pollution; defilement."

The case of Dunlop v. United States, 165 U. S. 486, 500, 501, 17 Sup. Ct. 375, 41 L. Ed. 799, throws little light on the instant case, except to accentuate the construction of the statute that, to be obscene, lascivious, lewd, or *indecent,* the letter or publication sent through the mails must be calculated with the ordinary reader thereof to deprave him, deprave his morals, or lead to impure purposes in the direction of impure sexual relations or acts. The court said (165 U. S. 500, 501, 17 Sup. Ct. 380, 41 L. Ed. 799):

"Now, what is [are] obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion; but it must come—before it can be said of such literature or publication—it must come up to this point; that it must be calculated, with the ordinary reader, to deprave him, deprave his morals, or lead to impure purposes. * * * It is your duty to ascertain, in the first place, if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as

essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

"The construction placed by counsel upon this is that it practically directed the jury that obscene literature was such as tended to deprave the morals of the public *in any way whatever*, whereas the true test of what constitutes obscene literature is that which tends to deprave the morals in one way only, namely, by exciting sexual desires and lascivious thoughts. It is not, however, the charge given by the court that was too broad, but the construction put upon it by counsel. The alleged obscene and indecent matter consisted of advertisements by women, soliciting or offering inducements for the visits of men, usually 'refined gentlemen,' to their rooms, sometimes under the disguise of 'baths' and 'massage,' and oftener for the mere purpose of acquaintance. It was in this connection that the court charged the jury that, if the publications were such as were calculated to deprave the morals, they were within the statute. There could have been no possible misapprehension on their part as to what was meant. There was no question as to depraving the morals in any other direction than that of impure, sexual relations. The words were used by the court in their ordinary signification, and were made more definite by the context, and by the character of the publications which had been put in evidence. The court left to the jury to say whether it was within the statute, and whether persons of ordinary intelligence would have any difficulty in divining the intention of the advertiser."

The indictment in that case charged that the matter was obscene, lewd, lascivious, and *indecent*. It is seen that the court adopted the construction of the statute that the matter must be calculated to deprave the morals in the direction of impure sexual relations.

The case of United States v. Journal Co. (D. C.) 197 Fed. 415, 417, is apt and instructive here. In that case, taking advantage or making use of the evidence given in court on the trial of one Beattic for the murder of his wife, a crime alleged to have been incited by his infatuation for a woman of bad and immoral character, the defendant published and circulated through the mails extracts from the evidence, including that of a doctor who had treated this woman for a foul sexual disease, and who as a witness described her physical condition, and also the evidence of another witness who had examined the underclothing of Beattic, and described its befouled condition, all of which evidence was given to show, and all of which tended to show, impure and improper sexual relations between Beattic and this woman, and show a motive for the crime of which he was accused. The language of this publication, as matter of course and of necessity, was foul, nasty, and indecent, and related plainly to sexual impurity and acts; but the court said, in substance, that while the publication and circulation had best not been made, still the publication and reading of same, instead of tending to deprave and corrupt the minds and morals of readers whose minds are open to such influences by arousing and implanting therein obscene, lewd, and lascivious thoughts and desires relating to sexual impurity, should rather have the very opposite or contrary effect. The indictment was quashed on this and other grounds. The cases seem to tenaciously adhere to the doctrine that one class only of writings and publications are forbidden the mails by this section, viz. those which have a tendency to excite the sexual feelings and desires and which tend to deprave the morals of the reader in that

direction. The Supreme Court of the United States has adopted this view of the statute, and I see but one course for the lower courts to follow. It is not enough that the letter or publication merely relate to sexual matters and illicit sexual relations, but it must be clothed in language and contain expressions which, with reasonable persons, tend to excite the sexual desires or passions or corrupt the morals of the reader in that direction. Can it reasonably be said that language in a letter charging a woman with being a prostitute, and surrounded by prostitutes and bastards, has any such tendency with reasonable persons of normal minds and constitutions? There are men undoubtedly to whom the mere mention of a prostitute as such would suggest libidinous thoughts and sexual desires, but such men, if there be such, are abnormal. The normal mind revolts at the word "prostitute" as applied to a woman. The normal man and woman are repelled and disgusted, not attracted, by such language and threats as are contained in the letter now under consideration. It is objectionable to the moral sense of any decent-minded person of intelligence to read such communications or to be informed that such communications are written, except in cases of necessity and to serve some good purpose. Atwell's Federal Criminal Law (2d Ed.) considers this statute, and the cases (Atwell's Fed. Criminal Law [2d Ed.] pp. 148–156), and with other things the author says (page 150):

"The courts all along have almost universally construed section 3893 to be directed against such impurity as related to sexual matters and gave rise to libidinous thought. If the addition of the word 'filthy' in the new statute broadens the construction, it will be welcome indeed, because, under the present authorities, the old section permitted a perfect sluice of vulgarities and coarseness and obscenity to pass through the United States mails unchallenged and unprosecuted. For instance, the courts have held that the use of the word 'son-of-a-bitch' in a sealed envelope is not an offense. It would seem that under the dictionary definition of the word filthy, as quoted above, the law would now comprehend the use of the word 'bitch' and the phrase 'son-of-a-bitch' and 'whore' and 'prostitute' and a great many others that are used in an abusive way toward the recipient of the mail. This, however, remains to be seen, and the construction of the new statute will be welcomed if it now inhibits the use of such expressions."

In United States v. Dempsey (D. C.) 188 Fed. 450, 451, the court, reciting the language of the letter complained of, said:

"The letter was mailed in this district, and addressed to a young lady in the state of Mississippi, and was as follows: 'Do it a little Club. I kiss and hug all the girls when they get initiated. Need no light in hall. President. Professional hand-holder. Nights only.' Assuming, without deciding, that the contents of the letter were not of that character which would make it nonmailable, in view of the construction of section 3893, R. S. (U. S. Comp. St. 1901, p. 2658), in Swearingen v. United States, 161 U. S. 446, 451, 16 Sup. Ct. 562, 40 L. Ed. 765, that would still not be conclusive of this case, as the Penal Code amends that statute very materially, by adding, after the words 'every obscene, lewd and lascivious,' the words, 'and every filthy' book, pamphlet, picture, or letter."

This language is so clearly suggestive of sexual impropriety, and is so clearly calculated and designed to suggest and awaken sexual thoughts and desires with those whose minds are that way inclined, that it comes within the definition or construction placed on the stat-

ute by the Supreme Court. It is not filthy, but clearly lascivious, which means, "tending to excite voluptuous emotions; luxurious," as, "He capers nimbly in a lady's chamber to the lascivious pleasing of a lute"—(Shak. Rich. III). "Lasciviousness" means "lascivious desires or conduct; lewdness; wantonness; lustfulness; looseness of behavior." See Century Dictionary.

If the language quoted and used in the Dempsey Case does not plainly suggest "looseness of behaviour" under circumstances and conditions calculated to awaken and excite libidinous or sexual thoughts and desires, it is difficult to conjure up words which would. It is not an accusation, but a solicitation and suggestion of a sexual nature, calculated to excite sexual emotions and desires. The cases have been substantially uniform (I am not informed of any exception) in holding that a "filthy" writing or letter, as described in the statute, must be "filthy" in its relation or reference to the sexual relations or desires. There are many filthy writings which have no reference to that subject, and I find no case which brings such writings or communications within the statute. In United States v. Martin (D. C.) 50 Fed. 918, it was held that a letter or communication, however chaste the language, attempting to secure, or written for the purpose of securing, an assignation for improper sexual relations, is within the statute. This is not because of the use of the word "filthy" in the statute. To the same effect is United States v. Moore (D. C.) 129 Fed. 159.

One paragraph of section 211 of the Criminal Code of the United States remains to be considered. In the act of May 27, 1908, c. 206 (35 Stat. 416), entitled "An Act making appropriations for the service of the post office department," etc., there was placed the provision (amending section 3893, R. S. of the United States [Comp. St. 1916, § 10381], by adding same), "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder or assassination." This, of course, broadened materially the meaning of "indecent" as used in section 3893, R. S., from which section 211 of the Criminal Code was taken. March 4, 1909, the Criminal Code, "An act to codify, revise and amend the penal laws of the United States" (35 Stat. 1088, c. 321), was enacted, taking effect January 1, 1910, and this provision of section 3893, R. S., placed there by the amendment of 1908, was omitted from section 211 of the Penal Code (see page 1129), but was restored, so to speak, or added thereto, by the act of March 4, 1911, entitled "An act making appropriations for the service of the post office department," etc. (36 Stat. pp. 1327, 1339, c. 241), where we find the following:

"Sec. 2. That section two hundred and eleven of an act of Congress entitled 'An act to codify, revise, and amend the penal laws of the United States,' approved March 4, 1909, be amended by adding thereto the following: And the term 'indecent' within the intendment of this section shall include *matter of a character tending to incite arson, murder, or assassination.*" (Italics mine.)

This paragraph is now a part of section 211 of the Criminal Code. See volume 10, U. S. Comp. St. 1916, Annotated, § 10381, p. 12762.

The indictment in the instant case charges that the letter complained

of and made a part of the indictment and above quoted, "was obscene, lewd, lascivious, and filthy *and otherwise indecent.*" (Italics mine.) The words "otherwise indecent" in the indictment are very general, and do not specifically allege that the terms, accusations, and threats contained in such letter are of a character tending to incite either murder or assassination. There is no direct charge that the words of this letter as a whole, or as to any part, are of a character tending to incite murder, or that there was such an intent, but still it is charged that while obscene, etc., they were "otherwise indecent," and "indecent" may include matter of a character tending to *incite* murder or assassination. "Incite," in this connection, means "move to action"—that is, move to "murder"; to "stir up"—that is, "stir up murder"; "to arouse" —that is, "arouse to murder" or "assassination." Such words and epithets as are contained in the letter in question here might sufficiently stir the anger and indignation, especially when accompanied by such threats as accompany them, to induce murder; but are they of a character tending to "move to action" by committing murder, or "stir up" the person addressed to commit murder? In Long v. State, 23 Neb. 33, 36 N. W. 310, 315, in construing the charge of the trial judge in which he used the words "requested, advised, and incited," it was held "incited" meant the same in a criminal case, or *that* criminal case, as "aid, abet, or procure." Is not that the proper construction here, and must not the words or phrases used be such as naturally tend to suggest and aid or abet murder or assassination? If not, almost any threat in a letter which stirs or tends to stir up angry passions and resentment is "matter of a character tending to incite murder or assassination," as these words are used in this statute. I think it would be a strained and unwarranted construction to hold that the communication complained of, taken as a whole, is of a character tending to incite either murder or assassination. No jury would be justified in so finding. When the language of a writing or letter is capable of two constructions or meanings, one within and the other without the statute, it may be for a jury to say whether or not it offends against the statute and is nonmailable; but when the meaning is plain and unambiguous, and there is no doubt as to the meaning, I do not think a case for a jury is presented, unless the writing is either obscene, lewd, lascivious, or so filthy as to be of an indecent character, as heretofore defined, in the opinion of the court. Clearly, the court must construe the statute and its meaning, and define the meaning of each of the words therein; and if the article complained of as a whole and in each of its expressions is not within it, no case for the jury is presented. In this case the application of the word "bastard" to the child referred to and the word "prostitute" to the mother, and a characterization of all the friends and associates of the mother as a "bunch of prostitutes and bastards," suggests plainly that the mother has had improper sexual relations with some man, and given birth to a child out of wedlock, and also that the mother gives herself for hire to improper sexual intercourse, and also associates and surrounds herself with those given over to the same immoral and vicious practices. Is it for the court to say, as matter of law, that all

this would not suggest libidinous thoughts and sexual desires with those readers into whose hands it might come, or would not tend to deprave the morals of such readers in that direction? If not, then a case is presented for the consideration and decision of a jury. This letter not only brands this one woman as a prostitute, but the female friends back of and about her as of the same class, and in this way and to that extent indicates where such characters may be found. However, it is not an advertisement and a solicitation of business, but an out and out accusation of wrongdoing on the part of the woman, accompanied by the threat to publish her moral laxity and infamy to all new acquaintances and thus alienate them from the addressee. It is not alluring or enticing or calculated or intended to be, but repellant to all well-disposed persons. The reading of this letter, instead of debasing the morals of the decent and correct and normal minded, would have the very opposite effect. However, it would direct the thoughts of all readers to the subject of illicit sexual relations, but to what extent it would operate on the morals of the reader is a matter of conjecture. When Congress extended the meaning of "indecent" to embrace words or matter of a character tending to incite arson, murder, or assassination, it was acting with knowledge of the decisions of the courts, and it seems evident it would have so broadened the meaning as to include threats and accusations of the character contained in this letter if it had intended to exclude them from the mails as nonmailable matter. I am not content with the restricted construction placed by the courts on the language of section 211 of the Criminal Code, where it adds to the words "every obscene, lewd, or lascivious," the words "and every filthy * * * letter, writing * * * of an indecent character," as it seems to me it was not the purpose of Congress to restrict nonmailable letters to written or printed matter which relates to sexual acts and conduct and matters which will excite or tend to excite libidinous thoughts and sexual desires or debase and degrade the mind and morals of the reader in the direction indicated.

In Tyomies Pub. Co. v. United States (6th circuit) Knappen, C. J., Denison, C. J., and Day, D. J. (211 Fed. 385, 128 C. C. A. 47), the indictment related to certain pictures, accompanied by certain words printed above and below, to an extent characterizing the picture. The Circuit Court of Appeals said:

"Section 3893 of the Revised Statutes did not contain the words 'and every filthy,' which were inserted at the time of the enactment of the Penal Code in 1909. It was plainly the purpose of Congress, in adding these words, to enlarge the scope of the statute so as to cover a class of publications that were not included in the old section. United States v. Dempsey (D. C.) 188 Fed. 450. The trial judge submitted the issue as to whether or not this picture was filthy to the jury, saying: 'By the term "filthy" is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing.'"

Does not this decision, while not binding, require this court to have submitted to the jury on a trial the question whether or not this letter was "filthy" within the meaning of the statute? The language is clearly "vulgar" and "offensive to the moral sense" in matters relating to illicit sexual relations, and is therefore of the same general char-

acter as is written language prohibited the mails and covered by obscene, lewd, and lascivious. I think the language "filthy * * * letter * * * of an indecent character" brings within the statute a communication sent to another through the mails which would not be covered by the preceding words obscene, lewd, and lascivious if it be a filthy letter of an indecent character, even though it is not of a character which would promote or excite sexual desires and emotions.

[3] I am not at liberty to set up my opinion on this subject against the great weight of authority, especially that of the Supreme Court. There is no doubt the two counts are properly united in the one indictment. The acts of defendant were directed against the one person; were of the same general nature, sending nonmailable matter (so alleged) through the mails at the post office named; and were clearly closely connected in point of time. For the reasons given, on the whole, I think this indictment good as to the first count and bad as to the second count. There will be an order sustaining the demurrer as to and dismissing the second count, and overruling the demurrer as to the first count.

MASSES PUB. CO. v. PATTEN.

(District Court, S. D. New York. July 24, 1917.)

1. POST OFFICE ⟸14—POSTMASTERS—REVIEW OF OFFICIAL ACTION BY COURTS.
A federal court has jurisdiction to review the official action or proposed action of a postmaster, and, if it appears that it is outside of the authority conferred upon him by law, must so decide; but his decision is final if there is any dispute of fact upon which it may rest, and even where it must turn upon a question of law it has a strong presumption of validity.

2. POST OFFICE ⟸14—NONMAILABLE MATTER—SEDITIOUS PUBLICATIONS.
The provisions of Espionage Act June 15, 1917, tit. 1, § 3, making it an offense to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or promote the success of its enemies" in time of war includes in the prohibition only statements of fact which the utterer knows to be false, and mere criticism or expression of opinions relating to acts of the government, expressed either in language or by cartoons, however immoderate in tone or harmful in effect, is not within the purview of the statute, and publications containing such matter cannot lawfully be excluded from the mails under title 12, § 1, of the act as in violation of such provision.

3. POST OFFICE ⟸14—NONMAILABLE MATTER—SEDITIOUS PUBLICATIONS.
Such matter is not nonmailable as in violation of the second or third clauses of said section either as "willfully causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States" or "willfully obstructing the recruiting or enlistment service of the United States to the injury of the service," where it is limited to criticism or abuse of existing law or war policies, even including the conscription law, and stops short of counseling or advising resistance to the law.

In Equity. Suit by the Masses Publishing Company against T. G. Patten, Postmaster of the City of New York. On motion for preliminary injunction. Motion granted.

See, also, 245 Fed. 102, 157 C. C. A. 398; 246 Fed. 24, 158 C. C. A. 250.

The plaintiff applies for a preliminary injunction against the postmaster of New York to forbid his refusal to accept its magazine in the mails under the following circumstances: The plaintiff is a publishing company in the city of New York engaged in the production of a monthly revolutionary journal called "The Masses," containing both text and cartoons, each issue of which is ready for the mails during the first ten days of the preceding month. In July, 1917, the postmaster of New York, acting upon the direction of the Postmaster General, advised the plaintiff that the August number to which he had had access would be denied the mails under the Espionage Act of June 15, 1917. Though professing willingness to excerpt from the number any particular matter which was objectionable in the opinion of the Postmaster General, the plaintiff was unable to learn any specification of objection, and thereupon filed this bill, and now applies for a preliminary injunction upon a statement of the facts.

Upon return of the rule to show cause the defendant, while objecting generally that the whole purport of the number was in violation of the law, since it tended to produce a violation of the law, to encourage the enemies of the United States, and to hamper the government in the conduct of the war, specified four cartoons and four pieces of text as especially falling within sections 1 and 2 of title 12 of the act and by the reference of section 1 as within section 3 of title 1. These sections are quoted in the margin.[1]

The four cartoons are entitled respectively, "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," "Congress and Big Business." The first is a picture of the Liberty Bell broken in fragments. The obvious implication, taking the cartoon in its context with the number as a whole, is that the origin, purposes, and conduct of the war have already destroyed the liberties of the country. It is a fair inference that the draft law is an especial instance of the violation of the liberty and fundamental rights of any free people.

The second cartoon shows a cannon to the mouth of which is bound the naked figure of a youth, to the wheel that of a woman, marked "Democracy," and upon the carriage that of a man, marked "Labor." On the ground kneels a draped woman marked "Motherhood" in a posture of desperation, while her infant lies on the ground. The import of this cartoon is obviously that conscription is the destruction of youth, democracy, and labor, and the desolation of the family. No one can dispute that it was intended to rouse detestation for the draft law.

The third cartoon represents a Russian workman symbolizing the Workmen's and Soldiers' Council, seated at a table, studying a paper entitled, "Plan for a Genuine Democracy." At one side Senator Root furtively approaches the figure with a noose marked "Advice," apparently prepared to throw it over the head of the workman, while behind him stands Mr. Charles

[1] TITLE I.

Espionage.

Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

TITLE XII.

Use of Mails.

Section 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, that nothing in this act shall be so construed as to authorize any person other than an employé of the dead letter office, duly authorized there to, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.

E. Russell, the Socialist member of the Russian Commission, in a posture of assent. On the other side a minatory figure of Japan appears through a door carrying a raised sword, marked "Threat," while behind him follows a conventional John Bull, stirring him up to action. The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its Allies into a continuance of the war for purposes prejudicial to true democracy.

The fourth and last cartoon presents a collection of pursy magnates standing about a table on which lies a map, entitled "War Plans." At the door enters an apologetic person, hat in hand, diffidently standing at the threshold, while one of the magnates warns him to keep off. The legend at the bottom runs as follows: "Congress: 'Excuse me, gentlemen, where do I come in?' Big Business: "Run along, now! We got through with you when you declared war for us.'" It is not necessary to expatiate upon the import of this cartoon.

The four pieces of text are annexed to the end of this report as addenda, A, B, C, and D. After that part of B so set forth, the article continues, showing the hardships and maltreatment of a number of English conscientious objectors, partly from excerpts out of their letters, partly from reports of what they endured. These statements show much brutality in the treatment of these persons.

The challenged text, omitting the excerpts just mentioned, total about one page out of a total of 28. Throughout the rest are sprinkled other texts designed to arouse animosity to the draft and to the war, and criticisms of the President's consistency in favoring the declaration of war.

The defendant attaches to its papers as well copies of the June and July numbers of The Masses and a number of Mother Earth, a magazine edited by Emma Goldman and Alexander Berkman, recently convicted in this court for a conspiracy to resist the draft. The earlier copies of The Masses contain inflammatory articles upon the war and conscription in revolutionary vein, some of which go to the extent of counseling those subject to conscription to resist. This case does not concern them except in so far as the defendant's position is correct that in the interpretation of the August number the purpose of the writers may be inferred from what preceded, and that an audience addressed in the earlier numbers would put upon the later number a significance beyond what the contents would naturally bear if it stood alone. It is not necessary for a determination of this case to set forth in detail the contents of these numbers. The copy of Mother Earth also need not be referred to.

Gilbert E. Roe, of New York City, for plaintiff.
Earl B. Barnes, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is well settled that this court has jurisdiction to review the act of the postmaster. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Post Publishing Co. v. Murray, 230 Fed. 773, 145 C. C. A. 83; Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370; United States v. Atlanta Journal, 210 Fed. 275, 127 C. C. A. 123. If it appears that his proposed official course is outside of the authority conferred upon him by law, the court cannot escape the duty of so deciding, just as in the case of any other administrative officer. Noble v. Union River Logging Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. However, again, as in the case of other such officers, the postmaster's decision is final if there be any dispute of fact upon which his decision may rest, and even where it must turn upon a point of law, it has a strong presumption of validity.

Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894; Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. In this case there is no dispute of fact which the plaintiff can successfully challenge except the meaning of the words and pictures in the magazine. As to these the query must be: What is the extreme latitude of the interpretation which must be placed upon them, and whether that extremity certainly falls outside any of the provisions of the act of June 15, 1917. Unless this be true, the decision of the postmaster must stand. It will be necessary, first, to interpret the law, and, next, the words and pictures.

It must be remembered at the outset, and the distinction is of critical consequence throughout, that no question arises touching the war powers of Congress. It may be that Congress may forbid the mails to any matter which tends to discourage the successful prosecution of the war. It may be that the fundamental personal rights of the individual must stand in abeyance, even including the right of the freedom of the press, though that is not here in question. Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Re Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93. It may be that the peril of war, which goes to the very existence of the state, justifies any measure of compulsion, any measure of suppression, which Congress deems necessary to its safety, the liberties of each being in subjection to the liberties of all. The Legal Tender Cases, 12 Wall, 457. It may be that under the war power Congress may mobilize every resource of men and materials, without impediment or limitation, since the power includes all means which are the practice of nations in war. It would indeed not be necessary, perhaps in ordinary cases it would not be appropriate, even to allude to such putative incidents of the war power, but it is of great consequence at the present time with accuracy to define the exact scope of the question at bar, that no implication may arise as to any limitation upon the absolute and uncontrolled nature of that power. Here is presented solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered, but necessary to the existence of the state as such. Every one agrees that the exercise of such power, however wide it may be, rests in Congress alone, at least subject to such martial law as may rest with the President within the sphere of military operations, however broadly that may be defined. The defendant's authority is based upon the act of Congress, and the intention of that act is the single measure of that authority. If Congress has omitted repressive measures necessary to the safety of the nation and success of its great enterprise, the responsibility rests upon Congress and with it the power to remedy that omission.

[2] Coming to the act itself, it is conceded that the defendant's only direct authority arises from title 12 of the act, §§ 1 and 2. His position is that under section 1 any writing which by its utterance would infringe any of the provisions of other titles in the act becomes nonmailable. I may accept that assumption for the sake of argument and turn directly to section 3 of title 1, which the plaintiff is said to violate. That section contains three provisions. The first is, in sub-

stance, that no one shall make any false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies. The defendant says that the cartoons and text of the magazine, constituting, as they certainly do, a virulent attack upon the war and those laws which have been enacted to assist its prosecution, may interfere with the success of the military forces of the United States. That such utterances may have the effect so ascribed to them is unhappily true; publications of this kind enervate public feeling at home which is their chief purpose, and encourage the success of the enemies of the United States abroad, to which they are generally indifferent. Dissension within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects of such agitation upon the success of the national project, or of the correctness of the defendant's position.

All this, however, is beside the question whether such an attack is a willfully false statement. That phrase properly includes only a statement of fact which the utterer knows to be false, and it cannot be maintained that any of these statements are of fact, or that the plaintiff believes them to be false. They are all within the range of opinion and of criticism; they are all certainly believed to be true by the utterer. As such they fall within the scope of that right to criticise either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority. The argument may be trivial in substance, and violent and perverse in manner, but so long as it is confined to abuse of existing policies or laws, it is impossible to class it as a false statement of facts of the kind here in question. To modify this provision, so clearly intended to prevent the spreading of false rumors which may embarrass the military, into the prohibition of any kind of propaganda, honest or vicious, is to disregard the meaning of the language, established by legal construction and common use, and to raise it into a means of suppressing intemperate and inflammatory public discussion, which was surely not its purpose.

[3] The next phrase relied upon is that which forbids any one from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The defendant's position is that to arouse discontent and disaffection among the people with the prosecution of the war and with the draft tends to promote a mutinous and insubordinate temper among the troops. This, too, is true; men who become satisfied that they are engaged in an enterprise dictated by the unconscionable selfishness of the rich, and effectuated by a tyrannous disregard for the will of those who must suffer and die, will be more prone to insubordination than those who have faith in the cause and acquiesce in the means. Yet to interpret the word "cause" so broadly would, as before, involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which

fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper. Assuming that the power to repress such opinion may rest in Congress in the throes of a struggle for the very existence of the state, its exercise is so contrary to the use and wont of our people that only the clearest expression of such a power justifies the conclusion that it was intended.

The defendant's position, therefore, in so far as it involves the suppression of the free utterance of abuse and criticism of the existing law, or of the policies of the war, is not, in my judgment, supported by the language of the statute. Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself. One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. The defendant asserts not only that the magazine indirectly through its propaganda leads to a disintegration of loyalty and a disobedience of law, but that in addition it counsels and advises resistance to existing law, especially to the draft. The consideration of this aspect of the case more properly arises under the third phrase of section 3, which forbids any willful obstruction of the recruiting or enlistment service of the United States, but, as the defendant urges that the magazine falls within each phrase, it is as well to take it up now. To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.

It seems to me, however, quite plain that none of the language and none of the cartoons in this paper can be thought directly to counsel

or advise insubordination or mutiny, without a violation of their meaning quite beyond any tolerable understanding. I come, therefore, to the third phrase of the section, which forbids any one from willfully obstructing the recruiting or enlistment service of the United States. I am not prepared to assent to the plaintiff's position that this only refers to acts other than words, nor that the act thus defined must be shown to have been successful. One may obstruct without preventing, and the mere obstruction is an injury to the service; for it throws impediments in its way. Here again, however, since the question is of the expression of opinion, I construe the sentence, so far as it restrains public utterance, as I have construed the other two, and as therefore limited to the direct advocacy of resistance to the recruiting and enlistment service. If so, the inquiry is narrowed to the question whether any of the challenged matter may be said to advocate resistance to the draft, taking the meaning of the words with the utmost latitude which they can bear.

As to the cartoons it seems to me quite clear that they do not fall within such a test. Certainly the nearest is that entitled "Conscription," and the most that can be said of that is that it may breed such animosity to the draft as will promote resistance and strengthen the determination of those disposed to be recalcitrant. There is no intimation that, however hateful the draft may be, one is in duty bound to resist it, certainly none that such resistance is to one's interest. I cannot, therefore, even with the limitations which surround the power of the court, assent to the assertion that any of the cartoons violate the act.

The text offers more embarrassment. The poem to Emma Goldman and Alexander Berkman, at most, goes no further than to say that they are martyrs in the cause of love among nations. Such a sentiment holds them up to admiration, and hence their conduct to possible emulation. The paragraph in which the editor offers to receive funds for their appeal also expresses admiration for them, but goes no further. The paragraphs upon conscientious objectors are of the same kind. They go no further than to express high admiration for those who have held and are holding out for their convictions even to the extent of resisting the law. It is plain enough that the paper has the fullest sympathy for these people, that it admires their courage, and that it presumptively approves their conduct. Indeed, in the earlier numbers and before the draft went into effect the editor urged resistance. Since I must interpret the language in the most hostile sense, it is fair to suppose, therefore, that these passages go as far as to say:

> "These men and women are heroes and worthy of a freeman's admiration. We approve their conduct; we will help to secure them their legal rights. They are working for the betterment of mankind through their obdurate consciences."

Moreover, these passages, it must be remembered, occur in a magazine which attacks with the utmost violence the draft and the war. That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples

is not so plain. Literally at least they do not, and while, as I have said, the words are to be taken, not literally, but according to their full import, the literal meaning is the starting point for interpretation. One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within the law. If they do, it would follow that, while one might express admiration and approval for the Quakers or any established sect which is excused from the draft, one could not legally express the same admiration and approval for others who entertain the same conviction, but do not happen to belong to the society of Friends. It cannot be that the law means to curtail such expressions merely, because the convictions of the class within the draft are stronger than their sense of obedience to the law. There is ample evidence in history that the Quaker is as recalcitrant to legal compulsion as any man; his obstinacy has been regarded in the act, but his disposition is as disobedient as that of any other conscientious objector. Surely, if the draft had not excepted Quakers, it would be too strong a doctrine to say that any who openly admire their fortitude or even approved their conduct was willfully obstructing the draft.

When the question is of a statute constituting a crime, it seems to me that there should be more definite evidence of the act. The question before me is quite the same as what would arise upon a motion to dismiss an indictment at the close of the proof: Could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft? I cannot think that upon such language any verdict would stand. Of course, the language of the statute cannot have one meaning in an indictment and another when the case comes up here, because by hypothesis, if this paper is nonmailable under section 3 of title 1, its editors have committed a crime in uttering it.

After the foregoing discussion it is hardly necessary to speak of section 2 of title 12. The plaintiff insists that refusal to comply with the provisions of the draft cannot be classed as forcible resistance; that such a refusal is, at most, only inaction, the neglect of an affirmative duty even to the extent of submitting to imprisonment. It may be plausibly contended that by forcible resistance Congress meant more than passive resistance, but even if this be not true, the result is the same, because, so construed, the section goes no further than the last phrase of section 3 of title 1 as I have construed it here. What was therefore said upon that section will serve here.

The defendant's action was based, as I understand it, not so much upon the narrow question whether these four passages actually advocated resistance, though that point was distinctly raised, as upon the doctrine that the general tenor and animus of the paper as a whole

were subversive to authority and seditious in effect. I cannot accept this test under the law as it stands at present. The tradition of English-speaking freedom has depended in no small part upon the merely procedural requirement that the state point with exactness to just that conduct which violates the law. It is difficult and often impossible to meet the charge that one's general ethos is treasonable; such a latitude for construction implies a personal latitude in administration which contradicts the normal assumption that law shall be embodied in general propositions capable of some measure of definition. The whole crux of this case turns indeed upon this thesis. I make no question of the power of Congress to establish a personal censorship of the press under the war power; that question, as I have already said, does not arise. I am quite satisfied that it has not as yet chosen to create one, and with the greatest deference it does not seem to me that anything here challenged can be illegal upon any other assumption.

Finally, the question arises as to how far the earlier numbers of the paper should be considered. The theory is that the August number covertly refers to the explicit counsel of resistance in the numbers of June and July. A priori such a reference might legitimately incorporate the earlier expressions; I do not doubt that the memory of those expressions may in fact remain in the minds of readers and that they may be revived by the sympathy and accord with conscientious objectors expressed in the August number. Yet the plaintiff is still entitled to ask, whatever the results of its past utterance may be, that some words be pointed out which by some reference fairly inferable from the words themselves relate back to earlier and more explicit statements. I think there are no words in the four passages which admit of such an interpretation.

It follows that the plaintiff is entitled to the usual preliminary injunction.

A.

A Question.

Often I wish we had a continuing census bureau to which we might apply, and have a census taken with classifications of our own choosing. I would like to know to-day, how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a "round-up of slackers"? Are there none to whom this picture of the American republic adopting towards its citizens the attitude of a rider toward cattle is appalling? I recall the Essays of Emerson, the Poems of Walt Whitman, which sounded a call never heard before in the world's literature, for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man. It painted the quality of her culture for those in the old world who loved her. It was a revolt of the aspiring mind against that instinctive running with custom and the support of numbers, which is an hereditary frailty of our nerves. It was a determination to worship and to love, in the living and laughing present, the same heroisms that we love when we look back so seriously over the past.

I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the state, because they will not do

what they do not believe in doing. Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press, and induce the American government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world.

B.

A Tribute.

Emma Goldman and Alexander Berkman
Are in prison,
Although the night is tremblingly beautiful
And the sound of water climbs down the rocks
And the breath of the night air moves through multitudes and multitudes of leaves
That love to waste themselves for the sake of the summer.
Emma Goldman and Alexander Berkman
Are in prison tonight,
But they have made themselves elemental forces,
Like the water that climbs down the rocks;
Like the wind in the leaves;
Like the gentle night that holds us;
They are working on our destinies;
They are forging the love of the nations;
.....
Tonight they lie in prison.

C.

Conscientious Objectors.

We publish below a number of letters written last year from English prisons by conscientious objectors. It is as yet uncertain what treatment the United States government will mete out to its thousands of conscientious objectors, but we believe that our protestors against government tyranny will be as steadfast as their English comrades. It is not by any means as certain that they will be as polite to their guards and tormentors, but we hope they will remember that these are acting under official compulsion and not as free men.

Some discussion has arisen as to whether those whose objection to participating in war is not embodied in a religious formula, have the right to call their objection a "conscientious" one. We believe that this old-fashioned term is, however, one that fits their case. There are some laws which the individual feels that he cannot obey, and which he will suffer any punishment, even that of death, rather than recognize as having authority over him. This fundamental stubbornness of the free soul, against which all the powers of the state are helpless, constitutes a conscientious objection, whatever its original sources may be in political or social opinion. It remains to be demonstrated that a political disapproval of this war can express itself in the same heroic firmness that has in England upheld the Christian objectors to war as murder. We recommend to all who intend to stick it out to the end, a thorough reading of the cases which follow, so that they may be prepared for what is at least rather likely to happen to them.

D.

Friends of American Freedom.

Alexander Berkman and Emma Goldman have been arrested, charged with advocating in their paper, Mother Earth, that those liable to the military draft, who do not believe in the war, should refuse to register. That they would be arrested, on some charge, and subjected to bitter prosecution, has been inevitable ever since they appeared as the spokesmen of a working class protest against the plans of American militarism. Whatever you may think of the practicability of such a protest, you must, with their friends, pay tribute of admiration for their courage and devotion.

Alexander Berkman is one of the few men whose character and intelli-

gence ever stood firm through a quarter of a lifetime in prison. Emma Goldman has followed her extreme ideal of liberty for 30 years, up and down, in better places and worse than the federal penitentiary. They can both endure what befalls them. They have more resources in their souls, perhaps, as they have the support of a more absolute faith, than we have who admire them. But let us give them every chance for acquittal that the constitution of the times allow. Let us give them every chance to state their faith. The Masses will receive funds for this purpose.

THE THEMIS.

(District Court, S. D. New York. May 28, 1917.)

1. SHIPPING ⟸40—CONSTRUCTION OF TIME CHARTERS—PROVISION AGAINST OVERLAP.

The owner chartered a steamship to a Canadian company for nine consecutive seasons beginning in the spring each year and hire to continue until her redelivery at Philadelphia or Baltimore between December 15th and January 5th. The owner later made a complementary charter to libelant for the winter seasons, the steamer to be delivered at Philadelphia or Baltimore at owner's option "upon redelivery by" the Canadian company between December 15th and January 5th each season as called for by its charter. *Held*, that the undertaking by the owner to deliver the ship under such charter was not contingent upon her redelivery by the Canadian company, over which libelant had no control, but that the owner assumed responsibility for such delivery with the right to call upon the first charterer for any default. *Held*, further, that the margin of 20 days given the first charterer and the owner under libelant's charter for redelivery was intended to cover any "overlap" which pending voyages of the vessel might require.

2. SHIPPING ⟸56—CHARTER—LIABILITY FOR BREACH.

The Canadian company subchartered the steamer one season for eight months; hire to continue until her redelivery to the owner north of Hatteras "not later than January 1, 1916." On September 12, 1915, over the protest of the original charterer, the subcharterer started the vessel on a voyage from New York to New Zealand and Australia. On her arrival at Colon the canal was found closed indefinitely on account of slides, and on October 5th she proceeded on her voyage around the Cape, with the result that she was not redelivered to the owner until May 5, 1916, after libelant's charter term for that season had expired. *Held*, that the subcharterer was not entitled to any overlap for completion of the voyage beyond that allowed for in the original charter, which required redelivery unconditionally by January 5th; that, having elected to proceed with the voyage from Colon, with the certainty that it could not be completed within the charter term, the subcharterer became primarily, and the owner secondarily, liable, for the damages caused by the breach of libelant's charter.

3. SHIPPING ⟸52—CHARTER—BREACH BY CHARTERER—"PREVENTION" OF REDELIVERY.

To relieve a charterer from liability for failure to surrender the ship within the time limited by the charter, there must have been physical "prevention" of the return by some cause excepted in the charter, except perhaps in case of an exception against strikes. The risk of the enterprise under the charter is his, and not the owner's, and mere financial loss to him, however serious, which would result from his keeping his contract will not justify him in breaking it without compensating the owner or a succeeding charterer for any loss which results from the breach.

In Admiralty. Suit by the Gans Steamship Company against Wilhelm Wilhelmsen and a Norwegian corporation, as owners of the steamship Themis, Nova Scotia Steel & Coal Company, Limited, and Barber & Co., Incorporated, impleaded. Decree for libelant.

This proceeding was commenced by the filing of a libel in personam by the Gans Steamship Company against Wilhelm Wilhelmsen and a Norwegian corporation, as owners of the steamer Themis, for breach of a charter party entered into on March 24, 1910, the contents of which will be stated hereafter. It sought damages for the failure of the owners to deliver the Themis under the charter party on or before January 5, 1916. The libel was filed on January 17, 1916, and on April 17, 1916, Wilhelmsen and the Norwegian corporation filed a petition under the fifty-ninth admiralty rule (29 Sup. Ct. xlvi) impleading the Nova Scotia Steel & Coal Company, Limited, under a charter entered into March 21, 1910, between the owners and that company, under which they were obliged to deliver the Themis at Baltimore between December 16th and January 5th of each year. The owners alleged that any default of theirs under the charter party between themselves and the Gans Steamship Company was due to this default of the Nova Scotia Steel & Coal Company, Limited, for which the latter was responsible. On May 6, 1916, the Nova Scotia Steel & Coal Company, Limited, in its turn impleaded Barber & Company, Incorporated, likewise under the fifty-ninth admiralty rule, by virtue of a charter party entered into between the Nova Scotia Company and Barber & Co., Incorporated, on the 31st day of March, 1915, by which they had sublet the Themis to Barber & Co. for a period of eight months. Each of the parties severally impleaded made answer to the petition filed against them. The answers of Barber & Co., Incorporated, and the owners allege that, owing to the closing of the Panama Canal by slides in October, 1915, the Themis was prevented from making her voyage already undertaken and from returning within the time stipulated. It is unnecessary to state at greater length the contents of the pleadings.

The facts are as follows: On March 21, 1910, the owners of the Themis made a charter to the Nova Scotia Steel & Coal Company, Limited, for nine successive seasons, of which the important parts are as follows:

"(1) That the said owners agree to let and the charterers agree to hire the said steamship for the term of *nine consecutive seasons* [underscored words in writing] from the day of her delivery, she then being placed * * * at the disposal of the charterers at Wabana not before April 1st or later than 15th of May (or charterers to have option of canceling this charter), * * * to be employed in any safe trade between ports in B. N. A., United States, West Indies, Central America, Caribbean Sea, Gulf of Mexico, South America, Europe, Africa, Asia, Australia or New Zealand as charterers or their agents shall direct."

"(4) That the charterers shall pay for the use and hire of the said vessels at the rate of £2,031.5 per calendar month, * * * hire to continue from the time specified for commencing the charter until her redelivery to the owners (unless lost) at Philadelphia or Baltimore *between December 15th and January 5th at charterer's option* [in writing]."

"(21) * * * The act of God, the king's enemies, loss or damage from fire on board in hulk or craft, or on shore, arrest or restraint of princes, rulers and people, collisions, any act, neglect, or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and every danger and accident of the seas, canals, and rivers, and of navigation of whatever nature or kind always excepted."

On March 24, 1910, the owners concluded a charter with the Gans Steamship Company for the Themis, of which the important parts are the following:

"(1) That the said owners agree to let and the said charterers agree to hire the said steamship from the time of delivery for *nine consecutive winter seasons* [in writing], steamer to be placed at the disposal of the charterers at Philadelphia or Baltimore at owner's option upon redelivery by the Nova Scotia Steel & Coal Company between December 15th and January 5th each season as called for by charter arranged for the steamer between owners and the

Nova Scotia Steel & Coal Company covering nine consecutive Wabana seasons commencing 1911, * * * in such lawful trades between safe port and ports in B. N. A. or United States or West Indies or Central America or Caribbean Sea, Gulf of Mexico, South America, Europe, Mediterranean Africa, Northern Africa," etc.

"(5) That the charterer shall pay for the hire and use of said vessel £1,562.-10 a month * * * from the day of her delivery as aforesaid, * * * hire to continue until her redelivery in like good order and condition to owners (unless lost) at a port in the United Kingdom or on the Continent, Bordeaux. Hamburg, excluding Rouen, each season between March 10th and April 10th at charterer's option.

"(6) That should the steamer be on her voyage towards the port of return delivery at the time a payment of her 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 owner's agents any difference shall be refunded to steamer or paid by charterers as the case may require."

"(18) * * * The act of God, king's enemies, fire, restraint of princes, rulers. and the people. and all dangers and accidents of seas, rivers, machinery, boilers, steam navigation and errors of navigation throughout this charter party always mutually excepted."

Wabana is situated on the St. Lawrence river, and the vessel was chartered for use in the coal and iron trade. The Gans charter was, as its contents implies, made to fill up that four months of the season which the Nova Scotia charter did not desire; that being a period when the St. Lawrence river was not open to navigation.

On the 31st of March, 1915, the Nova Scotia Steel & Coal Company, Limited, executed a subcharter of the Themis to Barber & Co., Incorporated, of which the important parts are as follows:

"(1) That the said owners agree to let and the said charterers agree to hire the said steamship from the time of delivery for eight months, steamer to be placed at the disposal of the charterers at a United States port north of Hatteras, * * * to be employed in carrying lawful merchandise * * * between safe ports in B. N. A., United States of America, West Indies, Central America, Caribbean Sea, Gulf of Mexico, South America, Europe, Africa, Australia or Asia * * * *neutral trades, no contraband* [in writing]."

"(4) That the charterer shall pay for the use and hire of said vessel at the rate of £7,680 per calendar month, * * * hire to continue from the time specified for commencing the charter until her redelivery to the owners unless lost, at *a United States port north of Hatteras not later than January 1, 1916* [in writing]."

"(8) That should the vessel be on her voyage toward port of return delivery at time a payment of hire comes due, said payment shall be made for such a length of time as owners or their agents and charterers or their agents may agree upon as the estimated time necessary to complete the voyage, and when the vessel is redelivered at owner's agents any difference shall be refunded by vessel or paid by charterers as the case may require."

"(22) * * * The act of God, the king's enemies, loss or damage from fire on board in hulk or craft or on shore, arrest or restraint of princes, rulers, and people, collisions, any act, neglect, or default whatsoever of pilot, master, or crew in the management or navigation of the ship, and all and every danger and accident of the seas, canals, and rivers and of navigation of whatever nature or kind always mutually excepted."

"(27) That * * * should steamer not be ready for delivery on or about May 5, 1915, charterers or their agents to have the option of canceling this charter at any time not later than the day of steamer's readiness."

The Nova Scotia Steel & Coal Company, Limited, or the owners, which does not appear, delivered the Themis to Barber & Co., Incorporated, on April 28, 1915, so that the charter expired by its terms on December 28th. Early in August, 1915, Barber & Co., Incorporated, advertised the Themis for an Australian voyage, and they began to load her in the fourth week of the month with a cargo for New Zealand and Australia. Although for long engaged in

the shipping business and in control of a fleet of steamers, either as owners or through charter, this was the first Australian voyage undertaken by Barber & Co. On August 13th the Nova Scotia Steel & Coal Company's agents, Gailey, Davis & Co., in a telephone conversation called the attention of Barber & Co., Incorporated, to the proposed voyage, to which Barber & Co., Incorporated, answered on that day that they "have her (the Themis) mapped out for Australasia and have so cabled owners." On August 18th Gailey, Davis & Co. answered this letter, stating that the Nova Scotia Steel & Coal Company was bound to redeliver the steamer at Philadelphia or Baltimore between the 28th (sic) and January 5th, and were not in a position to negotiate with Barber & Co. for a further extension of steamer's charter after December 28th, and that the Nova Scotia Company had requested them to impress upon Barber & Co. the necessity of delivering the steamer at Philadelphia or Baltimore not later than January 5, 1916; otherwise they would have to hold them responsible for any damages the owner might claim on them through any failure on their part to deliver her at the time stated. They further said that Barber & Co. were aware that the steamer went on charter to the libelants when surrendered by the Nova Scotia Company, that the libelants were bound to surrender her to the owners between March 10th and April 10th, and that any extension of the charter for the period between January 5th and April 10th would have to be made with the owners or the libelants. They suggested likewise the possibility of negotiations with the libelants in case they were not able to come to an arrangement with them.

On August 28th Gailey, Davis & Co. again wrote to Barber & Co., impressing upon them the importance of a return of the steamer "not later than January 5th next." On September 1st the libelants protested to the owners, and a long correspondence ensued, which it is not necessary to detail, except to say that the owners insisted that the libelants should look to the Nova Scotia Company and Barber.

The Themis cleared the port of New York on September 12th loaded with cargo to Wellington, New Zealand, and Brisbane, Sydney, Melbourne, and Adelaide, Australia. The cargo consisted of about 11,000 tons dead weight, substantially half of which was of oil in cases and barrels, and the balance distributed among other commodities. She reached the Panama Canal on September 21st. At that time slides had occurred in the canal, which kept her waiting until October 4th, when the authorities closed the canal for an indefinite period, which in fact lasted until the following April. On October 5th at 4 p. m., though it was concededly impossible to get back in season, she cleared Colon bound for Australia by way of the Cape, and arrived at Wellington, New Zealand, on December 12th. Between that date and February 23d she was either discharging or loading cargo in Australasian ports. On that day she left Newcastle, Australia, for Buenos Ayres, at which she touched and stayed for some ten days. She arrived in New York on May 5th.

Meanwhile, and on December 9, 1915, three days before the Themis reached Wellington, her first port of discharge, the libelant's attorneys wrote to the owner's agents stating that they abandoned all negotiations with Barber & Co., and would go into the market and obtain, if possible, one or two steamers to take the place of the Themis; that, as this involved a very heavy claim, they should press it against the owners, and the owners might look elsewhere for indemnification. Barber & Co. in their defense insist that thereafter it was unnecessary for them to make haste in the return of the vessel, and explained her delay in Australasian ports in part upon their knowledge so acquired that the libelants had abandoned their charter party. No point turns upon this fact, however, in the disposition of the case, except as an explanation of the delays in Australia in getting a return cargo.

Much proof was taken upon the trial respecting the conditions of the Panama Canal during September and October, 1915. In August, 1915, General Goethals, in charge of the building of the canal, left the Isthmus. He had arranged with the Secretary of War to return about the 1st of October and to leave permanently the 1st of November of that year. During his absence the canal was closed for short periods in August, and again early in September, but news reached Washington from the canal on September 12th that navigation was resumed, and on the 13th all ships of heavy draft had been passed

through. On September 20th it was reported in Washington that movements on the east bank on September 18th and 19th had again closed the canal, but that it would be open again in a week or ten days. General Goethals left New York on September 26th, supposing at that time that the difficulties were not serious, and that the canal would be opened in a week or ten days. Just before sailing he received a cable that navigation would be resumed on October 1st. He did not learn of the movement on the west bank until he was within one day of Colon, and it was this movement which resulted in the long closure. At that time he supposed that the canal would be open on October 15th or November 1st, but he withdrew his resignation, which he had presented on the supposition that the canal was permanently open. He reached the Isthmus on October 4th, visited the slides, and that night issued a public statement that he would close the canal to navigation until there was reasonable hope of maintaining a channel without frequent interruption. In his opinion, any ship in August or September was fully justified in anticipating that the canal was usable, and he himself had given that assurance to transportation companies before leaving the Isthmus in August of that year. There had been before August sporadic interruptions to navigation since August 15, 1914, when the canal was opened to commerce, but none of these had been for more than about a week's time. These difficulties had arisen from movements on the east bank.

The distance from New York to Wellington and from New Zealand to New York amounts in all to some 18,000 miles, and the average cruising speed of the Themis in the Atlantic during the preceding winter was 217.68 miles a day, at which speed it would have taken her for the distance in question 83 days 16 hours. She had from September 12th to January 5th, 115 days, which left her at that rate of sailing 31 days to discharge and load in New Zealand and Australia. Her time from Wellington to Newcastle was 18 days 6 hours, leaving her, therefore, an actual leeway for discharge and loading, if she went to only those two ports, of 13 days.

Much testimony was taken respecting the conditions of transportation across the Panama Canal in October, 1915, and it is in some conflict. It appeared that the labor available at that point was of a careless and ignorant character; that the storage facilities were cramped, and the weather conditions trying. It is true, however, that large quantities of cargo were carried across the Isthmus during that period and transshipped into bottoms on the Pacific. Just what were risk of injury to the cargo and delay in transshipping the cargo at the Isthmus cannot be certainly stated, except that the risk was substantial and some delay certain. Nor could it be known whether a vessel could be obtained upon the Pacific side, or when, for carriage to Australasia. Evidence was also introduced respecting the possibility of bringing the cargo back to New York and transshipping it here. At that time the New York harbor was unquestionably congested with freight. The evidence fell short, however, of showing that this could not have been done, and the most that can be said is that it would have been difficult. No evidence was introduced as to the possibility of transshipment at some other port en route between Colon and Wellington.

The positions of the parties are as follows:

The libelants, that the owners are primarily bound for failure to deliver the ship on or before January 5th in accordance with their charter.

The owners, that they were not called upon to deliver the ship except upon redelivery by the Nova Scotia Steel & Coal Company, Limited, and that, as they never delivered, the owners' liability never arose.

Barber & Co., Inc., that on September 12th they were reasonably justified in undertaking a voyage to Australasia, and that the charter allowed them to sail, and to complete the voyage, although it might turn out by subsequent events to be impossible to do so within the time presented; that they were entitled to "overlap" for such time as might be necessary under the doctrine of The Straits of Dover (D. C.) 95 Fed. 690; Id., 100 Fed. 1005, 41 C. C. A. 156. Furthermore, that assuming that they were not within the doctrine of The Straits of Dover, supra, the default was excused by the exceptions both in the charter party between the owners and the Nova Scotia Steel & Coal Company, Limited, and in that between themselves and the Nova Scotia Company,

especially the exception of "accidents of canals." They insisted that, having once embarked upon the voyage and having lawfully incurred liens upon the ship to the shippers for carriage, it was not tolerable that the voyage should be broken up and the cargo transshipped, even though, as was the fact, the bills of lading of the ships gave Barber & Co. the right to transship at any place en route.

Charles S. Haight and Wharton Poor, both of New York City, for libelant.

Roscoe H. Hupper, of New York City, for owners.

D. Roger Englar, of New York City, for Barber & Co., Inc.

LEARNED HAND, District Judge (after stating the facts as above). [1] The first question is whether the owners committed a breach in failing to deliver according to the terms of their own charter. The words used are as follows:

"To be placed at the disposal of the charterers at Philadelphia or Baltimore at owner's option upon redelivery by Nova Scotia Steel & Coal Company between December 15th and January 5th each season as called for by charter arranged for this steamer between owners and the Nova Scotia Steel & Coal Company."

The theory is that this clause, especially in the words "upon redelivery by," creates an absolute engagement between the owners and the libelants to deliver only when the Nova Scotia Steel & Coal Company surrendered. The two charters were complementary. The earlier, which was the Nova Scotia, provided for delivery by the owners at Wabana between April 1st and May 15th and for the term of "nine consecutive seasons." No period to each season is fixed in the charter, except that contained in article 4 touching hire. That article stipulates what the hire shall be, and that it shall continue "until her redelivery to the owners (unless lost) at Philadelphia or Baltimore between December 15th and January 5th at charterer's option." The libelants' charter was of the same kind; it provided for letting the ship for "nine consecutive winter seasons," she to be placed at charterer's disposal upon surrender "by the Nova Scotia Steel & Coal Company between December 15th and January 5th each season" as called for in that charter. This charter also did not state the length of the seasons, except in article 5, which fixed the hire and which provided that hire should continue until surrender "each season between March 10th and April 10th at charterers' option." The difference in the dates of surrender by the libelants and of delivery by the owner to Nova Scotia Steel & Coal Company arose from the fact that the former was to be in the United Kingdom or Continent, while the latter was to be at Wabana.

The purpose of the parties was therefore to let the ship for the whole of nine years except for a single westward voyage each year on the owners' account. If we assume that each charter gave the charterer an overlap under the doctrine of The Straits of Dover (D. C.) 95 Fed. 690, Id., 100 Fed. 1005, 41 C. C. A. 156, and Anderson v. Munson (D. C.) 104 Fed. 913, the case is, of course, with the respondents, but for the present I shall assume the opposite; i. e., that Nova Scotia Steel & Coal Company, Limited, was bound to surrender the ship be-

tween December 15th and January 5th, and the libelants between March 10th and April 10th. The issue is then whether the libelants or the owners should assume the risk of a violation of the charter by Nova Scotia Steel & Coal Company, Limited. On the face of it, I think the owners are the natural parties to assume such a risk. The libelants could not, of course, control the ship, and had no knowledge of the responsibility of the Nova Scotia Steel & Coal Company, Limited. Each summer season was, as to them, a venture of the owners, and in the absence of some clear intimation to that effect, the owners ought to answer for its success or miscarriage. It is not as though the owners had parted with all control of their ship, as in the case of an ordinary bailed chattel. They had their master and crew, and could in fact at any time on the eve of a voyage have withdrawn her, if the Nova Scotia Steel & Coal Company, Limited, had proved obstinate in diverting her from her prospective engagements.

Nor does the position of the clause "upon delivery by" seem to me important. Those words have a proper enough meaning, which is that they should be bound to deliver only at that time within the 16 days when the Nova Scotia Steel & Coal Company should surrender to them. Their obligation was therefore in part contingent upon that surrender, it is true, but contingent only within the period which they fixed. If the contingency was to be general, I think the clause would in substance have read "each season, if surrendered under charter arranged," etc. There ought to have been some indication that libelants' charter was conditional upon the complementary charterer's performance.

The cancellation of clause 16 in the charter signifies nothing. It was obviously undesirable to give the libelants the right to cancel the whole charter for 9 years because of one default. It is true that in the Nova Scotia charter a written clause was added limiting the right of cancellation to one season, and this might have been done in the libelants' charter. Yet the argument from the deletion of that clause seems to me extreme that the libelants were bound to take the Themis for no matter how small a part of the 4 months' season which might be left. The trade of the Nova Scotia Steel & Coal Company, Limited, contemplated no general voyages with a mixed cargo, and the leeway of 16 days was in all probability enough to accommodate the parties to any delays except such as would be covered by the exceptions in the charter. I conclude, therefore, that the more reasonable explanation is that the owners meant to bind themselves to a delivery to the libelants at the time when they had bound the complementary charter to surrender to them, and that they would look to that charterer if any default occurred. Their conduct when faced with that contingency was precisely that; they did not disclaim all liability, but very wisely and properly passed on the controversy to those who must in the first instance bear it, and who, it is conceded, were able financially to respond. I cannot see that they can now escape a secondary liability.

I have assumed that the Nova Scotia Steel & Coal Company, Limited, was responsible absolutely for a surrender not later than January 5th, and that the doctrine of The Straits of Dover, supra, did not apply; the propriety of that assumption now arises. In Anderson v.

Munson, supra, Judge Brown, with whom it originated in this country, especially put the rule upon article 4 of the charter, and said that without it the owner was absolutely bound to deliver on the day stipulated. In all the subsequent American cases there has been a fixed term, and article 4 has been unlimited in its language. See The Rygja, 161 Fed. 106, 88 C. C. A. 270; Trechmann S. S. Co. v. Munson, 203 Fed. 692, 121 C. C. A. 650; Munson v. Elswick (D. C.) 207 Fed. 984; Id., 214 Fed. 84, 130 C. C. A. 612; Ropner v. Inter-American S. S. Co., C. C. A. 2d Circuit, April 10, 1917, 243 Fed. 549, — C. C. A. —. It is true that the same result followed upon a charter apparently without article 4 (Gray v. Christie, 5 Times L. R. 577), but the clause was present in Bucknall v. Murray, 5 Com. Cas. 312, and Istok v. Drughorn, 6 Com. Cas. 220, 7 Com. Cas. 190.

In Watson S. S. Co. v. Merryweather, 12 Asp. M. C. 353, the length of the term was fixed in article 1 of the charter, and article 4 was added with a written clause like that here, i. e., "between 15th and 31st of October." Atkin, J., was perplexed as to what meaning to give the clause, because if he confined it to the period of the term in article 1, the clause effected nothing whatever. However, he felt bound to do this, because the iteration of the parties was an evidence of their settled purpose. That case was weaker than this, because here article 4 is not meaningless. It will be remembered that in neither the libelants' nor the Nova Scotia charter does article 1 fix any term to the letting; each is merely for a "season," and the length of the season is fixed only by the added written words of article 4. If those words were not added, the court would have to decide what a "season" was from the delivery dates, and then allow any reasonable "overlap." That would make altogether impossible the division of the year into two seasons, at least if the "overlaps" might extend for one month or six weeks. The added words were therefore necessary to the complete meaning of the charter, and were not only in limitation of the "hire to continue" clause, but of the very term of the letting. The period of 16 days was thought enough to give commercial latitude for the enterprises to be undertaken, and the event of unforeseen contingencies was amply provided for by the exceptions to be considered later. That period of 16 days was the "overlap" or "twilight" zone which gave the charterer a sufficient leeway against ordinary vicissitudes, beyond which he engaged himself not to go. Such a plan was altogether reasonable.

[2] If the Nova Scotia Steel & Coal Company, Limited, must surrender the Themis by a day certain, we should expect Barber & Co.'s subcharter to be of the same kind, and that is what we find. The term was fixed, to be sure, at 8 months from the delivery date, and the peremptory written words "not later than January 1, 1916," added to article 4, were meant to define any possible "overlap" which might put the Nova Scotia Company in default either to the owners or to the libelants. Article 4 did accomplish something, nevertheless, because it gave an "overlap" in December dependent upon that day in April in which Barber & Company, Incorporated, got the ship; perhaps it was not of great consequence, but the value of fixtures had risen greatly. If the delivery was in May, on the other hand, the limitation would

have cut down the term as need was, to avoid a default by the Nova Scotia Steel & Coal Company, Limited. Hence the clause was not redundant, as it was in Watson S. S. Co. v. Merryweather. Indeed, it is hardly plausible to insist upon an indefinite "overlap" in Barber & Co.'s charter, once one concedes the unconditional obligation of Nova Scotia Steel & Coal Company, Limited, to surrender by January 5, 1916.

Barber & Co.'s obligation being, therefore, to return the ship not later than January 1st, or we may say January 5th, the remaining question is whether their admitted failure comes within any exception of either charter party. These exceptions for the purposes of this case may be treated as the same. Although Barber & Co. was cutting its time for a round trip down very short, I attach no importance to that. Were the question of the reasonableness of the voyage under the doctrine of The Straits of Dover, supra, such considerations would have been relevant, but not here where the parties defined their own "overlap" at 16 days. The only question under such a charter party is whether the charterer has come within the exceptions.

[3] Every one agrees that the source of the trouble was the slide on the west bank of the Panama Canal in October, 1915. If the case rested upon reasonable expectations when the Themis left New York, I should find not only that it was reasonable on September 12, 1915, to undertake a voyage through the canal, but that no one ought to have hesitated. That issue is, however, irrelevant unless the slides prevented surrender on January 5, 1916, and the case comes down to a definition of "prevention." Mr. Englar throughout has proceeded upon the assumption that he need not show physical prevention, but that it is enough if the subcharterer could not have surrendered in season without the most serious financial consequences which would arise from breaking the voyage. I cannot agree in such a suggestion. Without exceptions of some kind performance of a maritime contract is not excused even when prevented by physical impossibility. Barker v. Hodgson, 3 M. & S. 267; The B. F. Bruce (C. C.) 50 Fed. 118, affirmed Lumberman's Min. Co. v. Gilchrist, 55 Fed. 677, 5 C. C. A. 239. The general rule applies to charter parties as well as to other commercial contracts in which impossibility of performance does not generally excuse. By hypothesis the promisee has suffered a loss through the breach, and if the promisor wishes to avoid performance according to the terms of the promise, it is for him to foresee, and provide against, the chance that he cannot realize his assurances. Exceptions, when they are put in, excuse impossible, not unprofitable (or, as Mr. Mackay prefers to say, "impracticable"), performance. Were it not so, the risk of the charterer's ventures would be imposed upon the owners, an intolerable result. The owners' loss through delay must be made a factor in the charterer's decision not to surrender, else he is allowed to confiscate the enhanced value of the ship. If the added loss in surrendering in season is more than the enhanced value, usually the charterer will choose to break his promise, unless restrained by commercial scrupulousness, but it is a strange idea that anything in the admiralty allows him at once to break that promise and disregard the losses to other

persons. The reasoning escapes me by which he should be allowed to throw upon another the miscarriage of his own enterprises. It is quite true that Barber & Co., Incorporated, were involved in serious loss if they transshipped at the Isthmus, in the Antilles, at the Cape, or in New York, but the libelants were involved in more serious loss if they did not. There is a frank ingenuousness in calling upon the libelants to assume their loss.

Nor is there the least warrant for saying that the admiralty has ever recognized anything of the sort. Suppose the ship had learned of the slide when one day out of New York. Will it be seriously argued that Barber & Co. could out of hand have confiscated the libelants' winter season? If not, when does the supposed doctrine apply? All the cases cited are where the performance has been physically prevented, except the "strikes" exception, of which more in a moment. It is true that under the "restraint of princes" clause the ship need not await actual arrest (The Kronprinzessin Cecilie, 238 Fed. 668), but that is no exception to the rule. The possibility of performance is in such cases prevented, quite as much as though a master delayed in port to avoid an advertised hurricane. Continued performance may become impossible by an imminent obstacle, though the ship does not persist in challenging the inevitable. The "strikes" clause is a true exception, but only, as Judge Ward says in The Toronto, 174 Fed. 632, 98 C. C. A. 386, because otherwise it could have no meaning. Wood v. Keyser (D. C.) 84 Fed. 688. Strikes generally arise over wages disputes, and every one knows that money will settle these; and an exception against strikes can therefore only mean an exception against the extra cost of strikes.

On the other hand, there are direct cases to the contrary. Thus the Court of Appeal in Assicurazioni, etc., v. Bessie Morris Co., 7 Asp. M. C. 217, held that the exception from perils of the sea did not absolve the owner from prosecuting the voyage unless either the ship could not be got off the strand, or unless the loss involved in her repairs was equal to her whole value. In Associated Portland Cement Mfrs., Ltd., v. Cory, 31 Times L. R. 442, the defendants sought to excuse their default under the restraint of princes clause, because half their tonnage had been commandeered by the British government. It did not appear, however, that performance thereby became impossible, but only more expensive, and the court (Rowlatt, J.) held for the plaintiff. A similar case is Bolckow v. Compania, etc., 33 Times L. R. 111.

The right of Barber & Co., Incorporated, to continue the voyage is, however, also placed upon another theory; i. e., the liability of the ship to the cargo. It is, of course, well settled that the bills of lading signed by the master for the charterer create a lien upon the ship in favor of the cargo as soon as it comes aboard. The Alert, 61 Fed. 113, 9 C. C. A. 390, following the dictum of Mr. Justice Curtis in Schooner Freeman v. Buckingham, 18 How. 182, 15 L. Ed. 341. No one disputes this, but the result of its application here would be to commit the ship to the voyage as soon as any cargo had been stowed. Therefore, if the slide had occurred in September while she was still

in port, instead of October, the Themis must have prosecuted her voyage, though it was obvious that it involved a breach of the charter party. Such a consequence is very near to a reductio ad absurdum. The whole basis of the theory in law disappears, moreover, when one observes that article 14 of each charter binds the charterer to indemnify the owner for any liability arising from the bills of lading. As against the ship the liens would be good, but the charterers remain, what perhaps they would have been without that article, the primary obligors. In that view the whole point adds nothing to the original position of the charterers that they were entitled to continue the voyage at the expense of the owners, or the next charterers. The liens of the shippers were expenses to which they were liable and which were indeed a necessary factor in the calculation which should have controlled their decision on October 5th to sail for the Cape. Those liens were no more than items in that calculation, and the fact that the ship stood secondarily liable was an irrelevant incident.

No one urges that the canal slides in fact prevented the physical surrender of the ship on time. It is not as though the Themis had come back across the Pacific and found the canal blocked at Panama. The slides made impossible the contemplated voyage, but that was all, and the owners by the exception made no assumption of such a risk. Suppose, for example, the Themis, bound to Bombay, found herself effectively blocked by Austrian and Turkish submarines, and chose to go around the Cape. Consistently it must be urged that under the "king's enemies" clause she would be entitled to clear the port of New York with the certain expectation of defaulting in her surrender day. Certainly it would make no difference if she got the news at Gibraltar. The charter does not affect to touch the profits; it gives the ship and leaves the use to the charterer. The exception goes no further than the charter; it excuses the mutual performances stipulated, but only those. The charterers' attempted interpretation in effect extends the letting by conditions dependent upon the profits of the venture, and subjects the engagements of the parties to the uncertainties of their business success. Such an interpretation is directly contrary to the very meaning of a commercial contract.

Therefore I find it unnecessary to decide whether the "accidents of canals" exception means only a strand in the canals or some other danger due to canals. The same is true of the slide as an "act of God," or an "accident of navigation." I may, indeed, assume that, did it prevent the surrender, it would be one of these as well as an "accident of canals." The result is that the charter was broken without excuse, and that Barber & Co., Incorporated, are liable.

The decree will hold both the owners and Barber & Co., Incorporated, liable with the usual clause directing the libelants first to exhaust their remedies against Barber & Co., Incorporated, and will direct a reference to ascertain the damages.

NEASHAM v. NEW YORK LIFE INS. CO.

(District Court, D. Nevada. July 16, 1917.)

No. 1967.

1. INSURANCE ⟸665(6)—WEIGHT AND SUFFICIENCY OF EVIDENCE—CAUSE OF DEATH.
   In an action on a life insurance policy defended on the ground that insured committed suicide, verdict for plaintiff *held* supported by the evidence.
2. INSURANCE ⟸646(7)—PRESUMPTIONS—CAUSE OF DEATH.
   Primarily the presumption is against self-destruction, and it is one of the strongest presumptions with which courts have to deal, and, while it will not prevail against clear and definite proof, suicide will never be inferred if the circumstances are consistent with any other reasonable theory.
3. INSURANCE ⟸646(6)—PRESUMPTIONS—CAUSE OF DEATH.
   There is a presumption against murder or the intentional taking of the life of another as well as against suicide, and if the evidence be such as to warrant the inference either of suicide, murder, or accident, in an action on an insurance policy, the presumption must always be in favor of accident.
4. INSURANCE ⟸668(12)—QUESTIONS FOR JURY—CAUSE OF DEATH.
   If the circumstances surrounding the death of an insured person are consistent with either murder or suicide, the question must be left to the jury to determine as between the two conflicting causes.
5. INSURANCE ⟸665(6)—QUESTIONS FOR JURY—CAUSE OF DEATH.
   The absence of motive by an insured person for committing suicide, while not conclusive, is a consideration which enters strongly into the sum of the evidence in determining the cause of death.

At Law. Action by Matilda C. Neasham against the New York Life Insurance Company. On petition for a new trial. New trial denied.

Thomas E. Kepner, of Reno, Nev., for plaintiff.

Cheney, Downer, Price & Hawkins, of Reno, Nev., for defendant.

VAN FLEET, District Judge. This is a petition for new trial. The action is by the widow of William C. Neasham, deceased, to recover on a life policy issued by defendant to her husband in which she is named as beneficiary. The policy, for $10,000, was issued July 10, 1914. It contains a stipulation avoiding it in the event of self-destruction of the assured, sane or insane, during the first insurance year. Deceased met a violent death February 27, 1915, and the defense was that he died as the result of a self-inflicted gunshot wound—a suicide. The jury found the issue against defendant, and awarded plaintiff a verdict, upon which judgment was entered; and defendant now asks that the judgment be vacated and the verdict set aside.

A number of grounds are advanced in support of the petition, the one principally pressed being insufficiency of the evidence to sustain the verdict, and as the others, involving alleged errors in law, were maturely considered at the trial, this is the only question which now calls for consideration.

At the close of the evidence the defendant moved the court for an instructed verdict, which was denied, and this ruling is insisted upon by defendant as involving error. But recognizing the well-defined distinction in the principles applicable to a motion for an instructed verdict and those which obtain upon an application for a new trial, it is contended by defendant that, assuming the evidence to be such as to justify the court in denying the former motion, there is nevertheless such an entire lack of any real, substantial controversy on the question as to the cause of the death of the assured, and that the evidence preponderates so strongly in support of the defense, that it is now the imperative duty of the court to grant the present application and set the verdict aside.

This necessitates a brief consideration of the features of the evidence bearing on the cause of death, all of which was circumstantial.

On the morning of his death the deceased, who resided with his family in Reno, was observed between 8:30 and 9 o'clock walking through town and out along the track of the Southern Pacific Company toward Sparks, and about an hour later was found in a moribund condition, lying in a cut or depression by the side of the track some distance east of Reno. He was apparently unconscious when found, but was still breathing in a heavy or stertorous manner. The coroner and sheriff reached the scene some time after 10 o'clock, and on their arrival found him dead. The place where the body lay was locally referred to as the "gravel pit" or "oil pit," a deep sunken way or cut along the railroad track between Reno and Sparks, with a wagon road running through it to facilitate loading and hauling oil from an oil pipe or tank situated on the railroad right of way. The body was lying on its right side, with the right arm partly extended at an angle from the body, and the left lying across the abdomen. A pistol—a Savage automatic of .32 caliber—which the evidence tended to identify as one purchased by the deceased the day before, was lying some few inches from the right hand, and an empty cartridge shell of .32 caliber was found on the ground near the body. The head was lying up the slope of the cut, with the feet extending into or near the wagon track. The clothing was not in disorder, except that the hat had fallen off, and there was no evidence at the point where the body lay of any disturbance of the ground to indicate a struggle. The deceased's watch, a small sum in coin, and some other small articles were found on his person. Blood was oozing from the mouth and nostrils, and a fresh bloodstain was found on the right arm of the coat at the elbow. Investigation disclosed a wound in the back part of the throat or mouth, a little to the right of the median line, leading through the soft palate and into the brain cavity, of a size sufficiently large to enable the insertion of the middle finger of a man's hand, and so located as not to be visible except by opening the mouth and depressing the tongue. Fractured bone could be felt in the wound, and a stellar-shaped fracture of the skull was found on the back part of the head just above and to the right of the occipital protuberance, with a small fraction of skull bone pushed out beyond the regular contour of the skull, but no exit wound through the scalp; the fracture being on a line

a little upwards from the point of entrance of the wound in the throat. While the autopsy was not such as to definitely disclose the producing cause of the wound, the opinion of the sheriff and doctors was that the wound was from a gunshot. There was no apparent injury to the lips, teeth, or tongue, and the testimony of the physicians was to the effect that the wound could not, in their opinion, have been caused, other than by the insertion of the weapon in the mouth, without injuring the adjacent organs, unless inflicted while the deceased had his mouth open in the act of yawning or retching, or crying out in agony, and that it was of a character to produce death.

These are, in substance, the facts relied on by defendant as making in favor of the theory of suicide, and, standing alone, they are perhaps more than ordinarily persuasive of the correctness of that theory. But they do not stand alone. Arrayed against them, or at least with them, are certain additional circumstances disclosed by the evidence, which, in an effort to establish suicide purely from circumstances, must be taken into account.

In the first place, the evidence is wholly lacking in anything in deceased's situation tending to disclose motive for taking his own life. He was in what may be termed fairly easy financial circumstances. He was a rancher and stockman, owning a large ranch, with stock and other personal property, and having his home in Reno. His ranch was under mortgage for $15,000, but the loan was not due for nearly a year and a half, and the evidence tended without controversy to show that his ranch was worth at least twice the amount of the mortgage, while he had to his credit in the bank at the time of his death a balance of something over $800, and nothing was shown to indicate that he was at the time to any extent disturbed over business affairs. He was between 47 and 48 years of age, a large, strong, robust man, in good health, and of uniformly cheerful disposition; lived very happily with his wife and family, consisting of a number of children—"an ideal family life," as testified by the minister of his church,—attended church frequently, and a fraternal organization of which he was a member. The evidence disclosed that he had returned only two days before his death from a visit with his wife and other members of his family to the opening of the Panama-Pacific Exposition in San Francisco, where he had enjoyed himself, and appeared very cheerful and happy throughout the trip. He had been in his bank the day before his death, and the president testified that he appeared perfectly normal in manner; while on the morning of his death he was up and about the house as usual with his family, dressed the baby, helped his wife in the kitchen, and was in his usual cheerful mood at the breakfast table; and a friend who met and talked with him for several minutes on the street, when he was on his way to the scene of his death, testified that he had never appeared more cheerful and contented. It appeared, moreover, that he did not seek or apply for the insurance involved, it having been taken out at the solicitation of an agent of the defendant; and there is no suggestion that at the time the policy was issued, or at any other time, the idea of self-destruction was even remotely entertained. So much on the question of motive.

The body of the deceased was first discovered by one Lalonde, a sheep shearer temporarily stopping at the time in Sparks. He testified, in substance, that he was walking on the railroad track, and saw deceased lying in the cut and heard him breathing heavily; that, thinking there was something wrong, he called to two other men whom he saw in the vicinity, and they all went down to where deceased was lying, or within a few feet of where he lay, saw the pistol near the body, and, concluding that he had shot himself, went to a nearby point and telephoned to the sheriff, and when they returned to the place where the body lay life was extinct. These three men, Lalonde, Brown, and Rodolph, afterwards testified at the inquest as to the fact of finding the body, but they had disappeared before the trial, and could not be found or produced, and their testimony as taken before the coroner was read by consent. No definite effort, so far as appears, was made at the inquest to identify these men as to their permanent place of abode, their character, antecedents, or mode of life, nor as to how they came to be in the vicinity at the time. They testified that they were out walking and just happened to meet there. One of them testified that they heard no report of a gun.

The evidence tended to show that the ground where the body lay was sandy and damp, and of a character to clearly show the impression of footprints, and there were certain footprints testified to by the officers as having been found about the body. They differed somewhat, however, as to the results of their observations in this regard. The coroner testified that "the only tracks were the footprints of one person that led to where the body lay"; that he saw no others. The sheriff testified: "Arriving at the scene, I found three tracks leading down to where the body was lying; one track leading to the spot, and two other tracks leading to within eight or ten feet of the spot. Those tracks turned and went back, making altogether five lines of tracks, three going and two returning. * * * I saw no tracks other than what I have mentioned." The undertaker, who accompanied the officers, stated: "I observed a few tracks coming from the east toward the body. I didn't take much interest in that; I was interested in other matters." No effort was made to identify the tracks or footprints testified to as leading up to the body as those of the deceased, nor was it clearly shown whether those particular tracks stopped at the point where the body lay or were retraced. Moreover, the inquiry as to the character of the soil and evidence of tracks was directed generally to "the ground where the body lay," and the fact was not developed whether the condition of the wagon road running through the cut was such that footprints of one walking in the roadway could be readily discerned or followed.

Ex-Sheriff Burke, superintendent of state police at the time of the death, an experienced officer, testified to making an examination of the place where the body was found and its immediate surroundings, on Sunday, the day after the death, for any indications of other persons having been in the vicinity; and he stated that at a point about 100 to 125 feet from where the body lay, just across the railroad track, he found tracks in the soft, sandy ground, "and observed a place where some one had been lying down."

There was a discrepancy in the evidence as to the condition of the pistol found by the body of the deceased and the number of unexploded shells it then contained. The shopkeeper who sold the weapon to deceased testified that when deceased bought the pistol he asked him how it worked and to load it; that he informed him that he had but nine cartridges on hand, while the weapon carried more, but deceased said that would be enough, and they were inserted in the magazine before he took the weapon away. There was produced in evidence at the trial the pistol with eight unexploded cartridges and one empty shell, and the sheriff testified, in substance, that when he picked the weapon up from the ground the hammer was back—that is, the gun in a position to shoot by pulling the trigger—with a shell in the chamber, the others in the magazine, and one empty shell lying on the ground; that he removed the magazine and the shell from the chamber, picked up the shell on the ground, and turned them over, with the weapon, to the coroner, from whose custody they were produced. It was developed on his cross-examination that his testimony at the inquest, as reported in the certified transcript of the proceedings, differed from this in one or two significant respects. It there appeared that, when he was there being examined about the condition and contents of the pistol when picked up, these questions were put and answered:

"Q. Is this in the same condition that it was? A. No; I removed the shell from the chamber, and there are nine shells in the magazine. Q. Is it in the same condition? A. It is in the same condition with the exception that the safety was on the trigger; I took the shell out of the chamber, and there are nine in the magazine."

And it was shown in this connection that with the "safety on the trigger" the hammer could not be drawn back or cocked or the weapon exploded; that in that condition the weapon was harmless.

As suggested, the autopsy was not carried to a point sufficient to disclose the character of the missile making the wound, if missile it was. The surgeon conducting it, as indicated from his evidence, assuming apparently that the wound was the result of a gunshot and was sufficient to cause death, made no further or more definite examination as to the producing cause of the wound in the throat. The scalp was turned down sufficiently to disclose the nature of the fracture of the skull, but the brain cavity was not opened, nor, so far as appears, was a probe used to search for a bullet, the operator contenting himself with inserting his finger in the opening in the throat. Accordingly the evidence did not disclose whether there was a bullet in the brain, or, if there was, that it was of the same caliber as the empty shell found by the body. Moreover, there was apparently no effort made to ascertain whether the pistol, when picked up, bore any evidence of having recently been discharged, such as burnt powder or otherwise.

One other circumstance remains to be noticed to which much significance is attached by the plaintiff. When the body of the deceased was brought home from the coroner's, there was observed by members of the family on the forehead, over the right eye, just at the line of the hair, and partly covered by it, evidence of an injury various-

ly referred to by the witnesses as "a dent," "a depression," or "a scar," which the evidence tended to show had never before been observed by the members of deceased's immediate family or others acquainted with him, including his family physician, who had attended the family for 11 years. It was described by the different witnesses as being all the way from an inch and a quarter to two or more inches in length, and three-sixteenths to a quarter of an inch deep—of sufficient depth and length, as one or two expressed it, to partly lay the little finger in it—but with little, if any, discoloration. It was first observed by the undertaker at his undertaking rooms, who said he thought it a scar and paid no particular attention to it, but he testified that it was not caused by moving the body or handling it after death. The family physician characterized it as a bruise or scar, apparently made with a blunt instrument, which it had taken considerable force to produce—sufficient to knock a man down and perhaps render him unconscious—but as to how recently it had been inflicted, he stated it was impossible definitely to say, for the reason that such a wound, if inflicted when death shortly ensues, does not take on the same appearance or characteristics as under other circumstances; that the blood, being stopped in its circulation, has not the same tendency to extravasate or cause discoloration, as on a living person, and particularly in an injury to the scalp, where the capillaries are not profuse. There was no evidence tending more definitely to disclose when or how this injury was inflicted upon the deceased.

[1] These are, in their material substance, the circumstances bearing upon the manner in which the deceased came to his death. Can it be justly said that, when considered as a whole, they point so inevitably and certainly to the conclusion of self-destruction that the jury, as reasonable men, were not justified in adopting a contrary view; and that their finding is so lacking in substantial support in the evidence that it is now the duty of the court to set it aside? With a full appreciation of the responsibility, so strongly impressed by counsel as resting upon the court, to supervise their verdict, and see, so far as lies within the proper exercise of its power, that it speaks the truth, I feel constrained to answer the inquiry in the negative.

Before discussing the facts, it will be well to have in mind the principles which must control in their consideration.

[2] Primarily, the presumption is against self-destruction, and it is one of the strongest presumptions with which courts have to deal. Being, as it is, entirely opposed to natural instinct to deliberately take one's own life, the fact will never be inferred unless the evidence is such as to fairly exclude every other reasonable hypothesis as to the cause of death. Of course, the presumption will not prevail against clear and definite proof; but if the circumstances are consistent with any other reasonable theory, the latter must be adopted to the exclusion of that of suicide. These principles have become axiomatic in their application. Elliott on Evidence, §§ 2393–2394. The rule is thus stated by that learned author in the last section:

"No general or definite rule can be stated as to the extent or degree of proof considered sufficient to establish the theory of suicide. It is evident that it must be sufficient to overcome the presumption against the voluntary taking

of one's own life. And if the circumstances proved to establish the theory of suicide leave a reasonable hypothesis that death resulted in any other manner, the evidence will be regarded as insufficient. A general rule might be formulated to the effect that the preponderance required of the insurer in order to overcome the proof and presumptions against suicide must be such as to exclude with reasonable certainty any hypothesis of death by accident or by the act of another."

And as illustrating the strength of the presumption the author states in section 2392:

"The presumption of law is always against suicide. This presumption is so strong that the courts usually require some evidence of an intention of suicide, as the intent is regarded as the gist of the act. This presumption against suicide is also strong enough to rebut the usual and natural inferences that might arise from the conditions and circumstances ordinarily pointing to suicide. Thus where the assured was found dead, lying on his back with a pistol in his right hand, which was lying across his breast, and there was a pistol or gunshot wound in his right temple, this was held insufficient evidence of suicide."

As graphically stated by the Supreme Court of Kentucky in the leading case of Ætna Life Insurance Co. v. Milward, 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092, discussing the reasons underlying the presumption:

"The love of life is instinctive; self-preservation is its first, as it is its strongest, law. In the absence of mental derangement, of any known fact calculated to unseat the judgment and to overcome the love of life, the inquiring mind naturally and properly looks for other causes of the deed when death by violence occurs. When all the facts are inconsistent with the theory of suicide, except simply that of the dead body in the presence of its instrument, it would be unnatural and illogical to confine the inquiry to that incident, and declare the death suicide. The act of suicide is not only unnatural, but is highly immoral and criminal. The presumption of law is against it; so is the presumption of fact."

[3, 4] It is true that the presumption is likewise against murder or the intentional taking of the life of another. Accordingly, if the evidence be such as to warrant the inference either of suicide, murder, or accident, the presumption must always be in favor of the latter (Starr v. Insurance Co., 41 Wash. 199, 83 Pac. 113, 4 L. R. A. [N. S.] 636); whereas, if the circumstances exclude the theory of accident, but are consonant with either murder or suicide, the question must be left to the jury to determine as between those two conflicting causes. Ætna Life Ins. Co. v. Milward, supra.

Examining the circumstances with these principles in view, I think it will readily be seen that the case is not one where the court would either have been warranted in granting an instructed verdict or be justified in setting at naught the finding of the jury.

The three facts most strongly dwelt upon by defendant in support of the theory of suicide are, naturally, the character of the death wound, the purchase of the pistol by deceased so immediately preceding death, and the finding of the weapon in close proximity to the body. As indicated above, these circumstances, picked out of the whole body of the facts and isolated from their associated surroundings, undoubtedly tend to lead the mind, as matter of first impression, to the inference of self-destruction; but it will be found that when

considered in the light of precedent they are not even, taken by themselves, to be regarded as of a significance so unerring as to necessarily negative the theory of death occurring in some other manner. Many cases may be cited based upon circumstances of very similar import, and pointing to suicide with a degree of apparent certainty substantially as strong, and in some aspects perhaps even stronger, where the courts have refused to hold that the jury were not justified in finding against the theory of self-destruction.

Thus, in Ætna Life Insurance Co. v. Milward, supra, the following facts, as stated by the court, were presented, which, it will be observed, present a case as strikingly significant of suicide in many of its features as the present:

"The insured was found dead from the effects of a pistol shot wound in the head. His body, partially disrobed, as he had slept, was discovered lying in a small porch or entry, which was partially inclosed, at the rear of his residence. By his side were two pistols, both loaded, but in one a discharged cartridge. The shot entered his head on the left side, behind the ear, and passed through in nearly a straight line. The two pistols were lying rather to his right side. He was right-handed. His domestic relations were apparently pleasant, being happily married. He had also two young children. His health was good. His mercantile business was prospering satisfactorily. He was about 34 years old, and a man of good habits and character. The shot which killed him was fired about dawn November 21, 1900. It was heard by but one person, who testifies in the record. The tragedy was unseen by any witness in the case. Appellee, widow of deceased, and her two infants slept in an upstairs room, but were not aroused by the shot. There were no other evidences of violence, nor of the presence of another person at the scene of the killing. The backyard, where it occurred, had walks leading to it which were paved, and would not for that reason have shown tracks. One of the pistols probably belonged to deceased, or had recently been in his possession. It was a nickle-plated Iver-Johnson revolver. The other, a blued-steel barrel pistol, was not identified as to its ownership. It was from the latter the fatal shot was fired. There was some evidence that the insured was a man of intense application to business, was of a nervous temperament, that he had a year or so previous to his death consulted a physician, who had advised him to take a rest on account of nervous exhaustion or depression, and that he took a vacation of two or three weeks in the Northwest. After his return the physician found him restored to health, and quit treating him. A few days before his death deceased complained of pain in the back of his head."

Discussing these facts, the court say:

"Appellant argues that the verdict is flagrantly against the evidence, because, it is contended the evidence, of which the foregoing is a fair epitome, shows clearly that the death was suicide; or, in any other view of it, * * * fails to show that the death was caused by accidental means, and therefore there was a failure of proof on behalf of the plaintiff. As indicated, the evidence is wholly circumstantial. It may none the less point as unerringly to a correct conclusion as if detailed by eye-witnesses. * * * Circumstantial evidence tells the story of a past transaction by the similitude between the things shown to have been done and what, in the experience of mankind, has been found to be generally the cause or result of similar occurrences. From these the mind deduces the most probable cause of the occurrence in question. The result of this process of reasoning has been found to be so unvarying as to justify its adoption as a rule of evidence. The jury were authorized to apply to the facts detailed their knowledge of human nature, and to indulge, in aid of deduction predicated upon the established facts, those presumptions which common experience has established, and which therefore the law allows."

And it was held that, viewing the evidence in the light of these presumptions, the jury were justified in reaching the conclusion that the death occurred from a cause other than suicide, and that it could not be said that in this process of reasoning the jury were required to "guess" the cause of death.

In Kornig v. Western Life, etc., Co., 102 Minn. 31, 112 N. W. 1039, the facts were, in substance, these:

The deceased was a man of cheerful disposition, living happily with his family, a kind father, and devoted to his children. He had been moderately successful in business, and immediately before his death was in possession of a considerable sum of money, amounting to several thousands of dollars. There was testimony to the effect that he had slept and lived at home, and got his meals at home, where he had all his things, including his clothing; that his wife had seen him on the day of his death and daily for some time before; but it further appeared that from the 1st day of March up to the 12th day of April, the day of his death, he had had a room rented in a house in Minneapolis. There was evidence tending to show that on the day of his death he had had trouble with the woman of the house where he had the room, and that he had shot her; that she ran into the street for assistance, and that thereupon the officers entered the premises and found deceased dead upon the floor.

As stated by the court:

"He was lying on his left side, with his left cheek on the floor, his left arm beneath the body, the legs bent at the knees and drawn up, and the right arm so that the hand was on his leg. Loosely gripped in his hand was the revolver, the muzzle of which projected between and below the legs, so that it was visible to one standing in the doorway. In the right side of the head was a bullet wound, about an inch and a half back of the ear. The trend of the bullet was downward and backward. Two or three cartridges remained in the revolver, which was of a .38 or a .32 caliber. Two or three empty cartridge shells had been extracted from it. Only a small amount of money and some papers were found on the person of the dead man. No one was found in the building in any wise connected with the death of the insured."

Upon these facts it was said by the court:

"The defendant insists that the testimony demonstrates that this was a case of suicide, pure and simple. The law on this subject is well-settled. There is little controversy as to its formula and a singular unanimity in its application. * * * It is the defendant who must, when circumstantial evidence is relied upon, establish such facts as preclude the hypothesis of natural, violent, or accidental death. The burden of proof does not rest on the plaintiff to establish such facts as demonstrate or justify the theory of death otherwise than by the hand of the insured himself, in order that the jury may find against death by suicide. It is not material that 'there was not enough evidence to say that murder was done.' O'Rear, J., in Ætna Life Ins. Co. v. Milward, 118 Ky. 716, 82 S. W. 364, 365 (and see cases collected at page 366), 68 L. R. A. 285 [4 Ann. Cas. 1092]. Moreover, where the cause of death is in doubt, there is a presumption of law against death by suicide. It is true that there is a corresponding presumption against death by crime. The result of the rule in such a case as this is, as has been well said by Cassoday, C. J., in Rohloff v. Aid Association, 130 Wis. 61, 109 N. W. 989, 991: 'Can it be said as a matter of law that the inferences or conclusions to be drawn from such facts are so clear and unambiguous that reasonable men, unaffected by bias or prejudice, would agree that the deceased intentionally shot himself?' "

And it was held that the jury were justified in finding that the case was not one of suicide.

In Fidelity & Casualty Co. v. Love, 111 Fed. 773, 49 C. C. A. 602, the facts are sufficiently indicated in the discussion of their effect by Judge Selby, writing the opinion for the Court of Appeals, sustaining the judgment for the plaintiff, where he says:

"Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partly dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show, almost, if not quite, conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting. Whether it was accidental or intentional is a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. * * * The evidence is presented in detail and at length in the record, and it would serve no useful purpose to state it. In a case very much like this one in many of its features, the Supreme Court has recently held that the trial court did not err in submitting the question of suicide to the jury. Supreme Lodge v. Beck, 181 U. S. 49 [21 Sup. Ct. 532, 45 L. Ed. 741]."

There are other interesting cases that might be referred to, but it would subserve no useful purpose to discuss them. In all of them the facts were strongly, but unsuccessfully, urged by the insurer as practically demonstrating suicide. See, also, National Union v. Fitzpatrick, 133 Fed. 694, 66 C. C. A. 524; O'Connor v. Modern Woodmen, etc., 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244; Metropolitan Life v. De Vault, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27.

Illuminated by the reasoning of these cases, the sinister significance of the facts relied on as making in favor of suicide is greatly modified, if not largely negatived; and when they are considered, as they must be, with all the concomitant circumstances, it is impossible, with a just appreciation of the reasonable deductions to be drawn therefrom, to say that the jury were not warranted in the conclusion reached by them. The one respect in which the instant case can in an essential respect be differentiated from the facts presented in any one of those above cited is in the peculiar character and location of the injury causing death. But, in the first place, it would be going far to say that such a wound, even if definitely shown to have been produced by deceased's pistol, could not have been the result of accident—from a careless handling or examination of the weapon—especially in view of the fact, which the evidence tends to disclose, that the deceased was unfamiliar with its working. But conceding that that theory is not sufficiently probable as the basis of a verdict, to make it reasonable, very clearly the facts do not exclude the theory of the injury having been received at the hands of another. It may readily be conceived that it could have been inflicted in a close, deadly struggle with an assailant, or after deceased had been knocked down—the weapon being inserted in his mouth to stifle his cries for help or to deaden the sound of the explosion. And to account for the absence of any indications of a struggle where the body lay, and the condition of the clothing, it might well be that the assault was committed on the railroad

track or at some other point where evidence of a struggle would not be left, and the body carried to the cut and there disposed as found for the very purpose of indicating suicide. The jury may well have reasoned in this way, and it would not, as contended, involve a resort to surmise or speculation, but merely legitimate deduction from the circumstances. Ætna Life Ins. Co. v. Milward, supra.

So far as the purchase of the pistol is concerned, it is not of controlling significance. It may have been dictated from any one of many considerations in no wise connected with the purpose by deceased to take his own life. He may have been aware that he was going on a dangerous errand and might need it for protection. And as to the finding of the weapon by the body, that is a feature characterizing so many cases of death by violence as to carry necessarily little weight. As said by the court in Kornig v. Western Life, etc., Co., supra, in discussing the circumstances of a revolver found loosely gripped in the right hand of the deceased:

"In the nature of things, this circumstance is by no means conclusive. Nothing is more common in the history of crime than to place the means of death near or in the hands of the victim. The revolver was not shown to have belonged to the deceased, nor to have been formerly in his possession. In many reported cases in which the insurance companies have sought to avoid liability on the theory of suicide, the presence of a pistol, in connection with other circumstances, has been held by the courts not to sustain the defense. The fact that a pistol was found in the hand of deceased is not conclusive. In Leman v. Manhattan Life Ins. Co., 46 La. Ann. 1189, 15 South. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348, a man without physical or mental disturbance or financial or family trouble and in good spirits was found dead with a pistol wedged in the bed of his thumb. The verdict for the beneficiary was sustained. In Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110, the beneficiary recovered, although the deceased was found with a bullet hole near the center of his forehead, and with a self-cocking revolver in his right hand; the last three fingers resting on the handle, the index finger on the trigger, and the thumb just back of the hammer. In very many other cases beneficiaries recovered notwithstanding the presence of the revolver in the immediate vicinity of the deceased."

Another circumstance should not be overlooked. The pistol found lying by the deceased was a modern high-power weapon, carrying, as the evidence discloses, steel-jacketed cartridges of great penetrating force, and yet, as we have seen, the projectile fired into deceased's brain, if such was the cause of the wound, made no exit. There are other considerations of a minor character arising upon the evidence, tending, in a greater or less degree, to negative the theory of suicide; such, for instance, as to how, as the body lay, blood could have gotten on the elbow of his coat. They need not be all here adverted to, since it is not now so material how, in fact, the deceased came to his death, as it is that the evidence be shown to involve some reasonable theory of death other than self-destruction; and it would seem that what has been suggested, when taken in conjunction with the very potent although negative circumstance that there is an entire absence of anything in the evidence tending to disclose motive, establishes such a case.

[5] The absence of motive, as in a crime, while in no wise conclusive, is, notwithstanding, a consideration which enters strongly into the

sum of the evidence to be considered, in an effort to establish suicide from circumstances.

Thus, in Modern Woodmen v. Kozak, 63 Neb. 146, 88 N. W. 248, discussing the absence of motive, it is said:

"But there is another fact of which the jury could not have been ignorant, namely, the absence from the record of all evidence tending to show a motive inciting to self-destruction. Self-murder is abhorrent to the mind, and common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude."

And see note to Modern Woodmen, etc., v. Kincheloe, 175 Ind. 563, 94 N. E. 228, 28 Ann. Cas. 1913C, 1259, 1262.

As a result, and after a more than usually painstaking consideration of the record in this case, I am satisfied that there was that in the circumstances presented to the jury to fully warrant the verdict rendered; and that to set their verdict aside would, in effect, be to deny the plaintiff her constitutional right to have the jury pass upon the facts.

This conclusion renders it unnecessary to consider the plaintiff's motion to dismiss the petition for want of due service.

A new trial will be denied.

HARTMAN v. TOYO KISEN KAISHA S. S. CO.

(District Court, N. D. California, S. D. August 6, 1917.)

No. 15877.

1. SEAMEN ⟸29(2)—PERSONAL INJURIES—LIABILITY.
   Where passengers and members of the crews of a steamship company were transported between the wharf and the steamships at a particular port in launches, the duty rested upon the party responsible for the management of a launch in which a member of the crew was returning to his ship to so handle it as to afford him reasonable opportunity to land safely upon the gangway of the vessel.
2. SEAMEN ⟸29(2)—PERSONAL INJURIES—LIABILITY.
   Where a member of the crew of a vessel was permitted to go ashore while the vessel was in port for a proper purpose, and in due course returned to the ship, and was injured by the negligent management of the launch in which he was taken to the ship, it was immaterial, so far as liability for his injury was concerned, whether he went ashore for his own personal ends or on an errand for the ship.
3. SEAMEN ⟸29(4)—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.
   Where a steamship company arranged with a steamship agency to transport passengers and crews of its vessels between the wharf and the vessel, and a member of the crew returning to the vessel found the large launch usually employed absent on other work, he was within his rights in taking passage on a small launch in charge of employés of the same agency, and which in other instances had been so used when the larger launch was not available.
4. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION ACT—EMPLOYMENTS WITHIN STATUTE—SEAMEN.
   Under Judicial Code, § 256 (Act March 3, 1911, c. 231, 36 Stat. 1160 [Comp. St. 1916, § 1233]), giving the courts of the United States exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where

the common law is competent to give it, and section 24 (Comp. St. 1916, § 991), giving District Courts original jurisdiction of such causes, a state Workmen's Compensation Act did not apply to an injury sustained by a member of the crew of a vessel in a foreign port, though he was not an ordinary seaman, but employed on the vessel as a barber, especially where the state Supreme Court holds that the statute does not cover injuries sustained outside the territorial limits of the state.

5. MASTER AND SERVANT ⊂=114—PLACE OF WORK—MEANS OF ACCESS TO PLACE OF EMPLOYMENT.

It is the duty of an employer to furnish his employé a reasonably safe place for the performance of his labor, including reasonably safe means of access to his place of employment, so far at least as the circumstances require such means to be furnished by the employer.

6. MASTER AND SERVANT ⊂=103(1)—PLACE OF WORK—DELEGATION OF DUTY.

The duty of furnishing a reasonably safe place to work, including reasonably safe means of access to the place of employment, may not be delegated by the employer to another so as to relieve him from the consequence of any default in the manner in which it is performed.

7. MASTER AND SERVANT ⊂=114—PLACE OF WORK—MEANS OF ACCESS TO PLACE OF EMPLOYMENT.

In legal contemplation an employé is as much within the discharge of his duty to his employer while proceeding to his place of service through the means provided by the master as when actually engaged in his work, though he performs no service en route, and though the cause of absence from his work be for his own purposes.

8. SEAMEN ⊂=29(2)—PERSONAL INJURIES—LIABILITY.

Where a steamship company engaged a steamship agency to transport passengers and crews of its vessels to and from the shore in launches, it was liable for the negligent management of such a launch causing injury to a member of the crew, even though the steamship agency was an independent contractor, since in the discharge of the particular service of conveying the injured employé to the ship it stood merely in the shoes of the employer, and performed a duty cast upon the employer by law.

9. DAMAGES ⊂=131(2)—INJURIES TO LEG—AMOUNT OF DAMAGES.

A barber employed on a ship sustained an injury in a foreign port, both the tibia and fibula being fractured in an unusual manner so that pieces of bone had to be cut away to make them unite, The fracture was imperfectly reduced, and he was brought home in charge of the ship's doctor without any resetting of the limb, resulting in a partial knitting, so that upon his arrival in San Francisco the bones had to be rebroken. He was in the hospital in San Francisco for 10 days, and in care of a nurse at his home for three or four months, after which he was required to go on crutches, or with a cane, unfitting him to resume his calling as barber for some considerable time, though he had been able to do other work. *Held*, that an allowance of $700 in addition to an allowance of a similar amount for medical treatment, nurse hire, appliances, and drugs would be proper.

At Law. Action by A. L. Hartman against the Toyo Kisen Kaisha Steamship Company. Judgment for plaintiff.

Edgar D. Peixotto, of San Francisco, Cal., for plaintiff.
Samuel Knight, of San Francisco, Cal., for defendant.

VAN FLEET, District Judge. This is an action to recover for personal injuries alleged to have been suffered by plaintiff while in defendant's employment, through the negligence of those for whom it is claimed defendant is responsible. A jury was waived, and the action tried to the court.

Plaintiff at the time of the injury was employed as a barber on the Shinyo Maru, one of defendant's liners plying between Japanese and American ports, the vessel being on the particular occasion in the port of Nagasaki. At that port, where conditions are such that steamers do not lay at the bund or wharf, but out in midstream, defendant had a contract with Holme, Ringer & Co., a steamship agency, part of whose business was the operation of launches for the transportation of passengers and crews of vessels to and from the shore, to perform such service on their behalf, and this was the exclusive means afforded for the purpose.

On the day of the accident, plaintiff had been ashore on leave, for purposes of his own, and in due time was returning to the vessel; when he reached the bund he found that a large launch usually employed in the transportation was absent on other work, and he was taken out to the steamer on a smaller one in charge of employés of the same agency. In attempting to board the ship, the sea being somewhat choppy, he was thrown down and injured, having his leg broken.

[1-3] At the conclusion of the oral argument, in giving counsel leave to file briefs, the court stated that there were but two questions of law giving rise to any doubt in its mind as to the way the judgment should go: First, whether, as claimed by defendant, the demand was one falling within the Workmen's Compensation Act of the state as affording the exclusive remedy; and, second, whether, under the circumstances disclosed, the defendant was responsible for the negligence of the employés of Holme, Ringer & Co., through whose instrumentality the injury occurred. And as to the evidence the court at the same time stated:

"I can state in a very few words my views as to what the evidence shows: I think that the court must find, under the facts, that there was a negligent handling of this boat, this launch, at the time of the injury; that is, that the plaintiff's injury was caused by negligence. I do not think the circumstances are such as to show contributory negligence in plaintiff, as claimed; it does not appear that he was not justified in endeavoring to board the steamer in the manner he did and which resulted in his injury; in other words, the situation was not such as to advertise to an ordinarily reasonable man that there was any extra hazard in his attempt to board the steamer at the time. I think that the duty rested upon whoever was responsible for the management of the launch to so handle it as to afford reasonable opportunity to the plaintiff to safely land upon the gangway of the vessel. I think, moreover, that under the evidence the plaintiff was quite within his rights and within the protection of his contract of employment, in going ashore and returning to the vessel on the occasion in question. Whether he went for his own personal ends, as seems to be conceded, or on an errand for the ship, makes no difference under the circumstances. It is a matter of common knowledge that it is customary on all vessels coming into port, unless under exceptional circumstances, that those employed aboard are, on proper occasions, permitted to go ashore; and that privilege does not ordinarily take them out of the terms of their employment. Of course, if they go without leave or engage while absent in something which is wholly apart from anything connected with their service, and receive injury, that is a different thing; but if an employé of a ship is permitted to go ashore, as this plaintiff was, under proper conditions, and for a proper purpose, and in due course returns to the ship, and is injured, under circumstances and in a manner such as here shown, I think it entirely

too narrow a view to say that he is acting merely on his own personal responsibility and without the protecting terms of his contract.

"Furthermore, the evidence satisfies me that the plaintiff, in returning to the steamer, was entirely within his rights in taking passage on board this small launch, as to which some question is made. The evidence shows without any serious conflict that this was not the only instance in which the small launch was used for a like purpose, but that it was so used in many other instances when the larger launch was not available. The agent was under contract with the defendant to furnish means of communication back and forth between the pier and steamer, the situation being such in that harbor, as stated, that there could be no approach of liners of this draught to the wharf, but where they had to seek an anchorage and maintain communication with the shore by means of launches, the contract called upon Holme, Ringer & Co. to furnish that medium of communication, and I have no doubt that under the law the use of that small launch for such purpose should be held to have been entirely within the terms of the contract between the parties. The defendant held out to its employés aboard the ship that they were to use the means of transportation thus afforded; and if the circumstances are such under the law as to make the employés of Holme, Ringer & Co. the employés pro hac vice of the defendant, then, of course, the defendant would be responsible for the negligence of those in charge of the launch. I am satisfied that, had due precautions been taken in the handling of the launch, plaintiff, like the other two men who were aboard, could have landed safely, and this want of care seems to me to have arisen either in one of the men managing the launch not handling his boat hook as he should, or a failure to have some one on the gangway of the steamer with a hook or other proper means to aid in holding the small craft in a safe position while the landing was being effected. That being the means furnished by the defendant for the purpose for which it was being used, a due regard for the safety of its employés would have dictated the necessity, especially in view of the somewhat rough character of the water, of having a man on the gangway with some appropriate means to aid in holding the launch while those on board were being taken off.

"Accordingly my judgment is, as before suggested, that the circumstances here are such as to warrant the court in finding that there was negligence on the part of those handling the small boat which proximately caused the injury, and the question I wish to examine more definitely in this connection is as to where responsibility for such negligence rests. If the defendant is to be held responsible for the management of the launch, as I am inclined to think it is, then, of course, the plaintiff has a right of recovery. What that recovery should be, since I am not ready to decide the case definitely, by reason of the legal questions suggested, I will determine should I reach the conclusion that the defendant is legally responsible."

The views thus expressed upon the evidence have not been modified by my further consideration of the case, nor do I deem it necessary to add to them.

As concerns the questions of law reserved.

[4] 1. The contention that plaintiff's claim is within the Workmen's Compensation Act of the state (St. 1913, p. 279), and that jurisdiction accordingly rests exclusively with the Industrial Accident Commission, has been settled adversely to defendant, since this case was submitted, in the very recent case of Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086. In that case it was sought to uphold an award under the Workmen's Compensation Act of New York (Consol. Laws, c. 67) for an injury received in a maritime transaction, as against the objection that that act had no application, that the jurisdiction in such cases was exclusively in the federal courts, and it was held that under the provisions of section 9 of the Judiciary Act of

1789 (Act Sept. 4, 1789, c. 20, 1 Stat. 76 [Comp. St. 1916, § 1583], re-enacted in Judicial Code, §§ 24, 256):

"Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the federal District Courts, 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. The Hine, 4 Wall. 571, 572, 18 L. Ed. 451; The Belfast. 7 Wall. 624, 644, 19 L. Ed. 266; Steamboat Co. v. Chace, 16 Wall. 522, 531, 533, 21 L. Ed. 369; The Glide, 167 U. S. 606, 623, 17 Sup. Ct. 930, 42 L. Ed. 296. And finally, this remedy is not consistent with the policy of Congress to encourage investments in ships, manifested in the Acts of 1851 and 1884 (R. S. 4283–4285; section 18, Act June 26, 1884, 23 Stat. 57, c. 121), which declare a limitation upon the liability of their owners. Richardson v. Harmon, 222 U. S. 96, 104 [32 Sup. Ct. 27, 56 L. Ed. 110]."

The present case is concededly of maritime origin, but it is suggested that the fact that plaintiff's duties were other than those of the ordinary seafaring man has the effect to take it without the principles of the Jensen Case. But that case is not bounded by any such narrow lines.

Moreover, in North Alaska Salmon Co. v. Pillsbury, 162 Pac. 93, likewise decided since the submission of the present case, it is held by the Supreme Court of California that the Workmen's Compensation Act of the state, in force at the time plaintiff's injuries were received, did not cover claims arising upon injuries inflicted outside the territorial limits of the state; that in such instances the Industrial Accident Commission had no jurisdiction to award compensation.

2. The second question arises on defendant's contention that, conceding the plaintiff's injuries to have been the result of negligence, it was the negligence of Holme, Ringer & Co., who, it is claimed, was, under their contract with defendant, an independent contractor for the service it undertook, and that defendant cannot therefore be held liable for such negligence; that plaintiff's right of recovery, if any, is against Holme, Ringer & Co. But the fallacy of this contention can, I think, be readily shown by a consideration of one or two principles governing the relation of master and servant, which the contention seems to wholly ignore.

[5-7] The first and most fundamental is that of the duty of an employer to furnish his employé with a reasonably safe place for the performance of his labor, which includes reasonably safe means of access to his place of employment, so far, at least, as the circumstances require such means to be furnished by the employer; and this duty may not be delegated by the employer to another so as to relieve him from the consequence of any default in the manner in which it is performed. This principle is so imbedded in the law of master and servant as to be universally recognized as controlling in every instance where it is not modified by special circumstances or by some specific feature of the contract. And that, as suggested by the court in its discussion of the evidence, the plaintiff was, under the circumstances shown, within the protection of his contract of employment at the time of meeting with his injury, is likewise not to be questioned. An employé in legal contemplation is as much within the discharge of his

duty to his employer while proceeding to his place of service, through the means provided by the master, as when actually engaged in his work, and this although he perform no service en route, and though the cause of absence from his work be for his own purposes. Rideout v. Pillsbury, 173 Cal. 132, 159 Pac. 435; Moore v. Pacific Coast Steel Co., 171 Cal. 489, 153 Pac. 912; Koskela v. Albion L. Co., 25 Cal. App. 12, 142 Pac. 851. And see Ocean Accident Co. v. Industrial Accident Commission, 173 Cal. 313, 159 Pac. 1041, relied on by defendant, where, at page 1044, L. R. A. 1917B, 336, the same doctrine is recognized.

[8] Applying these principles, it will at once be perceived that it can make no difference to the question of defendant's liability if it be assumed that, as between it and its agent, Holme, Ringer & Co., the latter was, under their contract, to be regarded as an independent contractor, since, in any event, in discharge of the particular service of conveying plaintiff to the ship, it stood merely in the shoes of the defendant and performed a duty cast upon the latter by the law. James Griffith & Sons Co. v. Brooks, 197 Fed. 723, 117 C. C. A. 117; American Shipbuilding Co. v. Lorenski, 204 Fed. 44, 122 C. C. A. 353; Bohnhoff v. Fischer, 210 N. Y. 172, 104 N. E. 130; Raxworthy v. Heisen, 191 Ill. App. 457; Luce v. Holloway, 156 Cal. 162, 103 Pac. 886; Shearman & Redfield on the Law of Negligence, § 176.

As stated in Shearman & Redfield, § 176:

The rule is well established that one cannot "escape from the burden of an obligation imposed upon him by law by engaging for its performance by a contractor. Whatever he is bound to do must be done; and though he may have a remedy against his contractor for the failure of the latter to discharge his duty, strangers to the contract are still at liberty to enforce the rights conferred upon them by law without noticing the contract."

And in Griffith & Sons Co. v. Brooks, supra, where the injury resulted from the use of a derrick employed by an independent contractor, it is said:

"In applying the doctrine of liability arising out of the breach of a master's positive personal duty, it is to be observed that there is a tendency at times to confuse it with other doctrines equally well established, as, for instance, with the fellow servant rule; but the line of distinction in this behalf is pointed out in decisions of this court. Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 482, 70 C. C. A. 64; Kentucky Block Cannel Coal Co. v. Nance, 165 Fed. 44, 47, 91 C. C. A. 82; Illinois Cent. R. Co. v. Hart, 176 Fed. 251, 252, 100 C. C. A. 49 [52 L. R. A. (N. S.) 1117]. * * * The derrick now in question was a quasi permanent appliance, requiring care in its installation commensurate with the character of the work to which it was to be applied. If the company had itself rented the derrick and installed and operated it in the same place and work in which Bishop located and used it, the company's duty to plaintiffs to install the derrick with reasonable care would scarcely have been questioned; and it is to misapply the principles of independent contract to insist that this duty ceased simply because the company chose for its own benefit to employ Bishop to do the same thing, and, regardless of the safety of its own servants, suffered him to install the derrick negligently. The reason for the master's care remaining, its duty also remained."

And so in Raxworthy v. Heisen, supra, it is said:

"It is a well-recognized principle that the duty of a master to furnish his employé a safe place to work cannot be delegated to an independent con-

tractor, so as to relieve him from liability. 16 Am. & Eng. Encyc. of Law, 197; Bailey on Personal Injuries, vol. 1, § 44; Bernheimer Bros. v. Bager, 108 Md. 551, 561 [70 Atl. 91] 129 Am. St. Rep. 458."

There are some further considerations, suggested rather than urged, bearing upon the relations of the parties, but I do not regard them as materially affecting the plaintiff's right to recover, and they do not call for special notice.

[9] 3. This leaves only the question of the amount of compensation to which plaintiff should be justly entitled for the injury and the suffering and incidental detriment accruing therefrom. The injury was rather a severe one, the break being below the knee, and both tibia and fibula being fractured in rather an unusual manner, so that pieces of bone had to be cut away to make them unite. Plaintiff was taken for first treatment to a hospital in Nagasaki, where an X-ray was taken and the fracture imperfectly reduced, the bones not being brought in apposition. He was then taken aboard the steamer and brought home in charge of the ship's doctor, no resetting of the limb being had on the voyage. While the evidence in this regard does not establish malpractice in his early treatment, the result was such that on arrival in San Francisco, a partial knitting having taken place, he had to be taken to a hospital and the bones rebroken to secure more perfect union, this resulting in a delayed recovery. Plaintiff was in the hospital for some ten days, and thereafter in care of a nurse at his home for some three or four months, after which he was required to go on crutches or with a cane, unfitting him for some considerable time from resuming his calling as barber because of his inability to stand on his feet without pain, although he has been able for some time to run a car for hire. Defendant did not assume or pay any of the attendant expenses resulting from plaintiff's injury, as medical treatment, nurse hire, appliances or drugs, but the same have been borne by the plaintiff. These expenses, from the items in evidence, making reasonable allowance for some indefiniteness, will, I think, be covered by the sum of $700; and, in addition to this, compensation for plaintiff's suffering and loss of time, during which he was incapacitated, at least to a partial extent, for earning a living, may, I think, very reasonably be fixed at a like sum.

Judgment may accordingly be entered for the plaintiff in the sum of $1,400 and his costs.

UNITED STATES v. FRICK et al.

(District Court, N. D. California, Second Division. July 30, 1917.)

No. 15388.

1. PUBLIC LANDS ⟸120—AVOIDANCE OF PATENT—FRAUD.
It being as essential to purchase of public land as timber land that it be unoccupied and unclaimed and free from improvements by others as that it be more valuable for its timber than for its mineral deposits, all of which the statute requires to be stated and shown, fraudulent statements as to the former in the application and before the Land Office are ground for avoidance of the patent, even though the land be more valuable for its timber than its mineral deposits.

2. PUBLIC LANDS ⟸120—AVOIDING PATENT—FRAUD—EVIDENCE.
Evidence in suit to avoid patent for public land under application to purchase as timber land *held* to show fraud in procurement.

3. PUBLIC LANDS ⟸120—AVOIDANCE OF PATENT—GENERAL RELIEF.
Under the prayer of the bill for general relief in a suit to avoid for fraud a patent for public lands, defendant having passed the land to a bona fide purchaser, money damages may be decreed.

4. PUBLIC LANDS ⟸120—AVOIDANCE OF PATENT—DAMAGES.
Defendant in a suit to avoid a patent to public lands obtained by fraud having passed title to a bona fide purchaser, recovery may be had of him of the amount he sold it for; Act March 2, 1896, c. 39, 29 Stat. 42, 43 (Comp. St. 1916, §§ 4901–4903), providing for recovery only of the amount for which it was sold by the government where title has passed to a bona fide purchaser, applying only to case of a patent issuing erroneously, but without fraud.

In Equity. Suit by the United States against W. P. Frick and another. Decree for complainant.

J. W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal.

Jordan & Brann and Richard M. Lyman, all of San Francisco, Cal., for defendants.

VAN FLEET, District Judge. This is a bill by the United States seeking equitable relief on the ground of fraud, alleged to have been committed in the procurement of a patent to certain public lands therein described, under an application to purchase them as timber lands, the substance of the material averments being that the application was made by one Robertson, from whom the defendant Frick purchased; that the fraud consisted in false representations and statements made in the sworn application and in testimony given before the Land Office by both Robertson and Frick—the latter appearing as a witness therein, on behalf of the applicant—as to the character and state of the lands, in this, that it was represented both in the application and in a nonmineral affidavit filed therewith and in the testimony given on the hearing that the applicant and witnesses had personally examined the land, that it was unfit for cultivation, but was valuable chiefly for its timber, that it was uninhabited and unoccupied, and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal,

and that there were no mining or other improvements thereon; that these statements and representations were false, and known to the applicant and said Frick, when made, to be false, and were fraudulently made, solely for the purpose of deceiving the land officers of the United States and inducing the issuance of the patent; that it was the fact, and was known to both Robertson and Frick, that the land had always been more valuable for mineral than for timber, and that for a long time prior to and at the time of the entry of Robertson and the issuance of the patent, and at the time of the purchase of the land from Robertson by Frick, there were located on the land gold quartz and placer mining claims owned by one L. Parker, of Grizzly Flat, the location of which appeared upon the records of the recorder of El Dorado county, wherein the land was situate, and that on a portion of said lands there were several thousand dollars worth of mining improvements owned by said Parker; that these facts were well known to the applicant, Robertson, at the time he made his application and procured his patent, and were fully known to the defendant Frick at the time he gave his testimony and when he made the purchase of the lands. It is alleged that after the transfer of the lands to Frick Robertson died, and that Frick has since held the title to said lands and claims the same and the whole thereof, and that the said claim and the patent constitute a cloud on plaintiff's title.

The primary relief asked is that the patent be held void and set aside, and the land restored to the public domain, but coupled therewith is a general prayer that the complainant have such other or further relief as may accord with the principles of equity.

Frick alone answered (the fictitious defendants having been dropped out), denying the averments of fact counted upon as constituting fraud, and alleging that since prior to the commencement of the action he had ceased to have any interest in the land.

The record disclosed that Robertson's application was filed August 23, 1907; that his final proof was made October 28, 1907; and that on November 7, 1907, he made a conveyance of the land to Frick, the deed not being placed of record, however, until some time after the patent issued, which was on April 6, 1908. It was disclosed at the trial that some time in 1911, the precise date of which does not appear, defendant Frick had deeded the land to the California Door Company, and that this conveyance was placed of record a short time prior to the filing of the bill herein, which was on October 27, 1911; that this fact came to the attention of the government's attorneys for the first time shortly before the trial, but, investigation satisfying them that the door company was a bona fide purchaser for value, they refrained from making it a party, proceeding instead upon the theory that in the event fraud on the part of defendant Frick was shown, vitiating the title as to him, the government would be entitled, under its prayer for general relief, to recover from him the value of the land in lieu of a cancellation of the patent.

The case accordingly proceeded upon this theory, and the main questions presented for consideration are: (1) Does the evidence sustain the charge of fraud as against the defendant Frick? and, if so,

(2) Is the government entitled, in this form of action, to recover the value of the land in money damages as compensation for the fraud through which it has been deprived of its land?

[1] The defendant contends that the only material consideration involved in the question of fraud is whether the land was shown to be more valuable as mineral land than for its timber; that, if shown to be chiefly valuable as timber land, which it is claimed the evidence establishes, then the other facts charged as elements of fraud become immaterial, and the suit must fail. But I cannot accede to the correctness of this contention, either in the premise or the conclusion. In the first place, I am unable to concur in the view that the evidence shows with any certainty that the land is more valuable for its timber than for its mineral deposits; but, if it were otherwise, there are further elements of fraud charged which may no more be ignored than the alleged misrepresentations as to the character of the land. To be open to application and purchase by Robertson, it was quite as essential under the law that the land should be unoccupied and unclaimed and free from improvements by others as that it should be of the character represented in the application; the statute requires these several facts to be stated and shown, and it does not undertake to make any distinction as to their materiality to constitute a valid application for purchase from the government.

In this view, what are the facts as to the alleged fraud? As to the contents of Robertson's application and the nature of the testimony given by him and his witnesses before the Land Office, including the defendant Frick, there is no controversy. Their statements were to the effect that they were intimately acquainted with the land applied for and every part of it, and had been over the property and made a careful examination of it; that the land was not and would not be fit for cultivation; that it was steep, rugged, rocky, and of thin soil; that it was wholly unoccupied and unimproved; that there were no indications whatever of any salines, deposits of gold, silver, cinnabar, copper, or coal thereon, and that the land was chiefly valuable for its timber; that no person had any claim, interest or right in said land or the timber thereon other than the applicant himself.

The evidence for plaintiff tended to show that the land in question is located in a highly mineralized zone where much mining for the precious metals is carried on and has been for many years, and that the land in question has always been well known throughout the community as mineral land; that for several years prior to Robertson's application—some seven or eight—one Parker had both quartz and placer mining claims on a part of the land, which he had purchased from a predecessor and for which he had paid a consideration of some $1,200; his claims were of record in the recorder's office of the county wherein the land is located; he had a substantial dwelling on the land, where he lived with his family; that he prosecuted his mining operations on these claims, from which he had made a living for himself and family from the gold extracted therefrom; that there were at least two well-developed veins or ledges on the property; that his mining operations included several hundred feet of trenches from 10 to 20 feet deep and from 25 to 100 feet or more wide, and that leading

to his claims there was over a mile of ditches used to convey water to them; that these operations and his occupation as a miner were well known, and that they had continued down to a period coincident with, if not later than, the filing of Robertson's application; that, while Parker at about that time was absent by reason of sickness, his son was in possession for him; and that they were negotiating for the sale of their rights in the property, which they held at a value of $10,000.

In this connection Mrs. Parker testified that she handled the gold that was taken out, and that on one occasion in but two days washing they took out over $340; that she thought this was after the earthquake or about that time; that they always made a good living from their mining.

The evidence further tended to show that the occupation of the land by Parker and his mining operations were well known to defendant Frick. One Mauk testified that he and Frick were partners in the mining business during at least a part of this period; that they discussed the amount paid by Parker for his mine or claims on the land in question; and that he and Frick rented a monitor to Parker for use in working the mine, Frick being present when the monitor was loaded to be carried to the mine. Mauk further testified that he had been in the mining business about nine years, and that this vicinity was distinctly a mineral country, and that he had operated three or four mines within it adjacent to this property, and found it profitable.

Mr. Kingsbury, the mineral expert for the government, who made a careful examination of the land on October 3 and 4, 1910, testified that there was evidence of a good deal of work done upon the land; that cabins had been built, excavations 100 feet wide and 250 feet long, a couple of shafts dug, and trenches and ditches; that he made an examination of the ground as to its mineral qualities, and found a number of "colors" of gold, and was of opinion from his explorations that there were sufficient indications for any one to make a mine pay. This was the substance of the evidence in behalf of the government.

As opposed to this, the evidence on behalf of the defendant was chiefly of a negative character. It was to the effect that the witnesses had examined the land or were more or less familiar with it; that they did not discover any improvements thereon of any present value; that while there were evidences that mining had at some previous period been prosecuted to some extent on one part of the land, there was no work of value or any indications of present occupation, and that they thought the place abandoned. Some of them testified that they saw no cabin or dwelling or evidence of habitation. One or two stated that they saw a cabin, but did not investigate as to its being inhabited, as they thought it deserted.

As to the character and nature of the land, the witness Remick testified that he cruised the timber for the defendant and found there were about 5,000,000 feet; he testified at first that he did not know as to its value, but later, on being recalled, stated his judgment that the timber was worth $10 an acre. His evidence as to the mineral character or value of the land was so entirely of a hearsay character that the court was required to strike it out. The defendant Frick, testify-

ing in his own behalf, stated that he knew positively the land was not mineral land; that he was thoroughly familiar with mining and mining property and had been over this land a number of times; had, in fact, surveyed it; that there were no paying mines in the country; that he considered the land worth about $5 an acre as timber land; that as mineral land, if it ever had any value, it was entirely worked out; that he had mined himself in that vicinity with Mr. Mauk, but that they did not make any money, and that he had satisfied himself that there was no mineral in the district in paying quantities. While he testified that he was familiar with the property, he stated that he did not know that there was a dwelling or house upon it, or that Mr. Parker was living there. He could not recall what he had paid Robertson for the property, but thought that it was about $5 an acre; nor could he recall how long after Robertson procured his certificate that he had made the purchase. He said it was customary for him to buy lands on receivers' receipts, when the man had made his final proof; that he had bought a number of other pieces of timber land in the same vicinity about the same time.

Mr. English, mineral expert called by defendant, testified that he made an examination of the property covering a period of some 12 hours; that he came to the conclusion from his examination that it was of no real value as mineral land, and that in his judgment the Parkers could not have made a living upon it from mining; that he found no evidences of mineral or gold deposits such as to warrant the belief that values were to be found. This is the substance of the defendant's evidence.

There was in addition some evidence and circumstances from which it might be deduced, if necessary, that the application of Robertson was really made in the interest of Frick, and not for his own use and benefit, but for speculative purposes of sale, which the statute forbids, and would render it for that reason void; but, as that aspect is not specially pressed by the government, the question need not be pursued to a conclusion.

[2] It is enough to say that, taking the evidence as a whole, I am fully satisfied that it sufficiently sustains the allegations of fraud counted upon. Very clearly the case is not within the doctrine of the cases relied upon by the defendant from the Land Department holding that the mere existence of evidences of previous mining operations upon the land will not preclude its purchase as timber or agricultural land, where it appears that such mining operations have been abandoned, and that the land is in fact not valuable for the purpose. Here the evidence of any purpose by Parker to abandon the mining rights previously secured and being enjoyed by him is lacking; and the evidence of the mineral character of the land is positive. The land was therefore not open to purchase as timber land; and the procuring of the patent under the circumstances shown was not only a wrong perpetrated upon Parker's possessory rights, but, as well, a fraud upon the government, of which Frick is shown to have been fully aware.

[3] The land having passed to an innocent purchaser, unaffected by the fraud, so that the patent may not be avoided, may the government, in this action, have satisfaction in money damages for its value? De-

fendant contends that it may not; that the suit must fail, and the government, if it desires to pursue its rights further, must resort to an action at law for deceit, wherein defendant will be entitled to a trial of the issues by a jury. Under ordinary circumstances this would be true, but I do not regard the rule as obtaining in an instance of the present character. The case falls, I think, within the well-recognized exception that, where the facts are such as primarily to give equity jurisdiction of the controversy, and that jurisdiction has obtained, if an act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court will retain jurisdiction to award money damages or give such other relief as may be just in the premises.

Such a case was Cooper v. United States, 220 Fed. 867, 136 C. C. A. 497 (decided by the Circuit Court of Appeals of this circuit), which in the circumstances is not to be readily distinguished from the present case. There the transfer of the land was made after suit brought, but before service, and the bill was amended to bring in the grantee as a party. It appearing at the trial, however, that the latter was a bona fide purchaser for value, and the fraud being established, the lower court awarded a decree against the party charged for the value of the land in damages; and the appellate court held that this relief, being within the issues, was properly awarded under the general prayer.

Another similar case is that of Johnson v. Carter, 143 Iowa, 100, 120 N. W. 322, where the court, in response to a similar objection, say:

"It would be a strange perversion of the spirit which pervades all rules of equity if, when a party who has been defrauded of his title to land brings the person who defrauded him into a court of equity, upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the title to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages."

So in United States v. Debell et al., 227 Fed. 760, 764, 142 C. C. A. 284, 288, it is said:

"While it is true that a complainant may not, in a suit in equity, join a cause of action in equity and a cause of action at law, and that where his cause of action in equity fails on the proof he cannot recover damages or moneys that he might have recovered at law, it is also true that where the proof sustains the cause of action in equity, but the defendant has by his course of conduct rendered the appropriate relief first sought ineffective, the chancellor may require him to make compensation for his prevention of that relief. Where the primary relief sought is the restoration of property, and the defendant has placed it beyond his and the court's reach, the court may require him to pay the value of the property, or the proceeds he received from it, because the right to this relief inheres in and grows out of the equitable cause of action which the plaintiff has established. * * * If, therefore, the proof established the plaintiff's cause of action in equity against the defendant for the restoration of the land, he cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court."

Moreover, in this instance there would be little justice in requiring the plaintiff to bring an action at law. The defendant was made aware early in the trial of the theory upon which the government was pro-

ceeding as to the relief sought, and made no motion to dismiss or any suggestion as to a desire for a jury trial, but proceeded without objection to a submission of his evidence. Under the circumstances I think his present contention comes too late.

Within these principles I think the government entitled to recover under its prayer for general relief, the value of the land of which it has been deprived through defendant's fraud.

[4] The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the government, $2.50 per acre, and in that regard relies upon the provisions of the act of March 2, 1896 (29 Stat. at L. 42, 43), entitled, "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes;" but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent has issued erroneously. It does not affect cases proceeding like the present, on the theory of fraud in the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the government is not to be permitted to benefit by his misdoing; that, having deprived the government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived. That was, as will be seen, the measure of damages sustained by the Circuit Court of Appeals in Cooper v. United States, supra, and is implicitly recognized as the proper measure in the other cases cited.

Under this rule, it appearing that the defendant has sold the land in question, which he acquired in wrong of the government's rights, for the price of $32.50 per acre, I am of opinion that that figure should be the measure of the government's recovery. Let a decree be entered accordingly.

SUN CO. v. PHILADELPHIA TRANSPORTATION & LIGHTERAGE CO. et al.

GRAY v. SUN CO.

(District Court, E. D. Pennsylvania. July 9, 1917.)

Nos. 11, of 1910, and 12, of 1911.

1. SHIPPING ⊂=42—HIRING OF BARGE—WARRANTY OF SEAWORTHINESS.
Where respondent, as owner, on request of a third party, furnished a barge for the carrier of merchandise for libelant at a stated hire per day, there was the same implied warranty of seaworthiness as though the parties had dealt with each other directly.

2. SHIPPING ⊂=121(1)—UNSEAWORTHINESS—ASSUMPTION OF RISK BY SHIPPER.
The existence of an implied warranty of seaworthiness does not necessarily exclude the application of the doctrine of assumption of risk of unseaworthiness by a shipper, and in such case, where the unseaworthiness and the grave danger of loss of cargo are palpable and known to him, if

he allows the loading to proceed and the cargo to be taken by the vessel in her unfit condition, he assumes the risk of loss through such unseaworthiness.

8. SHIPPING ⇐121(1)—UNSEAWORTHINESS—INJURY TO VESSEL IN DOCK.
Respondent furnished a barge to carry merchandise for libelant from its dock to a steamship. On arrival at the dock, the master was told by libelant's representative that there was plenty of water for it to lie safely; but during the loading one corner settled upon an obstruction on the bottom, by which the barge was strained and commenced to leak to such extent as to be clearly unseaworthy before the loading was completed, and on being towed to the steamship sank before it could be unloaded. *Held*, that libelant not only assumed the risk to the cargo, but was liable for the damage caused by the sinking.

In Admiralty. Suit by the Sun Company against the Philadelphia Transportation & Lighterage Company and Jesse Gray, with cross-libel by Jesse Gray. Decree for respondent Gray on cross-libel.

Francis S. McIlhenny, of Philadelphia, Pa., and Convers & Kirlin, of New York City, for libelant.

Francis C. Adler and John F. Lewis, both of Philadelphia, Pa., for respondent Philadelphia Transportation & Lighterage Co.

Howard M. Long, of Philadelphia, Pa., for respondent Gray.

BRADFORD, District Judge. In this case a libel in personam has been filed by the Sun Company, owner of a quantity of oil in barrels, against the Philadelphia Transportation & Lighterage Company, hereinafter referred to as the transportation company, and Jesse Gray, owner of the barge Jesse Gray, hereinafter referred to as the barge, resulting from the loss of a number of barrels of oil caused by the sinking of the barge. A cross-libel in the form of an answer has been filed by Gray against the Sun Company to recover damages for injuries to the barge caused, as alleged, by the negligence of that company. The libel alleges in substance, among other things, that on or about November 2, 1909, the transportation company contracted with the libelant to furnish a barge at the rate of $8 per day to carry 1,000 barrels of oil from the libelant's works at Marcus Hook to the steamship Friesland, then loading at pier No. 53, south wharves, Philadelphia; that on or about November 4, 1909, the transportation company tendered the barge to the libelant under the above mentioned contract at the libelant's pier at Marcus Hook as ready to receive the cargo of oil for carriage as above set forth; that the barge was and continued under the command of Captain Henderson, who had been placed in charge of her by Gray, her owner; that on or about the last mentioned day the barge received from the libelant at its said pier 735 barrels of oil; that when this number of barrels had been loaded on her her captain refused to receive any more cargo, stating that to load any more barrels would make the barge unseaworthy; that the barge was then towed with the 735 barrels of oil on board to pier No. 53, where she arrived November 4, 1909, about 5 p. m.; that about 6:20 p. m. on the same day she sank with her cargo; that by reason of her sinking a large quantity of the oil was lost; that a certain amount of oil "mixed

with water" was recovered; that labor and services and the use of materials were necessitated in salving the oil from the water and in the towage and temporary storage of the barrels containing the same; that the sinking of the barge was due to her unseaworthiness without fault on the part of the libelant; that at the time the barge was tendered to the libelant and the oil was loaded upon her she was unseaworthy for the receipt and carriage of the cargo contracted for, and for the cargo actually received on board; and that the unseaworthy condition of the barge was not at the time known to the libelant.

The transportation company in its answer to the libel of the Sun Company, alleges in substance, among other things, that no sum whatever is due by it to the libelant by reason of the matters stated in the libel; that on the afternoon of November 2, 1909, the transportation company was requested by the libelant to furnish a barge for the purpose of carrying a cargo of oil in barrels from Marcus Hook to Philadelphia, and was informed by the transportation company that it had no barges or lighters for hire, but that Gray had a barge named the "Jesse Gray" that had been under charter to the transportation company, which the libelant could probably hire to carry the cargo of oil; that at the libelant's request the transportation company communicated with Gray and hired the barge for the libelant at the price of $8 per day; that the barge was tight, staunch and strong and in all respects seaworthy and fit to carry the cargo of oil; that she proceeded to Marcus Hook on the evening of November 3, 1909, arriving there about 9:15 the same evening and on the morning of November 4, 1909, commenced to load the cargo of oil in barrels; that upon the arrival of the barge at the libelant's wharf her master was informed by the libelant's representative that the dock contained plenty of water and was perfectly safe for the barge to lie at to be loaded; that subsequently by reason of the unsafe condition of the dock the barge became twisted and strained, and this condition was called to the attention of libelant's representative, but the libelant proceeded with the loading and when the same was completed the barge was taken in tow by the libelant's tug Minerva on the afternoon of November 4, 1909, and proceeded to Philadelphia where she arrived about 6 p. m. of the same day; that shortly after leaving the libelant's wharf at Marcus Hook the barge began to leak, due to the injury she received by reason of the unsafe condition of the libelant's dock, and her master requested the master of the Minerva to put her pump into the barge to pump her out, as she was leaking so badly that it was necessary to do something to prevent her sinking, but the master of the barge was informed by the captain of the Minerva that her pump was not in working order, that in order to work said pump it would be necessary to stop the Minerva, and that the latter could not run while they were pumping the barge out; that when the Minerva and the barge reached the vicinity of the Horseshoe in the Delaware river, the Minerva was relieved by the tug Cahill, and the latter then proceeded to tow the barge up the river to her destination; that when the barge arrived at pier 53 she had gone down so far that her deck was within ten inches of the water, and the Cahill's siphon at the request of the master of the barge was put in her

but was unable to relieve her from water and she sank at the dock and in consequence thereof a portion of her cargo was lost; and that the sinking of the barge and the loss of her cargo were not due to any unseaworthiness of the barge, but to the fault of the libelant in not furnishing a proper and safe dock for her to load at and in not furnishing a tug in a seaworthy condition and properly equipped to tow her to her destination.

Gray filed an answer to the libel of the Sun Company, intended to serve also as a cross-libel, in which he alleges in substance, among other things, that Captain Henderson had not been placed in charge of the barge by him, but on the contrary was placed in such charge by the transportation company; that no sum of money whatever is due by him to the libelant; that pursuant to an agreement on or about November 2, 1909, between the libelant and the transportation company the barge while under the command of Captain Henderson and under the control of the transportation company, being tight, staunch and strong, and in all respects seaworthy and fit to carry the cargo of oil, afterward loaded upon her, proceeded to Marcus Hook, and on the morning of November 4, 1909, the libelant commenced to load a cargo of oil in barrels upon her; that upon the arrival of the barge at the libelant's wharf her master was informed by the representative or agent of the libelant that the dock contained plenty of water and was perfectly safe for her to lay at and be loaded with said cargo; that subsequently a corner of the barge became caught on the bottom; that the loading of the cargo was completed and the barge thereupon left Marcus Hook in tow of the libelant's tug Minerva in the afternoon of November 4, 1909, and proceeded to Philadelphia where she arrived about 6 p. m. of the same day; that shortly after leaving the libelant's wharf the barge began to leak, due to the fact that she had become strained and twisted while lying ashore at libelant's dock by reason of its unsafe condition; that the fact of her having been ashore had been called to the attention of the libelant's representative or agent prior to the completion of the loading of her cargo; that her master thereupon requested the master of the tug Minerva to put the tug's pump into the barge to pump her out as she was leaking so badly that it was necessary to do something to prevent her sinking, but he was informed by the captain of the Minerva that her pump was not in working order and that in order to work it it would be necessary to stop the Minerva, as the tug could not run while pumping the barge out; that when the Minerva and the barge reached the vicinity of the Horseshoe in the Delaware river the Minerva was relieved by the tug Cahill and that tug proceeded with the barge in tow up the river to her destination; that when the barge arrived at pier 53 she had gone down so far that her deck was within ten inches of the water, and the Cahill's siphon at the request of the master of the barge was put in her, but was unable to relieve her from the water and she sank at the dock and in consequence of such sinking a portion of the cargo was lost; that the sinking of the barge and the loss of the cargo were not due to any unseaworthiness in her nor to any fault on the part of

Gray, but were solely due to the fault of the libelant in not furnishing to the barge a proper place to be loaded at and in not furnishing a tug in a seaworthy condition and properly equipped to tow her to her destination; and that by reason of the stranding of the barge at the libelant's dock and the twisting and straining of her as a result thereof she sank and was considerably damaged.

The libelant in its answer to the cross-libel of Gray takes issue on the material allegations therein contained touching the cause of and circumstances preceding and attending the alleged injury to the barge and her sinking and the loss of oil.

On most of the material and disputed points there is considerable conflict among the witnesses, and much care has been required to ascertain where the preponderance of the evidence, direct and circumstantial, determinative of this suit as a civil cause, is to be found. I shall not undertake in this opinion to discuss in extenso the evidence, but shall rather state controlling conclusions, only briefly referring to the evidence supporting them.

One of the principal points of dispute in the case is whether the transportation company on its own account by agreement with the libelant chartered the barge from Gray and undertook the carriage of the oil for the libelant, on the one hand, or on the other, procured the barge from Gray for the libelant merely as an accommodation or act of friendship to it and without entering into any agreement or incurring any responsibility for the carriage of the oil. On this subject there is much controversy. I find as a fact, established by what I believe to be a clear preponderance of the evidence, that what the transportation company did in the matter of procuring the barge was not done on its own account or for any pecuniary profit or advantage to be derived from it, but was solely an act of friendship for the accommodation of the libelant, and that there was no express or implied warranty of seaworthiness of the barge by the former company. It follows that the libel must be dismissed with costs as to the transportation company.

[1] Gray, the owner of the barge, did not deal directly with the libelant for her employment in the carriage of the oil from Marcus Hook to pier No. 53, and he contends that, therefore, there was no implied warranty to the libelant of her seaworthiness for the contemplated service. This position is untenable. He knew that the barge was to be employed by the libelant in the carriage of the oil and that he was to receive $8 per day as her hire to be paid by it. When he furnished the barge for that purpose there was an implied warranty that she was reasonably fit for that service, and that warranty in the absence of special circumstances would run and enure to the benefit of the shipper. Under the maxim "qui facit per alium facit per se," the arrangement had by Gray with the transportation company for the use by the libelant of the barge placed him in the same position with respect to an implied warranty as if he had dealt directly with the libelant.

[2] The existence of an implied warranty of seaworthiness does not, I think, necessarily exclude the application of the doctrine of

assumption of risk from unseaworthiness by a shipper and owner of merchandise. The implied warranty is a creation or implication of the law for the protection of those who in good faith and without knowledge or notice of unseaworthiness entrust goods or merchandise to a vessel for carriage. As a general rule and unless under special circumstances responsibility for the safe condition of the vessel rests upon her owner and not upon the shipper. But in the case of a mere implied warranty, where the unseaworthiness of the vessel and the grave danger of loss of the cargo are palpable, unmistakable and present to the mind of the shipper who, having power to prevent it, allows the loading of the cargo to proceed and to depart on the vessel in her unfit condition, he assumes the risk of loss through such unseaworthiness. For the law implies the warranty, not to encourage recklessness or bad faith on the part of the shipper, but for his protection while acting in good faith and in reliance, though mistaken or even careless, upon the sufficiency of the vessel for the contemplated voyage. It is urged that it is unwise and oppressive to impose upon the shipper the duty of passing judgment upon the sufficiency or insufficiency of the vessel at the risk of litigation and damages should it be judicially decided that he had without sufficient cause prevented the carriage of the cargo. This consideration is not without weight, and serves to show that even in the case of a mere implied warranty of seaworthiness, the shipper, unless under special circumstances as above mentioned, cannot be held to assume the risk of loss from unseaworthiness. But if the vessel from any cause has gotten into such faulty condition as reasonably and unavoidably to impress the shipper possessing ordinary prudence, with a sense of her unseaworthiness, under the principles of law as well as of equity the vessel owner should be estopped from holding the shipper liable in damages for preventing the carriage of the intended cargo. In The Scandinavia (D. C.) 156 Fed. 403, it was held that the doctrine of assumption of risk is applied in admiralty as fully as in other branches of jurisprudence, notwithstanding the rule that damages will in some cases of concurrent negligence be divided. That case, it is true, involved the question of liability for personal injuries. But I perceive no distinction in principle, so far as the applicability of the doctrine of assumption of risk is concerned, between a question of liability for personal injuries and a question of liability for the loss or destruction of one's goods. In that case it was held that the negligence of the libelant in using a manifestly unsafe ladder provided by the vessel was the "immediate and proximate cause of the injury." So in this case it was not the unseaworthiness of the barge, but the action of the libelant in permitting her to proceed with the barrels of oil, in her palpably unseaworthy condition, on her voyage from Marcus Hook to Philadelphia, that constituted the immediate and proximate cause of the injury. It abundantly appears from the evidence that during the loading of the barge, which continued from about 8 o'clock in the morning until after 1 o'clock in the afternoon, and several hours before her departure for Philadelphia, her unseaworthiness was recognized by those representing the libelant and by others actually engaged in the.

loading or carriage of the oil, as fraught with extreme peril to the cargo—peril so manifest and grave as to involve assumption of risk by the libelant through persistence in the completion of the loading and in the carriage of the cargo on her.

[3] But, further, there was no breach by Gray of any implied warranty of unseaworthiness, for the evidence as a whole does not show that the barge was in an unseaworthy condition at the time she was tendered to and accepted by the libelant.

The loss of oil complained of was indisputably the result of the leaking and sinking of the barge, without any stress of weather to account for it. But there is much controversy as to the cause or causes to which her unseaworthy condition was attributable. Various theories of greater or less plausibility have been advanced to explain her defective condition during and after the loading of the cargo. It is urged by Gray and the transportation company that the libelant's dock was an unsafe place in which to load the barge, and much evidence has been directed to the presence within about a couple of feet from the bulkhead of a submerged end of a pile or other hidden obstruction upon the top of which it has been contended a corner of the barge settled with the falling tide and process of loading, thereby subjecting her to undue strain and causing her to spring a leak through the opening of her seams or otherwise. On the evidence it is not altogether clear that any corner of the barge was at any time, prior to or during the loading, close enough to the bulkhead to rest upon or over or touch the pile end or other hidden obstruction referred to. But it is quite clear that before the completion of the loading of the barge one of her corners did descend upon and become engaged with and remain suspended from some submerged obstruction of hard and unyielding nature whereby she was strained, twisted and caused to leak. It has been contended that before and at the time she was taken to Marcus Hook to receive the cargo of oil she was unseaworthy for the carriage of the cargo of oil, in that she was generally unsound and weak. But the evidence, as above stated, does not support this contention. It was the duty of the libelant as owner to keep the bottom of the dock free from hidden dangers whether consisting of submerged piles, rocks or other obstructions, calculated to cause damage to vessels occupying the dock in the course of business at its request. The master of the barge had a right, in the absence of knowledge on his part to the contrary, to assume that the berth assigned to her by the libelant for the loading of the cargo was suitable and safe for that purpose. Indeed, it appears from the evidence that on the arrival of the barge at the dock her master was informed by the representative or agent of the libelant that the dock contained plenty of water and was perfectly safe for her to lie in and be loaded with the intended cargo. This assurance, amounting to a guaranty, brings this case within the ruling of the court in Merritt v. Sprague (D. C.) 191 Fed. 627, where there was a recovery for injury to a vessel in the dock, the master of the vessel being unacquainted with the dangerous character of the bottom and the charterer having guaranteed a safe and suitable berth for loading and discharging. The libelant did not perform its duty to keep

the bottom of the dock in safe and proper condition, and the injury to the barge being directly attributable to such omission, the libelant must be held liable to Gray as her owner to the extent of such damage; there having been no assumption of risk nor any contributory negligence on the part of the master of the barge with respect to such damage.

A decree in accordance with this opinion may be prepared and submitted.

DOTY et al. v. MASON.

(District Court, S. D. Florida. August 27, 1917.)

No. 1629.

1. BANKRUPTCY ⟸76(1)—CLAIMS—LIABILITY AS INDORSER.
Presentment for payment, dishonor, and notice fix the liability of the indorser of a note, and the payee may then proceed at his option against that of the maker or indorser; hence the payee may, in such case, file an involuntary petition in bankruptcy against the indorser based upon his claim arising on the note.

2. BANKRUPTCY ⟸92—PETITION—CLAIMS.
The claim of a petitioner in bankruptcy against the alleged bankrupt, based on the bankrupt's indorsement of a note, will not be stricken from the petition, because of the pendency in the state court of a suit between the petitioner and indorsers in relation to the note.

3. BANKRUPTCY ⟸76(3)—GENERAL ASSIGNMENT—CONSENT.
A creditor who assents to the debtor's general assignment for the benefit of creditors cannot thereafter urge such assignment as an act of bankruptcy, but a creditor's knowledge and assent to the execution of an assignment does not. where a subsequent assignment was necessary to give it effect as a general assignment, prevent the creditor from urging that the last assignment was an act of bankruptcy.

4. BANKRUPTCY ⟸81(3)—PETITION—SUFFICIENCY.
The sufficiency of a petition in involuntary bankruptcy, in respect to the description of the petitioner's claim, must be tested by the rules which would govern a declaration or a bill in equity, in an action or suit to enforce such claims.

5. BANKRUPTCY ⟸77—JURISDICTION—PROVABLE CLAIMS.
The existence of provable claims to the requisite amount is essential to the bankruptcy court's jurisdiction.

6. BANKRUPTCY ⟸81(3)—PETITION—CLAIMS.
The existence of debts or claims to the requisite amount being jurisdictional, the existence of such debts or claims should be alleged with sufficient definiteness for the court to find from the petition in bankruptcy the jurisdictional fact.

7. BANKRUPTCY ⟸81(3)—PETITION—SUFFICIENCY.
In view of the Florida decisions that bills of particulars, attached to pleadings and not made a part of such pleadings by apt words, cannot be reached by demurrer, notes and accounts attached to a petition in bankruptcy, filed in the District Court for Florida, do not become a part thereof, so that upon attack of the petition by motion to dismiss, they cannot be considered.

8. BANKRUPTCY ⟸92—PETITION—DISMISSAL.
A petition in bankruptcy, to which were attached exhibits which might readily have been made a part of the petition, defective because of such failure, will not be dismissed without opportunity to amend.

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9. BANKRUPTCY ⊜92—PETITION—EXHIBITS.
Accounts attached to a petition in bankruptcy cannot be reached by a motion to dismiss in the nature of a demurrer, unless they were made part of the petition by proper reference.

10. BANKRUPTCY ⊜92—CLAIMS—DISMISSAL.
Where petition in bankruptcy alleged that petitioners rendered services to bankrupt, the fact that accounts attached to the petition as exhibits showed that the services were rendered to the bankrupt and others furnishes no ground for motion to strike such claims.

11. PERPETUITIES ⊜6(11)—RULE AGAINST—CONVEYANCE IN TRUST.
An agreement or declaration of trust, whereby trustees acknowledged that they held the property for the benefit of the grantor's mortgage creditors, his individual creditors, and for the holders of certificates of shares in an unincorporated association, provided for issuance of certificates to the grantor and others, and for the declaration of dividends, etc., and authorized the trustees to borrow money and dispose of any or all of the trust property. The agreement provided that the trust should continue for 27 years. *Held*, that conveyances and assignments made to give effect to the trust did not violate the rule against perpetuities forbidding property to be withdrawn from sale for a period longer than a life or lives in being, and 21 years thereafter; the rule being directed against the withdrawal of land from sale, and the trust agreement not withdrawing such property from sale.

12. BANKRUPTCY ⊜76(3)—ASSIGNMENTS—AMENDMENTS OF ASSIGNMENTS.
Where creditors failed to attack, as a general assignment, the original conveyance and assignment within four months thereafter, the fact that the grantor subsequently executed a second instrument, which shortened the period of the trust, and in some respects enlarged the trustees' powers, will not warrant the creditor in urging that the second instrument constituted an act of bankruptcy; it being a mere amendment of the first.

In Bankruptcy. Involuntary petition by Clarence T. Doty and others against Henry Mason, otherwise known as Harry Mason. On motion to dismiss the petition. Dismissed.

George M. Powell and Charles E. Pelot, both of Jacksonville, Fla. (F. L. Dancy, of Jacksonville, Fla., on the brief), for petitioners.
Kay, Adams & Ragland, of Jacksonville, Fla., for defendant.

CALL, District Judge. On October 6, 1916, an involuntary petition in bankruptcy was filed by Doty and others against Harry (Henry) Mason, in which, after alleging the jurisdictional facts, the claims of petitioners were stated as follows:

(a) Doty's claim, based on a "promissory note, a true copy of which is hereto attached as Exhibit A."
(b) Collins' claim is for balance due for work and services rendered to Mason, "as per statement hereto attached as Exhibit B."
(c) Powell & Pelot's claim is due for services performed for Mason and disbursements, "in accordance with the attached statement of account, Exhibit C."

The act of bankruptcy is alleged as the making of a general assignment for the benefit of creditors by Mason on August 1, 1916. Copies of the instruments relied on as constituting the assignment for the benefit of creditors are attached to and by apt words made a part of the petition.

The bankrupt to this petition files four motions to dismiss, three of said motions being directed to the claims of petitioners as set out in clauses "a," "b," and "c" of the petition.

[1] The first ground of the motion to strike Doty's claim is that it appears from the petition and exhibit that the bankrupt's liability is that of indorser, and no showing that the petitioner has pursued his remedy against the maker or other indorser, or that either or both are insolvent.

The case of In re Bowers (D. C.) 215 Fed. 617, decided by Judge Newman, does not, in my opinion, sustain the contention of counsel that the payee of a note cannot petition an indorser in bankruptcy without first showing either that the other indorser and maker, one or both, are insolvent, or that he has exhausted his remedies against them. The petition alleges presentment for payment, dishonor, and notice. This is sufficient to fix the liability of the indorser, and the payee may then proceed at his option against either the maker or any one of the indorsers he may elect. The Bowers Case held that liabilities as indorser would not be taken into consideration in arriving at solvency vel non in a case where the makers were shown to be solvent and able to pay the obligation. And this, I think, was correct.

The above disposes of the second ground of the motion.

[2, 3] The third ground is based upon a suit claimed to be pending in the state court between Doty and the indorsers in relation to this note. This is not a reason, in my judgment, to strike the claim of Doty from the petition. The two motions to strike claims "b" and "c" of the petition rest virtually on the same grounds, i. e., knowledge of and assent to the instruments relied upon to constitute the general assignment.

It is too well settled to admit of controversy that a creditor who assents to a general assignment for the benefit of creditors cannot thereafter urge such general assignment as an act of bankruptcy. In the instant case, however, the petitioners do not rely upon the deed and declaration of trust of November 10, 1915, but do rely upon the instruments executed August 1, 1916. In other words, that these last-mentioned instruments made effective the intention of the bankrupt to make a general assignment, and until their execution there had been no general assignment. If this view is correct, then any knowledge of or assent to the instruments executed in November could have no deterrent effect upon the petitioners to proceed against the August instruments.

[4, 5] The fourth motion is to dismiss the petition, the first ground of which is general. The second and fourth grounds are that it does not appear by the petition that either of the petitioners have provable claims against the bankrupt. The fact that note and accounts attached to the petition were not made parts of it was stressed in argument by counsel for the bankrupt, and that without such note and accounts, the allegation was too general to require the bankrupt to answer, and therefore the petition would have been amenable to a demurrer, before the adoption of the new equity rules, and is now vulnerable to attack by motion to dismiss.

[6] The sufficiency of a petition in involuntary bankruptcy in respect to the description of the claim of the petitioners is to be tested by the rules of pleading which would govern a declaration or a bill in equity in an action or suit brought to enforce such claims. The existence of provable claims to the requisite amount is jurisdictional. As said by Judge Connor, in Re Farthing (D. C.) 202 Fed. 562:

"The existence of provable debts against the respondent, due to each of the petitioning creditors * * * is jurisdictional. It follows, therefore, that the existence of such debts or claims and their nature should be alleged with such particularity and definiteness as will enable the court to find from the petition the essential jurisdictional fact. In a creditor's bill, to which a petition in involuntary bankruptcy may be assimilated, the indebtedness by the defendant to the plaintiff should be set forth with that degree of particularity of description which would entitle the plaintiff to judgment upon it in an action at law."

[7] In the petition (a), Doty's claim is described as "a liability of Mason, based on a promissory note; the amount thereof is $5,000, and at the time of filing the petition is still due and unpaid, with interest from a certain date," etc.

Collins' claim (b), balance for work and services rendered to Mason; that there is due thereon $5,000, with interest from a certain date.

Powell & Pelot's claim (c), balance due for services performed for Mason, and for disbursements, and the amount due thereon is $15,246.90, with interest from a certain date.

[8] It is extremely doubtful if such statements standing alone would be sufficient. "B" and "c" might be, under the forms for common counts, for work and labor done. "A" would clearly not be sufficient. There is nothing in the statement to show by whom the note was made, to whom payable, etc. But each of these clauses refer to the note and accounts as Exhibits A, B, and C, respectively. And it is contended they become thereby a part of said petition. I am referred to two cases by petitioners to support this theory: State v. S. A. L., 56 Fla. 670, 47 South. 986, and Seebass v. Mutual Reserve Fund Life Association (C. C.) 82 Fed. 792. In the first of these cases the exhibit by apt words was made a part of the pleading, and in the second the decision was based upon the statute of New Jersey, which specifically made exhibits attached and referred to a part of the pleadings. Under the uniform decisions of the Supreme Court of Florida, that bills of particulars attached to pleadings and not made a part of such pleadings by apt words cannot be reached by demurrer, I am of opinion that said note and accounts, by being attached to said petition as Exhibits A, B, and C, do not become a part thereof, so that upon attack by motion they can be referred to in order to rescue the petition from attack. Cheney v. Trammell, 65 Fla. 459, 62 South. 916, and cases cited. This defect is, however, easily amendable, and the petition would not be dismissed without opportunity afforded the petitioners to make such amendment, and I proceed to the consideration of the other grounds.

[8, 10] The third, fourteenth, and fifteenth grounds of the motion treat the accounts Exhibits B and C as parts of the petition, and at-

tack it third because the accounts show that the services were performed to Mason and others jointly, and fourteenth and fifteenth because the accounts show that those two petitioners knew of and consented to the instruments now attacked as a general assignment for the benefit of creditors. While I do not think the accounts have been, by proper reference, made a part of the petition so that they can be reached by the motion treating it as performing the office of a demurrer, even if such accounts be considered parts of the petition, I do not think either is well taken. As to the third ground, while the account may show services rendered to other parties, the petition alleges such services were rendered for Mason; and as to the fourteenth and fifteenth grounds the reply is the same as made above to the motion to strike clauses "b" and "c."

[11, 12] The other grounds of the motion attack the petition because it is contended that the conveyances attached to and made a part do not constitute a general assignment within four months before the filing of the petition.

In November, 1915, the bankrupt, joined by his wife conveyed to five persons as trustees, and their successors and assignees in fee simple, 2½ lots in the city of Jacksonville, to have and to hold unto the said trustees, their successors, heirs and assigns forever in trust for the uses, purposes, and conditions set forth in an agreement and declaration of trust of the same date. This conveyance had warrant of title, etc., except as to certain mortgages specified. On the same day the trustees and grantors in the aforesaid conveyance entered into an agreement and declaration of trust, whereby the trustees acknowledged they held the property for the benefit of: (A) The mortgage creditors; (B) The individual creditors of Mason; and (C) the holders of certificates of shares in the Mason Hotel Company, an unincorporated body provided for in the agreement (consisting of the trustees.) The trustees were authorized to do business of various kinds for the purpose of refunding the obligations under class A, and to that end to make a deed of trust and issue bonds thereunder to the amount of $650,000. This agreement further provided that the trustees should hold the legal title to all property; that they should have authority to adopt and use a common seal, make contracts in the conduct of the trust, release, sell, exchange or otherwise dispose of at public or private sale any or all of the trust property, real and personal, either in cash or for credit, as they deemed expedient, and various other powers therein named. Finally, and in addition, they were vested with such powers as are usually possessed by directors of corporations engaged in similar businesses under the laws of Florida. It provided for stated meetings of the trustees, and that a majority should control; that they should elect one of their number chairman, also a secretary and treasurer, and appoint such agents and attorneys as they deemed necessary, etc., and fix their compensation. It then provided that the trustees should issue to Mason 1,000 shares or certificates, and to his wife 500 shares or certificates in the Mason Hotel Company, as the consideration of the conveyance of the property described in the conveyance first above mentioned, and that the holders of such certifi-

cates should be the beneficial owners of such properties, profits, etc. It further provided that the trustees from time to time at their discretion could declare dividends out of the net earnings. It then provides that the shares should be personal property, and the executors and administrators would succeed to the rights of a deceased shareholder; that ownership of shares should not entitle the holder to any title in or to the trust property, or right to call for a partition or division of the same or for an accounting; that no debts contracted by the trustees shall be binding personally upon the shareholders; that the trustees shall be held blameless and indemnified out of the trust estate for any personal liability incurred by him, except such as may result from the acts done in bad faith. It then provides that the trust shall continue for 27 years, after which period it shall be liquidated and the proceeds distributed among the shareholders, except that the shareholders may, under certain contingencies, authorize the continuance of the trust for a longer period. It then provides the method by which the agreement and declaration may be amended. It also provides for the distribution of the proceeds in the event of the sale by the trustees of any or all of the trust estate, and defines the term "net profits."

On November 15, 1915, the trustees executed a mortgage to a trustee of the trust property to secure an issue of $650,000 known as the Mason Hotel Company, 6 per cent. refunding bonds for the purpose of refunding class A and class B as specified in the conveyance first mentioned. These instruments were all duly filed and recorded at or about the time of their execution. On August 1, 1916, pursuant to authority contained in the agreement of November 10, 1915, the powers of the trustees were enlarged, and they were authorized to issue $150,000 income bonds, to be a junior lien to the $650,000 refunding bonds, on the trust property. They were also empowered to use so much of the proceeds of the last issue as they deemed expedient in the operation of the properties or adjusting any claim pertaining to said properties, whether the obligations were those of Mason or the Mason Hotel & Investment Company, a corporation.

The trustees were also empowered to issue short-term notes for the purpose of borrowing money to be used in the administration of the trust and pledge the income and rents for the payment of same. A limit upon the indebtedness of the trustees is placed at $800,000. The trustees are given the right to make settlement of all outstanding bonds of the Mason Hotel & Investment Company, and any claims against said company pertaining to said trust property.

This agreement of August 1, 1916, then amends former agreement by providing that the trust shall determine 21 years after the death of the last surviving trustee named in the agreement of 1915. This instrument was recorded August 25, 1916. On August 1st the trustees, pursuant to the amended agreement of August 1st, executed a mortgage upon the trust property to the Guaranty Trust & Savings Bank to secure $75,000 of income or second mortgage bonds. The position of the petitioners, as I understand it, is that this amended agreement and the mortgage thereunder in connection with the prior

conveyances and agreement constitute a general assignment for the benefit of creditors. I do not understand that the petitioners claim that the amendment to the agreement and the mortgage thereunder of themselves standing alone would be an act of bankruptcy, but that the original agreement and declaration of trust is void because it violates the rule against perpetuities, and only became effective on August 1, 1916, by the change then made in the term the trust should continue.

It is therefore this question that should be first decided. The rule against perpetuities forbids that property shall be withdrawn from sale for a period longer than life or lives in being, and 21 years thereafter. The original agreement or declaration of trust provided that it continue for 27 years, the amendment that it should continue for 21 years, after the death of the survivor of five trustees first appointed. The Supreme Court of Florida, in Cawthon v. Stearns Lumber Co., 60 Fla. 315, 53 South. 739, say:

"The interest of the grantee having vested upon the execution and delivery of the deed of conveyance, the continuance of the vested interest does not offend the rule against perpetuities."

In the instant case the estate, trust or otherwise, of the five parties vested under the conveyance of November 10, 1915, and under that instrument and the agreement and declaration of trust, was to continue for 27 years, and such additional time as was necessary to wind up the trust officers only.

The rule against perpetuities is directed against the withdrawal of real property from sale. In the original agreement and declaration of trust the land deeded is not withdrawn from sale. The power to dispose of any and all of the trust property is vested in the trustees absolutely. The time of sale, the terms, whether for cash or on credit, is left to their discretion. The certificates or shares held by the cestui que trust are negotiable, and provision is made for their sale, involution by law, and transfer by the trustee. For each of these reasons it seems clear to me that the first agreement and declaration of trust does not offend against the rule. If it does not, then the interest of the bankrupt vested in the trustees on November 10, 1915, and any attack made at this time of filing the petition comes more than four months after the instruments were recorded.

With the interest of the bankrupt vested, the changes made by the amended agreement would be changes in the powers of the trustees, and in my judgment would not constitute an act of bankruptcy.

There are other objections urged against the petition by the bankrupt; but, in the view I take of the case, it is not necessary to discuss them.

The motion to dismiss the petition will therefore be granted.

BIRDSALL et al. v. DELAWARE & H. CO.

(District Court, M. D. Pennsylvania. June Term, 1914.)

No. 622.

1. EXECUTORS AND ADMINISTRATORS ⟸49—ASSETS—LEASES—ROYALTIES.
Royalties under a coal lease are in the nature of purchase money of real estate, and the right to collect them vests in the personal representatives of the deceased lessor, and not in his heirs or devisees of the land.

2. EXECUTORS AND ADMINISTRATORS ⟸37(1)—ADMINISTRATION—ASSETS.
Where assets or choses in action are not administered by the executor of a decedent, the right to administration upon the death of such executor remains in the estate, and must be administered by an administrator de bonis non.

3. EXECUTORS AND ADMINISTRATORS ⟸37(1)—ADMINISTRATION—SETTLEMENT OF ESTATE.
Where the administration has been finally closed, and all accounts settled and all debts paid, there is no necessity for administration upon remaining assets, and the heirs may proceed to a collection of such assets without further administration.

4. WILLS ⟸559—DEVISES—CONSTRUCTION.
The husband's devise of all his estate to his wife carries with it his interest as lessor in a coal lease.

5. EXECUTORS AND ADMINISTRATORS ⟸37(1)—DECEDENT'S ESTATE—ADMINISTRATOR DE BONIS NON.
After expiration of 10 years all claims against an estate are presumed to be fully satisfied and settled, so that, in a proceeding to collect royalties on a coal lease due estate, administration de bonis non is not necessary, though the estate was not shown to be fully administered.

6. EVIDENCE ⟸67(1)—SETTLEMENT OF ESTATE—PRESUMPTIONS.
Where testatrix was entitled to share in a judgment for royalties under a coal lease, it will, until conclusively determined that all accounts have been settled and all claims of creditors discharged, be assumed that the estate is in process of settlement, and a release for payment of royalties must be given by executors of the testatrix and not the residuary legatees.

7. EXECUTORS AND ADMINISTRATORS ⟸37(1)—COLLECTION OF ESTATE—ADMINISTRATION DE BONIS NON.
Where there had been administration on the estate of one entitled as a lessor to share in royalties under a coal lease, but it nowhere appeared that the decedent's interest in the lease was in any manner disclosed as an asset, administration must be regarded as incomplete, and, six years not having elapsed between decedent's death and institution of action to collect royalties, administration de bonis non should be had, such administrator executing release for payment of royalties.

At Law. Action by James C. Birdsall and others against the Delaware & Hudson Company. On rule to show cause why a fi. fa. should not issue to enforce collection of judgment. Defendant directed, on submission of release as provided, to forthwith pay the judgment, fi. fa. to be issued in case of failure.

See, also, 216 Fed. 717.

S. B., C. B. & J. H. Price, of Scranton, Pa., for plaintiffs.

Jas. H. Torrey, of Scranton, Pa., for defendant.

WITMER, District Judge. Plaintiffs brought suit, on behalf of themselves and others interested in a coal lease with the Delaware & Hudson Company, for recovery of royalties, and, upon recovery of verdict and appeal to the Circuit Court, that court expressed the opinion that this court would afford proper protection to defendant by requiring proper releases from parties interested in the verdict, before payment. The amount of money to be paid is no longer in controversy. The question remaining has to do solely with the proper parties required to release defendant on payment of the verdict. The lease under which the royalties accrued, recovered, and represented in the verdict was between the defendant company and the following lessors, with undivided interests represented, to wit: (1) James Stott, eight-twelfths; (2) William S. Birdsall, one forty-eighth; (3) Charles E. Hackley, two-twelfths; (4) Maria L. Bailey, one-twelfth; (5) James C. Birdsall, one forty-eighth; (6) George H. Birdsall, one forty-eighth; (7) E. Louise Matthews, one forty-eighth.

The devolution of the interests of these parties, since the execution of the lease, October 24, 1890, has been admitted to be as follows:

1. James Stott died January 23, 1904, testate, leaving a will in which he devised all his estate to his wife, Mary Jane Stott, and made her sole executrix of his will. The will was duly probated in the register's office of Lackawanna county, and letters testamentary were issued to Mary Jane Stott. No inventory and appraisement was filed, nor was any account ever filed by the executrix, who treated the estate of her testator as her own, and paid the funeral expenses and such debts as were legally due.

Mary Jane Stott died June 7, 1914, testate, leaving a will in which she devised her residuary estate to Mary B. Manville and Lilian Jadwin, and appointed Robert A. Jadwin, Mary B. Manville, and Lilian Jadwin her executors. The will was duly probated in Lackawanna county, and the above-named persons were appointed her executors. No inventory or appraisement of the estate has been filed, nor have the executors filed any account.

2. William S. Birdsall died January, 1915, testate, leaving a will which was duly probated in the register's office of Wayne county, in which he appointed Willard J. Birdsall the executor of his estate. The will was duly probated by the register of wills of Wayne county, Pa., and letters testamentary were issued to said executor. There has been no distribution of the estate nor discharge of the executor.

3. Charles E. Hackley and wife, by deed dated November 8, 1909, recorded in Lackawanna county, in Deed Book No. 242, p. 221, conveyed his interest in the lease and royalties to George H. Birdsall, one of the original parties to the lease.

4. Maria L. Bailey died in Trenton, N. J., November 8, 1901, testate, her husband, Daniel L. Bailey, having died previously. She left a will in which she specifically devised the coal property near Olyphant, now being worked by the Delaware & Hudson Company, with the income from the same, and also all the residue of her property, to her daughter, Anna M. Lowthrop, and appointed her the executrix of her will. The said will was probated in the office of the surrogate

of Mercer county, N. J., and Anna M. Lowthrop was appointed executrix. No account was filed at any time by the said executrix.

Anna M. Lowthrop died in Trenton, N. J., November 17, 1910, testate, leaving a will in which, after making specific devises, none of which relate to the lease or the property therein described, she devised the residue and remainder of her estate to her nephews, Robert Bailey Matthews and William Matthews, who were appointed the executors of her estate. The will was duly probated in the office of the surrogate of Mercer county, N. J., and, Robert Bailey Matthews having renounced, William Matthews was appointed sole executor of the estate.

William Matthews is, and has for some years been, a resident and citizen of the city of New York in the county and state of New York.

William Matthews, as executor of the estate of Anna M. Lowthrop, deceased, filed an inventory of the estate about December 10, 1910, in which there was no specific reference to, or appraisement of, the property covered by the lease or the royalties arising therefrom. About August 11, 1911, William Matthews, as executor, filed his final account in the office of the surrogate of Mercer county, showing no receipts of moneys from royalties under the lease sued upon, which account showed as remaining in the hands of the accountant for distribution between Robert B. Matthews and William Matthews, the residuary legatees, $10,416.55. September 15, 1911, the said account was finally confirmed. With said account there were filed releases of legacies and devises by all the specific legatees named in the will, and by Robert B. Matthews, one of the residuary legatees.

5. James C. Birdsall is still living and a party to this action.

6. George H. Birdsall died January 27, 1913, testate, leaving a will in which he devised his entire estate to Amanda V. Birdsall, his widow, and appointed her executrix of his estate. His will was probated March 18, 1913, in the register's office of Lackawanna county, and letters testamentary were issued to said executrix. No inventory or appraisement of property of the estate has been filed, and the executrix has filed no account. There has been no distribution of the estate.

7. E. Louise Matthews is still living, and is a party to this action.

The release tendered by the plaintiffs is acceptable to the defendant in so far as the same has to do with the interests originally represented by William S. Birdsall, Charles E. Hackley, James C. Birdsall, George H. Birdsall, and E. Louise Matthews. The dispute has arisen concerning releases covering the interests represented by James Stott and Maria L. Bailey, now deceased.

Counsel for plaintiffs has tendered the release of the lessor ultimate legatees, while defendant's counsel insists that their personal representative only can deliver a sufficient acquittance.

[1-3] It has been decided that royalties under a coal lease are in the nature of purchase money of real estate, and that the right to collect the same vests in the personal representatives of a deceased lessor, and not in his heirs or devisees of the land. Lazarus Estate, 145 Pa. 1, 23 Atl. 372; McFadden's Estate, 224 Pa. 443, 73 Atl. 927. It is equally well settled that, regarding assets or choses in action not administered by an executor of a decedent, the right to administration

upon such remaining assets, upon the death of such executor, remains in the estate, and must be administered by an administrator de bonis non. Wagner's Estate, 227 Pa. 460, 76 Atl. 215. However, the necessity of administration on such remaining assets, I am of opinion, depends upon the state of administration of the estate administered. If the administration has been finally closed, all accounts settled, and all debts paid, the heirs may proceed to a collection of such assets without further administration upon the estate. Hubbard v. Urton (C. C.) 67 Fed. 419.

[4, 5] Turning now to the several interests under consideration, it will be noted that James Stott died January 23, 1904, testate, devising all of his estate to his wife, Mary Jane Stott, appointing her also sole executrix. She took out letters, but made no effort to further administer the estate, and, after paying the funeral expenses and such debts as were brought to her attention, she treated the estate of her husband, left to her by his will, as her own, up to and until her death, June 7, 1914. That she was at the time of her death the sole owner of the estate bequeathed to her by her husband is not doubted. Her husband's interest in the coal lease being included in his devise of "all of his estate," she took the same subject only to such demands as the law had upon his estate, which, if not now actually discharged, are presumed to have been fully satisfied and settled. York's Appeal, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65; Chapman's Appeal, 122 Pa. 341, 15 Atl. 460.

[6] When Mary Jane Stott died, her estate, under her will, passed to her executors, to be administered and divided as directed, subject also to all legal demands upon the same. Until it is conclusively determined that all accounts have been settled and claims of creditors discharged, it may be assumed that the estate is in process of settlement, and, until complete settlement has been made, it will not be possible to determine whether the residuary legatees receive any portion of these royalties, or, in fact, any other portion of the estate of their decedent. Therefore the executors, Robert A. Jadwin, Mary B. Manville, and Lilian Jadwin, and not the residuary legatees, are entitled to receipt for their decedent's interest in the judgment, and should be parties to the release on payment of the same by defendant.

[7] Following up the interest of Maria L. Bailey, the other original lessor whose interest is in dispute, it appears that she died testate November 8, 1901, her husband having previously died, specifically devising the coal property described in the lease and the income from the same, and all the residue of her property, to her daughter Anna M. Lowthrop, appointing her also executrix of her will. The will was probated in Mercer county, N. J., where she died, and no further steps appear in the administration of the estate. January 17, 1910, when Anna M. Lowthrop died, there was no necessity for further administration upon her mother's estate, as heretofore stated, and the estate devised to the daughter, Anna M. Lowthrop, was settled and had absolutely vested. Since then the estate of Anna M. Lowthrop was administered by her executor, William Matthews, who also made distribution and took releases. It nowhere appears that the interest

of the testatrix in the coal lease represented here in this judgment formed part of the estate administered, or that it was in any manner disclosed as an asset of the estate. The conclusion follows that it was not administered, and to this extent the administration may be regarded as incomplete. It therefore follows that ancillary administration d. b. n. c. t. a. should be raised upon the remaining estate of decedent arising from the coal lease in this district, and that such administration should receipt for and release decedent's proportionate part of the judgment.

It is therefore ordered and directed that when the release submitted is amended in accordance herewith, being duly executed and tendered, that the defendant shall forthwith pay the judgment recovered to the several parties as their interests may appear, or to their duly appointed attorney, together with interest and all accrued costs. On failure to make payment, the rule granted to show cause why a fi. fa. shall not issue to enforce collection is made absolute.

PENINSULAR NAVAL STORES CO. v. TOMLINSON et al.

(District Court, S. D. Florida. August 31, 1917.)

1. DEEDS ⊂=114(1)—CONSTRUCTION—SUFFICIENCY.
The purchaser who borrowed from complainant money to defray the purchase price gave complainant a mortgage on all of the property purchased, and in satisfaction of the mortgage executed a deed which, after describing all save one of the parcels purchased, recited that the purchaser did bargain, sell, and convey to complainant all of the land and other property used in connection with the turpentine business operated by him at a named city. The parcel omitted was used by the purchaser in the turpentine business, and was located near the named city. *Held*, that such general description was sufficient to carry the omitted parcel.

2. VENDOR AND PURCHASER ⊂=231(1)—BONA FIDE PURCHASER—WHO IS.
The purchaser, after executing the conveyance to complainant by warranty deed, conveyed the omitted parcel to defendant. The mortgage and deed to complainant was duly recorded. *Held*, that as the proper record of an instrument required by statute to be recorded is constructive notice of its contents to all the world, defendant, the deed and mortgage being of record and sufficient to put him on inquiry by which he could have learned of the conveyance to complainant, was not a bona fide purchaser, but took subject to complainant's prior deed.

3. VENDOR AND PURCHASER ⊂=243—BONA FIDE PURCHASERS—EVIDENCE.
In such case, as defendant was charged with constructive notice, evidence that the omitted parcel was used in connection with the turpentine business of the purchaser, his grantor, together with admissions by the purchaser, was admissible against defendant.

In Equity. Bill by the Peninsular Naval Stores Company, a corporation, against J. I. Tomlinson and W. N. Fender. Decree for complainant.

R. P. Daniel and Lucien H. Boggs, both of Jacksonville, Fla., for complainant.

Reynolds & Rogers, of Jacksonville, Fla., for defendants.

CALL, District Judge. On July 15, 1913, the complainant filed its bill against the defendants, praying that the deed from defendant Tomlinson be reformed as to include the G. I. F. Clarke grant, and that the deed to the defendant Fender be delivered up and canceled.

The bill, after alleging the jurisdictional facts, alleges that in March, 1913, the complainant advanced to defendant Tomlinson $16,000 with which to purchase the naval stores business of Carter & O'Bryan; that said purchase was consummated with said amount, and conveyance received by Tomlinson; that said advance of $16,000 was evidenced by four promissory notes of $4,000 each; that said notes and advances were secured by mortgage and contract executed by the said defendant Tomlinson; that it was the intention of the parties that said mortgage should cover all the personal, real, and mixed property conveyed in the deed by Carter and O'Bryan; that said notes secured by the mortgage aforesaid not having been paid, the parties agreed that defendant Tomlinson should deed all the property covered by the Carter & O'Bryan conveyance to the complainant in full satisfaction of all of said notes except the last to become due of $4,000; that on April 14, 1914, a conveyance was executed by the defendant Tomlinson, with intent to carry out the agreement, and said notes delivered up and canceled; that by a clerical mistake in copying the descriptions of the fee-simple land in the Carter & O'Bryan deed the true intent of the parties was not carried out, and certain mistakes made in description of parcels of land; that by such mistake the grant to G. I. F. Clarke of 500 acres in section 38, township 9 south, range 30 east, was altogether omitted from the mortgage and deed to the complainant; that said deed contained this further description after the particular lands described, "And for the considerations aforesaid both parties do hereby bargain, sell, convey, set over, transfer, assign and deliver unto the second party, its successors and assigns, all other property, real, personal and mixed, of what kind or nature soever, owned and used by the said J. I. Tomlinson in connection with the said turpentine business heretofore operated by him at Moultrie, St. Johns county, Florida, it being the intention of this instrument to vest in the second party full ownership of all the property used in connection with the said turpentine business just as fully as though the same were specifically described and enumerated in this instrument;" that all the lands of which the descriptions are sought to be reformed, together with the G. I. F. Clarke grant, were used in connection with said turpentine still, and were intended by the parties to be described and conveyed in and by said deed; that in May, 1914, the defendant Tomlinson undertook to convey to the defendant Fender the G. I. F. Clarke grant in fee simple by a deed, regular in all respects; that all the conveyances were recorded in St. Johns county, Florida, at or soon after the execution of the same.

Answers were duly filed by the defendants, the defendant Tomlinson denying that it was ever the intention or understanding that the Clarke grant should be included in the lands conveyed by the deed to the complainant, and the defendant Fender denying that the Clarke grant was used by Tomlinson in the turpentine business at Moultrie, and further

alleging that he was a bona fide purchaser for value of the Clarke grant without notice of the mistake or claim of complainant.

On December 10, 1914, the cause was referred to J. Turner Butler, to take the testimony of the parties and report to the court with his findings of law and fact. On February 23, 1917, the special master made his report, in which he finds:

First. That Carter & O'Bryan conveyed to Tomlinson the lands described in the bill of complaint, including the Clarke grant.

Second. That complainant loaned Tomlinson the money with which to purchase said lands, and for the purpose of securing said moneys received from Tomlinson a mortgage specifically describing all of said lands, except the Clarke grant, said mortgage containing a blanket clause as alleged in the bill.

Third. That the Clarke grant was used by Carter & O'Bryan and by Tomlinson in connection with the turpentine still at Moultrie, and it was the intention of the parties that the same should be covered by the mortgage.

Fourth. That in February, 1914, Tomlinson and wife undertook to convey the lands acquired from Carter & O'Bryan to the complainants for the consideration set out in the bill. That said deed contained the general clause heretofore quoted. That Tomlinson used said Clarke grant in connection with the turpentine operations at Moultrie, and that it was the intention of the parties to have the deed include the Clarke grant.

Fifth. That in May, 1914, Tomlinson and wife executed a deed to Fender covering the Clarke grant, but the recitals in the deed to complainant were sufficient to put Fender on notice of complainant's claim, or furnished the means of identifying complainant's claim, and defendant Fender is not a bona fide purchaser without notice.

Sixth. That complainant is entitled to the relief prayed.

Seventh. That certain objections to testimony are overruled.

On March 8, 1917, the defendants Fender, filed exceptions to that portion of the master's fifth finding:

First. "That the recitals in the deed and mortgage from Tomlinson to complainant were sufficient to put the defendant Fender on notice of complainant's claim, or furnished the means of identifying complainant's claim."

Second. To the sixth finding of the master that the complainant is entitled to the relief prayed by its bill.

Third. To the seventh finding of the master, admitting testimony of the use of the Clarke grant in connection with the turpentine still at Moultrie, and admissions of Tomlinson relating thereto are admissible against Fender as claiming through him.

By agreement of the parties the cause was heard by the court on April 20, 1917, on the master's report, the exceptions thereto, the testimony taken before him, and exhibits filed by the parties.

Upon the testimony there is no contention, nor could there be, that so far as the defendant Tomlinson is concerned the complainant is entitled to the relief prayed for, for a reformation of the deed in respect to the several tracts of land. The deed to the defendant Fender produces, however, the real question to be decided. If Fender is a bona fide purchaser from Tomlinson of the Clarke grant, any relief against

him and as to the Clarke grant must be denied. The complainant insists that it is entitled to the relief prayed against him:

First. Because the deed to it containing the general clause, conveyed to it the Clarke grant and its record, was notice to all the world, and therefore Fender took his deed with such notice, and is not a bona fide purchaser without notice.

Second. Because Fender set up the affirmative defense of bona fide purchaser for value and without notice, and has totally failed to prove that he paid a valuable consideration, and therefore his defense falls.

The defendant Fender, on the other hand, contends the decree should be in his favor because the complainant has not shown legal title in itself, and has not shown that he had notice of the claim of the complainant, and that without such showing the presumption of bona fides support his claim without proof from him of consideration, etc., for his conveyance.

There is a sharp conflict in the decisions of the courts of the several states on this question; many of them holding that the party resting his rights on the fact that he is a subsequent purchaser or creditor for value and without notice must establish those facts. Equally as many or more hold that in a contest between the subsequent purchaser with a recorded deed and the claimant under a prior unrecorded deed the presumption of bona fides is with the subsequent purchaser, and the claimant under the unrecorded deed must prove notice or want of consideration.

The case of Lake v. Hancock, 38 Fla. 60, 20 South. 811, 56 Am. St. Rep. 159, apparently holds to the first-mentioned doctrine, and the later cases of Feinberg v. Stearns, 56 Fla. 282, 47 South. 797, 131 Am. St. Rep. 119, and West Coast Lumber Co. v. Griffin, 56 Fla. at page 878, 48 South. 36, seem to hold the last-mentioned doctrine. It does not seem necessary to me to decide the point in this case. Here there was no unrecorded deed. The questions to be determined are: (1) Is the general description clause contained in the deed to complainant sufficient to vest in it title to the Clarke grant; and (2) if it is, is the record of said deed constructive notice to the subsequent purchaser?

[1] As to the first of these questions I am of opinion that it is sufficient to vest title of all the real estate then owned by the grantor and used in connection with the turpentine still at Moultrie.

[2] The other question is, Is the defendant Fender charged with notice by the record of this deed? It is unquestioned law that the proper record of an instrument required by the statute to be recorded is constructive notice of its contents to all the world. Tyler v. Johnson et al., 61 Fla. 730, 55 South. 870. Any one dealing with the property covered by such instrument is charged with notice whether he has seen it or not. If the contents of the recorded deed brings to his knowledge such facts as ought to put a reasonably prudent man on inquiry, he is then charged with knowledge of such facts as this inquiry would have produced.

In the instant case an examination of the records of St. Johns county would have shown that Tomlinson acquired the lands from Carter &

O'Bryan, including turpentine leases, still, etc., and immediately gave a mortgage to the complainant in which all the lands, leases, etc., so acquired were specifically described, with a general clause following covering all lands used in connection with the turpentine still. That thereafter these same lands, leases, etc., were conveyed to the complainant, still with a general clause of conveyance to cover all lands used in connection with the turpentine still at Moultrie. Can it be said that one subsequently taking a deed from the grantor of a portion of land so acquired would be protected in equity because he failed to make the inquiry that would have informed him of the fact that that very land was used in connection with the turpentine still and was covered by the clause in the deed? I think not, especially when one remembers that Fender was familiar with the turpentine business, and had been for 24 years.

I am of opinion, therefore, that the record of this deed was notice to the defendant Fender, and that the complainant is entitled to relief prayed against him.

This disposes of the first two exceptions.

[3] The first two exceptions being disposed of contrary to the contention of the defendant Fender, the third is of little moment. If Fender received the deed with notice, constructive or otherwise, then the evidence admitted will be considered against him. If he had been a subsequent purchaser for value without notice, such evidence could not have affected his interest, and of course no relief could have been had against him.

A decree will be prepared finding the equities with the complainant, and granting the relief prayed in and by the bill of complaint.

BRADY v. J. B. McCRARY CO.

(District Court, S. D. Florida. August 15, 1917.)

1. REMOVAL OF CAUSES ⟸107(6)—PETITION FOR REMOVAL—AMENDMENT.
   A petition for removal may be allowed to be amended in the federal court to show the citizenship of the plaintiff's assignor where he sues as assignee.
2. REMOVAL OF CAUSES ⟸89(1)—PROCEEDINGS FOR REMOVAL—ACTION BY STATE COURT.
   The filing of a duly verified petition for removal, stating the necessary facts, together with a good and sufficient bond conditioned as required by statute, with written notice to plaintiff that the same would be filed, automatically removes the cause, and it is immaterial whether the clerk marks the papers filed or whether they are acted on by the state court prior to the time when defendant would be required to plead in that court.
3. REMOVAL OF CAUSES ⟸88—BOND FOR REMOVAL—SUFFICIENCY.
   A bond for removal *held* sufficient in the absence of any objection to its validity prior to its approval by the judge of the state court.
4. REMOVAL OF CAUSES ⟸88—BOND FOR REMOVAL—SUFFICIENCY.
   Under the statute of Florida which provides that a foreign corporation not complying with its requirements to authorize the doing of business

In the state cannot take advantage of such noncompliance, but is bound by its contracts, the fact that a bond given on removal of a cause and executed by a foreign corporation does not show that such corporation has complied with the state statute does not render it invalid.

At Law. Action by C. S Brady against the J. B. McCrary Company. On motion by defendant for leave to amend petition for removal and by plaintiff to remand to state court. Motion to amend granted and to remand denied.

E. M. Semple, of Miami, Fla., for plaintiff.
Shutts, Smith & Bowen, of Miami, Fla., for defendant.

CALL, District Judge. On March 23, 1917, the plaintiff commenced his suit against the defendant in the circuit court for Dade county, Fla., and on April 2, 1917, filed his declaration, claiming $50,000 damages. On the same day the defendant entered its appearance. On April 30, 1917, and before the time to plead, the defendant filed with the clerk of said court its petition for removal, on the ground of diverse citizenship, in which it alleged that the suit was one of a civil nature at common law, of which the District Court had original jurisdiction. It then proceeds to set out the substances of the declaration, the first two counts showing the making of contracts between the defendant and one Collins, of Dade county, Fla.; the accounts due thereunder having been transferred to plaintiff by written assignment. Four common counts follow for goods bargained and sold, work done and materials furnished, money had and received, and account stated. The allegation of jurisdictional amount is made. The petition then contains this averment, "Petitioner says on information and belief" that plaintiff at the time of the commencement, since that time, and is now a citizen and resident of Florida, and the defendant a citizen of, and with its principal place of business in, Georgia. With said petition, and at the same time, the defendant lodged with the clerk its bond with the Fidelity & Deposit Company, of Maryland as surety in the sum of $500, conditioned as required by the statute, together with an order for the signature of the judge of said court removing said cause to this court.

On April 28, 1917, notice that such petition and bond for removal would be filed on April 30th was given to and accepted by the attorney for the plaintiff. Owing to the absence of the judge, the order for removal and bond was not presented by the clerk to the judge until May 4th; the rule day in May being the 7th. The judge withheld his signature from the order and approval of said bond until he should be further advised. The bond was approved on May 19th. The order of removal seems never to have been made.

On May 28th the defendant filed the record in this court, and on June 4th the plaintiff moved to remand the case to the state court, on twelve grounds. The first four grounds are directed to the bond, its sufficiency and approval. The fifth and sixth attack the removal on the grounds that the petition and bond were not accepted or presented

to the judge; the seventh on the ground the case was not set for hearing and notice given to plaintiff's attorney; the eighth that the bond is not sufficient, and the ninth, tenth, eleventh, and twelfth that diversity of citizenship of plaintiff's assignor is not shown.

After argument on the motion to remand, and before any ruling thereon could be made, the defendant filed its motion for leave to amend its petition by showing the citizenship of Collins, the assignor of plaintiff; this last-mentioned motion being filed June 19th.

On May 7th the plaintiff applied for and had entered in the clerk's office of the state court a default judgment against the defendant, for want of a plea or demurrer.

Section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) limits the jurisdiction of District Courts on choses in action to such cases as might be brought by the assignor. Section 28 of said Code limits cases to be removed to those of which the District Court are given original jurisdiction, and section 29 directs the method of procedure in removals, and requires the party to make and file a petition, duly verified, in the state court at any time before he is required to plead by the state law for the removal of said cause, and shall make and file therewith a bond with good and sufficient surety that he will within 30 days file a certified copy of the record and pay all costs that may be awarded by the District Court, if it shall be held that the suit was wrongfully or improperly removed. The section then requires that written notice of such petition and bond for removal shall be given the adverse party prior to filing same.

[1] It seems to me that the first question to be determined is whether the amendment asked can be allowed. This question seems to me to be settled in the affirmative by the decision of the United States Supreme Court in Kinney v. Columbia Savings & Loan Association, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103. In that case the point was directly presented and ruled upon. The court in that case directly held that proceedings for removal were process and amendable. With the proposed amendment allowed, there is no question that the motion to remand in so far as citizenship is concerned is not well taken.

The motion to remand has other grounds, however.

[2] The plaintiff contends that the bond is insufficient, not filed within the time required, or filed any bond; that the bond was not filed until May 19th, when it was approved by the state circuit judge; that the bond was not accepted until after the plea day; that the petition and bond were not accepted by the state judge; that the petition and bond were not presented to the state judge; and that the petition was not set down for a hearing before the state judge, and plaintiff given notice of such hearing.

These grounds may be considered together. In the first place, the filing of a duly verified petition for removal, stating the necessary facts, together with a good and sufficient bond, conditioned as required by the section, with written notice to the plaintiff that the same would be filed, automatically removed said cause to the United States court.

The section makes it the duty of the state court to accept said petition and bond and proceed no further in such suit. It is too well settled by authority to need citation that even the refusal of the state court to grant the petition in a proper case made is of no moment. That this petition and bond was filed with the clerk of the state court on April 30th, the plea day being May 7th, appears to me too plain for serious contention. That the plaintiff's attorney was given notice and accepted same that such petition and bond would be filed April 30th admits of no dispute. Suppose the clerk did put his file mark on the bond and afterwards scratched it out, or suppose he had refused to file it; the rights of the defendant given by section 28 of the Judicial Code could not in any wise be prejudiced by the clerk's action. The section requires that the petition and sufficient bond be filed, and it is settled law that the clerk is the custodian of the records of the court, and a lodging with him for such purpose is a filing, whether he sees fit to place his file mark thereon or not. A litigant's rights cannot be injuriously affected by the failure or neglect of the clerk to do his duty. In the instant case the clerk seems to have done his duty by placing his file mark upon the bond.

Nor can the failure of the state judge to approve the bond and make the order of removal when presented to him on May 4th deprive the defendant of its right to remove. There can be no question that, had the attorneys for the defendant presented the papers there to the judge, instead of intrusting such duty to the clerk, no trouble would have been experienced.

This, it seems to me, disposes of these grounds of the motion to remand.

[3] There is one other ground that should be noticed. It is that the bond is insufficient on its face: (a) It is executed by a foreign corporation in a foreign jurisdiction with a foreign surety company, and it is not made to appear that the seals affixed have been authorized; and (b) that it is not made to appear that the foreign surety company is authorized to do business in the state of Florida, so that the state judge was authorized to accept same without justification.

The certified copy of the bond contained in the record appears to be signed by the president of the defendant, and the surety company by its agent and attorney in fact, and the corporate seal attached. This, it seems to me, would be amply sufficient to authorize the state judge to accept the same, unless something was brought to his attention questioning the validity of said bond. Nothing of this kind seems to have been done, as his approval and acceptance appear under date of May 19th.

[4] It is also contended that it does not appear that the surety company was authorized to do business in Florida. The foreign corporation act of Florida has been construed by the state Supreme Court as making the contracts voidable and not void, and such act has been amended by the Legislature at its session in 1915. But in any event by the terms of the act the foreign corporation not complying with the act can take no advantage of such noncompliance, but is bound

by its contracts. Section 29 of the Judicial Code requires "surety," not "sureties." This last ground, it seems to me, is not well taken.

The motion to amend will be granted, and the motion to remand will be denied.

It will be so ordered.

SULLIVAN v. ATLANTIC COAST LINE R. CO.

(District Court, S. D. Florida. August 17, 1917.)

1. MASTER AND SERVANT ⟸258(9)—INJURIES TO SERVANT—DECLARATION—RIGHT OF RECOVERY.

Plaintiff's declaration alleged in the first count that defendant was engaged in the hazardous occupation of railroading; that plaintiff was a mechanic working in defendant's shops; that his duties required him to use steel chisels; that he delivered to defendant's blacksmith a chisel to be dressed and tempered; and that, though it was the duty of the blacksmith to do such work, he carelessly, negligently failed to properly temper the chisel, so that upon being struck by a hammer, a piece of the cutting edge flew off and destroyed plaintiff's eye. Subsequent counts after allegations similar to those in the first count alleged negligence on the part of the blacksmith in dressing and tempering the chisel, and that the metal in the chisel was unfit and inadequate for the work required of plaintiff. *Held*, that the declaration, in view of all of the averments, did not show that the chisel furnished was defective, but established that the blacksmith's negligence in tempering it was the proximate cause of the injury.

2. MASTER AND SERVANT ⟸180(1)—FELLOW SERVANTS—STATUTES—CONSTRUCTION—"HAZARDOUS."

Laws Florida 1913, c. 6521, § 1, defines hazardous occupations, among them railroading. Section 2, declares that persons mentioned in the first section shall be liable for injuries inflicted on their agents and employés caused by their negligence unless they, their agents and servants, shall have exercised all reasonable care; while section 3 declares that such persons shall not be liable for injury done by the employé's consent, or caused by his own negligence, but if such persons or their agents be at fault as well as the employé, the injured employé may recover damages to the amount attributable to such persons. The section further declares that damages shall not be recovered where the injury occurs through the negligence of the injured employé and a fellow servant jointly engaged in performing the act causing the injury, and the employer is guilty of no negligence. A mechanic employed by a railroad company in its shops was injured by the splintering of a chisel which was improperly tempered by the railroad company's blacksmith. *Held*, that he could not recover, for his work was not extrahazardous within the act, but that recovery should be denied; the injury being the result of the negligence of a fellow servant.

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

At Law. Action by James F. Sullivan against the Atlantic Coast Line Railroad Company, a corporation. On demurrer to the declaration and motion to compel plaintiff to separate causes of action in three counts of the declaration. Demurrer sustained.

A. H. & Roswell King, of Jacksonville, Fla., for plaintiff.

John L. Doggett, of Jacksonville, Fla., for defendant.

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

CALL, District Judge. This cause comes on to be heard upon demurrer to the declaration and motion to compel the plaintiff to separate the causes of action in counts 2, 3, and 4.

The declaration charges in the first count that the defendant is engaged in the hazardous occupation of railroading, and then proceeds to allege that the plaintiff was a machinist engaged in working in the shops of the defendant; that his duties required him to use steel chisels; that he delivered to a blacksmith, an employé of defendant, a chisel to be dressed and tempered; that it was the duty of such blacksmith to do this work; that said blacksmith carelessly and negligently failed to properly temper such chisel, so that upon being struck by a hammer a piece of the cutting edge flew off and put out plaintiff's eye; that defendant failed to use proper precaution for the protection of the plaintiff, and to furnish safe tools with which to work.

The second count alleges all the allegations of the first count, and alleges further negligence in that the blacksmith in repairing, dressing, or tempering said chisel hammered or drew out same improperly, so that the cutting edge of said chisel was made or left with cracks, rifts, or seams running backward down the chisel, and thereby rendered liable to crack or shiver or break when the chisel was struck by the plaintiff.

The third count alleges all the allegations of the first count, and alleges further that the metal in the chisel was unfit, improper, and inadequate for use in the way and for the work then and there required of the plaintiff.

For a fourth count, after making the first count a part, it further alleges that the blacksmith improperly heated, dressed, and tempered the chisel, by reason of which, while plaintiff was using it as his duties required, said chisel broke, splintered, or shivered back from its cutting edge, and a fragment destroyed the sight of plaintiff's eye.

Chapter 6521 of the Laws of Florida, § 1, defines hazardous occupations, among them railroading. Section 2 provides that persons, etc., mentioned in section 1 shall be liable in damages for injuries inflicted upon their agents and employés caused by the negligence of such persons, etc., their agents and servants, unless such persons, etc., shall make it appear that they, their agents and servants, have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against such persons, etc. Section 3 then provides that such persons, etc., shall not be liable for injuries where the same is done by the employé's consent or caused by his own negligence, but if the employé injured and the persons, etc., mentioned in the first section, or their agents or employés, are both at fault, the injured employé may recover, his damages to be decreased or increased in proportion to the amount of default attributable to both, provided that damages shall not be recovered where the injury occurs through the negligence of the injured employé and a fellow servant jointly engaged in performing the act causing the injury, and the employer is guilty of no negligence contributing to the injury. Section 4 does away with the doctrine of "assumption of risk," in every case where the injury is attributable to the negligence of the employer, his agents or servants.

[1] The first count of the declaration is predicated on the duty of the defendant to temper and dress the chisel to be used by the plaintiff in his work, and that the blacksmith was employed by the defendant to do this work, and the work was so negligently done by the blacksmith that, upon the plaintiff using the chisel as he was required to do, a piece of the cutting edge flew off and destroyed the sight of his eye.

Then follows a general allegation that the defendant failed to use proper precaution for the protection of the plaintiff, and to furnish safe tools with which he was to do the work. This allegation follows the charge of negligence of the blacksmith and negatives the idea that the lack of precaution or the failure to furnish safe tools was the proximate cause of plaintiff's injury. There is no fact alleged in the declaration to show that the chisel furnished was defective, but, on the contrary, the direct allegation that the blacksmith's negligence in tempering it was the proximate cause of the injury is made. These allegations, taken with the further direct charge that the "steel chisels were required to be tempered and dressed by the defendant," makes the general language above noted surplusage.

[2] The plaintiff, if he can recover upon the first count, must do so under and by virtue of chapter 6521, Laws of Florida 1913, the terms of which are set out above. Unless he falls within the terms of that act, the doctrine of injury through the negligence of a fellow servant would apply.

What I have said above in regard to the general charge of the failure of the defendant to furnish suitable tools to do the work applies equally to the charge in the third count that the metal in the chisel was unfit, improper, and inadequate for use in the way and for the work then and there required of the plaintiff. If the proximate cause of the injury was the negligence of the blacksmith, any other defect or negligence is of no moment.

The second and fourth counts charge negligence of the blacksmith more definitely, and in respect to the cause of action are the same as the first count, and governed by the same rule.

The Supreme Court of Florida, in G., F. & A. Ry. Co. v. King, 74 South. 475, in the majority opinion, construes this particular act. On page 477 of 74 South. the Court say:

"This statute was intended to define the liability of employers for injuries to employés engaged in the hazardous occupations therein stated."

Among these is "railroading." It then proceeds to define, on page 478 of 74 South. "railroading," as used in this statute, to mean "work upon a railroad," and "the business of constructing railroads."

The same court, in Stearns & Culver Lumber Co. v. Fowler, 58 Fla. 367, 50 South. 682, discussing the power of the Legislature, say:

"The legislature may exercise a wide lawmaking discretion as to regulating employments, and the liabilities and remedies incident thereto, when the classifications adopted for legislative regulation or change are not purely arbitrary, and are made with reference to real and practical differences in employments, and not merely to different employers."

In the instant case the plaintiff was a machinist in the employ of the defendant in its machine shops, either to "work upon" or "the

business of constructing" a railroad. His work was no more hazardous, nor, so far as the declaration discloses, other or different from machinists employed in any machine shop owned by corporations or persons, other than a railroad. If this plaintiff can claim the rights given under chapter 6521, supra, simply because the shop was owned by, and he was the employé of, a railroad company, it would be a classification of "employers," and not "employments," and this the Legislature cannot do.

I am of opinion, therefore, that the declaration does not state a case falling within the terms of chapter 6521, supra.

As before noted, the allegations show that the plaintiff was injured through the negligence of a fellow employé, not through the failure of the employer to perform the duty assumed of exercising reasonable care and diligence to provide the employé with reasonably safe machinery, tools, and implements to work with, and suitable and competent fellow employés to work with him. Stearns & Culver Lumber Co. v. Fowler, 58 Fla. 368, 50 South. 680.

The principles announced by the court are amply sustained by the many cases cited in the opinions.

The defendant's demurrer must therefore be sustained.

UNITED STATES v. GRAND RAPIDS & I. RY.

(District Court, E. D. Michigan. October 5, 1916.)

(Syllabus by the Court.)

1. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACT.
   The main purpose of section 1 of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1916, § 8605), was to save the lives and limbs of those men who theretofore had been required to go on the tops of moving trains to set the hand brakes.
2. RAILROADS ⟸229—OPERATION—SAFETY APPLIANCE ACT.
   The law requires that the speed of trains shall be controlled by the use of the power or air brake, and prohibits the use of hand brakes for that purpose.
3. RAILROADS ⟸229—SAFETY APPLIANCE ACT—SCOPE OF ACT.
   In a suit against a carrier based on the allegation that in certain specific instances the speed of its trains was controlled by the use of the hand brakes, and not by the use of the power brakes, evidence tending to show that, by reason of the steep grade over which the movements complained of were made, the former method of control is safer than the latter, *held* immaterial; the question of safety having been considered and determined by Congress when the law prescribing the method of control was enacted.

At Law. Action by the United States against the Grand Rapids & Indiana Railway. Judgment for plaintiff.

The following stipulation of facts was agreed to:

(1) That the defendant is, and was during all the times mentioned in said causes of action, a common carrier engaged in interstate commerce by railroad in the state of Michigan.

(2) That the line of defendant's railway in the state of Michigan, including the part of the line from Elmira, in the state of Michigan, to Boyne Falls, in

said state, was during said times part of a through highway of interstate commerce.

(3) That the defendant operated over its line of railroad and over the part of the line from Elmira to Boyne Falls and within the jurisdiction of this court its certain freight trains alleged in the said causes of action, to wit: November 29, 1915, train second 65, drawn by engine 85; November 30, 1915, train 65, drawn by engine 87; December 2, 1915, train extra north, drawn by engines 28 and 81; December 3, 1915, train 65, drawn by engine 85; December 4, 1915, train 65, drawn by engine 81.

(4) That each of said trains was then and there engaged in the movement of interstate commerce.

(5) That the railway of the defendant continues and runs northward from Cadillac, Mich., to Mackinaw City, Mich., on the Straits of Mackinac, a distance of 128 miles. Intermediate stations are Elmira, 68 miles north of Cadillac, and Boyne Falls, 9 miles north of Elmira. The former crossing of the Boyne City, Gaylord & Alpena Railroad was 1 mile north of Boyne Falls at milepost 409, plus 3,300 feet.

(6) That there is a steep grade known as Boyne Hill descending to the north from a point at milepost 401 (4,900 feet north of the station at Elmira) to Boyne Falls (milepost 409), and thence on to the point of said former crossing (milepost 409, plus 3,300 feet), a distance of approximately 8¾ miles. The elevation at a point 400 feet north of Elmira station is 1,231 feet. At milepost 401 the elevation is 1,221 feet. At milepost 409, Boyne Falls, the elevation is 703.69 feet. At milepost 409, plus 3,300 feet, the elevation is 666 feet. The descent from milepost 401 to milepost 409, plus 3,300 feet, is 555 feet. For the 5 miles next north from milepost 401 the down grade is 73.9 feet in every mile. From the northerly end of said 5 miles the railway track descends 3¾ miles to milepost 409, plus 3,300 feet, upon a continuous grade, which is for nearly all that distance more than 1 per cent.; that is, 1 foot in every 100 feet, being a considerable part of that distance 1.2 and 1.3 per cent. in every 100 feet. The elevation at Petoskey, 15 miles north of said railroad crossing, is 650 feet.

(7) That each of the said trains mentioned in the first, second, fourth, fifth, and sixth counts in the declaration were run north from Cadillac to Mackinaw City. There were 40 cars in train second 65, November 29, 1915; 52 cars in train 65, November 30, 1915; 74 cars in extra train, December 2, 1915; 65 cars in train 65, December 3, 1915; and 53 cars in train 65, December 4, 1915. Each of said trains made a stop at Boyne Falls Station.

(8) That each of the locomotive engines drawing the trains mentioned in said first, second, fourth, fifth, and sixth counts in the declaration was at the time fully equipped with a power-driving wheel brake and appliances for operating the train brake system upon said trains and upon the cars therein, and that not less than 85 per cent. of the cars in each of said trains were at the time equipped with power and train brakes as required by section 1 in Act March 2, 1893, and in sections 1 and 2 in Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1916, §§ 8613, 8614), and the order of the Interstate Commerce Commission June 6, 1910, and that all the said equipment and appliances and the train brake system were at the time in good order and repair and efficient condition and properly connected for use.

(9) That all the cars in said trains were at the time equipped with efficient hand brakes as required by section 2 in Act April 14, 1910, c. 160, 36 Stat. 298 (Comp. St. 1916, § 8618), in good condition and working order.

(10) That the handling of said trains was in accordance with the following general order issued by the defendant from the superintendent's office, in effect on the dates aforesaid:

"All concerned:

"All freight trains of 10 or more cars descending Boyne Hill, between KS tower and FA siding, must be controlled by hand brakes, and air brakes are not to be used unless it is evident that the trains can not be controlled by hand brakes or unless necessary to use air brake to make stop.

"All freight trains must come to a dead stop just before commencing to descend Boyne Hill, and set a sufficient number of hand brakes to properly con-

trol the train, and must also test their air brakes at the same time and know they are in proper working order.

"In addition to the hand brakes two or three retainers must be used all the way down the grade to avoid possible damage to cars in rear of train in case air brake is applied and released.

"When possible to avoid it, the same retainers or the same hand brakes should not be used all the way down the hill, account dangerous heating of wheels. When necessary to change retainers or hand brakes, fresh retainers or hand brakes should be set before the old ones are released.

"When a freight train descending Boyne Hill is being controlled by hand brakes, the engineman must give a warning of two short and one long whistles before applying the air brakes to give warning to train crew that air brake is about to be applied. J. W. Hunter, Superintendent."

In addition to the foregoing stipulation of facts, certain oral testimony was offered by the defendant tending to prove that it was safer to control the speed of these trains by the use of hand brakes rather than by power brakes, and opposing testimony on this issue was offered in rebuttal by plaintiff.

John E. Kinnane, U. S. Atty., of Detroit, Mich., and Roscoe F. Walter, Special Asst. U. S. Atty., of Washington, D. C., for plaintiff.

James H. Campbell, of Grand Rapids, Mich., for defendant.

On Motion to Direct Verdict.

TUTTLE, District Judge (after stating the facts as above). Neither the court nor the jury makes the law. This law, like the other laws that we have to do with in this court, is made by the Congress. It is the duty of the court to state to the jury what these laws passed by the Congress mean, and, having done that, it is the duty of the jurors to find out what the facts are, when facts material to the issue are in dispute. Now, in this case the attorneys have been good enough to save us a great deal of trouble by stipulating what the facts are, except in regard to one matter. The government contends that this one element of the facts in dispute is not material to this case. The only element about which there is any dispute at all is whether or not it is safer in operating defendant's heavy freight trains over the grade in question to use the hand brakes in connection with the air brakes. The railroad very frankly and fairly admits what rule it had in force and what it required its men to do, and the conductor, engineer, and brakeman for the railroad have very frankly told us how they did operate the trains under that rule, which agrees substantially with what the government inspectors who were there and rode upon the trains say they did, so that there is no dispute about what the railroad did and how it had its trains equipped. The only thing that there is any dispute about at all is a conclusion of fact as to whether or not it is safer to operate a train as the defendant railroad company required it to be operated and did operate it, or to operate it by the air brakes alone. Now, I charge you that this conclusion of fact is not a material element in this case, and does not make any difference. That is a question which the Congress determined when it passed the law. Congress made the law, and, right or wrong, determined that very matter; and it saves you the necessity of deciding that issue of fact. The very first paragraph of the law in question is:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day

of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed, without requiring brakemen to use the common hand brake for that purpose."

[1, 2] Now, the purpose of that law, the purpose of that section, at least the main purpose of it, was to save the life and limb of those men who theretofore had been required to go out on top of those trains while they were in motion and turn the brakes. The purpose was to require not only that the train should be equipped with power brakes, but also that the power brakes should be operated. It would be a useless law that required such equipment, but still permit a rule or regulation by the carrier that prohibited the use of such equipment and required the use of the old hand brakes. The purpose of Congress was to fix it so that the engineer from his cab could check his train by the use of the air, hold it, and stop it, without requiring these brakemen to run along on the tops of the trains and turn the brakes. It is the duty of the courts to interpret that law in the light of the purpose for which it was enacted, and, if possible, to give to it the meaning which the Congress had in mind when enacting the law. It seems plain to me that that was the purpose and that is the meaning. Now, if that was the purpose, then the legislative branch of the government has determined what is required of the railroads, and it is not necessary every time a lawsuit is tried under that act for the court and the jury to find out whether it is better to use hand brakes or power brakes. I permitted proof in regard to that issue in this case because I did not know what the facts were, and you did not know what the facts were, when we started out with the lawsuit. I wanted the record to show clearly whether or not this was a case where an attempt had been made by the train crew to use the air brakes and they had failed to work, and that then the brakemen had gone out on the train and set the brakes. That would raise a different question and one that it is not necessary to pass upon in this case.

[3] The grade in question has existed for many years and is a part of the roadbed over which every train that passes over that route has to go. In the so-called Great Northern Railway Co. Case, 229 Fed. 927, 144 C. C. A. 209, it was held as follows:

"Aside from the language of the act and the amendments, there is external evidence that it was the intention of Congress thereby to make it unlawful to require brakemen to use hand brakes in the ordinary management and movement of freight trains in interstate commerce."

It was partially in view of the foregoing language used by the Circuit Court of Appeals of the Ninth Circuit that I permitted the testimony to be taken and the record in this case to be made, so that we might know whether the things complained about by the government had been done in the ordinary operation of the railroad.

I say to you as a matter of law that the things complained of by the government, as shown by this record, were in the ordinary opera-

tion of the railroad. In other words, it was not any unusual or special situation existing at that time. This was the usual grade, the usual train, and operated in the usual way according to the rules promulgated by the railroad company. The thing done was not made necessary by some emergency, but it was the usual ordinary operation of the train in accordance with the rule that the government is complaining about. It is admitted that the trainmen in every instance, while descending this grade and while the trains were in motion, were required to go on top of the cars and turn the hand brakes, and that this was contemplated by the rule.

Now, giving the defendant the most favorable view of all the testimony—in other words, assuming that you were to find by your verdict that it was safer to use the hand brakes in connection with the air brakes—I would still be compelled to charge you that, even though that was true, the defendant must operate their trains according to the law. The law requires that the speed of trains engaged in interstate commerce, or hauled over a highway of interstate commerce, shall be controlled by the use of power brakes on said train operated by the engineers on the locomotives drawing such trains. The law prohibits the control of the speed of trains engaged in interstate commerce, or hauled over a highway of interstate commerce, by the use of hand brakes on the cars in such train. After a careful study of the act, I believe that is the interpretation that should be given to it, and it is particularly my duty to so interpret the law, in view of the decision of the Fourth Circuit Court of Appeals in the case of the Virginian Railway Co., Plaintiff in Error, v. United States of America, decided May 4, 1915, 223 Fed. 748, 139 C. C. A. 278, and the decision in the Ninth Circuit in the case of the United States of America, Plaintiff in Error, v. Great Northern Railway Co., Defendant in Error, decided February 14, 1916, 229 Fed. 927, 144 C. C. A. 209.

So, I charge you, gentlemen of the jury, and direct you to return a verdict in favor of the plaintiff, the United States of America, and against the defendant, the Grand Rapids & Indiana Railway Company finding the defendant guilty as charged in all five of the counts of the declaration now here on trial, namely, counts 1, 2, 4, 5, and 6, and the clerk will take your verdict accordingly.

In re SNELL.

(District Court, N. D. New York. August 22, 1917.)

1. BANKRUPTCY ⇐410—DISCHARGE—TIME FOR FILING APPLICATION.

Under Bankr. Act July 1, 1898, c. 541, § 14, subd. "a," 30 Stat. 550 (Comp. St. 1916, § 9598), providing 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 discharge, such application must be filed within 12 months subsequent to the adjudication, and under the further provision of said section that when an extension of time has been granted the application "may be filed within but not after the expiration of the next six months" the court is without power to grant a discharge on an application filed more than eighteen months after the adjudication.

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2. BANKRUPTCY ⊂=410—DISCHARGE—EXTENSION OF TIME FOR FILING APPLICATION.

The right of a bankrupt to apply for a discharge is in no way affected by the progress of the settlement of his estate, and the fact that no trustee was appointed within a year after adjudication does not entitle him to an extension of time for filing his application on the ground that he was "unavoidably prevented" from filing it within that time.

In Bankruptcy. In the matter of C. Edward Snell, bankrupt. On application for extension of time to file application for discharge. Denied.

This is an application by the bankrupt for an order extending the time in which to file his application for a discharge, more than 18 months from the date of adjudication having expired, but the application for such extension being made within 19 months of the adjudication.

Harry J. Mosher, of New Berlin, N. Y., for petitioner.

RAY, District Judge. [1] The above-named bankrupt, C. Edward Snell, was duly adjudged a bankrupt on the 12th day of January, 1916. This application for an order extending the time in which a petition for a discharge may be filed to August 12, 1917, or 19 months from the date of adjudication, was presented August 6, 1917, or 18 months and 25 days after adjudication. The petition is dated July 10, 1917, but was verified by the bankrupt July 30, 1917, and presented to the court 7 days later.

There is no claim that the neglect to file at an earlier day was caused by any failure of the mails or neglect of any post office employé or any neglect of any officer of the court. Does the application come too late? Bankruptcy Act, § 14, subd. "a," 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."

The bankrupt contends that under this provision of the Bankruptcy Act he could not file his application for a discharge until the expiration of one month from his adjudication, and that he had 12 months after the expiration of such one month, or 13 months from his adjudication, in which to file his application for a discharge, and that in case he was unavoidably prevented from filing it, as he claims he was, within such 13 months "(such time)," then the court may permit such application for a discharge to be filed within the next 6 months, that is, within 19 months from the adjudication. This construction disregards the plain wording of the law, viz. "and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge," etc. He may not file his application within one month of the adjudication, but may within the 12 months next subsequent to or following the adjudication, not the 12 months next following or subsequent to the expiration of the month following ad-

judication, and during which month he cannot file his application for a discharge. This is the construction placed on this subdivision of section 14 of the Bankruptcy Act by most of the text-books and nearly all the decisions on the subject. Collier on Bankruptcy (10th Ed.) 317, says:

"The application should be filed after one month and within 12 months subsequent to the adjudication."

Black on Bankruptcy says:

"As to the limitation of 12 months, this gives the bankrupt a year and a day from the date of adjudication, and no longer, unless the time is extended by the judge for cause shown as above stated."

He also says, citing several cases:

"And the limitation of the statute is imperative, and not merely directory. If the 12 months have expired without the filing of an application (saving in the case where the bankrupt was unavoidably prevented from acting in time), it is not within the discretion or authority of the court to entertain the application or to grant a discharge, but its jurisdiction and authority in this particular are at an end."

In 3 Remington on Bankruptcy, 2280, § 2423, the author says:

"The bankrupt may file his petition for a discharge at any time after the expiration of a month and before the expiration of a year from the adjudication of bankruptcy."

This author also says (volume 3, § 2427):

"The bankruptcy court has no jurisdiction to grant a discharge on a petition filed after the expiration of 18 months from the date of adjudication. A discharge granted on a petition for a discharge filed thereafter is null and void."

He cites In re Knauer, 13 Am. Bankr. R. 503 (D. C.) 133 Fed. 805; In re Wagner, 15 Am. Bankr. R. 101 (D. C.) 139 Fed. 87; In re Von Borries, 21 Am. Bankr. R. 849 (D. C.) 168 Fed. 718; In re Loughran, 32 Am. Bankr. R. 330 (D. C.) 215 Fed. 271; Bacon v. Buffalo Cold Storage Co., 27 Am. Bankr. R. 736, 193 Fed. 34, 113 C. C. A. 358; In re Richter, 27 Am. Bankr. R. 215 (D. C.) 190 Fed. 905. He also cites, contra, In re Walters (Otto E.), 31 Am. Bankr. R. 565 (D. C.) 209 Fed. 132.

Loveland on Bankruptcy, vol. 2 (4th Ed.) p. 1295, § 712, says, citing In re Knauer (D. C.) 133 Fed. 805, 13 Am. Bankr. R. 503, In re Lewin (D. C.) 135 Fed. 252, 14 Am. Bankr. R. 358, In re Anderson (D. C.) 134 Fed. 319, 14 Am. Bankr. R. 221, In re Fritz (D. C.) 173 Fed. 560, 23 Am. Bankr. R. 84, and In re Wolff (D. C.) 100 Fed. 430, 4 Am. Bankr. R. 74:

"A petition filed more than 12 months and less than 18 months after the adjudication will not be heard unless leave to file it has been granted by the court after hearing the reasons for delay ex parte and without notice to creditors, and this leave will not be granted by a nunc pro tunc entry more than 18 months after the adjudication."

The text-writers do not discuss the question on its merits, but simply state the decisions cited by them as the law. The statements

in these text-books are little more, if anything more, than a digest of the cases bearing on the subject.

If the true construction of the words "subsequent to being adjudged a bankrupt" in the law is that they were placed there solely to prevent the filing of a petition for a discharge before adjudication, which adjudication follows a voluntary petition as matter of course, then the words "within the next twelve months" would clearly refer to the words "after the expiration of one month," and the true reading would be "any person, subsequent to being adjudged a bankrupt may, after the expiration of one month and within the next twelve months, file an application," etc. As the section is written in the statute it is, I think, quite clear that the Congress intended that the bankrupt should be debarred from filing his petition for a discharge for one month after his adjudication as a bankrupt, giving that time for his creditors to make inquiry and examine the bankrupt and witnesses prior to the filing of an application for a discharge. Then comes the fixing of the time, limitation of time, within which the application for discharge must be filed, and then the right to an extension of time by order of the court in case he (the bankrupt) is unavoidably prevented from filing his application within the 12 months next succeeding the adjudication.

[2] This has been the generally adopted and accepted construction of the statute. For some years I have steadily adhered to this construction and have repeatedly refused to depart therefrom, and have held that applications for a discharge not filed prior to the expiration of the 12 months succeeding the adjudication come too late, and that applications for an extension of time in which to file an application for a discharge must come to the court or judge within the 18 months succeeding adjudication, or be on their way in time to reach the court within such period and delayed in reaching the judge by the act or acts of some person or persons other than the bankrupt or his attorneys or agents or some unavoidable accident. Here the only excuse offered by the bankrupt for not filing his application in time is that the referee failed to notify him or his attorney of his decision as to the necessity of appointing a trustee, which appointment the referee finally decided not to make. But delay by the court or referee in conducting the bankruptcy proceedings proper or in deciding questions relating to the due administration of the estate arising therein affords no excuse for not filing the application for a discharge within the time fixed by statute. The decision or determination of such questions in no way affect the right of a bankrupt to file his application for a discharge. Says Loveland, vol. 2, p. 1296 (4th Ed.):

> "It will be observed that the time within which an application [for a discharge] may be made is not dependent at all upon the progress made in the administration of the estate. Assets may or may not have come into the hands of the trustee. The estate may have been wholly or partly distributed. It is immaterial whether any dividend has been declared or not."

So it is wholly immaterial whether or not a trustee has been appointed. If the bankrupt has not been guilty of any of the acts or omissions barring a discharge, he is entitled to file his application for a discharge

and have it granted after the expiration of one month from his adjudication, no matter what the condition of the proceedings as to the administration of the estate may be.

The application for an extension of time in which to file the petition for a discharge must be denied on both grounds.

So ordered.

SIMON BORG & CO. et al. v. NEW ORLEANS CITY R. CO. et al.

(District Court, E. D. Louisiana. August 2, 1917.)

No. 15457.

1. CORPORATIONS ⟸583 — CONSOLIDATION — CONSTRUCTION OF STATUTE — "THREE-FOURTHS OF ALL STOCKHOLDERS."
   The provision of La. Act No. 100 of 1898, requiring a vote of "three-fourths of all the stockholders" of each corporation to effect a consolidation, means three-fourths of the number of shares and not of the holders, where by their charters each share of stock is entitled to one vote.
2. CORPORATIONS ⟸194—STOCKHOLDERS' MEETINGS—LEGALITY OF ACTION.
   Stockholders of a corporation who were present and voted at a stockholders' meeting cannot attack the validity of the action taken, on the ground that the officers who called the meeting were not legally qualified.
3. STREET RAILROADS ⟸51—CONSOLIDATION—REVIEW BY COURTS.
   A consolidation of street railway companies, effected by the vote of a large majority of the stock, *held* not so inequitable on its face as to warrant intervention by a court of equity, at suit of minority stockholders, before its effect on their interests can be known.
4. EQUITY ⟸38—RETENTION OF JURISDICTION FOR FUTURE RELIEF.
   In a suit by minority stockholders to enjoin the carrying out of a plan for consolidation of the corporation with others, where injunction is denied on the ground that the consolidation has been lawfully approved by a majority of the stockholders, the court may properly retain jurisdiction to grant any equitable relief to which complainants may appear to be entitled after the effect of the consolidation is known.

In Equity. Suit by Simon Borg & Co. and others against New Orleans City Railroad Company and others. Decree for defendants.

Lazarus, Michel & Lazarus and David Sessler, all of New Orleans, La., for plaintiffs.

Howe, Fenner, Spencer & Cocke and McCloskey & Benedict, all of New Orleans, La., for defendants.

FOSTER, District Judge. In this matter the pleadings are too voluminous to be concisely stated. The case is this: The New Orleans Railway & Light Company (hereafter called the Railway Company) is a holding company, owning nearly all the stock, say from 97 to 100 per cent., of the following named corporations, to wit, the New Orleans City Railroad Company (hereafter called the City Company), the Orleans Railroad Company, the New Orleans & Carrollton Railroad, Light & Power Company, the New Orleans & Pontchartrain Railroad Company, the St. Charles Street Railroad Company, and the Jefferson & Pontchartrain Railway Company. These companies constitute together the street railway system of the city of New Orleans.

The Railway Company also owns nearly all the stock of the New Orleans Lighting Company and the New Orleans Gas Light Company. All of these companies maintain their corporate existence and the legal ownership of their franchises and physical property. The Railway Company itself owns a few miles of track, mainly extensions of the franchises of the other companies. The Railway Company operates the property of the City Company by virtue of a lease entered into on March 31, 1902, which runs to December 31, 1955, approximately the date of the expiration of the City Company's franchises. The plaintiffs and interveners together own 650 shares of the common stock of the City Company and 8 shares of its preferred stock, less than 1 per cent. The Railway Company owns over 97 per cent., the balance being held by some 36 individual stockholders.

On May 22, 1916, the meetings of stockholders of the said street railroads were held, and a plan of consolidation under the provisions of Act 100 of the General Assembly of Louisiana of July 12, 1898, was agreed to. At the meeting of the City Company plaintiffs appeared through counsel, and protested against the adoption of the plan without avail, and thereafter the bill was filed.

The bill prays that the consolidation agreement be held null and void, and for an injunction to prevent its execution. By a supplemental bill the cancellation of the lease from the City Company to the Railway Company and the appointment of a receiver to take charge of and operate the property is asked. By a second supplemental bill the prayer for the annulment of the lease is abandoned, but a receiver to superintend the lease is asked for. The interveners join with the plaintiffs and ask the same relief.

There are two main questions to be considered: First, is the consolidation illegal under the law of Louisiana? Second, is the proposed exchange of stock so inequitable as to warrant the interference of a court of equity?

[1] On the first question, it is contended on behalf of plaintiffs that, under the provisions of Act 100 of 1898, the consolidation was required to be approved by a three-fourths majority of the *stockholders,* and this means that the vote is to be counted per capita, regardless of the number of shares held by each stockholder; and, further, if the vote could be by shares, under the provisions of the law of Louisiana (section 7 J., Act 267 of 1914), the Railway Company could not legally vote more than 10 per cent. of the stock held by it, and therefore the consolidation was not approved by a three-fourths majority of the stockholders counted either way. There is no doubt that three-fourths of the stockholders, per capita, did not vote in favor of the consolidation.

Act 100 of 1898, par. 2, § 1, reads:

"* * * And that no such consolidation shall be consummated or completed until it and the terms and conditions thereof shall have been approved by three-fourths of all the stockholders of each of such consolidated companies. * * *"

There are other acts, to wit, Act 39 of 1877, Act 38 of 1882, and Act 259 of 1916, amending Act 100 of 1898, all dealing with public

service corporations and having the same provisions, while Act 158 of 1874, authorizing the consolidation of business and manufacturing companies, requires the consent of the owners of at least three-fifths of the *capital stock* of each company.

It is urged with great force and earnestness on behalf of the plaintiffs that it was the intention of the Legislature, when dealing with the consolidation of public service corporations, to require the consent of three-fourths of the stockholders regardless of the number of shares, and that this was for the purpose of protecting the minority stockholders. Act 100 of 1898 and the other acts in pari materia have not been considered by the Supreme Court of Louisiana. As upholding their contention, plaintiffs rely upon the case of Taylor v. Griswold, 14 N. J. Law, 239, 27 Am. Dec. 33. In this case the court applied the common-law rule, and held illegal a by-law of a corporation granting a vote to each share of stock, in the absence of any statute of the state or any provision of the charter. The defendants rely upon a number of cases, two of which are in point. In the case of Los Banos v. Jordan, Secretary of State, 167 Cal. 327, 139 Pac. 691, the Supreme Court of California construed a provision of the Civil Code of California, and held that the words "majority of stockholders" means a majority in interest of the stockholders, and not a majority in numbers only. In the case of Mower v. Staples, 32 Minn. 284, 20 N. W. 225, the Supreme Court of Minnesota held that a majority of stockholders, as ordinarily used, means a majority per capita when the right to vote is per capita, and a majority of stock when each share of stock is also entitled to a vote. The common-law rule has no application in Louisiana, and I am inclined to agree with the conclusion reached in the two cases last cited. By the provisions of the charters of all the companies interested in the proposed merger, each share of stock is entitled to one vote. In view of the modern trend in matters of this kind, it seems to me that the more logical and better interpretation to put upon the statute is that what constitutes a majority of stockholders and the manner of voting should be determined in each case by the provisions of the charters of the merging corporations.

Act 267 of 1914, known as the Corporation Act, § 7 J., is as follows:

"Corporations may hold stock in other corporations, and the capital stock of one corporation may be issued for capital stock in other corporations; provided, however, that no corporation shall be permitted to vote more than 10 per cent. of the capital stock of any other corporation, and whenever a given per cent. of the stock is required for any purpose, such per cent. shall be calculated on the total amount of outstanding stock entitled to vote."

Defendants contend this act has no application to them, as they acquired their stock before its adoption. This is immaterial, for, while the section limits the right of a corporation holding stock in another to the voting of only 10 per cent. of its stock, it also eliminates the surplus stock from consideration for all other purposes. In this connection it is clear that the merger was adopted by three-fourths of the stock entitled to vote, whether the vote of the Railway Company be restricted to 10 per cent. of its holdings or the full number of shares allowed to participate.

[2] Before passing this question, there remains to consider the further contention of plaintiffs that the board of directors and president of the City Company were not qualified officers because they were not owners of sufficient shares of stock in the corporation. There is a conflict of provisions in the charter; article 5 merely requiring a director to be a stockholder, and article 9 providing that, after the first board, all directors shall be holders of 50 shares each, common and preferred stock. Each of the directors concerned in this case is the owner of one share of stock, and other shares of stock to the extent required by article 9 of the charter were standing in their names on the books of the company, but admittedly were owned by the Railway Company. However, I consider it unnecessary to interpret the provisions of the charter. The directors and president were officers de facto, if not de jure, and any irregularity of their election would have no effect on the action of the stockholders at the meeting called by them, and otherwise regularly held, especially as plaintiffs had notice of the meeting and were present and participated.

[3] On the second question, it is contended by plaintiffs that the consolidation should be enjoined because grossly inequitable to the minority stockholders, for the following reasons: That under the lease by which the Railway Company operates the property of the City Company it is provided that in lieu of rent there shall be a semiannual payment of $50,000, to be applied as a dividend on the common stock, and a semiannual payment of $62,500, to be applied as a dividend on the preferred stock; that the Railway Company shall maintain the property in good condition and create a sinking fund for the payment of its mortgage indebtedness and the interest on same; that at the expiration of the lease the property will be returned to the stockholders free of any mortgages and incumbrances; and that, as the lease will be extinguished by confusion in the event of consolidation, the stockholders will be deprived of a certain dividend for 39 years and the ownership of valuable unincumbered property at the expiration of the lease, for which they will receive stock of doubtful value and without any guaranty as to its dividends. On the other hand, defendants contend that the stock of the new corporation will be more valuable than that for which it is exchanged; that at the expiration of the lease the property will still be burdened with mortgages exceeding $3,700,000, and its value will be very little because of the expiration of the franchises.

[4] Courts of equity, and particularly the federal courts, are being called upon constantly to superintend the reorganization of public service corporations, and of course will always protect the minority stockholders against an unfair plan proposed by the majority. In this case there is much to be said on both sides; but, in my opinion, whether or not the plan proposed is unfair can only be properly determined after it is put into execution. Plaintiffs are the owners of certain shares of stock that have a definite market value. It is proposed to give them other shares of stock that will also have a market value. It is logical to suppose that the street railway system of New Orleans can be more economically operated and financed if the property is all

owned by one corporation, and, on all the facts before me, it is a reasonable presumption that the stock offered to the plaintiffs will have equally as much market value as the stock they now own. I think it competent for the court to retain jurisdiction to enforce equality of exchange, but it would be inequitable to the owners of the majority of the stock to prevent the consummation of the merger.

In view of these conclusions, and the withdrawal of the demand for the cancellation of the lease, it is unnecessary to consider the other questions presented by the pleadings.

The restraining order heretofore issued will be recalled, and the prayer for injunction and appointment of a receiver will be denied. The bill will be retained for the purpose of granting such other relief as the nature of the case may require within a reasonable time.

HINMAN v. BARRETT.

(District Court, N. D. New York. August 21, 1917.)

1. REMOVAL OF CAUSES ⟸86(4)—PETITION—ALLEGATION THAT PARTIES ARE CITIZENS OF DIFFERENT STATES.
   A petition for removal of a cause for diversity of citizenship which fails to allege that the parties are citizens of different states, but merely alleges that plaintiff is a resident of one state and defendant a resident of another state, in which the action is brought, is defective.

2. PLEADING ⟸85(4)—TIME—ORDER—STIPULATION.
   A defendant is not required by law to plead until the time fixed by order, if the time be extended by order of court, or until the time fixed by stipulation, if the other party sees fit to stipulate in writing that he need not answer or plead until a fixed day.

3. REMOVAL OF CAUSES ⟸84—NOTICE OF INTENTION TO FILE PETITION.
   A notice of intention to file a petition and bond for removal of a cause is sufficient though it does not specify the time and place when it is to be presented.

4. REMOVAL OF CAUSES ⟸94—PETITION—NOTICE TO AMEND.
   Where defendant's petition to remove an action on the ground of diversity of citizenship by the attorney's error used the word "resident" instead of stating that the parties were "citizens" of different states, and the succeeding terms of the federal court are such that granting defendant's motion to amend will not cause delay, his motion will be granted.

At Law. Action by William F. Hinman against Thomas F. Barrett. On motion by defendant to amend removal petition so as to allege the diverse citizenship of the parties to the action. Motion granted.

Reuben S. Calkins, of Albany, N. Y., for plaintiff.
Stires & Dawley, of New York City, for defendant.

RAY, District Judge. After service of the summons and complaint on the defendant April 10, 1917, he appeared generally by his attorneys and obtained, by stipulation, an extension of time in which to serve his answer until May 21, 1917. Just prior to the expiration of this time, and in the afternoon of May 21st, defendant, by his attor-

neys, presented to Justice Hasbrouck of the Supreme Court, in which court the action was brought and was then pending, a petition of removal with the necessary bond on removal. The defendant served notice before filing such petition that he would present and file such a petition and bond for removal and apply for the approval of such bond, but did not state when or where he would apply or to what judge. The notice reads as follows:

"Supreme Court of the State of New York.

County of Albany.

William F. Hinman, Plaintiff, against Thomas F. Barrett, Defendant.

"Please to take notice that on the 21st day of May, 1917, and immediately after the service hereof upon you, we shall file in the office of the clerk of the county of Albany, state of New York, being the clerk of the Supreme Court in and for said county of Albany, the petition, a copy of which is hereto annexed, for the removal of the above-entitled cause to the District Court of the United States for the Northern District of New York, and that we shall also then and there file the bond, a copy of which is hereto annexed, and at the same time apply for the approval of the said bond, and for such other or further relief as may be just. Yours, etc., Stires & Dawley, Attorneys for Defendant-Petitioner, 45 Cedar Street, New York, N. Y.

"To Reubin S. Calkins, Esq., Attorney for Plaintiff, 12 Pine Street, Albany, New York."

Judge Hasbrouck, at 3 p. m. May 21, 1917, on presentation of such petition, notice, and bond, copies of which had been served on plaintiff's attorney at 1:30 p. m. of that day, approved the bond, and at 3:30 p. m. of that day the defendant filed such petition, notice, and bond in the office of the clerk of the county of Albany, N. Y., in which county the venue of the action was laid. The clerk stamped same as filed at 3:30 p. m. May 21, 1917. The clerk was then and there requested to certify such record of the case to the clerk of this United States District Court for the Northern District of New York, which he did as soon as necessary copies for certification could be made, and same duly certified were forwarded May 25th, and received and filed by the clerk of the United States District Court May 27, 1917.

It would seem that Mr. Calkins, the plaintiff's attorney, ignored such papers so served on him for May 25th, the same day the record on removal was forwarded to the clerk of the United States District Court, he served on defendant's attorney a copy of a judgment in this action taken as on default entered in Albany county clerk's office May 24, for $10,398.49, with a notice of entry of same. Thereupon defendant moved to vacate and set aside such judgment on the ground the cause had been removed to the United States District Court, and that the state court had lost jurisdiction, and this motion is pending awaiting the determination of this application. No motion to remand the cause has been made so far as this court is advised.

[1] The petition for removal is defective in that it fails to allege that the parties are citizens of different states. It does allege that the plaintiff is a resident of the state of Pennsylvania, and that defendant is a resident of the state of New York, Northern District, in which state the action was brought, but says nothing as to citizenship, except in the prayer it says:

"Wherefore your petitioner prays that this cause be removed into the District Court of the United States for the Northern District of New York on the ground of diversity of citizenship between the plaintiff and the defendant herein," etc.

The petition contains the necessary averment as to amount in controversy between the parties. These statements as to the residence of the parties with the statement in the prayer of the petition plainly indicate the ground on which removal was sought, viz. diversity of citizenship, but are not the equivalent of the necessary allegations of diversity of citizenship. Residence is one thing, but citizenship is another. A person may reside for months or even years in a state without being a citizen thereof.

[2] The plaintiff claims that there was no removal of the cause because of this defect in the petition, and for the reason the removal should have been made within 20 days of the service of the summons and complaint, as under the New York Code of Civil Procedure a defendant, in case of personal service, as here, is required to plead within that time. But a defendant is not required by law to plead until the time fixed by order, if the time be extended by order of court, or until the time fixed by stipulation, if the other party sees fit to stipulate in writing that he need not answer or plead until a fixed day. The New York courts and rules recognize stipulation of this character, and in the absence of fraud or mistake hold the parties to them bound thereby. This court has so decided. Groton B. & M. Co. v. Am. B. Co. (C. C.) 137 Fed. 284. And see Russell v. Harriman Land Co. (C. C.) 145 Fed. 745, and the numerous cases cited, page 966, 1 U. S. Compiled Statutes Annotated. There are a few cases to the contrary which seem to be based on the proposition that parties by stipulation cannot extend the time within which removal is to be made. On the papers presented to Judge Hasbrouck, he approved the bond on removal. He did not notice the defect and recognized the stipulation. The statute does not seem to require a regular notice of motion for approval of the bond and for an order of removal specifying a time and place at which the other party can be heard. If the papers are not sufficient to effect removal, there may be a motion to remand the cause. Section 29 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [Comp. St. 1916, § 1011]) reads as follows:

"Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the District Court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the District Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such District Court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said District Court if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and

bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said District Court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said District Court."

[3] And a notice of intention to file a petition and bond for removal of a cause is sufficient though it does not specify the time and place when it is to be presented. Potter v. General Baking Co. (D. C.) 213 Fed. 697. And see, also, Cropsey v. Sun Printing & Pub. Ass'n (D. C.) 215 Fed. 132; Chase v. Erhardt (D. C.) 198 Fed. 305; Hansford v. Stone-Ordean-Wells Co. (D. C.) 201 Fed. 185.

[4] I do not doubt the power of this court to allow the amendment proposed. The question is, under all the circumstances: Ought it to be allowed? The plaintiff claims the removal is sought for delay. But there is to be a term of this court at Auburn the first Tuesday in October and another the first Tuesday in December at Utica, and delay in the trial is unnecessary. So far as appears, the removal is sought in good faith, and in fact it is a removable cause. The error in using the word "resident" instead of "citizen" ought not to prejudice the defendant. It was an error of the attorney and passed the judge unnoticed. The proposed amendment of the petition corrects this, and states the facts showing the necessary diversity of citizenship. I think justice demands that the amendment be allowed. It is urged that when the bond approved by Judge Hasbrouck and the defective petition were filed the defect was so grave that no removal was effected, and that the state court has always retained jurisdiction and had jurisdiction, notwithstanding the presentation to Judge Hasbrouck and the approval of the bond and the filing of the papers, to render judgment in the cause, that the judgment is valid, and that an amendment to the removal petition will not effect a removal as of the date of the filing of the said bond and petition. That question is not before me. The defendant merely asks to amend the defective petition. The effect of the amendment can be passed on when the question arises. Judge Howard will pass on that question in deciding the motion to vacate the judgment entered in the state court after the petition and bond of removal were filed.

The application to amend comes before any motion to remand.

Motion granted.

Ex parte ROACH.

(District Court, N. D. Alabama, M. D. August 14, 1917.)

(Syllabus by the Court.)

1. ARMY AND NAVY ⊂=22—ENLISTMENT—EXPIRATION.
Under the provisions of the National Defense Act June 3, 1916, c. 134, 39 Stat. 166, upon the expiration of his enlistment an enlisted man is not automatically furloughed to the reserve.

2. ARMY AND NAVY ⊂=22—ENLISTED MAN—ACTS OF CAPTAIN.
No act or acts done by a company captain, or no act or acts of the company captain and the enlisted man, without the approval of the War Department, can operate as a discharge of the enlisted man, or as a furlough to the reserve.

(Additional Syllabus by Editorial Staff.)

3. ARMY AND NAVY ⊂=24—"FURLOUGH."
"Furlough," as a noun, means "(1) Leave of absence; esp., leave given to a soldier or, sometimes, a government official or employé, to be absent from the service for a certain time; also, the document granting the leave of absence. In the United States army furloughs are given only to enlisted men, officers being given leaves of absence. In the United States navy furlough is an extended leave of absence, or a suspension from duty by an executive order, on half leave-of-absence pay, given only to an officer. (2) A permit or passport." As a transitive verb, it means "to grant a furlough to; broadly, to allow leave of absence to."

At Law. Petition by Roy B. Roach for writ of habeas corpus. Writ dismissed, and petitioner remanded.

J. Q. Smith and John T. Roach, both of Birmingham, Ala., and Hill, Hill, Whiting & Stern, of Montgomery, Ala., for petitioner.

Thos. D. Samford, U. S. Atty., of Opelika, Ala., and Lieut. J. M Strassburger, of Montgomery, Ala., for the United States.

HENRY D. CLAYTON, District Judge. The petition for the writ of habeas corpus in this case presents for determination the question whether or not Roy B. Roach, who is detained for safe-keeping as a prisoner by the sheriff of Montgomery county under direction of the military authorities of the United States, is unlawfully restrained of his liberty under or by color of the authority of the United States. The question is answered by the ascertainment of the legal status of Roach, the petitioner, on July 29, 1917. If, as a matter of law, he was then in the active military service of the United States, his detention is legal. But if at that time he had been duly furloughed to the National Guard Reserve, as contemplated under sections 69 and 78 of the act approved June 3, 1916 (Comp. St. 1916, §§ 3044h, 3044p), and commonly called the National Defense Act, he is now restrained of his liberty illegally and should be discharged.

After a careful consideration of the evidence in this case, both oral and documentary, the court finds the facts necessary to the determination of the question to be as follows: That on April 24, 1914, Roy B. Roach enlisted in Company B, 2d Infantry, Alabama National Guard, for the period of three years. He was still serving with his

command when on June 29, 1916, he subscribed and swore to a federal enlistment contract, containing the following provisions prescribed by section 70 of the National Defense Act of June 3, 1916 (Comp. St. 1916, § 3044i):

"Form No. 14, A. G. O.

"Oath and Contract of Enlistment of Roy B. Roach, Co. C, 2d Infantry, A. N. G., in the National Guard of the United States and of the state of Alabama: I do hereby acknowledge to have voluntarily enlisted this 29th day of June, 1916, as a soldier in the National Guard of the United States and of the State of Alabama for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the state of Alabama, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and the Governor of the state of Alabama, and of the officers appointed over me according to law and the rules and articles of war. This oath is subscribed with the understanding that credit will be given in the execution of this contract for the period which I have already served under my current enlistment in the organized militia of the state of Alabama.

"Signature, "Roy B. Roach. Date of Current Enlistment in Organized Militia, April 24, 1914.

"Subscribed and duly sworn to before me this 29 day of June, A. D. 1916, Virgil T. Roach, 1st Lt. 2nd Infantry, A. N. G."

On July 1, 1916, while at the mobolization camp of the Alabama National Guard at Montgomery, petitioner and the company of which he was then a member, Company C, were mustered into the service of the United States.

On or shortly before April 24, 1917, when petitioner's three years' enlistment in service expired, he requested to be furloughed to the National Guard Reserve, and papers seeking to do this were forwarded to the proper military authorities at Montgomery. The papers were returned on account of some error. Petitioner then told his company commander that he desired to continue in the active service during the whole of his enlistment period, as he could do under section 69 of the National Defense Act (act approved June 3, 1916). Petitioner continued to do guard duty, to perform other military duties, and to draw pay during all of said time and until on or about June 22, 1917, when his company commander again addressed a communication to the commanding officer of the 2d Alabama Infantry, stating that, "enlistment of private Roy B. Roach having expired, request that he be furloughed to reserve." This communication was accompanied by petitioner's final statement and reservist's descriptive card, all of which were transmitted, through proper military channels, to the headquarters of the United States Army for the Southeastern Department for approval. It will be noted that this request for petitioner's furlough to the reserve was not made until after the act approved May 18, 1917, authorizing "the President to increase temporarily the military establishment of the United States," became effective.

While awaiting action by the Southeastern Department on petitioner's application for furlough, his company commander permitted him to deliver and surrender to the proper military authorities all gov-

ernment property in his possession; gave him transportation to his home, and petitioner was instructed by his company captain to go there and await receipt of the papers evidencing his furlough to the reserve. Petitioner returned to his home, his name was dropped from the rolls of the company, and omitted from the "Morning Report of Co. C," and the following notation was made on page 14 of the company pay roll, dated at Birmingham, Ala., June 30, 1917: "Roach, Roy B. * * * Furloughed to National Guard Reserve, active term of enlistment having expired. Held in service until date of furlough for convenience of government. Furloughed June 22, 1917."

On July 26, 1917, petitioner's request for furlough to the reserve was returned to the military authorities at Montgomery, from the headquarters of the Southeastern Department, disapproved, and with the information that petitioner could not under the law be furloughed to the reserve "during the present emergency."

A few days thereafter, and on July 29, 1917, and prior to August 5, 1917, the date when, by the President's proclamation of July 3, 1917, the National Guard Reserves were to be called into the military service of the United States, First Lieutenant Cowan, an officer of petitioner's company, acting under direction of petitioner's company commander, met private Roach in Birmingham, Ala., told him his application for furlough had been turned down, and ordered him to report back to his company for service. This petitioner declined to do, and was placed under arrest by Lieutenant Cowan following an altercation and encounter, the details of which it is not necessary to recite.

Petitioner was later brought to Montgomery under arrest, and placed in the Montgomery county jail for safe-keeping pending his trial by military authorities on the charge of striking a superior officer. Petitioner insists that on July 29, 1917, "he was a civilian and not a soldier in the contemplation of the laws of the United States, and was not subject to military law or authority."

The return of the sheriff to the writ showed that he was holding petitioner as stated above.

Counsel for petitioner insist that when on or about April 24, 1917, he requested to be furloughed to the reserve, and when later he surrendered the government property in his possession, his name was dropped from the company rolls, he was furnished transportation to his home and went there, petitioner's active military service ceased, and that he became, by operation of law, a member of the National Guard Reserve; that no approval of petitioner's application for furlough by authorities superior to petitioner's company commander was requisite; and that the issuance to petitioner of a reservist's descriptive card and a final statement were unnecessary to fix petitioner's status as a reservist. In short, that, under the facts of this case, the enlisted man Roach was automatically furloughed to the reserve.

[1] (1) The court cannot agree to this contention. Until the proper military authority had settled the accounts of the enlisted man, and had ascertained, among other things, whether the enlisted man would be required to make up any unauthorized absences, had made up

his final statement, and that there had been delivered to him a reservist's descriptive card, the evidence of the soldier's furlough to such reserve, it could not be said that the soldier had been furloughed to the reserve.

[3] Of course, it must be assumed that Congress selected the particular phraseology, "furloughed to the * * * reserve," employed in section 29 of the National Defense Act (Comp. St. 1916, § 1894), with knowledge that the term "furlough" is well defined by the lexicographers, and that its meaning is generally understood by the practical application made by the War Department. As a noun, it means: "(1) Leave of absence; esp., leave given to a soldier, or, sometimes, a government official or employé, to be absent from the service for a certain time; also, the document granting the leave of absence. In the United States army furloughs are given only to enlisted men, officers being given leaves of absence. In the United States navy furlough is an extended leave of absence, or a suspension from duty by an executive order, on half leave-of-absence pay, given only to an officer. (2) A permit or passport." As a transitive verb, and as such it is used in the National Defense Act, it means "to grant a furlough to; broadly, to allow leave of absence to." "Furlough," Webster's New International Dictionary, p. 878. So it is apparent that Congress had in contemplation that to be furloughed to the reserve meant to grant to the enlisted man a leave of absence until the enlisted man should be called into the service again by presidential proclamation, under section 111 of the National Defense Act, approved June 3, 1916 (Comp. St. 1916, § 3045), or under the act approved May 18, 1917, § 1, cl. 2. And, manifestly, it was contemplated that the practice and requirements of the War Department should be observed as a prerequisite to the furlough of the soldier to the reserve. In this case the soldier, petitioner Roach, was never furloughed to the reserve. In fact, his application to be furloughed was denied by competent military authority.

[2] (2) It is next contended for petitioner that when, following his request, petitioner's company commander allowed him to surrender the government property in his possession, gave him transportation to Birmingham, dropped his name from the rolls of the company, and made the notation of furlough on the company records, that such action of the company captain operated to furlough petitioner to the reserve. However, there is no merit in this contention of petitioner. The actions of his company captain, made without authority from his superior officers, were not binding upon the military establishment and the military authorities, and the captain had no authority to render valid or sufficient any acts of petitioner looking to the termination of his active service.

It will be remembered that when petitioner's first papers for furlough were returned on account of an error, that petitioner then told his captain that he desired to continue in active service, as he had the right to do under section 69 of the National Defense Act of June 3, 1916, and there is no requirement that this election be made in any particular form or manner.

While petitioner was in the active military service of the United States, and before the attempted furlough of petitioner to the reserve on June 22, 1917, as stated above, and while petitioner's enlistment was in force and he was performing military duties and receiving pay as a soldier, Congress passed the "Act to authorize the President to increase temporarily the military establishment of the United States," and said act became effective by the approval of the President on May 18, 1917. Paragraph 7 of said act contains the following provision:

"All enlistments, including those in the regular army reserve, which are in force on the date of the approval of this act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged."

Petitioner's enlistment falls within the purview of this act. He was not entitled to a discharge, and the military authorities were correct in holding that he could not be furloughed to the reserve during the present emergency, for the paragraph quoted above prohibited his furlough.

The court is of opinion, therefore, that on July 29, 1917, petitioner, Roy B. Roach, had not the status of a civilian or a reservist, but that he was in the actual military service of the United States and subject to military law and discipline. Accordingly, the application of petitioner for discharge from custody is denied, his petition for the writ of habeas corpus dismissed, and he is remanded to the custody of the military authorities; and the order to that effect will be entered.

ORDER.

Upon consideration of the petition of Roy B. Roach for habeas corpus, praying that he be discharged from custody, the return of the sheriff, the evidence, both oral and documentary, and after considering the argument and briefs of counsel for petitioner and the officers detaining him, the court is of opinion that petitioner is not unlawfully restrained of his liberty. It is therefore ordered, adjudged, and decreed by the court that said Roy B. Roach be, and he is hereby, remanded to the custody of the United States military authorities, and that his petition for discharge on habeas corpus be, and it is hereby, denied and dismissed.

In re STRINGER.

(District Court, E. D. New York. July 11, 1917.)

1. BANKRUPTCY ⟸228—PROCEEDINGS—ORDER OF REFEREE.
   Where none of the parties within 10 days following an order of the referee directing the trustee to make payment of dividend attempted to have it set aside, the order may for that reason be affirmed by the court of bankruptcy.

2. PARTNERSHIP ⟸181—CREDITORS—RIGHTS OF.
   Where a firm is dissolved by withdrawal of one of the partners and the assets delivered to another as liquidating partner, firm creditors may trace

into the hands of the liquidating partner firm assets, and individual creditors of such partner can look only to the surplus.

3. BANKRUPTCY ⟸339—DETERMINATION AS TO CLAIMS—EFFECT.

In bankruptcy against a member of a firm individually and as sole surviving partner, it appeared that an earlier firm had been dissolved, the assets delivered to the bankrupt as liquidating partner, and by him delivered to the latter firm. The trustee contended that certain debts had not been assumed by the latter firm, and, on appeal to the Circuit Court of Appeals from an order allowing claims based on such debts in part as against the firm assets, the claims were disallowed save as against the bankrupt as an individual. Other debts incurred by the earlier firm were not opposed by the trustee. No petition against the bankrupt as surviving partner of the earlier firm had been filed, and he was not a party to the proceedings in that capacity save through his bankruptcy as an individual. *Held*, that those whose claims were disallowed by the ruling of the Circuit Court of Appeals could not object to the payment of dividends to creditors whose claims against the firm assets were uncontested.

In Bankruptcy. In the matter of the bankruptcy of G. Franklin Stringer, individually and as sole surviving partner of Stringer & Company. Application by creditors to require the trustee to pay a dividend declared. Report of referee declaring dividend affirmed, and trustee directed to comply.

See, also, 230 Fed. 177, 233 Fed. 799, 234 Fed. 454, 240 Fed. 892.

Frederick W. Stelle, of New York City, for Graff.

J. Gardner Stevenson and A. Gordon Murray, both of New York City, for trustee.

Henry M. Stevenson, of New York City, for Mary E. Lewis, H. Leroy Lewis, and H. J. Lewis Oyster Co.

CHATFIELD, District Judge. Application has been made to compel the trustee to pay a 10 per cent. second dividend declared upon a dividend sheet made up in accordance with the opinion of the Circuit Court of Appeals, which established the status of claims by Mary E. Lewis, the H. J. Lewis Oyster Company, and H. Leroy Lewis, for certain loans amounting in the aggregate to $93,831.38.

[1] Notice was then given to the trustee by the attorney for Mrs. Lewis and her sons that such dividend would be contrary to the opinion of the Court of Appeals. The trustee has held back payment, and certain of the creditors have applied to this court to direct the trustee to proceed to pay this dividend, the 10 days having expired in which he should so do. This 10-day period is evidently the same as that in which a petition to review the referee's decision in allowing the dividend could be made, and no party has attempted to have the referee's order for the payment of this dividend set aside. This would of itself be sufficient ground to direct the trustee to proceed; but an interpretation of the opinion of the Circuit Court of Appeals, involved in any order which may be made, renders it advisable to consider the correctness of the dividend sheet.

The decision of the Circuit Court of Appeals was made on February 14, 1917 (240 Fed. 892), and modified the decision of this court, reported in 234 Fed. 454, by holding all of the above claims to be debts

provable only against G. Franklin Stringer, individually, as surviving partner of a firm known as Jewell & Stringer.

This firm of Jewell & Stringer dissolved upon the 23d day of May, 1912, and upon the following day the firm of Stringer & Co. was organized by the two remaining partners, viz. G. Franklin Stringer, Jr., and G. Franklin Stringer, Sr.

In January, 1915, G. Franklin Stringer, Jr., died, and the estate in bankruptcy which is being administered is that of G. Franklin Stringer, Sr., as surviving partner of the firm of Stringer & Co., and also that of G. Franklin Stringer, Sr., as an individual.

It should be noted that G. Franklin Stringer, as surviving partner of the firm of Jewell & Stringer, has never been petitioned into bankruptcy nor brought in except in so far as he is a party to these proceedings through his bankruptcy as an individual.

It also appears that an earlier firm, of Jewell, Stringer & Co., went out of existence in February, 1911, when one of the partners withdrew and the remaining partners continued as the firm of Jewell & Stringer, above referred to, until October of the year 1911, when G. Franklin Stringer, Jr., came into that firm as an additional partner.

There have been numerous different disputes determined in this case with reference to other claims by Mrs. Lewis, a sister of G. Franklin Stringer, Sr., and who had advanced large amounts of money to him in various phases of his business enterprises. Among the claims shown on the present dividend sheet is a firm debt of $30,000 allowed to Mrs. Lewis by the referee. So far as appears from the record, all of the claims presented upon the dividend sheet are based upon transactions continuing through the firms of Jewell, Stringer & Co., Jewell & Stringer, and Stringer & Co. In each case the debt from the prior firm was carried over into the books of the succeeding firm as a debt due against that firm.

In originally opposing the claims passed upon by the Circuit Court of Appeals, the trustee in bankruptcy objected to the allowance of the claims, "upon the grounds that they were liabilities of G. Franklin Stringer, Sr., individually, or that, if they were a liability of any other than G. Frankln Stringer, individually, they were liabilities of a former partnership of which he was a member." Referee's Report. The referee held that all three of the claims were debts of Jewell & Stringer which were carried over into and assumed by Stringer & Co.

The trustee in bankruptcy appealed from this allowance and then raised the objection that the firm of Stringer & Co. had not assumed the obligations of Jewell & Stringer, as well as the objection that the loans had been made to G. Franklin Stringer, Sr., as an individual. The District Court sustained this contention as to $47,033.05 of the moneys claimed by Mrs. Lewis, which had been loaned to Stringer, Sr., as an individual and had never gone beyond the point of money placed by him in the firm as a contribution by himself as a partner. Neither the referee nor this court understood that the trustee (who was representing general creditors holding claims arising from transactions with Jewell & Stringer, and which the trustee was thus supporting for payment out of the assets of Stringer & Co.) claimed or

would urge that the firm of Stringer & Co. had never assumed any partnership debts of Jewell & Stringer. The issue then presented was whether the Lewis claims were individual, as opposed to partnership claims, and whether these Lewis claims had been assumed by Stringer & Co., even if debts of G. Franklin Stringer, Sr.

This court in allowing an appeal to the Circuit Court of Appeals was inclined to refuse an appeal upon those assignments of error that might be construed as raising the contention that Stringer & Co. were not responsible for any debts which had been incurred by Jewell & Stringer. As a matter of fact, Stringer, Jr., was at all the times in question a member of the firm, and no testimony has ever been presented showing that Stringer, Jr., transferred his interest in these assets to his father as liquidating partner. The testimony was only to the effect that Jewell transferred his share, including the stock exchange seat, to Stringer, Sr., to act as liquidating partner, upon the assumption that the firm was solvent and in order that, as liquidating partner, Stringer, Sr., could transfer the property to the new firm. When this situation was first presented, the matter could have been sent back for further testimony; but it was allowed to go up on appeal by Mrs. Lewis and on cross-appeals by the trustee. The Circuit Court of Appeals has specifically passed upon the effect of a transfer by a solvent firm to one of its partners, of all its assets, for the purpose of liquidation, when viewed from the situation of a later firm, into which this so-called liquidating partner has entered as an individual and into which he has put those assets for which he became responsible as a survivor of the preceding firm.

The Circuit Court of Appeals has decided that the claim of Mrs. Lewis and of her son, H. Leroy Lewis, were in reality loans to Mr. Stringer as an individual, which could not be shown as claims against the firm assets unless the moneys loaned could be traced specifically into the firm assets in such a way that subrogation might be invoked therefor. The Circuit Court of Appeals has held that the H. J. Lewis Oyster Company's claim was a firm debt of Jewell & Stringer, but that it did not pass with the assets so as to become an obligation of Stringer & Co., and that it remains a claim against Mr. Stringer as an individual as liquidating partner.

Upon these facts the referee has attempted to marshal the assets (1) of Jewell, Stringer & Co., (2) of Jewell & Stringer, (3) of G. Franklin Stringer, Sr., individually, (4) of G. Franklin Stringer as liquidating partner of the firm of Jewell & Stringer (without reference to the rights of G. Franklin Stringer, Jr., who seems to have been lost sight of by the trustee), and (5) the claims of Stringer & Co. which admittedly included all claims mentioned above except the personal loans of G. Franklin Stringer, Sr., from his sister, and except the loans of Mrs. Lewis, H. Leroy Lewis, and the Lewis Oyster Company to the firm of Jewell & Stringer.

The referee has followed literally the direction of the Circuit Court of Appeals in treating these three claims as individual debts of G. Franklin Stringer, Sr., and has separated them from the debts due from G. Franklin Stringer as liquidating partner of the firm of Jewell & Stringer.

There is nothing in the opinion of the Circuit Court of Appeals to indicate any difference in result in the case of such marshaling. The opinion says that six bonds were handed over to Jewell & Stringer as agent for Stringer, Sr., individually. The court then says:

"If these facts be assumed, we have a liability in favor of Lewis against the firm of Jewell & Stringer. That liability became the personal liability of Stringer, Sr., on the dissolution of the firm of Jewell & Stringer."

If it was a loan to the firm as agent for Stringer, Sr., it never was a liability against the firm and would be in exactly the same category as the claim of Mrs. Lewis.

The claim of the H. J. Lewis Oyster Company is held by the Circuit Court of Appeals to have been for money loaned to Jewell, Stringer & Co. Renewal notes were given by Jewell & Stringer, and it was a liability of the firm of Jewell & Stringer at the time Jewell withdrew. The court then says that it will take Jewell's testimony as fact, and that the H. J. Lewis Oyster Company debt, upon the transfer to Stringer, Sr., became a debt against Stringer, Sr., "individually," and not against the firm of Stringer & Co. The court further says that the evidence is not convincing that the new firm assumed that liability.

[2] Without reverting to the testimony that Stringer, Jr., was a member of the firm, and that the stock exchange seat, which had to be transferred to an individual, was the property taken over by Stringer, Sr., and without inquiring further what debts were assumed with the assets which were in fact put into the new firm by Stringer, Sr., the referee has now acted upon the statement of the Circuit Court of Appeals that the debt of the Lewis Oyster Company also became a claim against Stringer, Sr., individually and not as liquidating partner. This is upon the theory, which has been assumed all the way through, that the firm of Jewell & Stringer was solvent, so far as its creditors were concerned, at that time. But, even if solvent, there is a difference between the use by a liquidating partner of firm assets for the purpose of paying firm debts, and the use of those assets to pay his individual debts, when it is evident that he was individually insolvent throughout the entire period. Firm creditors have a right to trace, into the hands of the liquidating partner, the firm assets, after payment of firm debts. Individual creditors could look to the surplus only, in order to help out the deficit in the individual assets.

[3] The opinion of the Circuit Court of Appeals, however, holds that the three claims above referred to should be disallowed as firm debts against the assets of Stringer & Co., and takes no account of what assets were available in the hands of Stringer, Sr., as liquidating partner for firm debts of Jewell & Stringer, as distinguished from individual debts of Stringer, Sr.

The trustee thus, by his appeal to the Circuit Court of Appeals, succeeded not only in obtaining a finding that the claims of Mrs. Lewis and of H. Leroy Lewis were individual liabilities of G. Franklin Stringer, but also has obtained a finding by the Circuit Court of Appeals that he as trustee need not pay the Lewis Oyster Company claim which was a firm debt of Jewell & Stringer, because he as trustee did not show that this debt was assumed by Stringer & Co. As a

matter of fact, it was not shown that any of the other debts were taken over by that firm in company with the assets. The trustee, of course, offered no proof as to the assumption of the Lewis debts, inasmuch as he was seeking to show that these debts were not the debts of the firm at all. It was unnecessary for him to offer such proof in order to show that the claims upon which he wished to pay dividends were taken over. His failure to oppose these claims made it unnecessary.

The result is that the trustee has succeeded, not only in throwing out the entire claims of Mrs. Lewis and of H. Leroy Lewis as firm obligations and in restricting payments of these claims to the estate of G. Franklin Stringer, Sr., as an individual and not as liquidating partner, but he has also accomplished the allowance of the other claims of the earlier firms against the last firm, by his failure to raise the question of what debts were assumed, and has by the decision of the Circuit Court of Appeals excluded the H. J. Lewis Oyster Company claim from participation in the dividend on the claims admittedly assumed by Stringer & Co., which as a matter of fact received all of the assets obtained by G. Franklin Stringer, Sr., as liquidating partner of Jewell & Stringer. These assets were, of course, available only for such firm debts as went with the assets and were taken off his hands as liquidating partner, by the new firm. No further evidence has been supplied by the Lewis claimants, and they have not appealed from the disallowance by the referee.

The report of the referee declaring the dividend is correct, and the trustee should proceed to comply with the referee's order and pay the dividend in question.

BJOLSTAD v. PACIFIC COAST S. S. CO. et al.

(District Court, N. D. California, First Division. May 12, 1917.)

No. 15692.

1. ADMIRALTY ⇐21—JURISDICTION—ACTIONS FOR INJURIES CAUSING DEATH—LAW GOVERNING.

The law of a state giving a right of action for wrongful death may be enforced in admiralty, but in such case, where the death occurred on the high seas, the law of the state of the owner's residence governs, and not that of the charterer, although it was the employer of the deceased, and the vessel was temporarily registered there, unless there was deception as to the ownership.

2. MASTER AND SERVANT ⇐388—WORKMAN'S COMPENSATION—NEW JERSEY STATUTE.

The Workmen's Compensation Act of New Jersey of 1911 (P. L. p. 134), by section 2, provides a method of compensation to dependents in case of the death of an employé, which, if accepted, shall be exclusive of any other, and which shall be presumed to have been adopted in every contract of hiring, in the absence of an express agreement or notice by one party to the other to the contrary. It further provides that "compensation under this schedule shall not apply to alien dependents not residents of the United States," and repeals all inconsistent laws. *Held*, that the right of recovery for the death of an alien seaman, where no mention of the subject was made in the contract of employment, and no notice

given, was governed by said section 2, to the exclusion of the Death Act of 1848 (P. L. p. 151), and that where the wife and children of the deceased were nonresident aliens there could be no recovery.

In Admiralty. Suit by Andreas Bjolstad, as administrator of the estate of Halfdan Hansen, against the Pacific Coast Steamship Company and the Pacific Coast Company. Decree for respondents.

See, also, 221 Fed. 692.

Andros & Hengstler, Golden W. Bell, Wm. Loewy, and Walter Loewy, all of San Francisco, Cal., for libelant.

Ira A. Campbell, Joseph B. McKeon, and McCutchen, Olney & Willard, all of San Francisco, Cal., for respondents.

DOOLING, District Judge. This is an action in the admiralty, brought by the administrator of the estate of Halfdan Hansen, deceased, who, in November, 1913, while a seaman on the steamer President, was drowned in the high seas, through the negligence, as is averred, of the owners and operators of the vessel. The action seeks to recover damages for the death of deceased in behalf of his widow and minor children. At the time of the accident the President was owned by the Pacific Coast Company, a New Jersey corporation. Her home port was New York, but she was under charter to, and operated by, the Pacific Coast Steamship Company, a California corporation, and was under temporary register at San Francisco. She was engaged in the coastwise trade between San Francisco and other ports on this coast. Hansen was employed by the California corporation, the charterer and operator of the vessel, and had no contractual or other relation with the New Jersey corporation, her owner. Under the general maritime law, of course, the action cannot be maintained, as no right of action exists under that law for damages for the death of a decedent. The laws of California and New Jersey, however, do authorize such an action in behalf of certain heirs and dependents of a decedent, and where such right of action is given even by state laws in admiralty cases they will be enforced in the admiralty courts.

[1] Libelant's first contention is that he can maintain this action because of the provisions of the California law, for the reason that the vessel was under a demise charter to a California corporation, was operated by it, and was under registry at San Francisco, where deceased was hired. But it has always been held that if any law, in addition to the general maritime law or congressional enactments, is to be applied to a vessel on the high seas, it is not the law of the state or country where the charterer resides, but the law of the state or country of the owner. It is argued with much force and great earnestness that it would be inequitable and unjust to apply here any law other than the law of California, because the contract of hiring was between the deceased and a California corporation, and no disclosure was ever made to him that the vessel was not owned by the corporation by which she was operated, and consequently his employment must be presumed to have been entered into, having regard to the provisions of the law of the state in which the corporation was organized, where he was hired, and where the vessel was enrolled.

But no fraud was practiced upon him, and if he inquired about the ownership of the vessel at all, such fact does not appear. There is no question of estoppel, and both he and the owner must be held bound by such law as follows the ship, whatever that law may be. He was not misinformed; and indeed, if he desired to know who owned the vessel, he could have readily acquired that information at the custom house. There seems to be no sufficient reason to depart in this case from the general rule that a vessel at sea is in the view of the law a part of the territory of the state where she is owned, and that the only law applicable to her, other than the general maritime law and such laws as Congress has enacted, is the law of such state. If, therefore, this action can be maintained at all, it not being maintainable under the general maritime law or any act of Congress, it must be because of some provision of the law of New Jersey.

[2] It is libelant's next contention that, if resort be had to the New Jersey law at all, the case must be governed by the Death Act of 1848 (P. L. 151), which gives a right of action generally to the next of kin of deceased, while libelees contend that the law to be applied here is the New Jersey Workmen's Compensation Act of 1911 (P. L. p. 134). Section 1 of this act provides generally for the compensation by the employer of an employé accidentally injured through the negligence of the employer, provided such employé was not himself willfully negligent, and such right of compensation shall not be defeated upon the ground of assumption of risk, or negligence of a fellow employé. Paragraph 4 of said section 1 makes the provisions of that section applicable to any claim for the death of an employé arising under the act of 1848.

Section 2 of the Compensation Act contains these provisions:

"Sec. 2. *Elective Compensation.* * * * 7. When employer and employé shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section 2 of this act, compensation for personal injuries to or for the death of such employé by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of the proof of such fact shall be upon the employer.

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section 2 of this act, and an acceptance of all the provisions of section 2 of this act, and shall bind the employé himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

"9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section 2 of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section 2 of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section 2 of this act and have agreed to be bound thereby. In the employment of minors, section 2 shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor. * * *

"12. In case of death compensation shall be computed but not distributed on the following basis: * * *

"If widow and one child, forty per centum of wages.
"If widow and two children, forty-five per centum of wages.
"If widow and three children, fifty per centum of wages.
"If widow and four children, fifty-five per centum of wages.
"If widow and five children or more, sixty per centum of wages. * * *
"Compensation under this schedule shall not apply to alien dependents not residents of the United States. * * *"

Section 3 repeals all acts or parts of acts inconsistent with the provisions of the Compensation Act.

The effect of this law is that in all cases where the relation of employer and employé exists, and where the statement in writing is made part of the contract of hiring, or the notice has been given as provided in paragraph 9 above quoted, the rights of the parties are fixed by section 1 of the Compensation Act and the Death Act of 1848. But in the absence of such statement and notice the rights of the parties are fixed by the provisions of section 2 of the Compensation Act; because section 1 is not operative where section 2 is, and all contracts of hiring are presumed to have been made with reference to said section 2, and are governed thereby, unless otherwise provided in the contract, or a notice to that effect has been given by one party to the other.

In the present case there was no statement in writing and no notice was given by either party, and the contract of hiring, if we have recourse to the New Jersey law at all, is presumed to have been made with reference to section 2, and is to be governed thereby. This is the construction placed upon the Compensation Act by the New Jersey courts (Gregutis v. Waclark Wire Works, 86 N. J. Law, 610, 92 Atl. 354), and their interpretation will be followed by the federal courts in administering the New Jersey law. Maiorano v. Railroad Co., 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792.

As the California law is not applicable, and as no right of action for death exists by virtue of the maritime law or any act of Congress, it follows that, if the present action may be maintained at all, it must find its support in section 2 of the New Jersey Workmen's Compensation Act of 1911, as the law of 1848 is inconsistent with that act where the relation of employer and employé exists, and is, as regards them, repealed. Paragraph 12 of that section provides for the amount of compensation to be paid in case of death, but contains this further provision:

"Compensation under this schedule shall not apply to alien dependents not residents of the United States."

The deceased, Hansen, was a native of Norway, not naturalized in this country, although he had declared his intention to become a citizen. His widow and minor children, in whose behalf the action is brought, never left Norway, but were living there at the time of his death, and are living there still. They have never even been in this country temporarily. While one who has declared his intention to become a citizen of the United States thereby acquires a certain status and some rights, he still continues to be an alien, even though a sea-

man, until his naturalization has been completed, and his wife and children, living in the land of his nativity and who have never been in this country, are "alien dependents not residents of the United States" within the meaning of the New Jersey law. In the present case, therefore, no right of action exists in favor of the widow and minor children of the deceased, Hansen. For such right is not only not accorded them by the law of New Jersey, upon which alone, as we have seen it must be based, if it exist at all; but they are expressly excluded from any such right by the very law upon which any right of action against an employer for the death of an employé must be based. It is no answer to this to say that the state law cannot deprive a seaman of his rights. That is quite true, but the right claimed here does not exist by virtue of any law, maritime or congressional, with which the New Jersey act interferes. If it exist at all, it must exist by virtue of the law of some state, here the state of New Jersey; and if it cannot be based on the law of that state, it does not exist. With the real or imagined hardships of such a situation the court is not in a position to deal. But this much may be said: If one has to rely upon a state law to support a claimed right, he must take the law as he finds it, hardships and all.

It results that this action may not be maintained, and the libel is therefore dismissed.

In re GOYETTE & LAVIGNE.

(District Court, D. Massachusetts. March 10, 1917.)

No. 22432.

1. BANKRUPTCY ⇐155—LIABILITIES OF TRUSTEE.

Bankrupts before their bankruptcy made a general assignment, and the assignee sold their property, consisting of a shop and contents, including a cash register and other articles held by bankrupts under conditional sale contracts which reserved title in the sellers. After the bankruptcy the assignee paid over the money in his hands to the trustee. The sellers of such articles made demand for the same of the purchaser, and in order to retain them he paid the balance due thereon and filed a claim therefor against the trustee. *Held* that, it not appearing with any certainty that the fund received from the assignee was increased by the fact that the property was not sold subject to the contracts, or, if so, to what extent, such fund was not impressed with any lien or trust in the hands of the trustee, and that claimants' remedy, if any, was against the assignee.

2. BANKRUPTCY ⇐155—LIABILITY OF TRUSTEE—TRUST FUND—RELATION TO COMMON-LAW ASSIGNEE.

The mistake of a common-law assignee in selling articles of personal property to which his assignor had no title, while it renders him personally liable, imposes no trust or lien in favor of the purchaser on the proceeds in the hands of a subsequently appointed trustee in bankruptcy.

In Bankruptcy. In the matter of Goyette & Lavigne, bankrupts. Review of order of referee disallowing certain claims. Affirmed.

Victor E. Runo, of Worcester, Mass., for Patrick J. Leary.
M. L. Katz, of Worcester, Mass., for National Cash Register Co.
Charles T. Tatman, of Worcester, Mass., for E. W. Ham Electric Co.
David F. O'Connell, of Worcester, Mass., for trustee.

MORTON, District Judge. This is a review by certain claimants of a decision by the referee disallowing their claims.

The evidence is not reported, and the facts are not very fully stated by the referee, but from his certificate and the statements of counsel at the hearing in these petitions they appear to be as follows:

The bankrupts prior to their bankruptcy had made a common-law assignment. Under this assignment the assignee took possession of and sold out in block the property assigned consisting of a shop and its contents. Among the contents were a safe, a cash register, and certain electric fixtures, which had been bought by the bankrupt on conditional sales under which the title remained in the vendors until the property was paid for. The assignee made an absolute sale of all these things (except for a certain mortgage which was assumed by the buyer), and conveyed, or attempted to convey, them to the buyer by a bill of sale in usual form with covenants warranting the title. On the appointment of the trustee in bankruptcy the common-law assignee settled up his account with him and paid over, under order of the bankruptcy court, the balance in his (the assignee's) hands, which was accepted by the trustee.

After the sale and delivery by the assignee to the buyer some of the original vendors of the articles mentioned made claim on the buyer for their goods; and in order to retain them he was forced to pay the balance due on the conditional sales. He thereupon presented this claim to the trustee (not the assignee) for reimbursement. Claims were also presented against the estate in bankruptcy for allowance as preferred or secured by some of the original vendors. All were disallowed by the referee. The assignee is not a party to the present proceedings.

[1] As to the claim of the buyer: Obviously, to entitle him to maintain it, he must show that he has a legal or equitable right to reimbursement from the estate in bankruptcy. The payment by him was not made at the request, express or implied, of the trustee, nor to redeem property sold by the trustee; there is no privity of contract between the trustee and the buyer. The latter dealt only with the common-law assignee, against whom he has a full and complete remedy.

The buyer contends that, if the existence and amount of the specific claims on the property here in question had been made known before the sale by the assignee, the sum realized by him would have been correspondingly reduced; that the assignee would have turned over just so much less to the trustee; and that there therefore came into the hands of the trustee a sum which must be regarded as the value of the outstanding titles, and which can be followed.

It is doubtful whether the sum in the hands of the trustee has been so increased. There is no finding to that effect by the referee. The

property here in question was sold as part of a much larger amount and in connection with a going business. The assignee had no power to sell it free from liens, and did not undertake to do so. It is a rather violent assumption to say that, if these outstanding claims had been made known at the time of the sale, the price realized would have been reduced by just the amount required to pay them off. Moreover, the gross sum received by the assignee was reduced by charges in connection with the assignment and sale, including his own charges for services, so that only a part of the sale price reached the trustee.

[2] Passing over these difficulties, the assignee's mistake as to his ownership of the articles here in question, and his selling them when he had no right to do so, imposed a liability on him, but one of a purely personal character. What was done impressed no trust or lien in the buyer's favor on the proceeds of the sale, even in the hands of the common-law assignee, and, of course, not on the part of those proceeds that reached the trustee. The claimant is not entitled to recover upon any theory of following the property.

The claim is also supported in argument upon the ground that it avoids circuity of action. It is contended for the buyer that he had the right to sue and recover from the assignee; that the assignee would then have the right to reopen his settlement with the trustee and obtain to some extent at least reimbursement for such sums as the buyer might have recovered from him; and that the buyer may therefore proceed directly against the trustee. The right of the buyer against the assignee is either for breach of warranty or for partial failure of consideration; the right of the assignee against the trustee is of a wholly different character, namely, to recover back money paid under a mistake of fact. It is to be noticed that there is no fund held by a third person, to which two or more parties made claim, as to which see Pease v. Supreme Assembly, etc., 176 Mass. 506, 57 N. E. 1003, and that it is not the case of a single transaction where one judgment will settle the rights of numerous parties interested in it. See Carr v. Silloway, 105 Mass. 543. The situation is that one party has the right to recover of another, who in turn has possibly the right to recover over against a third; the legal principles on which recovery could be had being entirely dissimilar in the two claims, and presenting no common ground of action. Such a case does not come within the doctrine relating to circuity of action or multiplicity of suits. Gould v. Gould, 5 Metc. (Mass.) 274.

The principles above stated are equally decisive against the claims of the original vendors who are in a weaker position than the buyer, because they can still retake the property.

I have found the case a difficult one, and not free from doubt; but for the reasons stated I conclude that the decision of the referee is right, and it is affirmed.

BOWERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 4, 1917. Rehearing Denied October 8, 1917.)

No. 2571.

1. POST OFFICE ⊂⊃49—ACTIONS—EVIDENCE—JURY QUESTION.
In a prosecution for violating Pen. Code, § 215 (Act March 4, 1909, 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]), by using the mails in connection with a scheme to defraud, where it was contended that defendant, making misrepresentations as to his ownership of Mexican lands and their character, disposed of such lands when he did not have title, evidence *held* to sustain a conviction.

2. POST OFFICE ⊂⊃49—OFFENSES—ESSENTIALS.
The government, in order to convict, must establish that defendant entered into the scheme charged, that he intended to defraud, and that for the purpose of executing his scheme he used the mails.

3. CRIMINAL LAW ⊂⊃155—USING MAILS TO DEFRAUD—LIMITATION.
The essence of the offense denounced by Pen. Code, § 215, being the use of the mails in pursuance of such scheme, a prosecution thereunder is not barred by limitations because the scheme was devised more than three years prior to the filing of the indictment, where overt acts were committed within that time.

4. POST OFFICE ⊂⊃48(4)—OFFENSES—INDICTMENT.
A count in an indictment indorsed as an indictment for violation of Pen. Code, § 215, which elaborately charged a fraudulent scheme, and that defendant in pursuance thereof fraudulently and feloniously placed and caused to be placed in the mails a letter, duly set forth, is sufficiently definite to show that it charged an offense under such section.

5. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE.
Testimony as to events relating to the scheme, but occurring more than three years before the filing of the indictment, is admissible where within that period the mails had been used in furtherance of the scheme.

6. CRIMINAL LAW ⊂⊃491(2)—EVIDENCE—HANDWRITING—ADMISSIBILITY.
Under Act Cong. Feb. 26, 1913, c. 79, 37 Stat. 683 (Comp. St. 1916, § 1471), declaring that, where the genuineness of the handwriting of a person is involved, any admitted or approved handwriting of such person shall be competent evidence as a basis for comparison by competent witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness, it was proper, in a prosecution for using the mails in connection with a scheme to defraud, to prove the signature of defendant, to admit documents as to which the witnesses testified they had seen defendant append his signature.

7. POST OFFICE ⊂⊃49—OFFENSES—ADMISSIBILITY.
Where defendant, having devised a scheme to defraud, intentionally, and for the purpose of carrying it out, wrote a letter and mailed it in violation of Pen. Code, § 215, within three years prior to the filing of the indictment, it was not necessary, in order for such letter to be admissible, that it should show on its face that it was in furtherance of the scheme to defraud.

8. CRIMINAL LAW ⊂⊃931—TRIAL—MISCONDUCT OF JUROR.
Where defendant contended that a juror, during the course of the trial and after adjournment, asked whether defendant would take the stand, and based upon such occurrence a claim of bias and unfairness on the part of the jury, defendant is not, having failed to call the matter to the attention of the court before verdict, in a position to thereafter call the matter to the court's attention.

9. CRIMINAL LAW ⟸1160—APPEAL—REVIEW.
Where there were conflicting affidavits relating to defendant's claim of unfairness on the part of the jury, the matter cannot be reviewed on error, having been decided adversely as to defendant by the trial court.

10. POST OFFICE ⟸50—OFFENSES—INSTRUCTIONS—"OWNED."
In a prosecution for using the mails in connection with a scheme to defraud in the disposition of Mexican lands, which it was claimed defendant did not own though he claimed to have a contract for the purchase of such lands, etc., a charge that the word "owned" implied that defendant had such an interest in and dominion over the property that he could convey a good and sufficient title thereto to an intending purchaser, when taken in connection with instructions that if the representations alleged to have been made in the indictment were false but defendant believed them to be true, they were not fraudulent, is sufficient.

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Clarence P. Bowers was convicted of violating Pen. Code 1910, § 215, by using the mails in connection with a scheme to defraud, and he brings error. Affirmed.

In an indictment containing three counts, Clarence P. Bowers and others were charged with a violation of section 215 of the Penal Code of 1910. Bowers was convicted under the second count, and asks review under writ of error. The indictment was filed January 10, 1913.

Stated in a brief way, the scheme charged to have been formed before February, 1910, was that the persons intended to be defrauded should be communicated with by mail by Bowers and the others through the medium of a pretended corporation, the C. P. Bowers & Co., and certain letters. papers, and advertising matter containing false and fraudulent representations, and statements concerning the corporation and its business, were to be sent to them by use of the mails. Bowers pretended to be the president, and other defendants were to be represented as the other officers of the corporation, but it is alleged that, in fact, the pretended corporation was not organized under the law of any state or of the United States, but C. P. Bowers & Co. was the name of a fraudulent corporation, and the guise under which Bowers and his associate defendants carried on the scheme. Bowers and the others were to advertise to persons to be defrauded that C. P. Bowers & Co. owned 630 acres of land near Tampico, Mexico, and had "a perfect warranty deed" to said land, and that the title thereto was "free from any possible defects"; that part of the land was cleared and planted; that machinery had been bought to cultivate part of the land to bananas; that banana trees had been planted; that bananas would be planted also for the use of the corporation, and that 300 acres were to be sold to persons intended to be defrauded, for $200 per acre in cash or in installments; that, immediately upon payment of the full purchase price of each acre, the C. P. Bowers & Co. would give the purchaser immediate possession and title, and would cultivate the land and plant banana trees, and that the purchaser would have certain quantities of bananas for each acre of ground; that the corporation would sell the bananas and, after deducting specific sums for services in marketing and for reimbursement, the balance of the sale price would be sent to the purchaser of the land; that the purchasers could pay a first installment of 12½ per cent. of the purchase price at the rate of $200 per acre, and take 30 days within which to investigate the land, and if at the end of 30 days the purchaser did not wish to take the land the C. P. Bowers & Co. would return the purchase money. It is alleged that all these representations and publications were fraudulent, and part of the scheme to defraud, and were to induce persons, in reliance upon the advertisements and publications, to buy portions of the land pretended to be owned by C. P. Bowers & Co., and to pay Bowers and his associates and to the pretended corporation large sums of money,

which sums Bowers and other defendants would wrongfully convert to their own use. It is alleged that when the scheme was devised Bowers knew that it was all fraudulent and that C. P. Bowers & Co. did not own the land described, and did not have a perfect or warranty deed to the 630 acres of land, and did not have any title to the land which was free from any possible defects, or any title; that Bowers and the other defendants never had title by perfect warranty deed or otherwise to 630 acres of land described, in Mexico or anywhere else in Mexico, in excess of 50 acres; that none of the land was cleared or planted; that no machinery for cultivation had been bought; that there had not been the number of banana shoots planted that were said to have been; that the defendants did not intend to clear and cultivate any land, or to give the purchaser the possession or title contemplated by the advertisements, and did not intend to pay any money over to the purchaser of the land, or to refund any installments to purchasers not desiring to take the land; that the land was not worth $200 per acre, or any other sum in excess of $10 per acre. It is charged that, in order to carry out the scheme as devised, they fraudulently mailed a letter dated February 19, 1910, to T. E. Hughston, at Pomona, Cal., in which Bowers wrote to him that he found it impossible to tell him exactly when he would have a deed for the seven acres of land which Hughston had bought.

Newton J. Skinner, Carl N. Skinner, Earl Rogers, and C. E. Williams, all of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal.

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

HUNT, Circuit Judge (after stating the facts as above). [1, 2] Counsel for defendant has earnestly contended that the evidence was insufficient to sustain a verdict. One of the witnesses for the government testified to this effect: That he was a farmer and mechanic, and about 1909 he bought seven acres of this banana land from C. P. Bowers & Co.; that his transaction was with C. P. Bowers, to whom he paid $1,000 on the purchase; that there was $400 still due, and he sent an agent to Bowers to endeavor to buy only five acres, but failed to adjust the matter as desired, and thereafter paid the $400 still due to Bowers; that he dealt principally with Gillespie, an agent of Bowers; that he received certain circulars through the mail before he made the purchase and a contract, and that he discussed the contract with Bowers, to whom he paid the money in June or July, 1909. The contract is a receipt of a deposit to secure the described quantity of land in the "C. P. Bowers & Co. Banana Plantation," etc., subject to certain conditions. It is recited that, payment having been made, the property will be granted "by good and sufficient deed of conveyance, the above-named lessee grantor furnishing unlimited certificate of title showing title to said property free and clear of incumbrance, within 10 days from date." The contract is signed "C. P. Bowers, Pres." To the contract was attached a "rider," wherein C. P. Bowers & Co. agree to plant the acreage described, within a month from date of the contract, to banana shoots, not less than 200 to the acre, and irrigate, maintain, and market the first year's crop without additional expense other than payment in full of the purchase price, and to continue marketing

the crop at special rates. We quote from the testimony of the witness:

"Well, I paid him $400, and he acknowledged receipt of it, and then I says, 'This circular says that as soon as I make the last payment on it you will hand me the deed. I would like to have the deed.' 'Well,' he says, 'I can't do it just now.' 'Well,' I says, 'Why?' 'Well,' he says, 'it takes some time to get a deed made in Mexico.' 'Well,' I says, 'why did you print it in your circulars?' and he says, 'Oh, you ought to understand anything in a circular ain't law and you don't have to go by it. We have to go by things that we can.' 'Well,' I says, 'how long before you can get it?' 'Well,' he says, 'I don't know, it might take two or three months.' I says, 'I am going away; I have done made my arrangements to go back to Georgia, and I would like to know about the matter.' "

This witness further said that Bowers told him that Gillespie was his agent. On July 16, 1909, Bowers wrote to Hughston that he was entitled to 7 acres in the banana plantation, and said:

"Your deed for the same will be ordered up with the next allotment of these documents, and presented to you for your signature just as soon as practical."

On December 17, 1909, Bowers wrote Hughston that he hoped to have the deed for the 7 acres soon, but he doubted whether he could give to Hughston a "river frontage as originally planned," unless he took up 10 acres, and would like to know if Hughston desired the additional 3 acres. On December 27, 1909, he wrote to Hughston that the deed for the 7 acres would be issued and forwarded for his signature "just as soon as practical," and added that it sometimes took as long as 9 or 10 months to have the documents issued, recorded, etc., in that country. On February 19, 1910, Bowers wrote him that it was impossible for him to tell him exactly when he would have the deed for the 7 acres, that he was hurrying things, "and rest assured that I will have it in your hands at the earliest possible moment." Mr. Hughston testified that he never received any deed, but about April, 1914, a month before the trial of the defendant was begun, he received a letter and deed for 7 acres and turned the papers over to the district attorney. Witness said the deed did not cover the land he bought, nor did it obligate Bowers to cultivate as required by the original contract made. On cross-examination he testified that there was a mistake about his having made a contract to buy 10 acres; that Gillespie put him down for 10 acres, but that he didn't want that much, and after a little squabble he adjusted the matter with Bowers by agreeing to take 7; that he called on Bowers about the delivery in the matter of the deed, and Bowers told him that he was having trouble about getting the deed from Mexico; that he never accepted the deed sent to him in April preceding the trial; that Gillespie told him C. P. Bowers & Co. was a joint-stock company. One of the circulars which the witness said he read set forth in elaborate terms that C. P. Bowers & Co. owned 630 acres in "Tropical Mexico," and would sell 10 acres on an easy installment plan, cultivate it, market the product, and remit the profit, less only a fair discount for acting as sales agents. The land was described as rich and as suitable for banana crops, which would mature rapidly, and bring in at least $41.62 the first year and

$117 the second year. With great detail the quantity of bananas and the prices to be realized were stated in the circular and the contemplated purchaser was advised as follows:

"In the second year you see, you have 1,000 trees, and the proportionate return will be the same, excepting that it will be less the following charge, which is for the services of C. P. Bowers & Co. and is itemized as follows:
"For marketing the fruit, 4¢ per bunch.
"For cultivating your ground, 10% of cash received."

The circular announced that C. P. Bowers & Co. were simply the agents of the purchaser and the contract could be terminated at any time upon the purchaser's desire. The information with respect to titles was as follows:

"Titles.

"The title to the land owned by C. P. Bowers & Co. is a perfect warranty deed, and is free, therefore, from any possible defect.

"Terms.

"We sell the land at $200 per acre. Ten acres sold for $200. You can pay the money down and secure immediate possession of title, or pay for each acre of land you take on the installment plan, i. e., $25 down and $15 monthly till paid. Deed to your land is handed you the moment the last payment has been made. When you receive your deed you have a complete acre or more (if you have bought more) of land under full cultivation, we, as your agents, having brought it to that stage. Thereafter you receive your annual income as its products are sold by us."

A clause in the circular stated that Alex. Smith & Co. of Tampico would tell who C. P. Bowers & Co. were, and that they were thoroughly responsible people, and knew about the title, situation, etc. Appended to the circular were many quotations from newspapers and writers concerning the banana growing industry, and paragraphs concerning the advantages of market facilities, and how the investment would bring an income for life. At the close of the circular were some seven "Hints and Paragraphs," such as, "Know your money is invested in an enterprise producing something for which a demand already exists;" "The savings of the average man never bring wealth; profitable investments alone create riches," etc.

There was further testimony from witnesses who stated that after reading the advertisements to the effect that the opportunity offered a chance to make an income for life, and that a half acre for every $100 invested would yield 26 per cent. the first year and 58 per cent. the second and succeeding years on the money invested, they bought some of the land from Bowers. One witness, J. C. Baird, testified that Bowers pointed out to him on a map the location of banana plantations and said that they were selling the land and intended to put a pumping plant on it for irrigation; that he corresponded with C. P. Bowers & Co. and together with his daughter concluded to make an investment; that he received a contract through the mails after remitting $190 in March, 1909. Mr. Baird introduced a letter which he had received from "C. P. Bowers, Pres." on paper headed, "C. P. Bowers & Co., Plantation Owners; C. P. Bowers, President; C. P. Bowers, Vice-President; H. C. Myers, Secretary—Los Angeles, Cal." This letter inclosed contracts made out in the names of J. C. Baird and

Eva Moore, calling for one acre of banana land each. With the testimony of this witness there was introduced a letter addressed to J. C. Baird, signed C. P. Bowers, Pres., written on paper with a caption of the corporation, wherein Bowers wrote him that in answer to his letter of the 15th of May, 1909, they were going to require—

"a little more time than we anticipated in issuing the deeds to yourself and daughter. * * * Things move very slow much slower in Mexico than in the United States, in fact, and especially when you are awaiting upon native officials."

Again, on June 30th, C. P. Bowers, Pres., wrote to Mr. Baird that they were doing everything possible to get the deeds, but that it required 9 months to have a deed delivered and recorded in one instance. The letter advised Mr. Baird that the time of the delivery of the deed did not interfere with the care of his land, and added that:

"The really important part of the entire transaction as we see it, lies in developing the land and producing the crop."

Again, on August 7, 1909, in a letter signed C. P. Bowers, Mr. Baird was advised that he (Bowers) had not yet received the deeds but hoped to have them ready soon, and that both acres of land for which shoots had been planted before Mr. Baird and his daughter purchased would have to be replanted before returns would come, because of a wash and storms, etc. At a later time, on February 2, 1910, Bowers wrote to Mr. Baird that he hoped before long the deeds would be ready for delivery, and again on February 9, 1910, he wrote to Mr. Baird that there was an oil lease on the whole tract of 630 acres which a large company held, and that the rear of the 630 acres adjoined some land in which there were some strikes of large "gushers." Mr. Baird said that he told Bowers at one time that nearly a year had gone by since he had purchased the property and that the promises for the deed had not been fulfilled; that he had paid cash and wanted his title; that he told Bowers that he had concluded that he could not make a deed to the property because he did not have any title to it; that Bowers remarked that he had some land down there, and when he got the matter fixed up "he thought he could make me a title in the next 60 days."

"Said I, 'Then you virtually admit that you did not own that land at the time you sold it to me?' 'Well,' he says, 'we paid some money on the land and hope to get at least 50 acres;' and I says, 'Mr. Bowers, I am satisfied that you don't own that land, and never did own it and can't give me a title to the property I bought of you. Now, I demand my money back. I demand you to refund to me the money that I paid for this property that you had not title to and couldn't give me a title to.' He says, 'I haven't got any money.'"

Thereafter this witness consulted counsel and made a demand, and received a document about the middle of April, 1914. The document, dated April 14, 1914, is entitled a contract of bargain and sale entered into between C. P. Bowers and J. C. Baird under certain designated conditions. In the first of the conditions Bowers states that he is the sole owner of a certain portion of the property described, which he acquired from Alex. Smith by bargain and sale on July 7, 1910. In the third paragraph the land conveyed from Smith to Bowers is described as 24 hectareas, 2,915 square meters from the southern portion

of said parcel of land, and C. P. Bowers sells, grants, and conveys to J. C. Baird lots 14 and 20 out of block 1, containing one acre more or less, and reserving 3 feet on the east and west boundary, etc. In the ninth paragraph of the contract Bowers declares that the property is free and clear from all incumbrances with the exception of a lease to exploit underground product, the lease having been given in 1901. This deed or contract was mailed to Mr. Baird, together with a letter from Mr. Newton J. Skinner, advising Mr. Baird that he is inclosing a deed for land purchased from Mr. Bowers out of the Bowers Mexican plantation according to the previous contract, and that "it was only within the last few days that Mr. Bowers had succeeded in obtaining a deed to the property and getting it recorded, although the deed was issued to Mr. Bowers about the time of the contract." Witness said that he never had received any profits from the land and that the deed sent him did not call for the land at all; that it was an entirely different piece from that which he had bought, and for that reason he had not accepted the deed and considered it of no value. Alex. Smith testified that he had resided in Tampico, Mexico, since 1900; that he met Bowers in 1907, and that he, Smith, had a deed for the 630 acres concerning which other witnesses had testified; that the final deeds for the property were made to him January 23, 1908, and January 25 and April 7, 1908; that he never had seen anything growing on the land except a little corn; that there were no fruits except wild ones there; that about a year before the trial he had been upon it, and that not more than 40 or 50 acres of the entire tract had been cleared, the clearing being along the river front; that it was grown up in jungle and weeds; that he knew nothing of a pumping plant upon it; that about 1907 he had had a transaction with C. P. Bowers concerning some of the property; that he gave Bowers a letter of option to buy the property at $10 an acre, payments to extend over a period of about a year. The witness explained he had lived in Mexico; that Bowers paid him about $1,500, and in the following year, 1908, he made a new agreement; that before the new agreement was made Bowers asked him to make deeds to various customers to cover some 40 or 50 acres and to convey lands near the river front in the property; that he made some of the conveyances but declined to make others; that he made a new option with Bowers' father; that the second contract called for various payments and contained an obligation whereby Smith should give Bowers a perfect warranty deed when the final payments were made; but that no payments were made on the contract, which expired by limitation, and that witness and Bowers corresponded. Smith said that about July, 1910, he gave Bowers a deed for about 60 acres in the extreme southern end of the property, and a deed for a small portion in the northerly end of the property; that when the contract of option expired he had deeded to Bowers' customers portions of the northerly tract and concluded to deed to Bowers the 60 acres in full settlement; that the deed for the 60 acres settled all relations between them. Witness said that when Bowers wanted deeds for part of the front lands, he refused until the land was paid for and that it generally took two months to get a deed recorded in Mexico.

There was much more evidence tending to support the case of the United States, but with that to which we have referred, and the admission that Bowers did not have a deed to the property which he sold to purchasers, enough has been shown to demonstrate that the case was clearly for submission to the jury under appropriate instructions to the effect that, in order to convict criminally, it was necessary for the government to establish that the defendant entered into the scheme charged, that he intended to defraud those whom he corresponded with, and that for the purpose of executing the scheme he intended to use the mails of the United States.

[3, 4] Error is assigned because the court overruled a special plea and motion to quash the indictment. The point presented is that the count under which Bowers was convicted does not specify that the offense charged was committed within three years prior to the filing of the indictment, January 10, 1913, and that the count is indefinite as to time and the mailing of the letter, and as to the description of the offense. But the scheme charged to have been fraudulent is elaborately set forth, and the defendant is directly charged with having fraudulently and feloniously placed and caused to be placed in the post office at Los Angeles, a letter in an envelope addressed as hereinbefore described. The letter is itself set forth in the second count, and is of date February 19, 1910. In Mitchell v. United States, 196 Fed. 877, 116 C. C. A. 436, it was held by the court that under an indictment for violation of section 5480 of the Revised Statutes as amended by the amendment of March 2, 1889, c. 393, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), it was immaterial when the scheme to defraud was devised, but that if the scheme or artifice was devised more than three years prior to the return of the indictment, but was in existence and the defendant was operating under it within three years, the case would be without the statute of limitations and might be prosecuted. We are of opinion, too, that there was sufficient particularity of statement in the indictment to demonstrate that it was for the violation of section 215. Moreover, it was indorsed as an indictment for violation of that section, and the offense described in the instructions of the court was that defined in section 215.

[5] Appellant objected to the testimony of a number of witnesses introduced by the government, on the ground that the events to which they testified transpired more than three years before the filing of the indictment. But under the rule of Mitchell v. United States, supra, the court correctly overruled such objections.

[6] The government, to prove the signature of the defendant, Clarence P. Bowers, offered a witness who said he had seen Bowers write his name to the particular documents offered. The court then admitted such documents with the signature of Bowers as exemplars, and letters bearing signatures C. P. Bowers were thereupon admitted in evidence. To all such evidence the defendant objected, but the objections were overruled and the jury were allowed to make comparison of the letters and documents. This ruling was proper under Act Cong. Feb. 26, 1913, c. 79, which provides that, where the genuineness of the handwriting of a person may be involved, any admitted or proved hand-

writing of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. Short v. United States, 221 Fed. 248, 137 C. C. A. 104.

[7] It is urged that the court erred in admitting the letter set forth as an overt act charged to have been mailed by the defendant, Bowers, to Hughston. The objection is based upon the ground that the letter does not appear to have been to further the scheme charged to have been devised by the defendant. But if the scheme had theretofore been devised and was fraudulent, and the defendant intentionally and for the purpose of carrying out the scheme wrote the letter described and mailed it within three years prior to the filing of the indictment, it was not necessary that the letter should on its face show that it was in furtherance of the scheme to defraud.

[8, 9] It is argued that defendant was not granted a fair trial because of the misconduct of a juror. Bowers, the defendant, in an affidavit filed in the District Court, set forth that upon one day in the course of the trial at the adjournment of court, and before he and his counsel had left their places in the courtroom, a juror stepped over to the attorney's table, and, leaning over the table, said to him (Bowers): "Are you going to take the witness stand in your own behalf?" Bowers in his affidavit said that he answered that he did not know, and adds that the manner of the juror was such that it made him (Bowers) feel that the juror was speaking for other jurors than himself, and fearing lest if he did not take the stand it would prejudice him in the mind of the juror, he took the stand; that he believed that because of the fact that he did not take the stand, and thus gave the prosecution an opportunity to comment upon the failure of the defense to produce certain evidence, the jury became prejudiced. Several other affidavits in support of Bowers' motion were filed. The juror named by the defendant, Bowers, filed a counter affidavit wherein he positively denies that he ever spoke to Bowers or to his attorney or communicated with either of them in any way whatsoever during the trial, and states that he thoroughly understood his duty as a juror which forbade him to ask any such question as Bowers said he asked him. The matter does not appear to have been brought to the attention of the court before the trial closed, although the defendant had ample opportunity to advise the court of the incident. Defendant is therefore in no position now to claim that his rights were prejudiced. Furthermore, the District Court having considered the matter the appellate court will not disturb the order denying a new trial.

[10] Many errors assigned relate to instructions given and refused. Special stress is put upon the charge of the court with respect to the word "owned," but we think that the meaning given was sufficient. The court said:

"That the word 'owned,' on the fourth page of the indictment together with the clause in which it appears, namely, 'The said C. P. Bowers & Co. owned six hundred and thirty (630) acres of land on the Tamesi river,' etc., implies that the defendant had such an interest in, and dominion over, the property referred to, that they could convey a good and sufficient title thereto, to an intending purchaser."

The court also instructed that if the representations intended to be made as alleged in the indictment were false, but defendants believed them to be true, then said representations would not be fraudulent; but if, however, such representations were false, and defendants knowing their falsity, or not believing them to be true, intended they should be made to deceive and induce the persons to whom they were to be made to send or pay money to the defendants or to C. P. Bowers & Co., then the scheme was one to defraud. This, in connection with the other portions of the charge wherein the court defined the elements of the offense, was correct. And, generally, the whole charge sufficiently set forth the legal principles which controlled.

After painstaking examination of the voluminous record, we fail to find any substantial ground upon which to predicate a reversal of the case, and, as the record discloses that defendant had a fair trial, the judgment must be affirmed.

Affirmed.

BRYAN v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1917. Rehearing Denied October 22, 1917.)

No. 4801.

1. RAILROADS ⟸54—RIGHT TO CHANGE LOCATION OF ROAD.
Where a railroad has been constructed and operated for 40 years, it could not be changed to a location several miles from the original location, for a distance of 20 miles, without legislative authority.

2. COURTS ⟸366(7)—DECISIONS OF STATE COURTS—FORCE IN FEDERAL COURTS.
Const. Ala. 1901, § 246, provides that no railroad in existence at the time of the ratification of such Constitution shall have the benefit of any future legislation, other than in execution of a trust, except on the condition of complete acceptance of all the provisions of that article. *Held*, that the holding of the Supreme Court of Alabama that no written acceptance of the Constitution is necessary is binding on a federal court.

3. RAILROADS ⟸54—RIGHT TO CHANGE LOCATION OF ROAD.
Where a Kentucky railroad corporation complied with Const. Ala., § 232, imposing conditions on foreign corporations doing business in the state, and for many years transacted business in Alabama, and availed itself of the benefits of the general statutes of that state, it accepted the provisions of the Constitution of 1901 as required by section 246, so as to entitle it to the right given to railroad corporations to relocate their line of railroad by Act Ala. Feb. 18, 1903 (Laws 1903, p. 131), as amended by Act. Aug. 20, 1909 (Laws 1909, p. 62).

4. RAILROADS ⟸33(1)—FOREIGN CORPORATIONS—DOMESTICATION.
Acts Tenn. Dec. 4, 1851 (Laws 1851–52, c. 23), giving a Kentucky railroad corporation authority to construct a railroad between certain points in Tennessee, and to exert some of its corporate powers, and recognizing the railroad as a Kentucky corporation, did not make it a corporation of both Kentucky and Tennessee.

5. RAILROADS ⟸54—RIGHT TO CHANGE LOCATION OF ROAD.
Where the charter of a Kentucky railroad corporation, though not in express terms, authorizing it to relocate its line of road, contained no prohibition against such relocation, the company could relocate its line of road in Alabama, providing the laws of Alabama permitted it to do so,

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as the change in location is peculiarly a subject of local control, especially as the Kentucky statutes authorize railroad companies to relocate their roads.

6. RAILROADS ⟸54—RIGHT TO CHANGE LOCATION OF ROAD.
Where the original termini of a railroad were Decatur and Montgomery, a change in such road for about 20 miles, to a new location several miles distant, was not in violation of Act Ala. Feb. 18, 1903, as amended by Aug. 20, 1909, authorizing railroad companies to relocate their line, but providing that they shall not change the termini or make an entire departure from the original line between such termini, as the statute refers to the original termini of the road, and not to points on the line between which there is a relocation of the track.

7. RAILROADS ⟸54—RIGHT TO CHANGE LOCATION OF ROAD.
Though some of the land upon which a railroad was constructed was granted by the United States to the state for the benefit of such road, the permission of Congress was not necessary in order to lawfully relocate the line of road, this being a matter for state legislation.

8. RAILROADS ⟸72(3)—CONTRACTS AS TO LOCATION OF ROAD—PERFORMANCE OR BREACH.
Where deeds to a railroad right of way recited that the building, erecting, and running of the railroad on and along the land was a part of the consideration, the building of the road on such land and its maintenance for 40 years was a compliance with the contract, and its removal to a new location after more than 40 years was not a breach of the contract.

9. RAILROADS ⟸72(3)—CONTRACTS AS TO LOCATION OF ROAD—CONSTRUCTION.
Where a railroad company conveyed to plaintiff land in the immediate vicinity of its road, which he devoted to the cultivation and growth of commercial peach and apple orchards, a recital in the deed that valuable improvements to be put on the land conveyed were a part of the consideration, did not amount to a contract on the part of the railroad to forever maintain and operate its line of road in its then condition, though the change in location of the road greatly damaged plaintiff's fruit business.

10. RAILROADS ⟸54—CHANGE OF LOCATION—INJURY TO MEMBERS OF PUBLIC.
A change in the location of a railroad, under legislative authority, gives a member of the public no common-law right to damages, any injury sustained by him being damnum absque injuria.

11. EMINENT DOMAIN ⟸2(1)—ACTS CONSTITUTING EXERCISE OF POWER OF EMINENT DOMAIN.
A railroad company, by changing the location of its road did not take, injure, or destroy property in the vicinity of the old location, within Const. Ala. 1901, § 235, providing that municipal and other corporations, invested with the privilege of taking property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements.

12. PLEADING ⟸339—PLEA IN ABATEMENT—WITHDRAWAL—DISCRETION.
It was within the trial court's discretion to allow defendant to withdraw its plea in abatement and file an answer, especially where, on plaintiff's own theory, a plea in abatement was an unauthorized pleading.

13. APPEAL AND ERROR ⟸1070(1)—TRIAL ⟸323—HARMLESS ERROR—VERDICT.
A verdict signed by one juror, by direction of the court, was sufficient, and plaintiff was not prejudiced because the jurors were not all required to sign or permitted to select their own foreman to sign it for them.

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

Action by Edward Jefferson Bryan against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

S. Mayner Wallace and Shepard Barclay, both of St. Louis, Mo., for plaintiff in error.

Edward S. Jouett, of Louisville, Ky., and Harold R. Small, of St. Louis, Mo., for defendant in error.

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

CARLAND, Circuit Judge. The parties to this action will be named as in the trial court. The plaintiff sued the defendant to recover damages which he alleged resulted from the abandonment by defendant of its main line of road from New Castle to Bangor, Blount county, Ala. At the trial of the case counsel for defendant moved the court to direct a verdict in its favor. The motion was granted, and the plaintiff has brought the case here assigning error. The plaintiff stated his causes of action in two counts.

The first count, after alleging the purchase of about 2,600 acres of land in Blount county, Ala, in the immediate vicinity of Reid's station, on the line of the South & North Alabama Railroad Company, hereafter called "South & North," and the cultivation and growth of commercial peach and apple orchards thereon, the purchase from said railroad company of its line of railroad by the Louisville & Nashville Railroad Company, hereafter called the "Louisville & Nashville," and the assumption by the latter of all the duties and obligations which could be required of the South & North as a common carrier, further alleged as follows:

"Plaintiff further states that at and before his purchase of said land, and during the development thereof, as stated, defendant contracted and agreed with plaintiff, in consideration of plaintiff's making and developing said investment and furnishing to defendant the tonnage therefrom, that, for as long a time as plaintiff produced said tonnage, said defendant would maintain and operate said line of railroad through and along his said land, in substantially the same way as was then being maintained and operated, and furnished to plaintiff the fast-freight and express service thereon for the products of said orchards to the markets of the United States and adequate transportation service for all the tonnage produced on said lands; but that on or about November 16, 1914, said defendant, wholly disregarding its said obligation to plaintiff, and in violation of its said contract and assurances, and notwithstanding that plaintiff had at all times offered, and was then continuing to offer, to defendant a large, and the full amount of said tonnage, discontinued and ceased operating that part of the said line of railroad through and along plaintiff's said property, at said Reid's station, and denied and still denies to plaintiff said fast-freight and express service for the products of said orchards, and all railroad facilities for all tonnage produced and to be produced on said land, and has since removed part of the roadbed of said line of railroad along plaintiff's said property and north of said Reid's station, and on account of the mountainous condition of said county and the topography thereof, and the peculiar location of plaintiff's said land, and because of the fact that there is no other accessible line of railroad therein, or means whereby any of the tonnage produced on said land may be carried away therefrom, has closed thereby all of said markets to the products of plaintiff's said orchards, and thereby destroyed the said value thereof."

The second count of the complaint, after making the allegations of the first count a part thereof by reference, alleged that plaintiff's injury was special in kind and different and greater in degree than that, if any, suffered by the public, and that under general law, as well as

under the laws of Alabama, plaintiff might not be so injured and damaged by defendant without just compensation being made.

We have carefully read and considered the evidence in the record, and are satisfied that there was sufficient evidence to take the case to the jury upon the question of damages, and, upon the assumption that defendant was bound to furnish the plaintiff with adequate shipping facilities as alleged in his complaint, the question whether such facilities were furnished or offered by defendant to plaintiff during the season of 1915, and prior to the abandonment of the orchards by plaintiff on December 2, 1915, was, upon the evidence before us, clearly a question for the jury. We are also satisfied that taking the evidence upon the question of whether the defendant, either expressly or impliedly, agreed with plaintiff, by correspondence and mutual business relations, to maintain and operate its line of railroad through and along his said land, in substantially the same way as the same was then being maintained and operated, and to furnish plaintiff the shipping facilities stated in the complaint, with all legitimate inferences which the jury might rightfully draw therefrom, there was not sufficient evidence to take the case to the jury upon that question. The most that can be said upon this phase of the case is that the defendant, prior to the abandonment of its line of road, was desirous that the plaintiff should make a success of his business of fruit raising, as tonnage for the road would be produced thereby. The building of the spur track to connect with the tramway of plaintiff, and the sending of an agent to supervise the shipping of fruit during the shipping season, were both consistent with this desire and purpose.

It is claimed, however, that under the facts stated in the complaint, the defendant had no legal power or authority to abandon its main line, which passed near the orchards of the plaintiff, and relocate the same as hereinafter stated, and that, such abandonment and relocation being illegal, the defendant is liable for any damage resulting therefrom to the plaintiff. This is the important question in the case. The facts bearing upon the question are as follows:

The South & North was incorporated by a special act of the General Assembly of Alabama, February 17, 1854. The railroad constructed by it extended from Decatur, Ala., through Birmingham, to Montgomery, Ala., a distance of about 182 miles. Speaking without reference to entire accuracy, the line of this railroad from New Castle, Ala., to Bangor, Ala., at the time of its abandonment, November 16, 1914, had been constructed and operated for about 40 years. From 1872 to January 21, 1914, the road was controlled and operated by the defendant, the latter from 1900 owning all the preferred and 80 per cent. of the common stock. This condition of affairs arose from the fact that the Louisville & Nashville furnished the money to build the road. On January 21, 1914, the South & North, for certain valuable considerations mentioned in the deed of conveyance, conveyed all its interests in its line of railroad to the defendant, the latter assuming "all the duties and obligations which could or can be lawfully required of the parties of the first part as a common carrier, * * * and the assumption of all other indebtedness of the party of the first part owing by contract with any person, firm, or corporation or on account of injury

to persons or damage to property and all indebtedness of any other character whatsoever." On November 16, 1914, the defendant discontinued the operation of the old line of the South & North from New Castle to Bangor, and commenced to operate the new double-track line between the points mentioned, which had been built and constructed during the previous two years. The distance between the points mentioned over the new line is about 20 miles, being about 2 miles shorter than the distance between the same points over the old lines. The new line is distant from Reid's station on the old line 4.9 miles. The average distance of the new line from the old line between the points mentioned is about 3 miles. The intervening space between the two lines is rough and mountainous, to such an extent as to be inaccessible by ordinary conveyance.

The new line departs entirely from the old line between the points mentioned. The considerations which led to the construction of the new line were to straighten the line of road, reduce curvature, and obtain lower grades, in order to facilitate the movement of business, reduce delays, and improve safety, and greatly increase the capacity of the road for handling business. The plaintiff when on the stand was asked the following question: "You admit, do you not, that the building of that double track through there on that straighter, shorter line is a matter of material interest and advantage to the general public, both in the matter of safety and expedition of service, freight and passengers?" The witness answered, "I do."

The plaintiff, relying upon the continuance of the shipping facilities furnished by the South & North as operated by the Louisville & Nashville, had, during the period of about 11 years prior to November 16, 1914, cultivated and grown on the land purchased by him, as before stated, commercial peach and apple orchards, known as the "Mont Eyrie Orchards." A portion of the orchards were located on land through which the original right of way of the South & North had been granted, a part of the consideration for such right of way being that the South & North would build a railroad on and along said lands.

Plaintiff alleges that the abandonment of the old line of road destroyed the value of these orchards; hence this suit. In the treatment of the question as to the authority of the Louisville & Nashville to abandon the old line and relocate the same as appears in the evidence, we put to one side the question as to whether the defendant offered to furnish the plaintiff, prior to his abandonment of his orchards in December, 1915, adequate shipping facilities by way of Warrior and Monmouth, with switching service over a portion of the old line to the old station at Reid's, as this question would only be material in case the defendant was bound to furnish adequate shipping facilities to plaintiff, and, in any event, it was a question for the jury under the evidence.

[1] We think it must be conceded that a railroad which has been constructed and operated for 40 years may not be relocated in the manner in which it is shown by the evidence the old line of the South & North was relocated, without legislative authority. Brown v. Railway Company, 126 Ga. 248, 55 S. E. 24, 7 Ann. Cas. 1026; Railway Company v. Kirkland, 129 Ga. 552, 59 S. E. 220; Lusby v. Kansas City, etc., R. Co., 73 Miss. 360, 19 South. 239, 36 L. R. A. 510.

In Brown v. Railway Co., supra, it was said:

"It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience, or expediency, or economy merely."

A great number of authorities are cited to support this statement of the law. In L. R. A. 1915A, 549, it is said:

"The general rule seems to be that a railroad cannot abandon its road or a branch, even though it may be operated at a loss, and cases which are apparently in conflict with this rule will be found to have turned on special circumstances that warranted the decision."

The defendant in this case does not contend that the law is otherwise, but seeks to show that there was legislative authority to make the relocation described in this case, both as to the South & North and the Louisville & Nashville. It is conceded by counsel for defendant that neither the charter of the South & North nor the Louisville & Nashville in express terms gave authority to make the relocation of which complaint is made. It is, however, contended that legislative authority was conferred both upon the South & North and Louisville & Nashville to make the change by certain legislation of the General Assembly of Alabama. Section 246 of the Constitution of Alabama of 1901 reads as follows:

"No railroad, canal, or transportation company in existence at the time of the ratification of this Constitution, shall have the benefit of any future legislation by general or special laws other than in execution of a trust created by law or by contract, except on the condition of complete acceptance of all the provisions of this article."

February 18, 1903, the Legislature of Alabama enacted the following statute:

"Section 1. Be it enacted by the Legislature of Alabama, that any railroad corporation owning and operating a railroad in this state, is hereby authorized and empowered to relocate any portion of its line of railroad for the purpose of straightening or otherwise improving the same, and for that purpose, to acquire by gift, purchase or by condemnation in the mode prescribed by law, all necessary rights of way over lands, and to abandon its original or constructed line: Provided, however, that nothing herein contained shall be so taken or construed as to authorize any railroad corporation to change the termini of its railroad, or to make an entire departure from its original line between such termini." Laws 1903, p. 131.

This statute appears in the codification of the Alabama Laws for 1907 as section 3484. The section was amended August 20, 1909, by the addition of other provisions, but the law of 1903 was retained, and reads as follows:

"* * * and may relocate any portion of its line for purposes of straightening or otherwise improving the same and for that purpose, may acquire by gift, purchase or condemnation all necessary rights-of-way over lands, and abandon its original or constructed line, but it shall not change its termini, or make an entire departure from its original line between such termini." Laws 1909, p. 62.

The law last above quoted is the specific authority under which the defendant acted. It is claimed, however, by counsel for the plaintiff,

that the South & North or the Louisville & Nashville never accepted the Constitution of Alabama within the meaning of section 246 above quoted, so as to be entitled to the benefit of the law of 1903 as amended in 1909. When the Louisville & Nashville took over the operation of the South & North in 1872, for the reason that it had furnished the money to build the road, a general statute of Alabama permitted a corporation owning a railroad to allow another company to operate it, and the question arose as to whether the South & North, having been created under a special charter, was authorized to permit this operation of its road by the Louisville & Nashville, since the South & North had never formally accepted the provisions of the Constitution above quoted, and was not authorized by its special charter or the amendments thereto to permit the operation of its road by another company. Out of this controversy arose the litigation which was involved in Louisville & Nashville R. R. Co. v. State ex rel. Gray, 154 Ala. 156, 45 South. 296. It was decided in this case that a written acceptance was not necessary under the terms of section 246, supra, and that the South & North had accepted the provisions of the Constitution of Alabama, within the meaning of said section, by availing itself of the benefits of the general statutes of Alabama. In the same case the question was raised and decided relative to the right of the Louisville & Nashville, a Kentucky corporation, to take the benefit of the Alabama law, and operate the South & North. There is a provision of the Alabama Constitution of 1901 (section 232) reading as follows:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The Legislature shall, by general law, provide for the payment to the state of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

The Supreme Court of Alabama in the case last cited, after considering the amendments to the charter of the Louisville & Nashville, passed by the General Assembly of Kentucky, March 6, 1878, and January 27, 1880, giving to the Louisville & Nashville authority to take over the operation of the South & North, said:

"Commencing on the 24th day of March, 1887, the defendant (Louisville & Nashville) has done all that foreign corporations are required to do by the Constitution and laws of Alabama to entitle it to do business in the state."

It appears from the record that on May 21, 1907, the defendant filed in the office of the Secretary of State for Alabama a certificate signed by its first vice president, designating Montgomery, Ala., as its known place of business in said state, and appointing George W. Jones its agent upon whom service of process might be made and all legal notices served for all the purposes contemplated by the laws of Alabama. The record also shows that the defendant, prior to the relocation of its line of road, had filed with the Secretary of State of Alabama duly certified copies of its charter, and all amendatory acts relating thereto, as granted and passed by the state of Kentucky. It is further contended,

however, by counsel for plaintiff, that although the defendant has performed all the acts required by the Constitution and laws of Alabama to authorize it to do business in said state, it does not appear that it has accepted the provisions of the Constitution of Alabama, and was therefore not entitled to the benefit of the relocation statute.

[2-4] We are of the opinion that the Gray Case, holding that no written acceptance of the Constitution is necessary, is binding on us, and that the same facts which were held to show the acceptance of the provisions of the Constitution by the South & North, must be held to show the acceptance by the Louisville & Nashville. It transacted business in the state of Alabama for many years, and availed itself of the benefits of the general statutes of that state. We have no doubt that the defendant having complied with section 232 of the Constitution of Alabama, it is entitled to do business in said state, and that by its conduct and acts, extending over many years, it must be held to have accepted the provisions of her Constitution. The defendant is a corporation of the state of Kentucky, and not, as claimed by plaintiff's counsel, a corporation of both Kentucky and Tennessee, as was held in Goodlett v. Louisville & Nashville R. R. Co., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230. The law of Tennessee giving the defendant authority within her limits to construct a railroad between certain points, and to exert some of its corporate powers, recognizes the defendant as a Kentucky corporation. Tennessee Act, December 4, 1851 (Laws 1851–52, c. 23).

[5] The charter of defendant granted by the state of Kentucky does not give authority in express terms to relocate its line of road, but it contains no prohibition against so doing. Hence it could relocate its line of road in the state of Alabama, providing the laws of Alabama permitted it to do so, as the change in the location of a railroad is peculiarly a subject of local control. The Kentucky act of March 6, 1878 (Laws 1877–78, c. 278), gave defendant authority to operate, lease, or purchase upon such terms or in such manner as it deemed best any railroad in any other state or states. It appears also that by subsection 4 of section 768 of the Kentucky statutes, enacted in 1894, it was provided that a railroad company "may, for the purpose of avoiding annoyance to public travel or dangerous or difficult grades or curves, or unsafe or insecure grounds or foundations, or for other reasonable cause, change the location * * * of any portion of its road; but shall not, except as otherwise provided, depart from the general route prescribed in the articles of incorporation." The defendant was entitled to the benefit of this law for the reason that on July 14, 1902, it literally complied with section 190 of the Kentucky Constitution, and also section 570 of the Kentucky statutes, imposing certain conditions upon the performance of which the defendant would be entitled to the benefit of the statute. So it may be truthfully said that the act of relocation by defendant was not only in accordance with the laws of Alabama, but in line with the public policy of Kentucky.

[6, 7] Counsel for the plaintiff further contends that, even if it be held that the defendant was entitled to the benefit of the relocation statute of Alabama, it did not comply with that statute. In order to sustain this position, it is urged that the law provided that there should

not be an entire departure from the original line of road between the termini of the same, and, in order to make this provision of the law applicable, it is claimed that New Castle and Bangor were the termini of the road; but this contention is not sound. The law means the original termini of the South & North, and not two points on the line between which there is a relocation of the track. The termini of the original South & North were Decatur and Montgomery. There is no merit in this contention. It is also claimed, as we understand the argument, that because the United States granted to the state of Alabama for the benefit of the South & North some of the land upon which the road was constructed, that permission by Congress was necessary in order to lawfully relocate the line of road. There is no merit in such contention. It was a matter for state legislation.

On July 6, 1914, the Railroad Commission of Alabama made the following order:

"Proposed Transfer of Train Service, Louisville & Nashville Railroad Company, from the Old Single Track to the New Double Track, between Bangor, Ala., and New Castle, Ala.

"Whereas, the Railroad Commission of Alabama, by its general order No. 13, dated December 6, 1907, and by its general order No. 17, dated May 3, 1909, provided that:

" 'No railroad company operating in this state shall discontinue any passenger train or service now being maintained without the consent and approval of the Commission;' and,

"Whereas, the Louisville & Nashville Railroad Company represents to the Commission that it has and will discontinue certain service heretofore maintained, by reason of the fact that it has and will relocate its line in part, changing the grade, departing entirely from the line heretofore existing between certain points, installing double tracks, discontinuing certain service upon certain portions of the line heretofore existing between Bangor, Alabama, and New Castle, Alabama, as shown by Exhibit A, hereto attached and made a part hereof, and inaugurating in lieu thereof similar service on proposed new double tracks, all of said changes in service and operation having been made and contemplated to be made in conformity with the statutes of Alabama in such case made and provided:

"Now, therefore, the said Railroad Commission of Alabama does hereby consent to and approve of the said discontinuance of service, and the proposed continuance of service, including the proposed rearrangement of tracks, grades, plans, and service as set forth in the said Exhibit A.

"Done by the Railroad Commission of Alabama, at the capital in the city of Montgomery, this 6th day of July, 1914.

"Railroad Commission of Alabama,
"By Chas. Henderson,
"Frank N. Julian,
"Leon McCord,
"Railroad Commissioners."

While the Railroad Commission could not authorize the defendant to relocate its road in violation of the laws of Alabama, the order above quoted is not only persuasive that no such law was violated, but it would seem to be conclusive upon the proposition as to whether the relocation was for the benefit of the public. We have no doubt, upon the facts appearing in the record, that the defendant had legal authority to relocate its line of road as detailed in the evidence. Conceding that the defendant had legal authority to do so, it is further contended by counsel for plaintiff that such relocation breached the contracts arising out of the right of way agreements.

[8] It appears from the record that, when the South & North constructed its line of road in 1871–2–3, it bought a right of way through six small parcels of land which now constitute a part of the body of 2,600 acres owned by the plaintiff. The right of way deeds or contracts, after reciting the money consideration, contained the following language: "And for further consideration of their building and erecting and running their railroad on and along" the described parcel of land. Not stopping to consider whether these recitals are conditions subsequent or covenants running with the land, we think that under the decision of the United States Supreme Court in Texas & Pacific Ry. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, the agreement must be held to have been complied with under the facts in this case. The South & North did build its line of road on and along the lands specified and maintained it for 40 years. It was decided in the Marshall Case, where the contract was to permanently locate car-works and machine shops at the city of Marshall, that the word "permanent" did not mean forever, lasting forever, or existing forever. In this case the railroad company had complied with its agreement for eight years, and it was held to be a substantial compliance with the contract. In Texas & Pacific Ry. Co. v. Scott, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94, it was said:

"It must be that such an agreement is made subject to the general exigencies of business, the public interest, and to the change, modification, and growth of transportation routes, as these may affect the requirements of the railway company's business."

[9] Something is claimed also in regard to the recital in defendant's deed conveying about 520 acres to the plaintiff. This recital, in addition to the money consideration, reads, "valuable improvements to be put on the land conveyed." In regard to this it may be said that the defendant is not complaining in regard to a failure of consideration, and, standing alone or with the other facts in the case, it does not make out a contract on the part of the defendant to forever maintain and operate its line of road in its then location.

[10] The change in the line of road being, as we have found, lawful, and there being no contract for the continuance of the road in its original location, counsel for plaintiff urges in this situation the proposition that a member of the public has such a vested interest in the continuance of a railroad location that he is entitled, upon its removal, to recover damages either at common law or upon the constitutional guaranty of compensation for property taken for public use. No authority is cited which, in our opinion, sustains the proposition stated, nor have we been able to find any. On the contrary, the rule seems to be established that where there is legislative authority to do an act, omitting for the present cases of the exercise of the power of eminent domain, if in the doing of it harm comes to an individual it is not a wrong for which the law gives a remedy. It is damnum absque injuria. A very instructive case on this question, as it was a case of railroad removal, is Dewey et al. v. Atlantic Coast Line Ry. Co., 142 N. C. 302, 55 S. E. 292. We quote the following excerpt from the opinion of the court:

"The defendants, having legislative authority to make the proposed change, are acting within their right. So far as now appears, they are only doing, or

proposing to do, 'a lawful thing in a lawful way,' and in such case, if harm comes to a third person, it is not a wrong for which the law will afford redress. It is damnum absque injuria. Thomason v. Railway Co., 142 N. C. 318, 55 S. E. 205 (plaintiff's appeal at this term); Broom's Legal Maxims (8th Ed.) p. 200; Pollock on Torts (7th Ed.) pp. 126, 127; Am. & Eng. Ency. (vol. 8) p. 697. The doctrine is well stated in this last citation as follows: 'It may be stated as a general rule that if the Legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful. If damage results as a consequence of its being done, it is damnum absque injuria, and no action will lie for it.' * * *

"It is not necessary, however, that the power to change a route should be given in the charter or a direct amendment thereto; but, as stated in one of the authorities, 'it may be given by charter or by special enactment, or by the general railroad laws of the state.' * * *

"Where, as in this case, the railroads are proceeding to do an authorized act, and in a lawful manner, there is no legal wrong done the plaintiffs, and the judge below was right in denying relief. There is no error, and the judgment below is affirmed."

In Jones v. Newport News, 65 Fed. 736, 13 C. C. A. 95, the Court of Appeals of the Sixth Circuit, Judge Taft delivering the opinion of the court, said:

"The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer."

Another leading case to the same effect is College Arms Hotel Co. v. Atlantic Coast Line Ry. Co., 61 Fla. 553, 54 South. 459. In this case it was said:

"Persons who own property at a town adjoining a railroad depot, and who, relying upon the continuance of the depot at the place, have improved the property, and 'have enjoyed special facilities in the conduct of their business' incident to such location, have no right, on the ground of special and peculiar injury to their property rights, to enjoin the enforcement of an order of the railroad commissioners for removal of the depot to another point at the town. * * * Property losses incident to the removal of a depot, that result in consequence of the exercise of lawful authority, do not afford a right of action, where no trespass is committed upon private property. In the authorized removal of a depot no law is violated, as in case of excessive charges or unjust discriminations."

The plaintiff having no contract, either express or implied, that the defendant would continue to maintain its road and run its trains, and the railroad having been constructed by legislative authority for the benefit of the public, and not for the particular benefit of any individual composing the public, there is no breach of contract or breach of duty, and hence no right of action. Kinealy, etc., v. St. Louis, etc., Ry. Co., 69 Mo. 658.

[11] We will now consider the case with reference to the eminent domain theory. The Constitution of Alabama provides (section 235, art. 12) as follows:

"Municipal and other corporations and individuals invested with the privilege of taking property for public use shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements."

The defendant did not take, injure, or destroy any property of the plaintiff by the construction or enlargement of its works, highways, or improvements, within the meaning of the Constitution. On this question Nichols, in his work on the Power of Eminent Domain, at section 142 uses the following language:

"An owner of land has no private rights in the continued existence of any public work other than a highway on or over his land. No action lies when a state capitol (Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815) or a college (Bryan v. Board of Education, 151 U. S. 639, 14 Sup. Ct. 465, 38 L. Ed. 297) is moved away, when water pipes (Asher v. Hutchinson, etc., Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52) in the streets are removed, or when a railroad (Kinealy v. St. Louis, etc., Ry. Co., 69 Mo. 658; Rockafeller v. Northern Central Ry. Co., 212 Pa. 485, 61 Atl. 960), or canal (Fox v. Cincinnati, 104 U. S. 783, 26 L. Ed. 928; Trustees v. Brett, 25 Ind. 409; Fishback v. Woodruff, 51 Ind. 102; Whitney v. New York, 96 N. Y. 241; Hubbard v. Toledo, 21 Ohio St. 379; Little Miami Co. v. Cincinnati Railroad Co., 30 Ohio St. 629; Commonwealth v. Pennsylvania Railroad, 51 Pa. 351; Fredericks v. Pennsylvania Canal Co., 109 Pa. 50, 2 Atl. 48; see, also, In re Water Front, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. [N. S.] 335), is discontinued, provided the change is made by authority of law."

Mills on Eminent Domain, § 317; Asher v. Hutchinson Water Line & Power Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52; Fox v. Cincinnati, 104 U. S. 783, 26 L. Ed. 928. We find no merit in this contention.

[12] It is next urged that the court erred in allowing defendant to withdraw its plea in abatement and file an answer to the complaint. On plaintiff's own theory a plea in abatement was an unauthorized pleading in Missouri, and it was entirely within the discretion of the court to allow it to be withdrawn and an answer to be filed as a matter of common justice.

[13] It is next urged that the court erred when it directed a verdict for the defendant because it asked one of the jurors only to sign the verdict. The juror who was so requested signed it, and it is claimed that it is not such a verdict as will support the judgment. It is urged that whether a case is submitted to a jury on the facts or whether the court directs a verdict the jury must act, and that there can be no verdict without the whole jury acts. It is usual for the trial judge, when a verdict is directed, to ask the jury to select a foreman to sign the formal verdict, but the whole proceeding is a mere matter of form. The record shows that the juror who signed the verdict was the foreman, and we conclude that the request by the court that the juror sign the verdict, being a mere matter of form, was entirely sufficient without the jury selecting their own foreman. The jury could not act contrary to the decision of the court. All they could have done would have been to all sign the verdict or select a foreman to sign it for them.

The verdict returned appears to be signed by the foreman, and whether the court or jury named the foreman would in no way prejudice the plaintiff.

We have considered all the points argued by counsel, and are of the opinion that the judgment below must be affirmed; and it is so ordered.

THE ROBERT M. THOMPSON.

THE AUGUSTA W. SNOW.

(Circuit Court of Appeals, Second Circuit. April 17, 1917.)

Nos. 229, 230.

1. COLLISION ⊂⊃83—STEAM AND SAILING VESSELS—EXCESSIVE SPEED IN FOG.
The steamship Thompson and the schooner Snow, on crossing courses, were in collision 50 miles off Cape Henry, in a dense fog. The Thompson was going at a speed of from 6 to 10 miles an hour, and the Snow at a speed of about 5 miles, with all sails set and drawing, which was not necessary to give her steerageway. The Thompson heard the fog signals of the Snow apparently on her starboard bow, but her captain could not be certain of the direction, and kept on until in sight of the Snow, when it was too late to avoid collision. *Held*, that both vessels were going at excessive speed, in violation of article 16 of the International Rules, Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326 (Comp. St. 1916, § 7854), and the Thompson also violated such rule in failing to stop and navigate with caution on hearing the fog signals of the Snow; that it could not be said that the excessive speed of the Snow did not contribute to the collision, and that both vessels were in fault and liable therefor.

2. COLLISION ⊂⊃82(3)—FOG—"MODERATE SPEED."
A sailing vessel navigating in a dense fog, with all sails set and drawing, and making her best speed under the wind conditions, is not going at the "moderate speed" required by article 16 of the International Rules, and in case of collision can exonerate herself from liability only by affirmatively showing that her excessive speed could not have caused or contributed to the collision.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moderate Speed.]

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

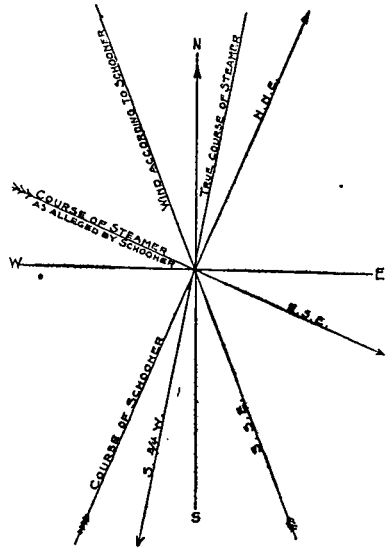
Suit in admiralty for collision by Smith Shipping Company, Incorporated, owner of the schooner Augusta W. Snow, against the steamship Robert M. Thompson, American Transportation Company, claimant, with cross-libel. Decree for libelant, and claimant appeals. Modified.

The following is the opinion of Mayer, District Judge:

These are cross-actions arising out of a collision between the schooner Augusta W. Snow (hereinafter called the Snow) and the steamer Robert M. Thompson (hereinafter called the Thompson) on April 1, 1914, in a dense fog, about 50 miles east of Cape Henry, Va. The Snow was bound from Jacksonville, Fla., to New York, with a cargo of yellow pine lumber; the Thompson was bound from Philadelphia to New Orleans, La., by way of Charleston, S. C. Each vessel charges the other with excessive speed, de-

fective lookout, and bad steering. All the testimony was taken on depositions, and presents the usual conflict as to vital questions of fact.

The theory of the Snow is that the Thompson, while proceeding at an excessive rate of speed, changed her course, and, instead of passing the Snow port to port, attempted to cross the latter's bow, a situation which could have been avoided by timely stopping and reversing of engines. The Thompson's theory is that the Snow, while going at an excessive rate of speed, luffed, and was allowed to take a sheer to starboard just prior to the collision, thus striking the Thompson at an angle of about 45 degrees. These theories may be illustrated by rough drawings, as follows:



The contentions of both sides as to the failure to give seasonable and adequate fog signals may be dismissed at the outset.

The first question requiring consideration is the speed of the respective vessels. Unfortunately, there is a divergence in the testimony as to the time of collision; the Snow contending, in substance, that the collision did not occur any later than 1 p. m., while the Thompson contends that it happened about 1:19 p. m.

Speed of the Snow.

The witnesses for the Snow, except her master, were examined prior to the examination of those for the Thompson, the first being Delk, the mate. Delk took the wheel at 12:30 p. m., and estimated that the schooner was going "about 5 miles an hour on an average, an hour." Upon being asked how he knew this, he said, "I could see, going through the water I can see whether she is going 8 or 5 miles; we had a log, the log will tell." By this he meant, of course, that if his estimate was wrong the reading of the log would correct him. He then said that at noon the log registered "about" 44, and that at the time of the collision or immediately thereafter the log registered "about" 48½, thus indicating a speed of "about" 4½ miles per hour, up to the time of the collision. Upon further examination, Delk, relying on his memory, testified that at 8 o'clock in the morning the reading was 22, "if I am not mistaken," and 44 at 12 o'clock (thus showing an average of 5½ knots from 8 to 12), and 98 at the midnight previous, "if I am not mistaken" (the log starting over again every hundred).

The substance of the testimony of Capt. Armstrong, the master of the Snow, is that her speed was a little less than 4 knots. He testified that he looked at the log (taffrail) at 12 o'clock and found it on 44; that the log was taken out of the water after the collision, examined, put away, and brought to New York, where it was taken to the store of John Bliss & Co., makers of nautical instruments and the makers of this log. There, Armstrong says, it was examined, and it showed a registration at 47.9. (The Bliss affidavit is, of course, inadmissible.) If the collision was at 1 p. m., the above readings would show a speed of 3.9 knots per hour (not 3.7, as Armstrong testifies at page 97 for instance. Probably this is a typographical error.

But the libel puts the collision at 12:50. Too much importance is not to be accorded to the mere fact that the libel states 12:50, because often an inadvertent error is made in pleadings, with only rough data in the hands of the proctors; but, in this instance, Armstrong gave the time as 12:50 to his owners (page 120). If, therefore, the collision occurred at 12:50 instead of 1 p. m., and if the log read at 44 at exactly noon, and at 47.9 at

exactly the time of collision, then the Snow went 3.9 knots in 50 minutes, or 5/6 of an hour, thus showing (if I figure correctly) a speed of 4.68 per hour, or, in round numbers, 4.7 knots per hour.

The logbook of the schooner, which was kept in the mate's room, was lost, and there is no reason to question the testimony as to its loss. The captain, however, kept "a kind of scratch log," part of which was written up before the collision and part filled out afterwards when he arrived at Newport News. (Libelant's Exhibit 3 for identification.) The captain was examined and cross-examined concerning this "scratch log," and in so far that log is before the court. He testified that the last entry in the log was made just after 12 o'clock, and his attention was called to the fact that the figures 50 in the entry 12:50 appeared to have been changed. He admitted that the 50 looked "a little different from the 12," but could not tell whether that was done at the time he wrote it or when it was done. Some sparring was engaged in by the proctors as to the admissibility of this paper. For the purposes of this particular point, it is not important whether the paper be admitted in evidence or not. If in evidence, it is apparent on inspection that some change has been made in the 50. If not in evidence, the attention of the captain was called to the matter, and, as above stated, he admitted that the figures 50 look "a little different from the 12" which precede them.

Campbell, the cook on the schooner, whose testimony shows intelligence, estimated that the collision occurred between 12:45 and 1 o'clock. In one part of his testimony Capt. Armstrong stated: "After the collision, the steamer swung alongside. It wasn't a minute. I took my (Howard) watch out. It was just 1 o'clock (Eastern standard time), and I called the mate's attention to it." I would say the collision occurred "one minute to 1—one or two minutes before 1." He was then asked, "Might it have been five minutes to 1?" and he answered, "Well, that is a time when a man can't tell very closely, because my attention was to getting the sails in." In any event, the captain looked at his watch *after* the collision, and we all know how easily we are deceived as to short lapses of time, especially in a moment of emergency or excitement.

Upon the testimony, it is impossible to determine with absolute accuracy the precise moment when the collision took place, but, reading all of the testimony together, I am much influenced on this point by the testimony of Delk, the mate, who for about 22 years had served on sailing vessels, and whose testimony, having been taken at the very beginning of the litigation, seems to have the ring of truth. Taking into consideration the calculations which I have set forth, and all the testimony relating thereto, the taffrail log and the captain's scratch log, I am satisfied that Delk was substantially right when he said that the Snow was going about 5 miles on an average, and about 4½ miles from 12 o'clock up to the time of the collision. The probabilities are that she was going close to 5 miles an hour (perhaps a trifle above or under), and this conclusion is fortified by the fact that the Snow was carrying all of her sails, including five head sails, that these sails were drawing full, and that the schooner was making all the speed she could with the wind she had (page 122). Nearly all the witnesses testified that the wind was freshening throughout the day, although Capt. Armstrong testified that there was a gradual decrease in the wind shortly before the collision.

There has been a good deal of discussion as to the conclusions to be drawn from the wind conditions reported by the United States weather bureau at Cape Henry, and as they appear in the logs of the warships Delaware and Kansas; but, in view of the distance of the place of collision from Cape Henry and from the warships, any conclusions based on these data would be affected by a large element of speculation. There is nothing accurate about the velocity of the wind over a large area, and a decrease or moderation at one point will not necessarily be duplicated at the same time at a point some miles away.

Experience has demonstrated that the best source of information upon a question of fact such as this is the credible testimony of seasoned men who are on the scene; and, on all the evidence, I am not satisfied that there was so marked a decrease as materially to reduce the speed of the Snow so as to get it down below (in any event) 4½ knots.

I am not unmindful of the testimony of the witnesses called on behalf of the Thompson, who estimated that the Snow was making 7 or 8 knots an hour, but, after all, these are estimates of interested witnesses on another vessel, made within a short time and under circumstances which do not assure certainty and I prefer to arrive at my conclusions on the testimony of the witnesses of the Snow with the fair inferences which follow from that testimony.

Having concluded, therefore, that the schooner made about 5 knots an hour, the next question is whether she was compelled so to do in order to keep her steerageway. Delk testified that the vessel was a "good steering vessel," and that he supposed she would have steerage at 3 knots, but it would take half an hour to answer the helm, and that he supposed he could hold her on her course at 3 knots (page 40). Armstrong, the captain, testified that in a rough sea he would want 3 or 4 or 4 or 5 knots, while in a lighter sea he could hold the course with a knot and a half or 2 knots; that is, when he had a comparatively smooth sea and a moderate wind (page 149). He also thought that it would not make much difference whether the schooner was light or loaded, although under some circumstances she would hold her course better light than loaded. He testified further that he could have maintained steerageway with less speed, but "we could not avoid running into anything as quick with less steerageway as we could the way we were going; our vessel would not mind our helm as quick" (page 100). "I think," he continued, "we should have as much steerageway as that (meaning the rate at which the Snow was going on the day of the collision) in order to avoid running into any object that might be ahead of her" (page 101).

I am satisfied that the Snow could have kept her course at 3 knots an hour, or, in any event, at between 3 and 4 knots an hour; and that when she proceeded at the rate of about 5 knots an hour, with all her sails set, she was also going at a speed in excess of her necessities for steerageway, and certainly in excess of her duty in a fog as dense as all witnesses agree that this fog was. The mere fact that she was going with all sails set strongly suggests a rate beyond the requirements of steerageway.

Speed of the Thompson.

If the time of the collision was 12:50 p. m., then on the testimony of the Thompson's officers, and as to the events before that time, it is apparent that the Thompson's speed was somewhere between 6 and 10 knots an hour, and obviously excessive. But timepieces often differ, both on land and sea, and the more satisfactory approach is to analyze the situation on the time as kept on the Thompson and testified to by her witnesses.

From 12:30 p. m., when the chief officers of the Thompson went below, to 12:49 p. m., the Thompson was making her full speed of 10 knots an hour (Brown, pp. 5, 49–50; Cavileer, p. 36). Although, according to Capt. Cavileer, of the Thompson, the fog at about 12:45 was "very dense" (page 37), and according to Brown, the engineer, it was "pretty thick," so that he "could see nothing ahead at all," and could see only "the length of the ship," but not "beyond that") Brown, pp. 49, 50), the vessel was permitted to keep on at full speed for at least 19 minutes.

It is true that at 12:30 the order was given to the engine room to "stand by," but that order at best minimizes, but does not avert, the danger of collision in a dense fog.

Of course, it is true that antecedent carelessness is of no consequence from the standpoint of fault, if not a contributing cause of collision; but this conduct on the part of the Thompson is of service in determining the truth as to the speed of the vessel at and just before the collision.

At 12:49 p. m., according to the engineer's log, there was a signal for stop, although Brown, the chief engineer, does not seem to have an independent recollection of the time of the order (page 31). At 12:53 p. m. there was a signal for half speed ahead (Brown, p. 31); but, as the engines were not reversed, the Thompson would still be going ahead when Brown received the half-speed order (page 32). Brown said, "At the end of 4 minutes (12:49–12:53) I *guess* she would be going about 3 knots *or thereabouts*;" while Capt. Cavileer

thought she was going "probably five mile an hour—that is, only roughly estimated" (Cavileer, p. 39).

The half speed would, according to Brown, "pick us up to *about* 6" (page 33), and it would take only about 2 minutes to bring the Thompson up from 3 knots to half speed, i. e., about 5 knots. From about 12:55 p. m., therefore, the Thompson was going at least at the rate of 5 knots; and in view of Brown's estimate of "about" 3 knots or "thereabouts," and Capt. Cavileer's rough estimate of 5 knots at 12:53, it is safe to say that at 1 o'clock, when the next stop order was received in the engine room, the Thompson was going better than 5 knots. The next signal was full speed ahead at 1:12, and meanwhile the Thompson, according to Brown, was making only one knot an hour or almost stopped; but at 1:12 p. m. Brown again received an order for full speed ahead, and a stop order at 1:15 p. m., and Brown admitted that at 1:15 p. m. he was going full speed. Again, the Thompson stopped, this time at 1:18 p. m., when she started half speed ahead, and the collision occurred according to Brown and Vogel, the second assistant, "about" 1:19.

If the testimony of the engineers is taken, the conclusion is irresistible that at the time of the collision the Thompson was going at somewhere from 5 to 6 knots an hour. If the captain's testimony (page 9) is taken to the effect that the collision occurred when the engines were full speed ahead, then she was going 10 knots for 7 minutes, i. e., from 1:12 to 1:19. Contradictions are sometimes the best indication of truth, but not always, and in this case, on this vital question of speed, the Thompson's story is very unsatisfactory. I cannot escape the conclusion that the Thompson was going either about 6 or about 10 knots per hour for some minutes before the collision, and this conclusion is reached without considering the estimates of some of those on the Snow. The answer "No" of Lawson, the Snow's lookout, to the question, "You couldn't tell whether the steamer was going ahead or not, could you?" is not significant. The question, in a sense, was casual, but, if taken at full value, it is merely an instance of the well-known experience that at the moment of emergency (and especially in a fog at sea) it is difficult to recall the precise movement of another vessel.

The Navigation of the Snow.

Lawson, an able seaman, who had followed the sea for five years, was stationed at the forecastlehead, keeping lookout and blowing the horn. He heard a whistle off his port bow (page 44) and then a second blast half a minute or a minute after (page 45). After these two blasts, Lawson heard several whistles before and several after he saw the Thompson. The Thompson blew one-blast signals after Lawson saw her, and these were answered by three blasts from the Snow. Lawson, who remained on the forecastlehead (page 53), reported the first whistle to the mate, but not the subsequent signals. There was not any necessity for Lawson to do any more, and fault cannot be attributed to the Snow on account of her lookout.

As to the movement of the vessels, the testimony of Delk seems trustworthy. As stated supra, he was an experienced man, was examined before the cross-libel was filed, and his answers seem neither cocksure on the one hand nor indefinite on the other. Shortly before the collision he heard the whistles of a steamer, but "they sounded far off, * * * one was on the starboard quarter one was about abeam" (Delk, p. 7). Capt. Cavileer, of the Thompson, testified that at 12:48 he heard a steamer's whistle off his port bow, and at 12:53 that he heard the same whistle, which was then abeam (Cavileer, pp. 5 and 6). Apparently, therefore, the two whistles of the same steamer were heard on both vessels. Thereafter, and about 2½ minutes before the collision, Delk heard another whistle about three points off his port bow, and shortly after that another, which sounded almost ahead, it being one long blast, and soon thereafter the Thompson loomed up out of the fog across the Snow's bow. When the Thompson loomed up out of the fog, she blew two blasts. As soon as Delk saw the Thompson he put "the wheel hard up, and the captain came and gave me a hand, and we put it hard astarboard" (Delk, p. 9). This maneuver would, and according to Delk did, send the Snow to port.

The Snow struck the Thompson on the starboard side. The Snow sank, floating on her lumber. The Thompson was out of sight in a few seconds, and did not stand by and offer assistance. Lawson, the lookout, Campbell, the cook, Barton, a passenger, and Capt. Armstrong, corroborated Delk on the point that the Thompson's whistle sounded off the port bow of the Snow. Capt. Armstrong testified that at the time of the collision he was at the wheel, that he saw the compass every half minute and at the time of the collision, was looking right at it, that the course was N. N. E., and had not been changed. He further said that, as soon as the Thompson was crossing the Snow's bow, he told the mate to put his wheel hard astarboard, and caught hold of the wheel in order to assist Delk to do this quickly; that the course of the Snow might have been changed by this maneuver, but not enough to notice. "In fact, we came together so quick the compass didn't have a chance to angle the vessel; if the vessel swung off, the compass didn't change any; she might have changed a little, but very little" (Armstrong, p. 96). In the opinion of Armstrong and Delk, the Thompson was heading E. S. E. at the time of the collision, at an angle of about 45 degrees. I am satisfied that the Snow held her course, with possibly some very slight and immaterial change practically at the moment of collision.

The Navigation of the Thompson.

An appreciation of the situation with which the captain of the Thompson was confronted may be summed up in a reference to his testimony on cross-examination (page 40): "Q. In your direct examination you said, 'Apparently on our starboard bow.' You are not positively sure, are you, that you heard it off your starboard bow? A. In my direct examination I said that the first I heard of the horn was very indistinct, and appeared to be on our starboard bow, but I could not quite detect where it was or what it was." It thus appears that although the master of the Thompson heard the fog horn of the Snow, and although he was not sure of her location or of the direction in which she was going, nevertheless he did not stop for a continuous period nor did he reverse his engines.

After the Snow came in sight, Capt. Cavileer said he starboarded his helm, then ported, and put his helm amidships. The helmsman, Belish, contradicted the captain, saying that he kept the wheel over "to the left" right up to the time of collision, and "didn't turn the wheel amidships at all" (page 104). But, assuming the captain's recollection to be correct, these confusing maneuvers were indulged in undoubtedly because of the fear of the captain that he would throw his stern in the path of the Snow, and, naturally, when the dangerous situation was apparent, he was endeavoring to do everything in his power to avoid collision. It is by no means unlikely that these changing maneuvers, hurriedly executed, gave to the witnesses on the Thompson the impression that the Snow luffed; but luffing by the Snow would be so unusual, in the circumstances, that it would require a great deal more than is presented in this testimony to carry that suggestion into conviction. The truth of the matter is that, proceeding at an excessive rate of speed, the Thompson came upon the danger much sooner than was expected, and in the alarming surprise her captain was compelled to try to avert collision in a very small space of time. Under the circumstances, these maneuvers cannot be said to have taken place in extremis, for the captain brought the situation on himself by reckless speed, when it would have been easy to stop and reverse.

Shanks, the first officer, did not make a very good witness, but I am reluctant to believe that this was anything more than the poor showing which men of this kind sometimes make when in the hands of lawyers. Shanks had an experience on the sea of 28 years, and for 9 years held a master's license for all ocean, steam, and sail, and it is difficult to believe that such a man would not know the simple movements of the helm and the simple results therefrom. Belish, the wheelsman, was an Austrian, unable to speak English; but I do not see that he made any error, but, on the contrary, simply did the physical acts which carried out the instructions of his superiors. I think in his case the criticism of the proctors for the Snow is largely based upon his

lack of knowledge of the English language. It may very well be that it would be wiser to employ, for positions of this kind on a vessel commanded by officers who speak English only, men who also can understand English; but, as I am unable to see that Belish made any mistake, I think that his lack of knowledge of the language is a matter of no consequence. The same observations may be made as to Siguro.

While I think that no fault is attributable to Belish or Siguro in the performance of their duties, yet their testimony, when read in the light of that of the captain and others on the Thompson, is so muddled and unsatisfactory that the Thompson has failed to carry the burden of proof which rests upon her to free herself from fault. On the other hand, the testimony on behalf of the Snow (with the exception of Armstrong's testimony as to the 12:50 entry, and possibly his testimony as to decrease of the wind velocity) is, in substance, clear and satisfactory.

From the foregoing it has already appeared that I am of opinion that both the Thompson and the Snow were proceeding at an excessive rate of speed, in view of the pending conditions. It is quite clear from the testimony that very little deviation would have avoided the collision. Shanks testified that the courses were practically parallel, and that "she (the Snow) would have gone clear of us the way she was going when I first saw her"; and, in effect, he attributed the collision to the luffing of the Snow. Capt. Cavileer testified that the Snow was "about one point of being parallel with our course," and that she was heading a point toward the Thompson. In answer to the question as to whether it appeared that the Snow at that time, if she held her course, would come into collision or go clear, he answered, "It appeared that she would clear me, * * * cross my stern, * * *" would go "under my stern" (pages 14 and 15), and he also attributed the collision to the luffing of the Snow. Capt. Cavileer further testified as follows: "Q. When you first saw the schooner she was heading in the direction which would lead right into the steamer, which I observe from your exhibit marked Exhibit K? A. Not right into her; no. Q. Well, I will ask you to look at that exhibit, Captain. A. Witness does so. Q. If your steamer was stopped at that time, and the schooner continued her course, she would have run into the steamer, wouldn't she? A. No, sir. Q. Pretty close to it? A. She would have come close to it, but she wouldn't have touched. Q. How far away would she come? A. From 100 to 150 feet. Q. The schooner would come pretty close to your steamer, wouldn't she? A. She would come from 100 to 150 feet from us" (pages 46, 47).

Finally, it is earnestly insisted upon behalf of the Thompson that the location of the vessels, as shown by various diagrams, supports the theory that the Snow was at fault; but I think that the testimony fully bears out the theory of the Snow that the position of the vessels and their course was as indicated in the rough diagrams supra.

The conclusion is unescapable that, by the exercise of caution on the part of the Thompson, the collision could have been avoided, and the real question in the case is whether, because of her excessive speed, the Snow is to be condemned for contributing to the collision.

The International Rules of Navigation, as far as here applicable, are (stated for convenience) as follows:

"Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard for the existing circumstances and conditions. A steam vessel hearing apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

"Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the

giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

It is unnecessary to repeat at length the principles which the courts have frequently announced in connection with the speed of vessels in a fog. It was clearly the duty of the Thompson, in view especially of the doubts entertained by her captain, either to slacken her speed to a rate considerably under that which she was going, or to stop or to reverse, and, had her captain done any one of these three things, the collision would, in all probability, not have happened.

In considering the liability of the Snow, it is, of course, necessary to ascertain what difference, if any, a slower speed would have made in the particular situation here under consideration. The proposition involved is concisely and aptly stated by Sir James Hannen in The Zadok, 9 P. D. 114 (1883), in referring to article 13 of the "Regulations for Preventing Collisions at Sea": "It was the duty of both vessels to note article 13, to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is not merely that vessels should go at a speed which will lessen the violence of a collision, but also that they should go at a speed which will give as much time as possible for the making of any proper maneuvers which may become necessary under unforeseen circumstances; for, in a fog, it cannot be told exactly from what quarter the danger may come."

The Snow kept her course and speed, and I am satisfied that a slightly less speed, of say a knot an hour, would not have enabled her to clear the Thompson. In any event, in view of the Thompson's conduct, I am not convinced that the collision could have been prevented if the Snow had been running at say 4 knots at the time when the Thompson loomed up out of the fog.

Of course, as the cases have repeatedly pointed out, it is neither possible nor advisable to lay down any rigid rule as to the precise rate of speed at which a vessel shall proceed in a fog. There are some rates which are obviously dangerous, but there are other rates on the border line, such as the Snow's in this case, where the determination of fault must rest upon all the surrounding conditions and circumstances.

It would unnecessarily extend this opinion to analyze case by case, but, from a reading of the many cases cited in the briefs, the principle generally adhered to and certainly followed in this circuit is that sailing vessels should lessen speed in a dense fog down to the rate at which they may maintain steerageway.

Generally speaking, it would seem that where sailing vessels have gone over 5 knots they have been condemned, and where they have gone about 4 knots or under they have been freed; but in each case, naturally, there has been a series of facts which in some one or more particulars differed from those in some other case. In The Chelsea (D. C.) 135 Fed. 616, for instance, the fog was not thick at the beginning, and when the vessel entered the dense fog she was reducing sail. In The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, the sailing vessel was going at 7 miles an hour southeast of Nantucket Shoals. Mr. Justice Brown said at page 548: "No absolute rule can be extracted from these cases. So much depends upon the density of fog, and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. It is not perceived why the considerations which demand a slackening of speed on the part of steamers in foggy weather are not equally persuasive in the case of sailing vessels. The principal reason for such reduction of speed is that it will give vessels time to avoid a collision after coming in sight of each other. If two steam vessels are approaching upon converging

courses at a combined rate of speed of thirty miles an hour, and are only able to see each other three or four lengths off, it would be practically impossible to avert a collision; whereas, if each were going at the lowest rate of speed consistent with good steerageway, a collision might easily be avoided by stopping and reversing their engines, or by a quick turn of the wheel and an order to go ahead at full speed. While sailing vessels have the right of way as against steamers, they are bound not to embarrass the latter, either by changing their course or by such a rate of speed as will prevent the latter from avoiding them. There is also the contingency that a schooner sailing with the wind free, as in this case, may meet a vessel closehauled, in which case the latter has the right of way, and the former is bound to avoid her. Beyond this, however, a steamer usually relies for her keeping clear of a sailing vessel in a fog upon her ability to stop and reverse her engines; whereas, it is impossible for a sailing vessel to reduce her speed or stop her headway without maneuvers which would be utterly impossible after the two vessels come in sight of each other. Indeed, she can do practically nothing beyond putting her helm up or down to 'ease the blow' after the danger of collision has become imminent. The very fact that a sailing vessel can do so little by maneuvering is a strong reason for so moderating her speed as to furnish effective aid to an approaching steamer charged with the duty of avoiding her."

While in The Nacoochee, 137 U. S. 330, 338, 11 Sup. Ct. 122, 34 L. Ed. 687, the Supreme Court disregarded the argument that the schooner was sailing too fast because not averred in the answer and not found by the court below, yet the principles stated by Mr. Justice Blatchford are of guidance in the case at bar. Among other things he said, at page 338 of 137 U. S., at page 124 of 11 Sup. Ct. (34 L. Ed. 687): "The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident. The latter is not shown, and it is shown that the steamer was not going at a moderate speed in the fog. It is found that the steamer first sighted the schooner when the latter was about 500 feet distant, and that the fog was dense and hung low down over the water. The steamer, from her own course and that of the schooner, when the former overhauled and passed the latter, must have known, by the lapse of time before she heard the supposed sounds of distress, that when she changed her course, by porting 13½ points, to south-southeast, it was quite likely she would encounter the schooner. She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog. This is the rule laid down by this court in the case of The Colorado, 91 U. S. 692, 702 [23 L. Ed. 379], citing The Europa, 2 Eng. Law & Eq. 557, 564, and 14 Jurist, pt. 1, 627, and The Batavier, 40 Eng. Law & Eq. 19, 25, and 9 Moore P. C. 286. The rule laid down in the last-named case is that at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. See, also, The Pennsylvania, 19 Wall. 125, 134 [22 L. Ed. 148]."

While excessive speed in a fog on the part of a sailing vessel is to be condemned, it cannot, in a particular case between given litigants, be considered a fault academically, and it is merely repeating a trite principle to say that the inquiry must be whether the violation of a rule of conduct, statutory or otherwise, was the sole or a contributory cause of the disaster.

As the Thompson was clearly at fault, and as the Snow, though going at an excessive rate of speed, was otherwise properly navigated, and as the rate at which the Snow was going did not contribute to the collision, the Snow may have a decree with costs, and in the cross-action a decree dismissing the libel with costs.

Settle decree on five days' notice.

On appeal from a final decree of the United States District Court for the Southern District of New York holding the steamship Robert

M. Thompson solely at fault for a collision which occurred between her and the schooner Augusta M. Snow on April 1, 1914, at a point about 50 miles east from Cape Henry, Va. The collision occurred between 12:50 and 1:15 p. m., a dense fog prevailing at the time.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for appellant.

MacFarland, Taylor & Costello, of New York City (Willard U. Taylor and Alfred Strickland, both of New York City, of counsel), for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1, 2] The District Judge has stated the facts fully and accurately in his opinion and they need not be repeated here except as they bear upon the speed of the Snow. The conclusion of the District Judge is stated at the close of his opinion as follows:

"As the Thompson was clearly at fault, and as the Snow, though going at an excessive rate of speed, was otherwise properly navigated, and as the rate at which the Snow was going did not contribute to the collision, the Snow may have a decree with costs, and in the cross-action a decree dismissing the libel with costs."

We are entirely satisfied with the opinion of the District Judge regarding the navigation and liability of the Thompson and, therefore, need spend no time in considering that branch of the controversy.

The important question for us to determine is—Was the Snow guilty of negligence? The court after reviewing the testimony reaches the conclusion that the Snow was making about 5 knots an hour, that she could have kept her course at 3 knots an hour and that when she proceeded at the rate of about 5 knots an hour, with all sails set, she was going faster than was necessary to maintain steerageway, "and certainly in excess of her duty in a fog as dense as all witnesses agree this fog was. The mere fact that she was going with all sails set strongly suggests a rate beyond the requirements of steerageway."

The District Judge after carefully reviewing the testimony reaches the following conclusion, which is clearly substantiated by the proof:

"I am of the opinion that both the Thompson and the Snow were proceeding at an excessive rate of speed in view of the pending conditions. It is quite clear from the testimony that very little deviation would have avoided the collision."

The judge concludes his résumé of the testimony by the following statement:

"The real question in the case is whether because of her excessive speed the Snow is to be condemned for contributing to the collision."

That she was going at excessive speed is thus conceded, as it necessarily must be, in view of the proof that she was making at least 5 knots an hour and that all sails were set and drawing. Some of the witnesses testified that she was making seven or eight knots an hour but all agree that she was going as fast as it was possible for her to go with the weather conditions then prevailing. We do not attempt an extended analysis of the testimony for the reason that the crucial question is one of law arising upon undisputed facts. Briefly stated, the facts are these—A schooner collides with a steamer in a dense fog.

The schooner is going as fast as it is possible for her to go. The International Rules of Navigation provide, article 16, as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at moderate speed, having careful regard for the existing circumstances and conditions."

It is, of course, difficult to define moderate speed in all circumstances but it is safe, we think, to define it as something less than top speed or full speed. A vessel that is proceeding as fast as her machinery or her sails will carry her is not going at moderate speed.

In The Pennsylvania, 86 U. S. (19 Wall.) 125, at page 136, 22 L. Ed. 148, Mr. Justice Strong says:

"But when as in this case, a ship at the time of a collision is in actual violation of a statutory rule, intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

In The Bolivia, 49 Fed. 169, at page 171, 1 C. C. A. 221, at page 223, this court said:

"We cannot agree with the opinion of the learned district judge that the fault of the steamship was not contributory to the collision. The burden is upon her to show that it was not and from the nature of the case this cannot be done. If she had been going slower, she would not have reached the place of the collision when the schooner was there."

See, also, The Rhode Island (D. C.) 17 Fed. 554.

We are of the opinion that after having found that the Snow was proceeding in violation of the statute requiring her to proceed at moderate speed the District Court could not find that this negligence did not contribute to the disaster. On the contrary, we are of the opinion that had the rule been followed it is more than probable that the collision would not have happened.

The decree is modified and both vessels are held at fault with the costs of this appeal to the appellant.

SANBORN-CUTTING CO. v. PAINE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2898.

1. BANKRUPTCY ⟸245—TRUSTEE'S SUIT FOR CREDITORS.
   A corporation having been adjudged a bankrupt under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act June 25, 1910, c. 412, 36 Stat. 838, the trustee could act for all the creditors in asserting their rights to liens on property coming into his custody by legal or equitable proceedings.

2. BANKRUPTCY ⟸303(3)—ACTION BY TRUSTEE—SUFFICIENCY OF EVIDENCE.
   In suit by a trading company's trustee in bankruptcy for an accounting and restitution of assets, etc., evidence *held* to show that, when the president of a packing company assigned to the officer of defendant company

shares of stock in the packing company and a debt owing the trading company by the packing company for merchandise, the trading company was insolvent, and that the assignor and assignees had ample reason so to believe.

3. CORPORATIONS ⟸542(1)—FRAUDULENT CONVEYANCES—QUESTION INVOLVED.
Where creditors of an insolvent corporation or those representing creditors assail transfers and agreements as prejudicial to their rights, the question is not whether the various transfers and agreements are to be upheld merely as between the parties to them, but whether the law will avail complaining creditors of the insolvent corporation to obtain possession of the property transferred as subject to corporate debts.

4. CORPORATIONS ⟸182—POWER OF MAJORITY STOCKHOLDER—CONVEYING PROPERTY.
The president of a corporation who owned all but two of its 25,000 shares of stock could not wholly ignore the fact that there was a corporate existence not to be disregarded at his will, as an individual stockholder, by independent attempt to convey the property of the corporation.

5. CORPORATIONS ⟸542(1)—CONVEYANCE BY CORPORATION—FRAUD.
Where an insolvent packing company transferred all of its property to another company, the only consideration moving to the packing company being payment by the transferee company of part of the packing company's debts, nearly all of which were due two individuals who at the same time were stockholders and directors in the packing company and also in the transferee company, the transfer from the packing company being made with the knowledge and intention on the part of the directors that the packing company should cease business after the transfer, such transfer cannot operate to defeat the claims of the packing company's creditors.

6. CORPORATIONS ⟸182—ACT OF MAJORITY STOCKHOLDER—WAIVER.
A trading company did not waive its claim upon the assets of a packing company, debtor to it, through the acts of the majority stockholder in the trading company; as he was not the corporation, and could not use its assets for his own benefit or deprive its creditors of their claims upon the assets.

7. BANKRUPTCY ⟸185—ESTOPPEL OF TRUSTEE—ACT OF MAJORITY STOCKHOLDER—BINDING FORCE.
The trustee in bankruptcy of a trading company was not estopped from pursuing a claim for restitution of assets against the assignee of a packing company, the trading company's debtor, on the theory that the trading company and its creditors became bound by any agreement between the majority stockholder in the trading company and the assignee company that the trading company would not enforce its claim against the packing company's assets; the trading company, and not its majority stockholder, having been the creditor.

8. BANKRUPTCY ⟸306—APPEAL—LAW OF CASE.
Where a trustee in bankruptcy took no appeal from a decree of the District Court, the Circuit Court of Appeals may not consider a point made in his brief that the District Court erred in not making an allowance.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suits in equity by V. A. Paine, as trustee of the Kake Trading & Packing Company, a corporation, against the Sanborn-Cutting Company, a corporation, and others. From a decree for plaintiff, as trustee, against the Sanborn-Cutting Company, the latter appeals. Affirmed.

G. C. & A. C. Fulton, of Astoria, Or., for appellant.

Gunnison & Robertson, of Juneau, Alaska, and James J. Crossley, of Portland, Or., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In December, 1915, the appellee, Paine, as trustee of the Kake Trading & Packing Company (to be called Trading Company), a corporation voluntarily adjudged a bankrupt on April 9, 1915, brought suit in the United States Court in Oregon against Kendall, Gordon, Sanborn, Kake Packing Company, and Sanborn-Cutting Company for an accounting by the Sanborn-Cutting Company of its conduct of the business of the Kake Packing Company, a corporation (to be called the Packing Company), since May, 1914, for restitution of the assets of the Packing Company, and for an account of 125 shares of stock of the Packing Company belonging to the Trading Company, and for judgment against Kendall, Gordon, and Sanborn-Cutting Company and each of them for $12,500, and for other relief. On the same day Paine, as trustee, brought suit in Alaska against the Kake Packing Company and appellant herein, Sanborn-Cutting Company. In the Alaska case the trustee prayed that the conveyance of the assets be held void, and that the Cutting Company account and make restitution to the Packing Company, or that, if restitution could not be had, the property be held by the Cutting Company subject to the debts of the Packing Company to be disposed of to pay the unpaid debts of the Packing Company, including a judgment theretofore recovered by the trustee against the Packing Company, or that the Cutting Company be required to pay the unpaid debts of the Packing Company, including the judgment recovered by the trustee and for judgment against the Cutting Company for $10,823.14, with interest, and for further relief. By stipulation the Alaska and Oregon suits were consolidated and tried on the merits before the United States District Court in Oregon. Decree was awarded Paine, as trustee, and against this appellant, Sanborn-Cutting Company, for $6,687.87, with interest, without costs to either party. Order of dismissal was made as to Sanborn, Kendall, and Gordon. Sanborn-Cutting Company appeals.

The Oregon suit is brought by the trustee of the Trading Company, bankrupt, for and on behalf of the trustee and all stockholders of the Packing Company similarly situated who may wish to join and for the benefit of the Packing Company. The substance of the complaint is that the Trading Company on April 9, 1915, doing business in Alaska, was not able to pay the just claims of its creditors; that the Kake Packing Company and the Sanborn-Cutting Company were Oregon corporations doing business in Alaska; that one Ernest Kirberger was president, manager, and trustee of the Trading Company, bankrupt, and owner of the majority of stock thereof; that the corporation owned property valuable for use in the salmon industry, and about February, 1912, together with Sanborn and Gordon, Kirberger organized the Kake Packing Company to pack fish and food products in Oregon and Alaska; that the Packing Company had a capital stock

of $50,000 divided into 500 shares of $100 par value each, Kendall and Sanborn each having 85 shares, Gordon 60 shares, Frank Sanborn, son of G. W. Sanborn, 10 shares, G. C. Fulton and G. W. Sanborn, 20 shares, and A. C. Kirberger, brother of Ernest, heretofore mentioned, 60 shares; that when the Packing Company was organized, Sanborn, Gordon, and Kendall knew of the fact that when the Packing Company was organized it was agreed between Gordon, Sanborn, and Kendall and Ernest Kirberger that Kirberger would buy 85 shares of stock therein by causing the Trading Company to sell and convey to the Packing Company all its property; that thereafter the Trading Company conveyed its property to the Packing Company, and the Packing Company paid to the Trading Company $8,500, which sum the Trading Company, through Kirberger, then immediately paid back to the Packing Company in consideration of 85 shares of stock in the Packing Company. The trustee contends that these 85 shares were purchased with the assets of the Trading Company and became the property of the Trading Company, bankrupt, and were delivered to Kirberger in trust for the Trading Company.

It is also alleged that thereafter the Packing Company owed the Trading Company $4,000 arising out of transactions between the two corporations, but that in furtherance of the scheme agreed upon between Sanborn, Gordon, and Kendall and Kirberger the Packing Company paid the $4,000 to Kirberger, who in turn at once paid the money back to the Packing Company and received 40 additional shares of stock in the Packing Company.

The trustee alleges that this transaction was made without any authority on Kirberger's part; that the 40 shares became the property of the Trading Company and rightfully belonged to the trustee.

It is charged that about January, 1914, Kendall and Sanborn, with a view to defraud the Trading Company and its creditors of 125 shares of stock in the Packing Company and to defraud the creditors of the Trading Company, conspired to obtain 125 shares of stock from Ernest Kirberger, in whose name the stock then stood, and that they induced Kirberger to transfer to Kendall and Sanborn the 125 shares in the Packing Company owned by the Trading Company for $1, a grossly inadequate consideration; that Sanborn, Kendall and Kirberger then well knew that such assignment would unlawfully defraud the Trading Company and its creditors and delay them in collecting their demands, the Trading Company then being known to be insolvent. It is charged that to carry out the scheme Sanborn and Kendall caused a meeting of the stockholders of the Packing Company to be held about May 11, 1914; that Sanborn and Gordon constituted a majority of the directors of the Packing Company, and in connection with Kendall and Frank Sanborn and Fulton, in violation of the rights of the minority stockholders and of the Trading Company, and in connection with Kendall, caused all the assets of the Packing Company to be sold and conveyed to the Sanborn-Cutting Company, appellant herein; that Sanborn and Kendall constituted a majority of the board of directors of the Sanborn-Cutting Company purchasing company; that the sale operated as a fraud against the Trading Company; that Kirberger

had no authority to assent to the sale; and that Kendall and Sanborn had no right to vote 125 shares referred to in the Trading Company in behalf of the corporation. It is alleged that Sanborn and Kendall held on to the 125 shares in the Packing Company stock, and that the Packing Company was obliged to discontinue business in Alaska, and the Sanborn-Cutting Company unlawfully now holds the property of the Packing Company, and has made profits without accounting therefor to the Trading Company or to the Packing Company; that the Packing Company while under the influences of Sanborn and Kendall will not proceed to have the conveyance and sale set aside; and that a demand on Kendall and Sanborn, as directors of the Packing Company, would be useless.

Sanborn-Cutting Company denied all allegations of fraud, admitted the transfer to it of the assets of the Packing Company, but said that the transfer was for a valuable consideration; that the sale was made at the request of Kirberger, who voted the stock in his name; and that, after the assignment of the assets to the Sanborn-Cutting Company in May, 1914, the latter company took possession of the property, and has no ownership in 125 shares of the Packing Company. By replication the trustee denied all affirmative allegations, and pleaded that the assignment was invalid and wrongful. In the Alaska suit the trustee sued for himself as trustee and other creditors of the Packing Company similarly situated. He pleaded that in August, 1915, in Alaska, as trustee, he recovered judgment against the Packing Company for $10,333.31, with interest; that execution upon the judgment was returned unsatisfied; that about May 12, 1914, the Packing Company, then controlled by the Sanborn-Cutting Company, with intent to defraud the creditors of the Packing Company, and particularly the Trading Company, by bill of sale conveyed all its assets in Alaska to the Sanborn-Cutting Company; that such transfer was not in good faith, but made with notice and in pursuit of a conspiracy to defraud the Trading Company out of its debt against the Packing Company; that the Packing Company was controlled by the Sanborn-Cutting Company, and that the property conveyed should be held subject to the payment of the debts of the Packing Company; that there are many unpaid creditors of the Trading Company, bankrupt; and that they have been delayed and hindered in the collection of their debts by reason of the transfer. The Sanborn-Cutting Company denied all fraud and pleaded purchase in good faith, and that the consideration for the purchase was that it should pay the debts of the Packing Company, excepting a claim of the Trading Company amounting to $8,582.21, and that such an arrangement was agreed to by the Trading Company, which corporation had assigned its claim to Sanborn and Kendall; that the property transferred to the Sanborn-Cutting Company was not worth more than $60,000, but that the latter company agreed to take the property and pay all the debts which were represented at the time to be $76,621.01, exclusive of the claim of the Trading Company; and that the Trading Company induced the Sanborn-Cutting Company to take all the assets of the Packing Company, the main inducement being cancellation of the claim of the Trading

Company against the Packing Company or the assignment thereof to Sanborn and Cutting, who agreed to satisfy the claim, and subsequently did. It is set up that possession was taken; that the judgment obtained in Alaska was fraudulent and void, in that it was based on the claim of the Trading Company which had theretofore been assigned to Sanborn and Kendall, and hence did not pass by the proceedings in bankruptcy; that Kirberger was the owner of all of the stock of the Trading Company, and had full power and authority to transfer the account referred to.

[1] We can at once dispose of the contention that the trustee is not able to maintain this suit by saying that, the corporation having been adjudged a bankrupt under the Bankruptcy Act of 1898, amended June 25, 1910, the trustee could act for all the creditors in asserting their rights to liens upon property coming into his custody by legal or equitable proceedings. Such is the rule of Pacific State Bank v. Coats, 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846, followed in Cooper Grocery Co. v. Park, 218 Fed. 42, 134 C. C. A. 64, and In re Lane Lumber Co., 217 Fed. 550, 133 C. C. A. 402. It is also very clear from the record of the appraisement of the Trading Company and the claims filed that in March, 1916, the assets on hand were insufficient to pay the claims.

In the quite voluminous record these matters are specially important. At the time of the transactions under investigation Ernest Kirberger owned 24,998 shares out of 25,000 shares of the Trading Company, and was president, manager and trustee thereof. When the Packing Company was organized by Kendall, Sanborn, and Kirberger on February 19, 1912, with a capital of $50,000 divided into 500 shares of the par value of $100 each, Sanborn and Kendall each subscribed for 85 shares, F. H. Sanborn, son of G. W. Sanborn, subscribed for 10 shares, and Ernest Kirberger for 125 shares, and A. C. Kirberger for 60 shares. Kirberger was president and manager. E. Kirberger testified that property which the Trading Company by resolution of February 29, 1912, authorized him by bill of sale to convey to the Packing Company to the amount of $7,500 represented purchase of 85 shares in the Packing Company, and that he intended to buy 40 shares for himself and to pay for them in cash, but he explained that the total 125 shares standing in the name of Ernest Kirberger were all paid for with the assets of the Trading Company, and the lower court so found. The property transferred was personalty and realty. No authority was given by the Trading Company to Kirberger to purchase the additional 40 shares for which he subscribed. Kirberger expected to get some money from his sister and to pay for these 40 shares in that way, but this plan was not carried out. He testified that the Packing Company owed the Trading Company $4,000 for merchandise, and to pay this $4,000 the Packing Company sent its check, and he (Kirberger) in turn indorsed the check back to the Packing Company in payment of the 40 shares just referred to. Gordon and Sanborn knew that this account of the Trading Company was used by Kirberger to buy the 40 shares of stock, and Kirberger testifies that in 1912 and 1913 he operated under direct instructions of Kendall and Sanborn.

[2] In the Sanborn-Cutting Company in 1914 Kendall and Sanborn were the sole owners, Sanborn being president and general manager, and the two being really the representatives of the corporation. It was in January, 1914, that Kirberger made two assignments to Kendall and Sanborn, one covering 125 shares of stock in the Packing Company, that being the same stock which had been purchased with the assets of the Trading Company; the other being a debt owing to the Trading Company by the Packing Company for merchandise amounting to $8,582.21. We think it clear from the evidence that when these two assignments were made the Trading Company was insolvent, and that the Trading Company and Ernest Kirberger and Kendall and Sanborn had ample reason to believe that the Trading Company was an insolvent corporation. It had been sued by a creditor, and its operations had not been successful. There was no consideration for the assignment of the stock in the Packing Company or for the debt owing to the Trading Company by the Packing Company for merchandise, except $2, $1 for each assignment. It appears, however, that on January 6, 1914, when Kirberger, in consideration of $1, transferred to Kendall and Sanborn all his interest to the 125 shares of the stock of the Packing Company then standing in his name on the books of the corporation, he also agreed to deliver to Kendall and Sanborn within 30 days from the date of such agreement 60 shares of stock in the corporation standing in the name of A. C. Kirberger, his brother, all subject to certain conditions, namely, that the transfer was to secure cash advances made in 1912 and 1913 by Kendall and Sanborn on account of the Kirbergers in matters connected with the conduct of the Packing Company. This agreement referred to also provided that, as Ernest and A. C. Kirberger desired to reimburse Kendall and Sanborn and to purchase and secure additional stock in the Packing Company, the two Kirbergers were to pay Kendall and Sanborn on or before February 15, 1914, $65,000 in cash or securities, and upon such payment Kendall and Sanborn were to transfer to Ernest Kirberger the 125 shares in the name of Ernest Kirberger and 60 shares in the name of A. C. Kirberger, and also 125 shares in the Packing Company then standing in the name of Kendall and Sanborn, but that in the event of default by the Kirbergers all the right of their stock in the Kake Packing Company should cease and become the property of Kendall and Sanborn. Neither this assignment nor the assignment of the account of the Trading Company against the Packing Company was ever authorized or ratified by the Trading Company corporation, and at a stockholders' meeting and a subsequent meeting of the board of directors held on March 17, 1915, both transfers were formally disapproved.

On May 11, 1914, after some preliminary talks the Kake Packing Company stockholders had a meeting to consider the transfer of all its property to the Sanborn-Cutting Company, and the Packing Company made a bill of sale of its entire assets to the Sanborn-Cutting Company for a recited consideration of $72,621.01. No money changed hands in this transaction, the transfer being represented by book entries. The resolution of sale named the sum of $72,621.01 liabilities

of the Packing Company, the Sanborn-Cutting Company agreeing to assume and pay all of such liabilities, and it appears that the Packing Company between the time of the sale, May 11, 1914, and the fall of 1914, during which time it earned profits, did largely from profits and earnings pay off a large part of the liabilities of the Packing Company. The Packing Company ceased doing business after the transaction with the Sanborn-Cutting Company, and in doing so followed previously made plans. But there was still the outstanding claim of $8,585.21 owing by the Packing Company to the Trading Company. The record discloses that nearly the whole of the liabilities assumed by the Sanborn-Cutting Company were either personal claims of Kendall, Sanborn, Sanborn & Son, or the Sanborn-Cutting Company, or were liabilities which had been secured or indorsed by them or some of them. It also appears that upon May 11, 1914, Kirberger and the Trading Company and the Packing Company made a deed to the Sanborn-Cutting Company for a consideration of $10 for a tract of land near Kake, Alaska.

[3, 4] We accept the finding of the District Court that the transactions had between the corporations and persons above mentioned were all without actual or willful intent to perpetrate any wrong. Here, as in many other instances where creditors or those representing creditors assail such transactions as prejudicial to their rights, the question is not whether the various transfers and agreements are to be upheld merely as between those who are the parties to them, but whether the law will avail complaining creditors of the insolvent corporation to obtain possession of the property transferred as properly subject to the payment of corporate debts. The assignments of January 6, 1914, made by Kirberger were not the acts of the Trading Company. The corporation received no consideration for either of them; no corporate act was ever had which authorized Kirberger to make them, and no ratification or acquiescence of or in them was made by the Trading Company as a corporation. Kendall and Sanborn well knew that there was no corporate authorization in Kirberger to make them. They knew that Kirberger owned all but two shares of the Trading Company stock, and though they dealt with him as the sole acting representative of the company, and though they believed that anything he might do in the name of the corporation with respect to its affairs would be of binding force, still as against creditors of the corporation Kirberger could not wholly ignore the fact that there was a corporate existence not to be disregarded at the will of himself, an individual stockholder, by independent attempt to convey the property of the corporation.

In Cook on Corporations the author cites many cases sustaining his text to the effect that a single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity except by subsequent ratification or adoption by the corporation in the regular manner, and, further, that although one person owns a majority of the stock or all of it, or all but two shares, he does not in consequence thereof acquire the right to act for the corporation or as the corporation independently of the directors. Cook on Cor-

porations (6th Ed.) pp. 2225, 2226. In Mays, Assignee, v. Foster et al., 13 Or. 214, 10 Pac. 17, it was held that, except under particular circumstances, the fact that a stockholder in a company transfers his stock to an individual cannot be construed as a transfer for the benefit of the company; it is simply an individual act between the parties, and although the company may have knowledge respecting it, such a transfer neither creates nor discharges any liability. In re Haas Co., 131 Fed. 232, 65 C. C. A. 218.

[5] Turning now to the transfer by the Packing Company of all of its property to the Sanborn-Cutting Company, appellant herein, we find that the only consideration moving to the Packing Company was payment by the Sanborn-Cutting Company of a part of the debts of the Packing Company. We must keep in mind that nearly all of these debts were due to Sanborn and to Kendall as individuals, or were for debts for which Sanborn and Kendall had become liable as indorsers. Thus the effect was that Sanborn and Kendall, being at the time stockholders and directors in the Packing Company, insolvent, selling corporation, and in the Sanborn-Cutting Company, buying corporation, attempted to gain preferences in favor of themselves over other creditors of the Packing Company and to the prejudice of such other creditors. Under such a situation the transfer from the insolvent selling corporation, being made with the knowledge and intention on the part of the directors that it shall cease business after the transfer has been made, cannot operate to defeat the claims of corporation creditors. In Sutton Manufacturing Co. v. Hutchinson, 63 Fed. 496, 11 C. C. A. 320, Justice Harlan sitting with the Court of Appeals of the Seventh Circuit drew a distinction between the powers of solvent and insolvent corporations with respect to the disposition and transfer of their estates. He said for the court:

"It is quite true that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors; and such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its charter or by statute, exercise as full dominion and control over its property, having due regard to the objects of its creation, as an individual may exercise over his property. But when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation. * * * It is, we think, the result of the cases that when a private corporation is dissolved or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases of preserving it for creditors rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors. * * * In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the objects of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditors, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created (1 Bl.

Comm. 480). and when they can no longer do so their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors. This rule is imperatively demanded by the principle that one who has the possession and control of property for the benefit of others—and surely an insolvent corporation, which has ceased to do business, holds its property for the benefit of creditors—may not dispose of it for his own special advantage to the injury of any of those for whom it is held."

This opinion of Justice Harlan is referred to and the case distinguished on its facts in Sanford Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. See, also, Jones on Insolvent and Failing Corporations, pp. 103, 104, 205; Williams v. Commercial National Bank, 49 Or. 498, 90 Pac. 1012, 91 Pac. 443, 11 L. R. A. (N. S.) 857; Marshall on Private Corporations, pp. 1054, 1055; Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. 622; Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29; Idaho-Oregon Light & Power Co. v. Bank of Chicago, 224 Fed. 39–45, 139 C. C. A. 503.

[6] We cannot accept the view that the Trading Company waived its claim upon the assets of the Packing Company by and through the acts of Kirberger, majority stockholder in the Trading Company. As already said, Kirberger was not the corporation, and could not use the assets of the Trading Company for his own benefit, and could not deprive the creditors of the Trading Company of their claims upon the assets of the corporation.

[7] Nor can we believe that the trustee in bankruptcy is estopped from pursuing the claim involved against the Sanborn-Cutting Company upon the theory that the Trading Company and its creditors became bound by any agreement between Kirberger and the Sanborn-Cutting Company to the effect that the Trading Company would not enforce its claim against the assets of the Packing Company. This seems very clear when we keep in mind the fact that the Trading Company was the creditor, and not Kirberger, and that under such circumstances Kirberger had no authority to bind the Trading Company and its creditors.

The District Court awarded judgment to the trustees against the Sanborn-Cutting Company for $6,688.87, that sum being 66⅔ per cent. of $10,333.31, the amount of the debt of the Trading Company, with interest thereon at 6 per cent. per annum from May 12, 1914.

[8] The trustee suggests that he is entitled to a modification of the decree so that he shall recover $10,333.31, which is the amount recovered in the judgment in the courts of Alaska against the Packing Company, made up of the accounts of bills receivable, $8,582.21, plus $1,750 due by appellant for certain real estate used as a canning site. The land was conveyed by deed May 11, 1914, by the Trading Company to the Packing Company and by the Trading Company with Kirberger and the Packing Company to the Sanborn-Cutting Company for a named consideration of $10. But, as the trustee took no appeal from the decree of the District Court, we may not consider the point made

in his brief that the court erred in not making the allowance referred to. Clark v. Killian, 103 U. S. 766, 26 L. Ed. 607; United States v. Blackfeather, 155 U. S. 180, 15 Sup. Ct. 64, 39 L. Ed. 114; Guarantee Co. v. Phenix Insurance Co., 124 Fed. 170, 59 C. C. A. 376.

These views dispose of the principal points in the case. The District Court found from the evidence that the value of the property transferred was about $60,000, that the liabilities, including that to the Trading Company, amounted to $90,000, and that, if the property had been applied to the payment of the debts of the Packing Company, 66⅔ per cent. would have been paid. This finding we approve.

Our conclusions are that the District Court was right in its decree that the assignment by Ernest Kirberger to Kendall and Sanborn of the account of $8,582.21 due the Trading Company from the Packing Company was null and void, and that the appellant corporation received the property transferred to it by the Packing Company subject to the indebtedness amounting to $10,333.31 owing by the Packing Company to the Trading Company, and received the assets and property as the trustee for the benefit of the creditors of the Packing Company, and that the trustee succeeded to the rights of the Trading Company as a creditor of the Packing Company, and we affirm the decree that the trustee recover from the Sanborn-Cutting Company $6,688.87, together with interest from May 12, 1914, and also costs.

In allowing interest on the sum awarded from May 12, 1914, the court correctly regarded the $6,688.87 as money due upon the settlement of a matured account. Sargent v. American Bank & Trust Co., 80 Or. 38, 154 Pac. 759, 156 Pac. 431.

Affirmed.

QUIRK v. BANK OF COMMERCE & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1917.)

No. 2932.

1. CONTRACTS ⊂=111—RESTRAINT OF MARRIAGE—CONSTRUCTION.
   A promise to remain single, whether during the promisee's or promisor's lifetime, will not be lightly implied, for even such partial restraint of marriage is generally deemed contrary to public policy, if not illegal.
2. WILLS ⊂=58(1)—CONTRACTS TO DEVISE—RESTRAINT OF MARRIAGE.
   Plaintiff, when a girl of 16, while attending school, met deceased, a man of nearly 50, and he shortly asked permission of her parents to pay her court with a view to marriage. On account of her immaturity and the disparity of ages, plaintiff's parents did not look with favor on the proposed marriage, but deceased remained devoted to her and upon the most intimate relations with her family. Five years thereafter plaintiff and deceased became engaged, but in deference to her mother's wishes plaintiff refused to then marry deceased. In accordance with deceased's request, plaintiff promised him that so long as he should live she would remain devoted to him, the same as she had been, and in return for and in consideration of the love and affection, service, and loyalty of plaintiff and her family, deceased promised to bequeath and devise to plaintiff the bulk of his fortune. The parties remained engaged, but the marriage was never consummated, although plaintiff and her family cared for de-

ceased in his declining years, when he was afflicted with an incurable disease. *Held*, that the agreement was not one even in partial restraint of marriage, for marriage to another would not have absolutely prevented plaintiff from performance of the obligations assumed by her toward deceased, who did not live in the same place, but merely visited her and her family in the summer, and hence the contract was not subject to attack on the ground that it was illegal, being in restraint of marriage.

3. FRAUDS, STATUTE OF ⟸50(1)—CONTRACTS TO BE COMPLETED WITHIN YEAR.
A contract is not invalid, under the statute of frauds, because the contingency on which it is based may not happen within one year, it being possible for it to happen within that time.

4. FRAUDS, STATUTE OF ⟸75—CONTRACTS TO DEVISE REALTY.
An oral contract to devise real estate is within the statute of frauds.

5. FRAUDS, STATUTE OF ⟸130(2)—CONTRACTS—INVALIDITY.
An oral contract to devise and bequeath property which is indivisible is, under the statute of frauds, entirely unenforceable if it includes an agreement to devise real estate.

6. FRAUDS, STATUTE OF ⟸130(2)—CONTRACTS—VALIDITY.
A testator entered into an oral agreement to devise and bequeath the bulk of his estate to plaintiff. About one-half of the estate consisted of realty. *Held* that, under the statute of frauds, the contract was unenforceable, for the testator had the option of giving plaintiff either realty or personalty, and to allow plaintiff to enforce the contract by recovering the personalty would, in effect, compel compliance with that portion of the contract unenforceable because relating to realty.

7. FRAUDS, STATUTE OF ⟸129(1)—PART PERFORMANCE.
The doctrine of part performance, which will take a case out of the statute of frauds, is applicable only to equity.

8. FRAUDS, STATUTE OF ⟸129(1)—PART PERFORMANCE—APPLICATION OF DOCTRINE.
In an action at law on an oral contract entered into in Wisconsin to devise and bequeath land and personalty, instituted in the federal district court for Tennessee, the doctrine of part performance need not be considered, being applicable only to equitable relief, and not being applicable to the contract under the Tennessee or Wisconsin laws.

9. FRAUDS, STATUTE OF ⟸138(4)—ACTIONS—PLEADING—SUFFICIENCY.
One who has given a consideration, and cannot enforce the promise solely because of the statute of frauds, and not because of some inherent illegality in the contract itself, may maintain a quasi contractual action.

10. COURTS ⟸333—FEDERAL COURTS—STATE PRACTICE.
The federal courts follow the state practice.

11. WILLS ⟸68—CONTRACTS TO DEVISE—ACTION—DECLARATION.
Shannon's Code Tenn. § 4437, abolishes technical forms of action, and allows all contracts to be sued on in the same form of action, while section 4438 declares that all wrongs and injuries to property and person may be redressed by an action on the facts of the case, and section 4439 allows counts in tort and contract to be joined. Plaintiff's declaration alleged that she and deceased entered into an oral contract whereby he was to devise and bequeath to her the bulk of his estate, consisting of land and personalty, and that she fully complied with the contract, but that deceased breached the same. *Held* that, though the declaration relied on the contract, nevertheless it stated a good cause of action on the quasi contract arising out of plaintiff's performance and defendant's breach, the contract being unenforceable under the statute of frauds.

12. PLEADING ⟸193(6), 352—ATTACK—MODE OF ATTACK.
Under the Tennessee practice, the error whereby two causes of action are joined in a single count can be taken advantage of only by a motion to strike and not by demurrer.

13. WILLS ⊂68—CONTRACTS TO DEVISE—ACTIONS—RUNNING OF STATUTE OF LIMITATIONS—QUANTUM MERUIT.

Where deceased breached his oral agreement to devise and bequeath the bulk of his estate, consisting of land and personalty, to plaintiff, plaintiff's right of action on the quantum meruit for services rendered in reliance upon deceased's agreement accrues at the death of deceased, and limitations do not begin to run until that time.

14. EXECUTORS AND ADMINISTRATORS ⊂206(4)—CLAIM FOR SERVICES—QUANTUM MERUIT—MEASURE OF DAMAGES.

Where deceased agreed, in consideration of plaintiff's love, affection, service, and loyalty, to devise and bequeath to her the bulk of his estate, and such agreement was unenforceable because of the statute of frauds, plaintiff's recovery on the quantum meruit is limited to the value of her services, and where, as here, the extent of the services to be rendered is entirely uncertain and dependent upon the length of the promisor's life, evidence as to the value of the bulk of the estate is inadmissible to show the value the parties put on such services, although deceased's financial condition and mode of life should be considered in determining the value of such services.

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

Action by Mollie Quirk against the Bank of Commerce & Trust Company, executor of the estate of Patrick Kallaher, deceased. There was a judgment for defendant on demurrer to the declaration, and plaintiff brings error. Reversed and remanded, with directions.

G. T. Fitzhugh, of Memphis, Tenn., and Robert N. McMynn, of Milwaukee, Wis., for plaintiff in error.

J. W. Canada, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, MACK, and DENISON, Circuit Judges.

MACK, Circuit Judge. The trial court sustained a demurrer to the declaration after refusing leave to plaintiff to amend a second time. The question presented on this writ of error is therefore whether the declaration states a good cause of action.

In substance, plaintiff, a citizen of Wisconsin, charges that Patrick Kallaher failed to fulfill his oral promise to devise to her the bulk of his fortune. The relation of the parties, the promise, and the consideration are set out at length in the allegations, which may be summarized as follows:

In the summer of 1888, Capt. Kallaher met Mollie at Waukesha, Wis., where he was spending the summer. At that time she was a girl of 16, living with her parents at Milwaukee, and attending school at St. Mary's Convent. He was then a man of nearly 50. He called upon her frequently that summer at her home, and they soon became very close and devoted friends. Soon thereafter he asked permission of her parents to pay her court with a view to marriage. On account of her immaturity and the disparity of ages, they did not look with favor upon the proposed marriage. He remained, however, none the less devoted to her, and upon the most intimate relations with her people, spending two to four days of each week of the summer season, which he was wont to spend at or about Waukesha, with Mollie and her family at Milwaukee. Upon these visits, which continued throughout a period of 20 years, he was received by the Quirks with great hospitality and

treated with kindness and affectionate regard, just as if he had been a member of the household.

During this entire period his affections were centered upon Mollie, whom he urged to marry him and whose consent he did obtain in 1893. Their engagement continued, it is alleged, from that time to the death of the testator; but the marriage was postponed on account of the objections of the plaintiff's mother during her life, and out of respect for her wishes thereafter as well as on account of the testator's ill health.

[1, 2] Shortly before the mother's death, and after Mollie had again refused to marry the Captain *at that time,* because her parents would not consent, the Captain asked her to promise him that so long as he should live she would remain devoted to him the same as she had been, and he told her that if she would so promise, that in return for and in consideration of the love and affection, service, and loyalty of herself and her family, given and to be given to him, he would bequeath and devise to her the bulk of his fortune; that thereupon she gave him her promise to that effect; that he thereupon entered into a contract with her that he would leave her the bulk of his fortune after his death in consideration of the life of service and loyalty and affection which had been and was to be devoted to him by her as long as he lived.

She averred that this contract was in no manner abrogated or impaired, but remained in full force and effect down to the date of his death, and that she had fully performed her part of the contract; that down to his death, in addition to the loyalty and affection and service of the plaintiff, he through all the years enjoyed the advantage and comfort of the home of plaintiff's family, which he always said was the only real home that he had ever had; that during his various visits and sojourns in the home of plaintiff's family, she and other members of her family waited upon him and rendered him such services of affection as would be given by daughters to members of their own household, and in later years such services became more and more difficult and unpleasant to perform; that for several years prior to his death he was afflicted with an incurable disease; that during all such time she and her sister waited on him, and affectionately and faithfully performed nursing services, regardless of the unpleasant nature thereof. Other services and acts of kindness, affection, and loyalty upon the part of Mollie and her family toward the comfort and well-being of the testator followed in full accord with the terms and spirit of their agreement. He was not only received most hospitably at the Quirk residence, but at his request Mollie remained with him at the hospital at Baltimore, and stayed with and comforted him during his last illness at Memphis, and at her home in Milwaukee, where he asked to be brought. He gave her $25,000 in bonds in June, 1910, and another $15,000 in June, 1912, telling her that this was only a gift at the time and not all that she was to get.

Defendant contends most strenuously that this agreement was one in restraint of marriage; that as such it was void and against public policy; and that therefore no action lies either for its breach or in quantum meruit for the consideration given by plaintiff.

It will be observed, however, that plaintiff specifically charges that the engagement to marry continued unbroken until the Captain's death,

and that the contract in question was made after she had refused to marry him at a specific time—a time when parental consent could not be obtained. It is not alleged that Kallaher either requested her or that Mollie promised not to marry another. The continued engagement implied, of course, a promise not to marry another while the engagement lasted; but this engagement, combined with the declination to marry the Captain at that particular time, cannot convert the promise to be as devoted and loyal to him as she had been into a promise to remain single. Clearly, the promise means either that the engagement shall continue with the implication that marriage will follow at some convenient time, and that the same affection theretofore given shall continue to be given, or it means that, even if her then refusal to marry shall persist, whether because of filial duty or after the parents' death in filial devotion to their wishes, or for any other reason, that she will nevertheless give him devotion and loyalty. A promise to remain single, whether during the promisee's or the promisor's lifetime, will not lightly be implied; for even such partial restraint of marriage is generally deemed contrary to public policy even if not illegal. And inasmuch as marriage to another would not absolutely prevent performance of the obligations thus assumed by her toward a man who did not live in the same place, but merely visited her and her family in the summer, it cannot fairly be deemed to have been contemplated by the parties that she should devote herself exclusively to him. We are unable to find any implied obligation that Mollie should not marry another; such care and devotion as a loving child would render would seem to cover the obligation, fairly construed. The contract, therefore, was not in restraint of marriage, either general or partial.

[3-6] The contract, however, was oral; and it is contended that it is unenforceable because of the statute of frauds. A contract, however, that on a contingency contemplated by the parties may be completed within one year is not subject to the statute because the contingency may not happen within that time. Heath v. Heath, 31 Wis. 223; Chase v. Hinkley, 126 Wis. 75, 79, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328; Deaton v. Tennessee Coal & R. R. Co., 12 Heisk. (Tenn.) 650, 654.

But an oral contract to devise real estate is within the statute, and an indivisible obligation is entirely unenforceable, if the grant of real estate forms a part thereof. In re Sheldon's Estate, 120 Wis. 26, 97 N. W. 524; Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767, 6 L. R. A. (N. S.) 703, 8 Ann. Cas. 112; Horton v. Stegmyer, 175 Fed. 756, 99 C. C. A. 332, 20 Ann. Cas. 1134; Browne, Statute of Frauds, §§ 140–142. We need not consider whether the promisee who has performed his obligation in full may waive performance of so much of the counter obligation as relates to real estate and enforce only that part which relates to personal property; if this were an agreement to devise all of the property, it would be necessary to determine this as between the conflicting authorities. Here, however, the bulk is to be given; not the bulk of realty and the bulk of personalty, but the bulk of the entire estate. Thereunder the testator might have devised only his realty; his was the option. A waiver of the right to the realty and recovery of the personalty alone would not be in accordance with the contract; it would

involve the substitution by the court of a new contract for the one made by the parties. Moreover, in this case, the declaration alleges that of an estate in excess of $600,000 not less than $250,000 was personalty. The bulk of the property, therefore, not only might include realty, but might consist only of realty. And when the promisor has the option of giving realty or personalty, his promise is wholly unenforceable because the enforcement of one of the alternatives would be but a wedge to secure the enforcement of the other. Howard v. Brower, 37 Ohio St. 402; Wolfskill v. Wells, 154 Mo. App. 302, 134 S. W. 51; Andrews v. Broughton, 78 Mo. App. 179; Patterson v. Cunningham, 12 Me. 506; Mather v. Scoles, 35 Ind. 1; contra, Mercier v. Campbell, 14 Ont. L. R. 639, criticised in 46 Canadian Law Journal, 273, and 26 Law Quarterly Review, 194; and see Browne, Statute of Frauds, § 152.

[7, 8] Inasmuch as the doctrine of part performance relates only to relief in equity (Browne, Statute of Frauds, sec. 451), and moreover does not prevail in Tennessee (Goodloe v. Goodloe, supra; Patton v. McClure, Mart. & Y. 333), and is inapplicable to the contract in question under Wisconsin law (Rodman v. Rodman, 112 Wis. 378, 88 N. W. 218), we need not consider its limitations.

[9-12] But one who has given a consideration, and who cannot enforce the promise solely because of the statute of frauds, and not because of some inherent illegality in the contract itself, is no longer remediless; a quasi contractual action is maintainable. Browne, Statute of Frauds, § 118. Whether a count on the contract and one in quantum meruit may be joined, and whether a single count setting forth the entire transaction and seeking whatever recovery may be possible thereunder is proper, are questions of local procedure; the federal courts follow the state practice. Under the Tennessee Code, technical forms of action are abolished; all contracts may be sued on in the same form of action (section 4437); all wrongs and injuries to property and person may be redressed by an action on the facts of the case (section 4438); and a simple statement of the facts suffices, if these facts entitle a plaintiff to recover in any form (Hall v. Memphis Co. [C. C.] 155 Fed. 57). Counts in tort and contract may be joined. Section 4439. And if a single count for the combined cause of action be formally defective, advantage could be taken thereof only by a motion to strike, not by a demurrer. Waggoner v. White, 11 Heisk. (Tenn.) 741. In this case all the facts necessary to constitute a good cause of action on a quantum meruit are set forth; the plaintiff's conclusion as to the theory on which she is entitled to redress alone is erroneous. While under common-law pleading there can be no recovery in quantum meruit under a count for breach of contract (Jackson v. Stearns, 58 Or. 57, 113 Pac. 30, 37 L. R. A. [N. S.] 639, Ann. Cas. 1913A, 284, and cases cited in note), under the Tennessee Code this declaration on the facts is good against demurrer. See Hall v. Memphis Co., supra; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549. See, too, Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013.

[13] The statute of limitations begins to run against such a claim for services, based upon a quantum meruit, not as the services are ren-

dered, but at the death of the promisor, when the obligation matures. Goodloe v. Goodloe, supra; In re Kessler's Estate, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74. Moreover, in the present case, the services continued until his death.

[14] Although the evidence as to the oral agreement is admissible to prove that the plaintiff's services were not given gratuitously, without expectation of reward, the promised reward affords no real measure of the plaintiff's quasi contractual recovery either in Tennessee or Wisconsin. Goodloe v. Goodloe, supra; In re Sheldon's Estate, 120 Wis. 26, 97 N. W. 524. The plaintiff's right must be measured by the reasonable value of the consideration given by her to him. If the services to be rendered had been definitely fixed in amount when the contract was made, the testimony as to the value of the bulk of the estate would be admissible to show the value that the parties placed on the services that were to be given; but where, as here, the extent of the services to be rendered is entirely uncertain and dependent upon the length of the promisor's life, such evidence is of no probative force in ascertaining their reasonable value. Woodward, Quasi Contracts, §§ 104–106, with citation of cases pro and con. Captain Kallaher's manner of living and financial condition at the time the services were rendered may, however, be considered in this connection; for the reasonable value placed by the parties on such highly personal services as this plaintiff performed for the Captain would be largely affected by his financial and social position and the circumstances under which they were given.

The judgment must be reversed, and the cause remanded, with directions to overrule the demurrer.

UNITED REAL ESTATE & TRUST CO. v. BLOCHMAN et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2899.

1. MORTGAGES ⊂=310—POWER OF TRUSTEE—RELEASE OF LOTS—PART PAYMENT.
The owner of land, on part payment by the purchaser, called the beneficiary, conveyed to a trustee under a trust agreement providing that the property might be subdivided into lots, that the signature of the trustee, with acknowledgment of the map or plat of the subdivision, should bind all parties, that the trustee was authorized to sign and acknowledge as proprietor such map or plat, subdividing the lands, as should be presented to it for signature by the beneficiary, that the land, when subdivided, should have at least 250 lots, and that beneficiary would expend in the subdivision, laying out, platting, and preparation for sale of said real property at least the sum of $25,000, all costs and expenses of subdivision to be borne and paid by the beneficiary. It was further agreed that, when so subdivided, the property might be sold by the beneficiary on payment to the trustee, for the benefit of vendor, of a specified sum for each lot, such sum to be paid by the trustee to the vendor as soon as received, whereupon the trustee was authorized and directed to execute deeds on any lot to the order of the beneficiary. *Held*, that the expenditure of the $25,000 by the beneficiary was not a condition precedent to his right to sell, and to the power of the trustee to release.

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

2. MORTGAGES ⇐310—CONSTRUCTION—TRUST DEED.
Where a declaration of trust, pursuant to which an owner of land conveyed the same to a trustee on part payment of the price by the purchaser, is equivocal, the doubt must be resolved in favor of the trustee; the instrument having been prepared by the vendor.

3. MORTGAGES ⇐310—TRUST DEED—RELEASE OF LOT—SALE.
Under a stipulation in a trust deed, whereby the owner on receiving part payment of the price conveyed the land to a trustee, that the vendor "does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns, whenever there shall have been paid to the said trustee for the account of said [vendor] the sum per lot as hereinbefore stated," an actual sale by the beneficiary was not essential to the trustee's power to release lots; the only requisite being the payment of the sum per lot as stipulated.

4. MORTGAGES ⇐310—POWER OF TRUSTEE—RELEASE OF LOTS—PART PAYMENT.
The further provision of such declaration of trust that, "whenever $1,000 shall be paid to said [vendor] on account of" the balance due on purchase price, "the interest on the amount so paid shall cease, and all payments made on account of sales or otherwise shall be credited on the first maturing obligation of said beneficiary," did not prevent a release of lots on payments of the stipulated sums per lot, though there were overdue installments of the balance of the price owing by the beneficiary.

5. MORTGAGES ⇐310—TRUST DEED—RELEASE BY TRUSTEE—PART PAYMENT—ESTOPPEL.
The vendor having accepted payments pursuant to which the trustee released lots, it cannot retain the money so received, and at the same time deny the authority of the trustee to make the releases and recover the lots, in the absence of any claim of fraud or misconduct.

6. MORTGAGES ⇐310—SALE BY TRUSTEE—DISQUALIFICATION.
Though antagonism had developed between the vendor and trustee under a deed of trust made to secure payment of the balance of the purchase price, it was not error to permit such trustee to sell the property on default of payments, where the vendor's interests were properly safeguarded by court's order, under which the trustee was authorized to perform only ministerial functions.

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

Suit by the United Real Estate & Trust Company, a corporation, against Lucien A. Blochman and others. From the decree entered, plaintiff appeals. Modified and affirmed, without costs.

Isaac E. Congdon, of Omaha, Neb., and A. Haines and Charles C. Haines, both of San Diego, Cal., for appellant.

A. H. Sweet, F. W. Stearns, C. H. Forward, and R. C. Springer, all of San Diego, Cal., for appellees Union Title Co. of San Diego and Union Trust Co. of San Diego.

Sam Ferry Smith, of San Diego, Cal., and Laurence Hammond Smith, of San Francisco, Cal., for appellee Blochman.

Theron Stevens, James G. Pfanstiel. and Frank H. Heskett, all of San Diego, Cal., for appellee Haskins.

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

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

DIETRICH, District Judge. The plaintiff and appellant, a Nebraska corporation, being the owner of a 40-acre tract of land within the city limits of San Diego, Cal., agreed to sell the same to the defendant Blochman for $150,000, and accordingly, $25,000 having been paid on account of the purchase price, the property was, by deed dated September 15, 1912, conveyed to the defendant Union Title & Trust Company of San Diego, to be held and disposed of by it pursuant to the terms of a declaration of trust to which plaintiff and Blochman assented. After reciting the payment of $25,000 to the plaintiff, called the payee, by Blochman, called the beneficiary, it was provided that the beneficiary was to pay to the title and trust company, called the trustee, the other $125,000, as follows: $25,000 within 9 months, $25,000 within 15 months, $25,000 within 21 months, and $50,000 within 24 months from August 1, 1912; all deferred payments to bear interest. There is a further provision, which will be more particularly referred to later, authorizing the platting of the tract by the beneficiary, and the release of lots by the trustee from the plaintiff's lien. The beneficiary was to pay all taxes, and in case of his failure to do so the plaintiff might pay the same, and the amount or amounts so paid should, with interest, "constitute an additional indebtedness to be paid by said beneficiary, and before he shall become entitled to have a deed from the trustee for any lot or part of said real property." Upon receiving the balance of the purchase price, together with interest, and an additional amount sufficient to cover taxes or other charges which the plaintiff might be compelled to pay, and the expenses of the trust, the trustee was to turn over the residue, if any, of money in its hands, to the beneficiary, and to convey to him or his assigns any unsold portion of the land. It was also provided that in case of certain defaults the plaintiff could declare the whole of the principal sum at once due and payable, and upon demand of the plaintiff it was made the duty of the trustee to sell the land in the manner and upon notice as prescribed in the declaration; detailed provision being made for such sale. Thereafter, in November, 1912, Blochman entered into an agreement with one Hampton for the assignment of his interest, and caused the tract to be surveyed by Hampton for townsite purposes, and a plat thereof, under the name of La Binda Park, to be presented to the trustee for its signature and acknowledgment, as provided in the declaration of trust, which plat, after acceptance by the city council, was filed for record in the county recorder's office on March 5, 1913. Hampton defaulted, and on April 28th Blochman transferred the contract to the La Binda Park Syndicate, a company which he had organized; the syndicate assuming his obligations as purchaser. The beneficiary (Blochman and the syndicate) fell into default on account of interest and the first payment of $25,000, and after taking some steps toward a formal declaration of default, and a foreclosure and sale of the tract, the plaintiff agreed to waive the default and accept the total amount then due according to the terms of the declaration of trust, and accordingly, on the 30th of June, 1913, the beneficiary paid to the trustee, for the credit of the plaintiff, $28,464.07, the overdue principal and interest in full. In October of the same year another payment was

made, more particularly to cover the then accrued interest of $2,671,-75. No other payments were made, and in November the beneficiary again fell into default, from which it was never relieved.

The lower court found that there was due the plaintiff, on account of principal and interest and taxes, the aggregate sum of $130,817.-90, with interest thereon from March 15, 1916, at the rate of 7 per cent. per annum, and decreed to it a first lien upon the whole of La Binda Park, with the exception of 30 lots therein, which it was held had been released by the trustee from the plaintiff's lien under the provisions of the declaration of trust. The appellant is content with the amount awarded, but maintains that its lien should extend to all of the lots, and here arises the first, and practically the only important, question. There is no serious difference of view as to the facts, and the principal controversy grows out of the construction to be given to the contract, the pertinent provisions of which are as follows:

"It is understood and agreed by the trustee, beneficiary, and the payee herein mentioned that the said real property may be subdivided into smaller tracts, lots, blocks, or subdivisions, and that the signature of the trustee herein to the proprietor's acknowledgment of the map or plat of said subdivision shall bind all the parties hereto, and the said trustee is hereby authorized and directed to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary hereunder; it being understood and agreed that said land, when subdivided as aforesaid, shall have and contain, in addition to the streets, alleys, and public grounds, at least 250 lots, none of which shall have a street frontage of more than 55 feet, except corner lots, which may have a frontage of not more than 100 feet; and it being further understood and agreed that said beneficiary will expend in the subdivision, laying out, platting and preparation for sale of said real property at least the sum of twenty-five thousand dollars ($25,000) on or before the 1st day of March, 1913.

"All the costs and expenses of said subdivision, and all surveys, mapping, platting, and filing maps, shall be borne and paid by said beneficiary.

"It is further agreed that, when so subdivided, said real property may be sold by the beneficiary hereunder, or his assigns, upon payment to the said trustee for the benefit of said payee a sum equal to one thousand dollars ($1,000) for each and every inside lot, and twelve hundred dollars ($1,200) for each and every corner lot, described in said subdivision or plat, which sums shall be paid by the trustee to the payee as soon as received in full, and without any reduction or any cost or expense whatever to the payee. And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein, or his assigns, whenever there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated."

The releases of the 30 lots which the trustee assumed the right to give were made in connection with the raising of the money used for the two payments above mentioned, aggregating between $30,000 and $31,000. Some of the lots appear to have been sold outright, and as to certain others the precise nature of the transaction is not entirely clear; but apparently, when the suit was commenced, the trustee still held the legal title thereto, subject to declarations of trust given by it in favor of divers interested persons. But in this connection it is important to note that in every case such disposition as was made was with the understanding on the part of the trustee, the beneficiary, and the party furnishing the money that the lots would be released from the plaintiff's lien, and it is wholly improbable that any part of the

money could have been procured, or would have been paid to the plaintiff, without such an understanding. Furthermore, the beneficiary claimed the right to demand releases, as the money was paid, at the rate of one lot for each $1,000, and the trustee assumed that it was its duty to comply with such demand. These facts at once distinguish and render inapplicable certain of the decided cases relied upon in the briefs.

[1] The plaintiff objects, first, that the provision for release did not become operative, for the reason that the beneficiary failed to expend "in the subdivision, laying out, platting, and preparation for sale of said real property, at least the sum of $25,000"; its contention being that the expenditure of this amount for the purposes stated was a condition precedent to the right of the beneficiary to sell and the power of the trustee to release. Not without reason, it complains of the manner in which the tract was subdivided and platted, with streets only 25 feet in width, and alleys 7 feet, but clearly the trustee is chargeable with no negligence in this respect, for it was granted no discretion and assumed no responsibility. It was not only authorized, but "directed," "to sign and acknowledge as proprietor such map or plat subdividing said land as shall be presented to it for signature by the beneficiary." In signing and acknowledging the plat, therefore, it simply performed its plain duty. It was under no obligation to see that $25,000 was spent before the subdivision was made. Nor, indeed, could it have been the intention of the parties that this amount should be expended before the plat was accepted and filed. Presumably most of the expenditures would be for grading the streets, clearing the lots, laying sidewalks, etc., and naturally such work would be done after the lines had become definitely fixed by the acceptance and filing of the plat.

[2] Great stress is laid upon the phrase "when so subdivided"; but, when considered in connection with the other provisions, it is somewhat of a strain to construe this language as meaning that after, and only after, the expenditure of $25,000 in platting and improving the tract, could sales be made. There is an express provision against transfers or releases so long as the beneficiary should be in default in reimbursing the plaintiff for delinquent taxes paid by it, and if the right to sell or transfer was intended to be conditioned upon the prior expenditure of $25,000 for platting and improvements, it is strange that such a condition was left unexpressed. It may be admitted that upon the whole the language is equivocal, and that the intent of the parties is left uncertain; but such doubt as there is must be resolved in favor of the trustee, for the reason that the instrument was prepared by the plaintiff.

[3] Nor do we think that the authority of the trustee to release was intended to be limited to cases of "sale" in the strict and narrow sense contended for by the plaintiff. No substantial reason is apparent why such restriction would be insisted upon by the plaintiff or assented to by Blochman. It was required that there should be at least 250 lots (as a matter of fact the number was greater), which, without taking into account the additional price to be paid for corner lots, would, at $1,000 each, yield twice the amount of the unpaid balance of the pur-

chase price. The plaintiff may therefore have very reasonably assumed that it was amply protected. There is no evidence that it deemed it material to know what consideration, if any, Blochman received, or what he did with the lots, provided he turned over to the trustee for its credit the stipulated amount, and we entertain no doubt that the term "sold" was used in a general sense, and that the real understanding of the parties is expressed in the sentence reading:

"And the said payee does hereby authorize and direct the said trustee to execute deeds on any lot or lots to the order of the beneficiary herein or his assigns, whenever there shall have been paid to said trustee for the account of said payee the sum per lot as hereinbefore stated."

[4] The plaintiff further contends that releases could not be given for payments made upon overdue or fully matured obligations. The basis for the argument upon this point is supposed to be found largely in the paragraph reading:

"Whenever one thousand dollars ($1,000) shall be paid to said payee on account of said sum of $125,000, the interest on the amount so paid shall cease, and all payments made on account of sales or otherwise shall be credited on the first maturing obligation of said beneficiary."

It is true that upon the payment of an overdue obligation the interest necessarily ceases to run, and an express provision to that effect would be unnecessary; but it is to be borne in mind that the language of this paragraph is general, and does not relate alone to the application of proceeds derived from the sale of lots, but to payments of all kinds, regardless of the sources thereof. Hence the language employed is comprehensive enough to cover all possible cases. The phrase "first maturing obligation" does not look to the future alone; it means the obligation longest overdue, or the one next to mature, as the case might be. In either case, the obligation would be the "first maturing" one. So, also, if at any time $1,000 is paid on account of the principal sum of $125,000, the interest on that amount ceases. If it happens that the application is upon a matured portion of the $125,000, the provision is unnecessary; but, inasmuch as payment might be made upon either a mature or an immature item, the general language is very properly employed.

It is not necessary to consider the extreme limit to which the right of release would under any circumstances extend, or to determine whether it would or would not exist after the plaintiff had taken legal steps to enforce its security, or had declared the beneficiary's default and had declined longer to recognize his right to complete the purchase under the terms of the contract. The money procured from the disposition of the 30 lots was to be used to discharge the beneficiary's obligations, and the plaintiff having promised to accept it, and waive past defaults, actual payment to the trustee operated to reinstate the beneficiary and reinvest him with the right to proceed with the purchase upon the terms specified in the contract. He was not repudiating or abandoning his obligations, but was performing them.

We have examined the numerous cases collected in the briefs, but most of them may be dismissed with the suggestion that they are readily distinguishable because of provisions in the contract unlike those here

involved. Of the others, some tend to favor one side and some the other, and they are so equally divided that it cannot be said that there is any decisive preponderance. Those most clearly supporting the plaintiff's contention, perhaps, are Clarke v. Cowan, 206 Mass. 252, 92 N. E. 474, 138 Am. St. Rep. 388, Fulton v. Jones, 167 App. Div. 765, 153 N. Y. Supp. 87, and Stephens v. Keen, 68 Fla. 558, 67 South. 226; and those for the defendants are Vawter v. Crafts, 41 Minn. 14, 42 N. W. 483, Gammel v. Goode, 103 Iowa, 301, 72 N. W. 531, Nims v. Vaughn, 40 Mich. 356, Lane v. Allen, 162 Ill. 426, 44 N. E. 831, Am. Net & Twine Co. v. Githens, 57 N. J. Eq. 539, 41 Atl. 405, and Chrisman v. Hay, 43 Fed. 552. And in connection with Clarke v. Cowan, see Clark v. Fontain, 144 Mass. 287, 10 N. E. 831. While the question is not entirely free from doubt, in view of the fact that there is no limitation expressed or clearly implied in the contract, we are inclined to hold that, under the circumstances existing at the time, the trustee was justified in concluding that it should yield to the beneficiary's demand for releases of specifically designated lots, at the rate of one for each $1,000 paid upon the condition and with the understanding that such releases would be given. It is not thought to be important that conveyance of legal title to the lots had not been actually made to the beneficiary, or upon his order, when the suit was commenced. It was sufficient that the trustee had declared that it held the legal title subject to his order.

[5] It is to be added that, even if these doubtful questions were to be resolved in favor of the plaintiff, still it could not succeed. In good conscience it cannot hold the $30,000, and at the same time take back the entire consideration for which it was paid. True, the beneficiary made payment upon account of an obligation he was generally bound to discharge; but he paid with the understanding and upon the consideration that the lots would be released. But, be his rights what they may, the loss here would fall primarily upon either the third parties, who actually furnished the money that went to the plaintiff, in reliance upon the promise that the lots would be released, or upon the trustee. There is no suggestion of fraud or bad faith on the part of the trustee or any purchaser or creditor. The most that can be said is that they acted under a mistaken view of the law and of the meaning of the contract. Strictly speaking, perhaps, it is not a case for the application of the principle of estoppel against the plaintiff, for apparently it was without knowledge of the sources from which the funds were derived or the understanding upon which they were turned over to and received by the trustee. But the plaintiff is here seeking equity, and it must do equity. Upon learning, in December, 1913, what had been done, if it desired to repudiate the transaction as being unauthorized, it should have tendered back the money which it had received; this it did not do, and does not now offer to do. It would be our duty to decline to aid it in any effort to profit by reason of the mistake.

[6] It remains to consider other assignments of minor importance. Plaintiff complains of those portions of the decree authorizing the trustee, subject to the supervision of the court, to make a sale of the

premises, investing it with discretion to sell in parcels or in one body, and awarding it $500 as compensation and $250 on account of attorney's fees. While under the circumstances we are inclined to think it would have been better if a special master had been appointed, with the requirement of bond and official oath, we cannot see how the plaintiff can be prejudiced in so far as the trustee is authorized to perform only ministerial functions. It is quite apparent, however, that over the objection of the plaintiff the trustee should not be invested with discretionary power. There can be no doubt that a feeling of antagonism has developed in the course of the litigation. The plaintiff has made charges of improper conduct against the trustee, and these it resents. Besides, the issues here have been such as to make the trustee and the beneficiary natural allies in the litigation. While not implying that the trustee would be consciously moved by such considerations, we cannot close our eyes to human frailty, and surely no litigant would be satisfied with a juror whose judgment is subject to such disturbing influences. With much show of reason, plaintiff contends that the tract should be sold as a whole. If, as it argues, steps should be taken to vacate the apparently absurd and indefensible plat, the sale of a lot here and there in the tract would render efforts to that end extremely difficult, if not entirely futile. The only assurance the beneficiary can rightfully demand is that the property bring the highest aggregate amount which it is possible to obtain. This assurance he will have, if the trustee is directed first to offer the tract in parcels, such as the defendant may designate, and then to offer it as a whole, and to accept, subject to confirmation by the court, the bids or bid which will yield the largest return.

Accordingly the cause will be remanded, with instructions to modify the decree in such manner that it will so direct. With this qualification, it will be affirmed. We find no sufficient ground for disturbing the allowances for compensation to the trustee and for attorney's fees. No costs on appeal are awarded.

RIDDELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2877.

1. POST OFFICE ⇐48(4)—USING MAILS TO DEFRAUD—INDICTMENT.
An indictment for using the mails to defraud *held* sufficient to state an offense, where it charged that defendant and others devised a scheme to subdivide and sell tracts of practically worthless land in small tracts for orchard purposes, and carried out the same by means of letters, circulars and copies of photographs sent through the mails, which fraudulently misrepresented the land as to its location, character, and value.

2. POST OFFICE ⇐48(4)—USING MAILS TO DEFRAUD—INDICTMENT.
An indictment for using the mails for carrying out a scheme to defraud, which sets out the scheme in detail in the first count, may, in other counts, describe it by reference to the first.

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3. CRIMINAL LAW ⊜371(1)—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.

In a prosecution for using the mails to defraud, where the evidence showed that defendant and others devised a scheme to subdivide certain lands which were practically worthless and sell the same by means of advertising matter sent through the mails, but that they afterward and more than three years prior to the indictment abandoned such lands and substituted other land to which they transferred the contracts of purchasers, and which they also fraudulently misrepresented, evidence of their acts and representations with respect to the first lands was admissible with proper instructions on the question of intent.

4. CRIMINAL LAW ⊜825(1)—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.

Instructions given on the trial of a defendant charged with using the mails to defraud *held* proper and sufficient, in the absence of request for more specific instructions.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against H. H. Riddell. Judgment of conviction, and defendant brings error. Affirmed.

The plaintiff in error was defendant in the court below to an indictment charging that at a certain time and place within the jurisdiction of the court the defendant, together with one Conway and one Richet, devised and intended to devise a scheme and artifice to defraud one Mrs. Patsy Doran, and other persons to the grand jurors unknown, and to obtain from them and each of them money and property, which scheme and artifice the indictment alleged to be, in substance, this:

That the defendant, and Conway and Richet, acting personally and as officers of an Oregon corporation, called Oregon Inland Development Company, would falsely and fraudulently pretend, represent, promise, and hold out to said Mrs. Doran and other persons to the grand jurors unknown, and to the public generally, that the company was the owner of 40,000 acres of land in Oregon which it and its said officers intended to and would subdivide into 3,086 farms of the following numbers and sizes, to wit, 2,712 farms of 10 acres each, 200 of 20 acres each, 150 of 40 acres each, 20 of 80 acres each, 2 of 160 acres each, one of 320 acres, and one of 640 acres; that the company was the owner of 3,086 town lots in the town site of Klamath Falls, Or., and that the said defendant and his said associates and the said company would sell one farm and one of the town lots for $240, payable $10 down and $10 each month until fully paid, and, further, that the entire 40,000 acres was farm and fruit land of high quality constituting parts of sections 16 and 36, and situate in Baker, Crook, Curry, Douglas, Grant, Harney, Jackson, Klamath, Lake, Linn, Lincoln, Malheur, Sherman, Union, Umatilla, Wallowa, Wasco, and Wheeler counties. That the said lands were adjoining and contiguous in many instances to lands then being farmed and planted with fruit trees, and that the lands so pretended to be owned by the company were also fruit and orchard lands. That the said 40,000 acres, and the said 3,086 town lots, were owned in fee by the company, and that any person or persons purchasing under contracts offered for sale by the defendant and his said associates and the said company would receive good title thereto. That deeds to the said 40,000 acres which vested title thereto in the company had theretofore been executed by John Veasen and Lulu Veasen, husband and wife, under date April 25, 1910. That the said scheme and artifice was to be further executed by the said defendant and his said associates and the said company, increasing the price to be paid by the purchasers from $240 to $300 for each tract, and by falsely and fraudulently printing, issuing, circulating, and distributing a certain illustrated booklet entitled, "Grande Ronde District, Oregon," which booklet contained, among

other things, a pretended map of Union and Wallowa counties, and of portions of Baker county, Or., which map had large portions of those counties identified in red colors. That the defendant and his said associates would and did further falsely and fraudulently pretend and hold out to the persons aforesaid and to the public generally that each of the townships on said map outlined in red contained 10 and 20 acre tracts and farms owned by the company, and were neither mountainous nor swamp lands. That the town lots so represented to be owned by the company were contiguous and adjacent to the town of Klamath Falls and a part of it, and that each of the lots was worth the "amount of the selling price of the contracts of said company," whereas, in truth and in fact and as the defendant then and there well knew, the said lots were not contiguous or adjacent to the town of Klamath Falls nor a part thereof, and were not less than a mile and a half distant from the nearest portion of the town, and not less than two miles from its business portion, were not of the value represented, and were and are of little or no value. That in furtherance of the scheme and artifice and as a part and portion thereof the defendant and his said associates would and did cause to be printed, mailed, circulated, and generally distributed large numbers of a certain poster which had written across it in bold red ink "Grande Ronde District, Oregon," and which poster had delineated upon it numerous half-tone reproductions of photographs named, labeled, and described by the designations, "Native Hay Scene on our Land near Promise," "Scene on our Land in Baker County, Note the Deep Soil on Creek Bank," "Trout Stream Crossing One Corner of our 20-Acre Tract Southeast of Elgin," "Scene on our Land West of La Grande," "Part of our Land Near Enterprise," "Part of our Land Near North Powder," "Part of our Land in Baker County Showing Creek," "Scene on One of our 40-Acre Tracts Near Imbler," "Part of our Land Near La Grande, Note the Gentle Slope," which statements, labels, legends, and delineations were false, fraudulent, misleading and untrue in every part as he, the said defendant, then and there well knew, and when, in truth and in fact, as the said defendant then and there well knew, the said company did not own or have any lands in either Baker or Wallowa county, Or., and when in truth and in fact, and as the said defendant then and there well knew, the cut and reproduction labeled "Native Hay Scene on our Land Near Promise" was not a reproduction of a scene on any land owned by said company, and when in truth and in fact, and as the said defendant well knew, the said company had and owned no lands near Promise, with similar allegations respecting the other labels and designations, and when in truth and in fact, as he, the defendant, then and there well knew, the said company was not the owner of 40,000 acres of farm land in the state of Oregon, nor of 3,086 town lots in the town site of Klamath Falls, Or., and when in truth and in fact, as the defendant then and there well knew, the said 40,000 acres of land so claimed to be owned by the company was not only not farm or fruit land of high quality, but was "high, bleak, cold, rocky, nonarable, nontillable, scab, and mountainous land fit only for use as grazing land, and totally unfit for orchard culture and cultivation." That the lands contiguous to and adjoining the said 40,000 acres so claimed by the said company were not, as the defendant well knew, capable of being farmed or planted with fruit trees, and that in truth and in fact, as the defendant then and there well knew, the deeds so claimed to be executed by said John Veasen and Lulu Veasen did not vest title to the lands therein described in the said company, for the reason that the said deeds were to be placed in escrow and were never delivered to the said company, or to any representative thereof. That in truth and in fact the said company owned and owns, as the said defendant then and there well knew, no lands in either Baker or Wallowa counties, Or., and owned lands in but six of the said townships so designated in red, and when in truth and in fact, and as the said defendant then and there well knew, the said 10 and 20 acre tracts advertised for sale in and by the circular and pamphlet entitled "Grande Ronde District, Oregon," were not only not orchard lands of high grade and quality, but were "high, bleak, rough, rocky, frosty, nonarable, nontillable, and inaccessible mountainous lands." That the said scheme and artifice was

made and entered into by the defendant and the said Conway and Richet to defraud the said Mrs. Doran and other persons to the grand jurors unknown and the public generally. That in pursuance of it the indictment alleges in count 3, at a time and place stated, the defendant knowingly, unlawfully, and feloniously placed and caused to be placed in the post office at Portland, Or., for mailing and delivery, a certain letter reading as follows:

"Oregon Inland Development Company Incorporated. 1121–1122–1123 Yeon Building. Address All Communications to the Company. Phone Main 133. Frank Richet, President Treasurer. J. T. Conway, Pres. & Gen'l Mgr. H. H. Riddell, Secretary.

"Portland, Oregon, 6/26/11.

"W. C. Hayward, Manilla, Iowa—Dear Sir: The sale of our contracts on the auction plan will close in the very near future. We are placing on the market and have sold several ten acre tracts, which we are selling on terms of $10 down and $10 per month without interest or taxes. The purchase price being $300 per tract. There is no town lot in connection with this new proposition. It is a straight purchase of a specified ten acre tract. We have decided to permit a number of our present contract holders on the auction plan to select one of these ten acre tracts in lieu of their present contracts; crediting them with the amount they have previously paid together with discount, if any, to apply on the purchase of a ten acre tract. In addition to this, they will receive a town lot at Klamath Falls when the same is allotted as per their original contract.

"In addition to these $300 tracts we have some higher priced lands that are selling at $400 and $500 per tract. We will also, upon request, accept transfer of the present contracts to apply on these higher priced lands. Contract holders may at their pleasure select a representative at their own expense and send him to La Grande from which point we would take him to make inspection and selection—for his people. We cannot, however, hold a large body of this land off the market unless some action is taken immediately. We herewith inclose plats of 32 ten acre tracts. We are writing our representative in Iowa, M. Hillias, 505 W. Broadway, Council Bluffs, Ia., and would suggest that you work in conjunction with him inasmuch as it would prevent two people selecting the same tract. He can arrange for you to have your acreage adjoining that of a neighbor if you and they so desire. We wish to urge upon you the necessity of immediate action inasmuch as that if you fail to take advantage of this offer at this time, and decide later that you wish a specified ten acre tract, it will of course necessarily be located farther out than our present offerings, and we cannot at this time agree to transfer your contract if you do not make immediate application. Call and see Mr. Hillias at once and oblige,

"Yours very truly, Oregon Inland Development Company,
"J. T. Conway, Vice-Pres. & Gen. Mgr."

Counts 4 and 5 of the indictment allege that the defendant, in further pursuance of the said alleged scheme and artifice, at certain specified times deposited, or caused to be deposited, in the post office at Portland certain specified "clearance receipts" relating to the sale of portions of the alleged lands of the alleged schemers, one alleged to have been issued in favor of E. H. Bryant of Gallup, N. M., and the other in favor of J. K. Hartline, of Albuquerque, N. M.

The indictment originally contained seven counts, to the last two of which a demurrer was sustained, and respecting the first two of which there was no proof of the deposit in the mails of the letters as therein alleged.

The trial resulted in the conviction of the defendant under counts 3, 4, and 5, and he has brought the case here by writ of error.

E. B. Dufur and Giltner & Sewall, all of Portland, Or., for plaintiff in error.

Clarence L. Reames, U. S. Atty., and John J. Beckman, Asst. U. S. Atty., both of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The contention that the indictment is insufficient to state an offense under the provisions of section 215 of the Criminal Code, upon which it is based, is, we think, wholly without merit. Indeed, it is difficult to conceive of a more brazen attempt to defraud the unwary of their money than it sets forth. Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Oesting v. United States, 234 Fed. 304, 148 C. C. A. 206; Walker v. United States, 152 Fed. 111, 81 C. C. A. 329; Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480; Colburn v. United States, 223 Fed. 590, 139 C. C. A. 136; Spear v. United States, 228 Fed. 487, 143 C. C. A. 67.

[2] It is true that neither of the counts under which the plaintiff in error was convicted set out the alleged fraudulent scheme in detail, but each of them refer to and make part thereof, as they properly may, the scheme set out in the first count. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Glass v. United States, 222 Fed. 773, 138 C. C. A. 321.

The record shows that in the execution of the alleged scheme the company, under the directorship of its officers—Conway, Richet, and the defendant—secured many thousands of dollars, for which acts the two former have heretofore, upon a similar indictment, been convicted.

The plaintiff in error insisted in the testimony given by him that he was entirely ignorant of the true character and situation of the lands in question, and, while admitting that he was a stockholder and the secretary of the company, testified that the stock that he held was for the benefit of Veasen, and that his only interest in the company was the salary he received as its attorney. That his private office adjoined and opened into that of the company; that he was active in the performance of his duties as its secretary, and himself framed or examined many of the letters, circulars, posters, and other papers issued by the company—was also admitted by him in his testimony, and there was on the part of the government much evidence given, tending to show that he was in fact a party to the alleged unlawful undertaking. That question of fact was, of course, left to the determination of the jury by the trial court, and under fair and correct instructions upon the point, and was resolved by the jury against the defendant.

There are but two more alleged errors occurring on the trial that we think need be specially mentioned.

[3] It appeared from the evidence in the case that the company was organized for the purpose of exploiting the lands covered by the deed alleged in the indictment to have been executed by John Veasen and his wife April 25, 1910, but never delivered, and that in the fall of that year the company and its officers—Conway, Richet, and the defendant—ceased all efforts in regard to those lands, and transferred them to lands situate in Union, Wallowa, and Baker counties of the same state, for which the company had entered into a contract with one Hibbard, the holders of contracts for the purchase of the Veasen lands

being notified by the company that they would be given in lieu thereof similar contracts for the purchase of the Hibbard lands.

It is urged that the court below erred in admitting in evidence acts of the company and its officers respecting the Veasen lands. While, as the court below expressly instructed the jury, the defendant could not be convicted for any act or acts committed in respect to those lands, since all such acts ceased more than three years before the filing of the indictment, the acts of the company and its officers in regard thereto were, in our opinion, clearly admissible upon the question of the intent with which their acts in regard to the Hibbard lands were performed; for the scheme alleged in the indictment was continuous in character, and applied to the lands situate in Union, Wallowa, and Baker counties, as well as to the Veasen lands. That the evidence objected to was properly limited by the court below clearly appears from this excerpt from its charge:

"The evidence concerning the organization of this corporation and its transactions during the time that it was exploiting the Veasen lands has been admitted, and is to be considered by you in order that you may ascertain and determine the nature and character of the business in which these people were engaged, and whether or not it was a fraudulent scheme; but, even if you should believe that up to the time the parties began operating in Eastern Oregon the scheme was fraudulent and a violation of the statute, it would not justify you in convicting the defendant, unless you should believe further that, after the company began operating in Eastern Oregon, it continued to maintain and operate as a fraudulent scheme and with intent to defraud the parties with whom it thereafter contracted. The acts set up in the indictment are charged as having been done on a certain date stated therein. The government is not confined in its proof to the dates set forth in the indictment, but it is bound, under the statute of limitations, to prove that the acts of the defendant on which a conviction is asked took place within three years prior to the finding of the indictment. Unless, therefore, you can find from the evidence beyond a reasonable doubt that subsequent to the 23d day of May, 1911, there was a fraudulent scheme and device, as set out in the indictment, and that the defendant was a party thereto, and that subsequent to that date he mailed, or caused to be mailed, one or more of the writings heretofore specified in the charge of the court, you must necessarily find him not guilty. Your inquiry, therefore, will be largely confined to a consideration of the nature and character of the business in which these people were engaged while they were exploiting the Union county lands, but in determining such nature and character, you have a right, as I suggested a moment ago, to consider the entire transaction, the circumstances under which the corporation was organized, the purpose for which it was organized, how it was organized, how it was conducted, and from that determine whether they were carrying on an unlawful scheme to defraud in exploiting the Union county land, and within three years prior to the finding of this indictment."

In the similar case of Samuels v. United States, 232 Fed. 536, 542, 146 C. C. A. 494, 500 (Ann. Cas. 1917A, 711), the Circuit Court of Appeals of the Eighth Circuit, in speaking of the admission in evidence of certain letters, circulars, and advertisements which were not referred to in the indictment, said:

"As the fraudulent intent is one of the material allegations in the indictment, evidence of other and similar ventures by the accused are properly admissible as bearing on the question of intent. The intention of a person charged with a crime can hardly ever be shown by direct evidence, and for this reason it is permissible to introduce evidence of other acts of a similar nature,

especially when committed continuously, and for a long period of time, thereby establishing the fraudulent intent."

In addition to the authorities there cited, see Farmer v. United States, 223 Fed. 903, 911, 139 C. C. A. 341; Stern et al. v. United States, 223 Fed. 762, 139 C. C. A. 292; Sprinkle v. United States, 141 Fed. 811, 816, 73 C. C. A. 285; Shea v. United States, 236 Fed. 97, 149 C. C. A. 307.

[4] The only other point that we think merits special notice is the contention on the part of the plaintiff in error that the effect of the instructions of the court below was that the jury was authorized to find the defendant guilty (as it did) under counts 3, 4, and 5, even though he only deposited, or caused to be deposited, in the post office one letter. It is quite true that each letter or other paper put into the post office in violation of the provisions of the statute constitutes a separate and distinct offense (In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174), and that there could be no legal conviction of the defendant under any count of the indictment without proof of the deposit in the mail of the letter or document therein charged to have been so deposited; and such, we think, is the true meaning of the instructions given by the court when read together, as they must be; and such, we think, must have been the understanding of the jury. Indeed, the court expressly charged the jury to disregard (as they did) the first two counts of the indictment, for the very reason that the government offered no evidence tending to show that the letters alleged in those counts to have been deposited, or caused to be deposited, by the defendant were in fact so deposited. If the defendant desired any more specific instruction upon the subject, he should have taken exception to the charge of the court at the time, bringing to its notice the ground of such exception, which, according to the record, he wholly failed to do.

The judgment is affirmed.

AMERICAN SURETY CO. OF NEW YORK v. SANDBERG et ux.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2951.

1. INDEMNITY ⟸15(4) — VOLUNTARY SURETYSHIP — INDEMNIFICATION OF SURETY.

   The fact that at the time of signing an agreement of indemnity the indemnitor was himself indemnified against loss does not affect the nature of his suretyship, or change its character from that of a voluntary act of accommodation.

2. HUSBAND AND WIFE ⟸268(6)—COMMUNITY PROPERTY—HUSBAND'S CONTRACT.

   Where a husband, as a voluntary act of accommodation, signed an agreement to indemnify a surety company against loss by reason of its execution of a bond of a construction company to a paper company to secure performance of a contract of the construction company, the execu-

tion of the indemnity agreement resulting in no benefit to the community property of the husband and his wife, the indemnity liability incurred by the husband was not a charge against the community property.

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

Action at law by the American Surety Company of New York, a corporation, against Peter Sandberg and Mathilda Sandberg, his wife. To review a judgment (225 Fed. 150) dismissing the action as to Mathilda Sandberg, plaintiff brings error. Decree affirmed.

The plaintiff in error brought an action against the defendants in error to recover $25,000, the amount of a judgment theretofore rendered against the defendant Peter Sandberg, on an agreement of indemnity which he executed on June 2, 1910, to indemnify the plaintiff against loss by reason of its executing as surety a certain bond of the Wells Construction Company, obligor, to the Powell River Paper Company, of Vancouver, B. C., obligee, to secure the performance of a certain contract between the parties last named, in the performance of which contract the construction company defaulted. The defendant Mathilda Sandberg appeared separately and answered the complaint in the present action, admitted that Peter Sandberg executed the indemnity agreement, and alleged that he executed it for the sole benefit and accommodation of the construction company, and not for the use, benefit, or profit of himself or of her, or of the community of the defendants, or for any purpose in which they were interested in any way, and that so far as she and the community were concerned, the same was without consideration. A jury trial was waived, and a judgment was rendered against Peter Sandberg for the full amount sued for, as his separate debt, the court holding that neither his codefendant nor the community real property of the defendants was affected by the lien of said judgment, and the action as to Mathilda Sandberg was dismissed.

The court made findings of fact, of which the following is the substance: That from the time of the marriage of the defendants to the present time they had used, owned, or possessed no property other than community property; that on June 20, 1910, there was no property in the possession of or under the control of Peter Sandberg which he then had, and none that he afterwards had, other than the community property and estate of himself and his codefendant and the income therefrom; that on the date when Peter signed the contract of indemnity, the construction company was engaged in constructing a building for the defendants herein, the contract price for which was $36,500, on which the defendants had paid, prior to June 20, 1910, the sum of $36,383.05; that the building was then practically completed; that the payments so made were all in cash, and there was no connection in the relationship of the defendants and the construction company in the matter of the construction of said building and the signing of said indemnity agreement; that the construction company was then in good and substantial financial condition; that Mathilda Sandberg had no knowledge of the execution of the indemnity agreement by her husband until the institution of the present action; that on May 5, 1913, a judgment was obtained by the paper company against the construction company, and against the plaintiff herein as surety in the sum of $25,000, but Mathilda Sandberg had no knowledge or notice of the pendency of the action; that neither of the defendants was ever a stockholder of the construction company, and neither had any financial interest in that company, and Peter signed the indemnity agreement at the request and for the accommodation of one Mettler, who was a large stockholder and an officer of the construction company, and an old friend of Peter's; that on the same date the construction company, Mettler, and one Vergowe executed to Peter an indemnity agreement against liability on his part; that Peter Sandberg, without the knowledge or consent of Mathilda, from time to time signed certain notes and guaranties to banks in British Columbia, in addition to the indemnity agreement above referred to, and for the use and accommodation

of the construction company, Mettler, Vergowe, and Wells; that all such transactions except the building contract of the Kentucky building were matters and things which did not affect or concern the community of the defendants or the defendant Mathilda Sandberg, but were for the sole use, benefit, and accommodation of third persons; that the contract regarding the construction of the Kentucky building was made and practically carried out and completed prior to June 20, 1910, and was entirely disconnected with any of the other dealings of Peter Sandberg and the construction company.

William C. Bristol and Fenton E. Grigsby, both of Portland, Or., for plaintiff in error.

Bates, Peer & Peterson and Charles T. Peterson, all of Tacoma, Wash., for defendants in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] We find no ground to disturb the findings of fact of the court below. The fact that at the time of signing the agreement of indemnity Peter Sandberg was himself indemnified against loss does not affect the nature of his suretyship, or change its character from that of a voluntary act of accommodation for the benefit of the Construction Company.

The law of Washington (Remington's Codes and Statutes, §§ 5915, 5916) recognizes the separate property of husband and wife. In the case of the husband it is that which he owned before marriage and that which he acquired afterward by gift, bequest, devise, or descent, with the rents, issues, and profits thereof. In the case of the wife it is that which she owned at the time of the marriage or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof. Section 5917 provides that:

"Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property, but the husband shall have the management and control of the community personal property, with a like power of disposition as he was of his separate personal property, except that he shall not devise by will more than one-half thereof."

Section 5918 provides that:

"The husband has the management and control of the community real property, but he shall not sell, convey, or incumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance."

The Supreme Court of Washington has held that any liability incurred by the husband in the prosecution of any business is prima facie a charge against the community, but that the presumption is overthrown by proof that the liability was not incurred in a business of which the community would have had the benefit if profit had been realized therefrom (McDonough v. Craig, 10 Wash. 239, 38 Pac. 1034); that a guaranty by the husband for the payment of goods to be furnished a corporation of which he is a stockholder, being merely a contract of suretyship, creates a separate and not a community debt (Spinning v. Allen, 10 Wash. 570, 39 Pac. 151), yet, if the husband is an officer and stockholder of the corporation and becomes surety to pro-

tect the property and business of the corporation, and if, under the circumstance, it is to be presumed that he is acting for the community and the benefits of his act might have belonged to the community, the property of the community will be held liable (Horton v. Donohoe Kelly Banking Co., 15 Wash. 399, 46 Pac. 409, 47 Pac. 435). Again, it is held that the execution of a note as an accommodation to a bank does not bind the community where neither the husband nor the wife had any interest in the bank. Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540. But it is otherwise if it is to be presumed that a benefit growing out of the husband's connection with the bank will inure to the community. Shuey v. Holmes, 22 Wash. 193, 60 Pac. 402. So, in Way v. Lyric Theater Co., 79 Wash. 275, 140 Pac. 320, it was held that notes given by a corporation, and married men who were stockholders, for the purchase of an automobile to be used as a prize for the benefit of the corporate business, are presumptively for the benefit of the communities, but that the presumption might be rebutted by proof. In Threshing Machine Co. v. Wiley, 89 Wash. 301, 154 Pac. 437, where a husband signed a note as surety only, and received no consideration, it was held that the debt was not a community debt. Such being the law of Washington as construed by the highest court of the state, it is clear that the community property of the defendants is not bound for the payment of Peter Sandberg's debt to the plaintiff.

The plaintiff contends that Sandberg's execution of the indemnity agreement resulted in benefit to the community property in this, that the construction company thereby was enabled to obtain the contract with the paper company, and thus to make money to repay to Sandberg his advances on the Kentucky building contract. But the contention is not sustained by the facts. There is no evidence that such was the purpose of Sandberg's act, or that he expected or derived any benefit to the community therefrom, and the fact was, as found by the court below, that at the time when Sandberg signed the indemnity agreement, the Kentucky building was substantially completed and paid for, and the construction company was then in good financial standing.

It is contended that the judgment rendered in British Columbia on behalf of the paper company is conclusive upon the defendants herein, for the reason that they were notified and had an opportunity to defend that action. But such is not the record. Peter Sandberg had notice of the action, but Mrs. Sandberg had not, nor was she a party to the action, and the court below found that she had no knowledge of it.

[2] Upon the facts as found by the court below, and the law as it is established in the state of Washington, we find no error in the decree which is appealed from.

The decree is affirmed.

ELVERS et al. v. W. R. GRACE & CO.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2750.

1. SHIPPING ⟸185—CHARTERS—DEMURRAGE—LIEN ON CARGO.
The reciprocal lien between ship and cargo arises only after the cargo is on board, and in the absence of contract therefor there is no maritime lien on the cargo for demurrage incurred by a charterer in the loading.

2. SHIPPING ⟸173—CONSTRUCTION OF CHARTER PARTY—CESSER CLAUSE.
No liability is destroyed by the cesser clause of a charter party, unless it is re-created in some one else by the lien clause.

3. SHIPPING ⟸173—CONSTRUCTION OF CHARTER PARTY—CESSER CLAUSE.
The lien and cesser clause of a charter party followed provisions fixing the lay days for loading and discharging and the amount of demurrage to be paid by the charterer for the excess of time consumed, and provided that "vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose." *Held*, that such clause left it doubtful whether the lien given extended to an antecedent liability of the charterers for demurrage in loading, or applied only to future liabilities, and should therefore be construed as not exempting the charterers from such liability.

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 Martin H. A. Elvers and Frederick A. E. Zimmer, owners of the ship Schwarzenbek, against W. R. Grace & Co., a corporation. Decree for respondent on exceptions to libel, and libelants appeal. Reversed.

For opinion below, see 231 Fed. 361.

Libelants are engaged in business in the city of Hamburg, Germany, as copartners under the firm name and style of Knohr & Burchard, Nfl., and are the owners of the steel ship Schwarzenbek. The respondent is a corporation organized and existing under the laws of the state of Connecticut, and doing business in the city of San Francisco, in the Northern district of California. On August 16, 1906, Knohr & Burchard, Nfl., in the city of London, England, chartered the Schwarzenbek to respondent to carry a cargo of sawn lumber from a mill or loading place on Puget Sound, or in British Columbia not north of Burrard's Inlet, as might be directed by charterers, to Callao, under a charter party containing, among others, the following provisions:

"Orders as to loading mill to be given within 48 hours, Sundays and legal holidays excepted, after notification to charterers or their agents in San Francisco of arrival of vessel at Port Angeles, Port Townsend, or Royal Roads, failing which lay days to count."

Charterers "shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid, lay days as follows: Thirty (30) working lay days for loading, not to commence before 1st Feby., 1907, unless with charterer's consent, to commence 24 hours after vessel is at loading place satisfactory to charterers, inward cargo and/or unnecessary ballast discharged and ready to receive cargo; master having given written notice to that effect. Discharge to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock, or place as charterers may direct, but

at not less than 35,000 feet B. M. per day. For each and every day's detention by the fault of party of the second part [charterer] or agents, they agree to pay to the said party of the first part [owners] demurrage at the rate of three pence sterling per register ton per day."

"Cargo to be stowed under the master's supervision and direction; charterers' stevedore to be employed at not exceeding $1.10."

"Vessel to have a lien on cargo for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

It is alleged in the amended libel for demurrage, filed June 11, 1914, that on or about March 2, 1907, the Schwarzenbek arrived at Royal Roads, one of the loading places mentioned in said charter, and her master gave notice to respondent charterers of her arrival thereat, which notice was received by said respondent charterers at the hour of 4:30 p. m. on March 4, 1907; that on March 6, 1907, at 5:45 p. m., said respondent charterers, in response to said notice of said master, wired the master of said ship as follows: "We will load your ship millside;" that said wire did not designate or direct to which millside said vessel should proceed, nor at what time said vessel should proceed thereto; that thereafter said master wired said respondent charterers a second time, and thereafter, on March 7, 1907, received the following wire from said respondent charterers, to wit, "Millside Fraser river;" that said ship then proceeded to the designated loading place, and, with her inward cargo and/or unnecessary ballast completely discharged, was ready to receive her cargo; that her master gave written notice of said facts and said readiness on March 13, 1907; that notwithstanding the performance by the libelants of all of the conditions of said contract of charter party, and notwithstanding there was no remissness nor fault on the part of said libelants, the respondent, by its own default, did not load the said ship within the 30 working lay days in said charter party agreed upon, but, contrary to the terms of said charter party, respondent delayed said ship until May 15, 1907; that libelants, by the acts and defaults of respondent, became entitled to demand from respondent demurrage for 33 days at the rate of 3 pence per registered ton per day; that on or about May 15, 1907, the master of said ship, on the demand of charterers, but reserving the rights and claims of libelants on account of respondent's breach of the charter party as aforesaid by duly made protest, issued bills of lading to said charterers, wherein and whereby said respondent or assigns were mentioned as consignees of said cargo, but which bills of lading contained no reference to the demurrage previously incurred; that said bills of lading are in the possession or under the control of respondent, and out of the possession and control of libelants, and libelants pray for their production by respondent; that notwithstanding respondent has been requested to pay the sum of $3,762.91, the demurrage aforesaid, respondent has refused and still refuses to pay the same or any part thereof, and libelants pray judgment for such demurrage and costs.

Respondent filed its exceptions to the amended libel on July 1, 1914, alleging that the amended libel did not state a cause of action against respondent. The court filed a written opinion (Elvers v. W. R. Grace & Co. [D. C.] 231 Fed. 361), sustaining the exceptions and dismissing the libel, and entered a decree accordingly. Libelants appeal from this decree.

Andros & Hengstler, Louis T. Hengstler, and Golden W. Bell, all of San Francisco, Cal., for appellants.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). There is but one question for review by this court, namely: Does the amend-

ed libel state a cause of action against the respondent (appellee)? The determination of that question rests upon the construction of the charter party signed by the parties, with particular reference to the effect to be given to the lien and cesser clause therein contained.

The charter party specifically states the number of lay days which shall be allowed to the charterers for loading of the vessel, and the conditions for discharge of cargo, and then follows the agreement by the charterer, absolute in form, to pay to the shipowner demurrage at the rate of three pence sterling per register ton per day for each and every day's detention of the vessel by the fault of the charterer. The libelants here seek to recover under the liability thus created, but the respondent claims it is absolved from that liability by the lien and cesser clause later appearing in the charter, and that the libelants, not having availed themselves of the privilege afforded by the lien clause, cannot maintain the present libel against the respondent. The lien and cesser clause provides:

"Vessel to have a lien on cargo, for all freight, dead freight, and demurrage, it being understood that all and any liability of the charterers under this agreement shall cease and determine as soon as the cargo is on board; all questions, whether of demurrage or otherwise, to be settled with the consignees, the owners and captain looking to their lien on the cargo for this purpose."

In Scrutton on Charter Parties and Bills of Lading (6th Ed.) the scope and purpose of this lien and cesser clause is explained as follows:

"This clause, known as the 'lien and exemption clause,' or 'cesser clause,' is usually inserted in consideration of the granting the shipowner of a lien which he would not otherwise possess on the cargo for demurrage and dead freight." Article 53, p. 137.

[1] There is no question concerning dead freight in this case. The only subject we have to deal with is demurrage for delay in loading the vessel. There is no maritime or common-law lien for demurrage prior to loading. The reciprocal relation of the ship to the cargo and the cargo to the ship, whereby the ship is bound to the cargo and the cargo to the ship, is not established until the cargo is on board. After the cargo is loaded on the vessel there is, under the maritime law, a lien on the cargo for demurrage which will then necessarily be incurred only in its discharge. 36 Cyc. 371; The Hyperion's Cargo, 2 Lowell, 93, 12 Fed. Cas. No. 6,987, affirmed in Donaldson v. McDowell, 7 Fed. Cas. No. 3,985; Two Hundred and Seventy-Five Tons Phosphates (D. C.) 9 Fed. 209; Hawgood v. One Thousand Three Hundred and Ten Tons of Coal (D. C.) 21 Fed. 681; Davis v. Smokeless Fuel Co., 196 Fed. 753, 116 C. C. A. 381. Prior to the loading the shipowner has a right of action against the charterer upon his specific agreement to pay demurrage as provided in the charter party.

[2] The appellee contends that by the cesser clause the shipowners in this case surrendered their right to enforce this liability against the charterers, and accepted in lieu thereof a lien on the cargo. In Crossman v. Burrill, 179 U. S. 100, 107, 21 Sup. Ct. 38, 45 L. Ed. 106, the Supreme Court stated that the true rule of construction of the cesser

clause had been settled by a series of English decisions in which that excellent commercial lawyer, Lord Esher, then lately Master of the Rolls, took a leading part, and that it was well summed up with the reasons supporting it by himself and other judges in two cases in the Court of Appeal, viz.: Clink v. Radford, [1891] 1 Q. B. 625, and Hansen v. Harrold, [1894] 1 Q. B. 612. In Clink v. Radford Lord Esher said:

"In my opinion the main rule to be derived from the cases as to the interpretation of the cesser clause in a charter party, is that the court will construe it as inapplicable to the particular breach complained of, if by construing it otherwise the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. In other words, it cannot be assumed that the shipowner without any mercantile reason would give up by the cesser clause rights which he had stipulated for in another part of the contract."

In Hansen v. Harrold, Lord Esher said:

"Where the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply in so far as the lien, which by the charter party the charterers are able to create, is not equivalent to the liability of the charterers."

In the Laws of England, compiled by the Earl of Halsbury (volume 26, p. 133), there is a very full statement and citation of the English authorities upon this subject, as follows:

"A charter party usually contains a stipulation, known as a cesser clause, providing that the charterer's liability under the charter party is to cease as soon as the cargo is shipped. Such a stipulation is valid, but its effect varies according to the language in which it is framed. Whatever form the stipulation may take, the exemption as regards future liabilities arising after the loading appears to be absolute. As regards antecedent liabilities, the cesser of liability depends upon the wording of the clause. The clause may expressly deal with such liabilities; it may provide that the liability in respect of them is to continue or to cease, either absolutely or conditionally upon their discharge. More usually there is no express reference to antecedent liabilities, and the extent of the exemption then depends upon the construction to be placed upon the particular stipulation employed. If it is clear from the words of the stipulation that all liabilities under the charter party, antecedent as well as future, are to cease on loading, the exemption is equally absolute in the case of antecedent liabilities as in the case of future liabilities. If, on the other hand, the words used are open to a different interpretation, the charterer's liability as to antecedent breaches of the charter party will cease only in so far as an equivalent is given to the shipowner in the shape of a remedy available against the consignee. The cesser clause will therefore be construed as inapplicable to the particular breach complained of, if the effect of a different construction would be to leave the shipowner unprotected in respect of that particular breach. To ascertain the extent of the protection conferred by a cesser clause, the lien clause which follows it and which embodies the remedy given to the shipowner as the corollary of the charterer's release must be read with it, and the two clauses must, if possible, be taken as coextensive. No liability is destroyed by the cesser clause, unless it is re-created in some one else by the lien clause. The construction of the cesser clause is therefore governed by the construction of the lien clause, and if that clause confers no lien on the shipowner in respect of the claim which is in question, the charterer's liability is not taken away by the cesser clause. Accordingly the cesser clause usually provides that it is not to take effect unless the cargo shipped is sufficient to satisfy the various liens which the shipowner may possess over the cargo."

[3] Turning now to the cesser clause under consideration, we find that it is not clear that all liability under the charter party, antecedent as well as future, is to cease on loading. Similar clauses expressed in such ambiguous language have been held by the courts as not exempting a charterer from responsibility for delay occurring prior to loading. 36 Cyc. 352; Pederson v. Lotinga, 28 L. T. 267, 5 W. R. 290. In Christofferson v. Hansen, L. R. 7 Q. B. 500, Lord Chief Justice Cockburn, referring to a similar clause in a charter party, said, "The language is to a certain extent ambiguous;" and, stating the two constructions that might be placed upon the clause, he mentioned them as one relieving the charterer from all liability both before and after loading, and the other relieving the charterer from only such breaches as might occur after loading. The court adopted the latter construction, Mr. Justice Blackburn saying:

"If persons wish and intend to get rid of all liability, past as well as future, they can very easily do so by expressing themselves in unambiguous language."

In Schmidt v. Keyser, 88 Fed. 799, 32 C. C. A. 121, the Circuit Court of Appeals followed the last-mentioned case in holding that:

"Where the charter party provided that all liability on the part of the charterer should 'cease as soon as he shipped the cargo,' * * * the clause applied only to liability accruing after the loading, and did not relieve the charterer. from liability accruing before the completion of the loading."

It comes, then, to this: If we find the meaning of the clause not clear, but doubtful, that, in and of itself, is a sufficient reason why we should not construe it as relieving the charterer from his stipulated liability for breaches prior to loading. Then if, upon examining the terms of the clause, we find that it provides for a surrender of the right of action against the charterers for liability for demurrage antecedent to loading, and no equivalent remedy is given the shipowners available against the consignees; that the liability destroyed by the cesser clause is not re-created in some one else by the lien clause; that it confers no lien on the shipowners with respect to the antecedent liability of the charterers, and therefore leaves the shipowners unprotected in respect to that particular breach; and that the lien conferred is not commensurate with the liability of the charterers under the general terms of the charter party; and we find further that the shipowners will have surrendered the antecedent liability of the charterers without any consideration, since the lien given the shipowners on the cargo after loading is one they had before, we must conclude that the charterers are not relieved from their antecedent liability prior to loading, and as a consequence the libel in this case stated a cause of action, and the demurrer should have been overruled.

The judgment is accordingly reversed, with direction to overrule the demurrer, and that such further proceedings be had as are not inconsistent with this opinion.

ALASKA PACKERS' ASS'N v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2927.

1. WORDS AND PHRASES—"WANTON."
   The term "wanton" includes all willful acts or conduct which is reckless of the consequences that may ensue therefrom.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Wanton.]
2. INDICTMENT AND INFORMATION ⊂⊃176—WANTON DESTRUCTION OF FISH—PROOF.
   Under an indictment under Comp. Laws Territory Alaska 1913, § 266, alleging that on July 30, 1913, defendant unlawfully and wantonly wasted and destroyed salmon taken in the waters of Alaska, the prosecution was not bound to prove the commission of the offense on that day.
3. CRIMINAL LAW ⊂⊃678(3)—ELECTION BETWEEN ACTS.
   Under such indictment the fact that the prosecution introduced evidence tending to show that defendant committed the alleged offense of July 26th did not show that the government or the law elected that day as the particular day on which the alleged offense must be proved to have been committed.
4. FISH ⊂⊃15—TIME OF OFFENSE—VARIANCE.
   In a prosecution under Comp. Laws Territory Alaska 1913, § 266, for wantonly wasting and destroying salmon taken in the waters of Alaska, alleging the offense to have been committed on July 30, 1913, where the court required the prosecution to elect to prove the offense as of July 28th, and admitted evidence of defendant's acts on other days to prove the offense charged, a conviction will not be reversed because of a variance between the date so elected and that named in the indictment.
5. CRIMINAL LAW ⊂⊃678(4)—WANTON DESTRUCTION OF FISH—EVIDENCE—PRIOR AND SUBSEQUENT ACTS.
   Where the court required the prosecution to elect July 28th as the day on which it would claim that the offense was committed, the admission of evidence as to the number of fish taken by defendant's fishermen on July 25th, 26th, and 27th, and defendant's failure to take them away, and the necessary dumping of the fish, and of evidence of the taking of fish on subsequent days extending to a day after July 30, 1913, and of defendant's failure to take them away, in consequence of which they were wasted and destroyed, not to establish a series of distinct crimes, but as bearing on defendant's guilt on July 28th, was not error.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

The Alaska Packers' Association was convicted of wantonly wasting or destroying salmon taken in the waters of Alaska, contrary to section 266 of the Compiled Laws of the Territory of Alaska, and it brings error. Affirmed.

Donohoe & Dimond, of Valdez, Alaska, and Warren Gregory, Allen L. Chickering, George H. Whipple, Evan Williams, and Donald Y. Lamont, all of San Francisco, Cal., for plaintiff in error.

William N. Spence, U. S. Atty., and William A. Munly, Asst. U. S. Atty., both of Valdez, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Section 266 of the Compiled Laws of the territory of Alaska provides:

"That it shall be unlawful for any person, company, or corporation wantonly to waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska."

The preceding section (265) is as follows:

"It shall be unlawful to can or salt for sale for food any salmon more than forty-eight hours after it has been killed."

The plaintiff in error was indicted in the court below for a violation of the first-mentioned section, the indictment alleging that, on the 30th day of July, 1913:

It "unlawfully and wantonly did waste and destroy a large number of salmon, which salmon then and there had been taken and caught in the waters of Alaska, to wit, at a point in the waters of Cook Inlet near the western shore of said Inlet between the mouth of the Kustatan river and the West Foreland in said territory and division, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The jury returned a verdict of guilty as charged in the indictment, upon which verdict judgment against the plaintiff in error was entered.

The specifications of error relied upon in the brief of the plaintiff in error are, in substance, that the trial court erred in denying its motion made at the time of the introduction of the first evidence tending to establish the charge, that the plaintiff then elect a date on which it should attempt to prove the commission of the alleged offense; that the court erred in overruling the defendant's objections to evidence tending to establish the crime alleged on any date other than July 28, 1913, evidence introduced on the part of the government having tended to show the commission of the offense by the defendant on that day; that the court erred in requiring the government, on the close of its evidence, to elect a date as the date on which the alleged crime was committed, for the reason that the 26th day of July, 1913, "had been elected by law as such date, as the 26th day of July, 1913, was the day the witnesses for the plaintiff testified to be the first day on which a large number of salmon were claimed to have been unlawfully and wantonly wasted and destroyed"; and that the court erred in permitting the government, over the defendant's objections, "to elect as the date of the commission of such alleged crime the 28th day of July, 1913, for the reasons stated in the last-preceding assignment of error."

[1] As has been seen, the act made criminal by the statute is to "wantonly" waste or destroy salmon or other food fishes taken or caught in any of the waters of Alaska. The term "wanton" includes all willful acts or conduct which is reckless of the consequences that may ensue therefrom. Strough v. Central R. Co. of New Jersey, 209 Fed. 23, 26, 126 C. C. A. 165; Hazle v. Southern Pacific Co. (C. C.) 173 Fed. 431.

[2, 3] We do not understand it to be contended—certainly it cannot be successfully contended—that the prosecution was bound to prove the commission of the offense on the precise day alleged in the indict-

ment, which was July 30, 1913, nor can it be properly held as matter of law that because the prosecution introduced evidence tending to show that the defendant committed the alleged offense on the 26th of the same month—four days before the day alleged in the indictment—that either the government or the law "elected" that day as the particular day on which the alleged offense must be proved to have been committed. Manifestly the mere waste or destruction of salmon or other fish on the 26th day of July, or on one or more other succeeding days, might have been far from satisfying the jury that such waste or destruction was wanton.

[4, 5] It appears from the record that testimony was introduced tending to show that at the beginning of the fishing season of 1913 the plaintiff in error contracted with two fishermen, named March and Hunter, for the catching of fish for the appellant's cannery, furnishing them with the necessary boats and fishing tackle, and that pursuant to the arrangement the fishermen built their trap, and that during the run of the king salmon, large numbers of which the fishermen caught, the plaintiff in error sent its boat from time to time to receive them; that after the run of the king salmon was over that of the red salmon commenced on the 24th of July, on which day the fishermen caught 2,500, the same number on the next day, and on the 26th of July about 1,000. The witness March having given testimony tending to show that Hunter went on the 25th of July to notify the plaintiff in error to take the fish, and that its boat did not call for them, was asked what was done with the fish that they had taken on the 24th and 25th of July, to which question objection was made on behalf of the plaintiff in error on the ground of incompetency, irrelevancy, and immateriality, including an objection "to the introduction of any testimony whatever tending to show or establish that salmon were wasted or destroyed at the place named in the indictment on any other date than the date alleged in the indictment, which was the 30th day of July, unless the government at this time elects to announce the date on which they propose to hold" the defendant under the indictment, and on the further ground that no evidence was admissible "tending to establish collateral crimes for the purpose of establishing the crime alleged." The objections were overruled, and exceptions reserved to the ruling, and the witness allowed to state the number of fish taken out by the fishermen on the 25th, 26th, and 27th of July, the failure of the appellant to take them away, the necessary dumping of all the fish taken out by the fishermen prior to the 27th, the coming of the cannery boat of the plaintiff in error on July 28th, at which time the fishermen had 2,000 fresh fish in the scow that had been furnished them by the plaintiff in error. Being asked what was done with those, objection was made on behalf of the plaintiff in error to the effect that no evidence was admissible "of a crime subsequent to the date either alleged in the indictment or fixed by the evidence," in response to which the court said:

"Testimony will be introduced showing the entire operation of this trap as tending to throw light on the charge in this case that on a certain day they were wasted, showing the methods used and the calling of defendant's boat or their not calling as the case may be, and showing the entire circumstances so it can be ascertained whether they did use reasonable diligence and

care in the protection of these fish, or whether they wantonly and recklessly wasted and permitted them to be destroyed—that is the question here."

And in pursuance of that ruling the prosecution was permitted to give testimony of the catching by the fishermen on various subsequent days extending to a date subsequent to July 30, 1913, of various numbers of fish, of the failure of the plaintiff in error to take them away, and the consequent necessary wasting and destroying of them, not, as the court clearly explained during the taking of the testimony and also to the jury in its instructions, for the purpose of establishing a series of distinct crimes, but only as bearing upon the question as to whether or not the plaintiff in error was guilty of wantonly wasting or destroying the fish on the 28th day of July, 1913, being the day (under the direction of the court) elected by the government's attorney upon the conclusion of its evidence as the day it would claim the crime charged was committed.

Since the indictment charged but the one crime, and since the prosecution was not limited to the precise date named in the indictment, and since the trial court ruled, and instructed the jury, in effect, that the evidence of the transactions on the days other than July 28th was admitted and should be considered solely as bearing on the question as to whether or not the fish were wantonly wasted or destroyed, we are unable to see any sound reason why the judgment should be reversed because of the variance between the date elected by the government's attorney and that named in the indictment and in the verdict of the jury.

The counsel for the plaintiff in error rely upon the case of People v. Flaherty, 162 N. Y. 532, 57 N. E. 73, as being identical in principle with the present one. But we think the case very different. There the defendant had been indicted for the crime of sexual intercourse with a female not his wife, under the age of 16 years, the indictment charging but one offense. The complaining witness testified that the defendant had had sexual intercourse with her on seven different occasions prior to her becoming of the age of 16 years, and at the outset of the trial counsel for the defendant moved that the prosecuting attorney be forced to elect upon which of the seven offenses he would demand a verdict of guilty. The motion was denied, and evidence given in respect to the commission of the offense on the seven different occasions, and it was not until the close of the case of the state that the prosecution made an election. On appeal the court held that the failure of the trial court to force the prosecution to elect at the outset of the trial was error, and accordingly reversed the judgment. The seven different offenses there were seven distinct crimes, whereas in the present case the mere wasting or destruction of fish on either of the occasions inquired about did not constitute a crime unless wantonly committed, and the facts relating to the various occurrences in the present case were admitted for the sole purpose of enabling the jury to correctly determine that question, as the court distinctly instructed them.

The subsequent decision of the Court of Appeals of New York in People v. Thompson, 212 N. Y. 249, 106 N. E. 78, L. R. A. 1915D,

236, Ann. Cas. 1915D, 162, in which the indictment was based on an alleged violation of the penal law of the state which reads as follows:

"A person who perpetrates an act of sexual intercourse with a female, not his wife, under the age of eighteen years, under circumstances not amounting to rape in the first degree, is guilty of rape in the second degree, and punishable with imprisonment for not more than ten years"

—states the case as follows:

"The female involved gave testimony, under her direct examination as a witness for the prosecution, in proof that the offense charged in the indictment was committed, and additionally, under the overruled objection and exception of the defendant, that subsequent to the commission of it the defendant had sexual intercourse with her four or five times. Because of the reception of this evidence the Appellate Division, as appears from the memorandum opinion there pronounced, reversed the conviction, holding that 'the court erred in admitting testimony as to subsequent offenses by the defendant upon the person of the female involved,' and granted a new trial. We do not agree with the Appellate Division in the view thus taken."

After thus stating the case and its conclusion, the court said:

"It is a general rule that it is error to receive evidence as proof of the offense charged that an accused has committed a criminal offense other than that charged in the indictment. Evidence which tends only to prove collateral facts and has not a natural tendency to establish the fact in controversy should be excluded because: (a) It would have a tendency to withdraw and mislead the attention and deliberation of the jury from the real issue under inquiry; and (b) would subject the accused to charges unconnected with that issue and against which he had no reason to prepare a defense (citing cases). This rule has, however, exceptions in those cases in which the evidence offered has a natural tendency to corroborate or supplement admitted direct evidence (citing cases). And the doctrine is now well, if not universally, established that in prosecutions for adultery, seduction, statutory rape upon one under the age of consent, and incest, acts of sexual intercourse between the parties prior to the offense charged in the indictment may be given in evidence."

And the court there referred to its previous decision in People v. Flaherty, so much relied upon by the plaintiff in error here, in these words:

"It is weightless as to the question under consideration. The error found in it was that the defendant throughout the seven days of the trial was unable to ascertain which of seven offenses testified to by the complainant he was indicted and to be tried for."

In the matter of Election of Counts, it is said in Bishop's New Criminal Procedure, vol. 1 (2d Ed.) § 460, that:

"Where the doings on different days may be regarded as parts of the one transaction, the combined acts on all the days may be shown, and there will be no cause for election"

—citing cases, and, regarding the time to elect, he alludes to the conflict in the decisions upon the subject, and, in conclusion, says in section 462:

"The doctrine of this chapter is less distinct in the books than one could wish; partly because it is difficult to reduce discretion to rule, and partly because judicial opinions on such a subject cannot, in the nature of things, be in complete harmony. It is believed that in most cases justice is best promoted where the judge permits the witnesses to go far enough to identify a transaction before compelling the election. What is chiefly to be avoided,

while the evidence for the state is being introduced, is to prevent the defendant being prejudiced with the jury by testimony indicating crimes for which he is not indicted, and to which he is not to answer. But whatever is done at the early stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defense."

The judgment is affirmed.

SCHOENWALD et al. v. BISHOP, U. S. Marshal, et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2817.

APPEAL AND ERROR ⊜1010(1), 1023—REVIEW—ACTION TRIED BY COURT.

Where an action is tried by the court without a jury by stipulation under Rev. St. § 649 (Comp. St. 1916, § 1587), the refusal of requests for certain findings is not subject to exception and review; nor is the judgment subject to revision, if supported by the findings and there is material evidence in support of such findings.

In Error to the District Court of the United States for the First Division of the District of Alaska; Robert W. Jennings, Judge.

Action at law by E. Schoenwald and S. T. Hills, as receivers and assignees of the Pacific Coast & Norway Packing Company, against Harry A. Bishop, as United States Marshal, and D. N. McDonald. Judgment for defendants, and plaintiffs bring error. Affirmed.

Replevin. Action to recover possession of the power boat Bernice, held by defendant in error Bishop, as United States marshal, under writ of attachment issued by the United States District Court for the District of Alaska, Division No. 1, in an action by defendant in error McDonald against the assignor of plaintiffs in error. Judgment for defendants. Plaintiffs allege error.

The Pacific Coast & Norway Packing Company is a Minnesota corporation doing business in the state of Washington and the territory of Alaska. In September, 1914, this company became financially embarrassed and was unable to settle its current obligations, although it is alleged its assets were valued largely in excess of its liabilities. On the 16th day of September, 1914, one Roy W. Nevin brought suit against the company in the superior court of King county, Wash., alleging that plaintiff was a creditor of the defendant corporation to the amount of $1,284, and that the corporation was in imminent danger of insolvency, and praying judgment for $1,284, and "for the appointment of a receiver of the property, assets, and business of the defendant, to control and manage the same, and to continue the business of said corporation for the benefit of all its creditors."

The superior court thereupon entered an order appointing E. Schoenwald (plaintiff in error) as receiver of all the property, assets, and business of the defendant in that action, upon his filing an undertaking executed to the state of Washington in the penal sum of $20,000, with a sufficient surety, conditioned for the faithful discharge of his duties in the usual form. It was further ordered that the receiver was empowered to take possession of and to do all things necessary to the preservation of the property and assets of the defendant therein, and to continue the business until the further order of the court. On September 25, 1914, the court appointed S. T. Hills (plaintiff in error) as joint receiver in the same action, and ordered "that the receivers do forthwith take any necessary and proper steps to the end of extending this receivership without delay over the property and assets of the defend-

ant company located in the territory of Alaska and its business operations therein." On October 26, 1914, the same court made the following order:

"This matter coming on to be heard upon the application of E. Schoenwald and S. T. Hills, as receivers of the Pacific Coast & Norway Packing Company, for an order directing said company, by its duly authorized officers, to convey forthwith to said receivers all its real property in the territory of Alaska, and to transfer to them all personalty there situated, C. O. Steberg, president of said company, being present and consenting to such order, and it appearing to the court that said conveyance and transfer is necessary to the successful conduct of the receivership: It is hereby ordered that the said Pacific Coast & Norway Packing Company convey to said receivers all its title to real estate situated in the territory of Alaska and transfer to said receivers all its personalty there situated, and said C. O. Steberg, as president of said company is hereby directed to execute and deliver to said receivers a sufficient deed to said real estate and a bill of sale of said personalty."

On the same day the Pacific Coast & Norway Packing Company, by C. O. Steberg, its president, and E. Schoenwald, its secretary, executed a conveyance of its real property and a transfer of its personal property, "pursuant to the order of the superior court of the state of Washington in and for King county, this day made and entered in the case of Roy W. Nevin, Plaintiff, v. Pacific Coast & Norway Packing Company, Defendant," to the plaintiffs in error as joint receivers of its property in Alaska, including in the transfer of personal property the power boat Bernice.

On January 25, 1915, D. N. McDonald, one of the defendants in error, commenced an action against the Pacific Coast & Norway Packing Company upon two promissory notes of the latter, which had been delivered before it went into the hands of a receiver for a certain indebtedness accruing in the district of Alaska to McDonald prior to the time of the appointment of either of the receivers mentioned. McDonald had the Bernice attached by H. A. Bishop, United States marshal for the First division of Alaska, and the judgment thereafter rendered in said action provided for the sale of the boat by the marshal to satisfy the judgment for $1,404.89 in favor of McDonald.

On April 28, 1915, plaintiffs in error commenced the present action to recover possession of the Bernice, alleging that the boat was of the value of approximately $2,000, and praying judgment for $500 damages and the costs of suit. Three days after the filing of the complaint herein, the Bernice, her engine, tackle, equipment, machinery, and furniture, were, by virtue of the giving of a bond to defendants by plaintiffs, given and surrendered to plaintiffs as by law provided.

The case was tried by the court before a jury, but the jury was discharged upon agreement at the close of plaintiffs' case, at which time defendants also rested, and both sides demanded judgment. The court thereafter made findings and conclusions of law, and directed that a judgment be entered in favor of the defendants. Plaintiffs allege error in the action of the court in refusing to make certain findings of fact and conclusions of law proposed by plaintiffs, and in making certain other findings of fact and conclusions of law in favor of the defendants. Other facts will be stated in the opinion.

Winfield R. Smith, of Seattle, Wash., and Winn & Burton, of Juneau, Alaska, for plaintiffs in error.

Gunnison & Robertson, of Juneau, Alaska, for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiffs in error, to sustain their case as plaintiffs in the court below, first introduced in evidence the record in the case of Nevin v. Pacific Coast & Norway Packing Company in the superior court of King county, Wash. In the complaint in that case it was alleged that the plaintiff was a creditor of the defendant corporation; that the corpo-

ration at the time the suit was begun was financially embarrassed and could not meet its obligations as they matured; that suits had been begun against it, and, if its property was seized and sold at forced sale, sufficient could not be realized to meet its obligations; that it was in immediate danger of insolvency. The prayer of the complaint was for the appointment of a receiver of the property, assets, and business of the corporation for the benefit of all of its creditors, and for a judgment against the corporation in the amount of $1,284, with costs and disbursements therein. In the answer of the corporation it asked that the complaint be dismissed, and for its costs and disbursements therein.

Upon the complaint being presented to the court, the court entered an order in which it was recited that upon the verified complaint, and after argument of counsel for the plaintiff and for the defendant, it appeared to the court that the defendant was in embarrassed financial circumstances and could not meet its obligations as they matured; that suits had been begun against it, and if its property was seized and sold at forced sale sufficient would not be realized to meet its obligations; and that said defendant, though its assets then exceeded its liabilities, was in immediate danger of insolvency. It was thereupon ordered that E. Schoenwald, of Seattle, King county, Wash., be appointed receiver in the action of all the property, assets, and business of the defendant, upon his filing an undertaking executed in the state of Washington in the penal sum of $20,000, with a sufficient surety, to be approved by the court, conditioned on the faithful discharge of the duties of such receiver; that the receiver was empowered to take possession of and do all things necessary to the preservation of the property and assets of the defendant, and continue the business of said defendant, with the full authority to do all things necessary thereto until the further order of the court, and should from time to time report to the court his doings thereunder; that thereupon Schoenwald qualified and entered upon his duties as receiver; that nine days later the court ordered that S. T. Hills, of Seattle, Wash., be appointed a joint receiver in the action with E. Schoenwald, the then receiver, of all the property, assets, and business of the defendant corporation; that the said Hills thereupon qualified and became a joint receiver with Schoenwald. It was thereupon ordered that the receivers forthwith take any necessary and proper steps to the end of extending their receivership without delay over the property and assets of the defendant corporation located in the territory of Alaska and its business operations therein.

Thereafter, to wit, on the 26th day of October, 1914, the court made an order directing the defendant corporation to convey forthwith to said receivers all its real property in the territory of Alaska, and to transfer to them all personalty therein situated, it appearing to the court that said conveyance and transfer were necessary to the successful conduct of the receivership; that on the same day the defendant corporation executed a bill of sale of the personal property located in the territory of Alaska to Schoenwald and Hills as receivers of the corporation, "and not otherwise," in which bill of sale it was recited that it was made "pursuant to the order of the superior court of the

state of Washington in and for King county, this day made and entered in the case of Roy W. Nevin, Plaintiff, v. Pacific Coast & Norway Packing Company, Defendant." This bill of sale included the power boat Bernice heretofore mentioned.

Had the plaintiffs rested their case upon this record, it would have appeared beyond any question that the right of the plaintiff to the possession of the power seine boat Bernice was based solely upon the assignment ordered by the superior court of King county, Wash., and the transfer executed by the Pacific Coast & Norway Packing Company, pursuant to that order, and that their rights as receivers were such as they had under the order of the court, "and not otherwise."

After the plaintiffs had introduced this record, they undertook to show by oral testimony that the assignment was a voluntary common-law assignment, and that the transfer was of the same character. There is the question whether this oral testimony was admissible to contradict, explain, or control the evidence furnished by the record of the proceedings in the state court; and there is also the further question whether, if the transaction should be held upon that evidence to be a voluntary common-law assignment and transfer, it would be given effect in Alaska as against the rights of the defendant, a local creditor in that territory.

But we pass these two questions (stating them only to mention the fact that they exist and that the latter has been elaborately discussed in the briefs) to consider the preliminary question whether upon this record we have any authority to review the judgment in this case. By stipulation of counsel a jury was waived, and the cause submitted to the court without a jury. The findings made by the court are in the nature of special findings—the court finding, among other things, in substance, that the instrument in writing purporting to transfer the property and assets of the corporation (including the power seine boat Bernice) showed on its face to be and was in fact executed pursuant to the order of the superior court of the state of Washington in and for King county; that the said Pacific Coast & Norway Packing Company had not by any action of its governing board transferred or assigned its property to Schoenwald and Hills, the plaintiffs in that case, in any capacity or at all, nor had it ratified or acquiesced in any such assignment or in the receivership proceedings.

Upon these special findings the court concluded that the assignment to and the receivership of Schoenwald and Hills were in invitum proceedings, and that both were in conflict with the rights of the defendant McDonald, a local creditor, and were against public policy, and had no extraterritorial effect, and should not be enforced in the territory of Alaska. The limitation to our authority in such a case has been clearly stated by the Supreme Court in Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 331 (45 L. Ed. 457), as follows:

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made. Hathaway v. National Bank, 134 U. S. 498 [10 Sup. Ct. 608, 33 L. Ed. 1004]; St. Louis v. Retz [Rutz] 138 U. S. 241 [11 Sup. Ct. 337, 34 L. Ed. 941]; Runkle v. Burnham, 153 U. S. 225 [14 Sup. Ct. 837, 38 L. Ed. 694]."

The plaintiffs submitted to the court requests to find certain facts in favor of the plaintiffs. These requests were refused. "They are no more the subject of exception and review than would be a request to a jury to find in a particular manner, and a refusal by the jury so to find." Dickinson v. Planters' Bank, 83 U. S. (16 Wall.) 250, 258, 21 L. Ed. 278. In the recent case of United States v. Fidelity & Guaranty Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696, the Supreme Court, referring to matters in evidence, but not in the findings, on page 527 of 236 U. S., on page 302 of 35 Sup. Ct. (59 L. Ed. 696), said:

"Assuming these defences were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment. Rev. Stat. §§ 649, 700, 1011 (amended by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318 [Comp. St. 1913, §§ 1587, 1668, 1672]); Norris v. Jackson, 9 Wall. 125, 128 [19 L. Ed. 608]; St. Louis v. Ferry Co., 11 Wall. 423, 428 [20 L. Ed. 192]; Dickinson v. Planters' Bank, 16 Wall. 250, 257 [21 L. Ed. 278]; Insurance Co. v. Folsom, 18 Wall. 237, 248 [21 L. Ed. 827]; British Queen Mining Co. v. Baker Silver Mining Co., 139 U. S. 222 [11 Sup. Ct. 523, 35 L. Ed. 147]."

As there is evidence to support the findings, and the findings support the judgment, there is nothing in this record for this court to review. The judgment is accordingly affirmed.

ZEITINGER et al. v. HARGADINE-McKITTRICK DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. July 21, 1917.)

No. 4900.

BANKRUPTCY ⊂=49—CORPORATIONS—INTERVENTION BY STOCKHOLDERS.

A court of bankruptcy cannot be compelled to exercise its jurisdiction in aid of a fraud, and has power to permit the intervention of stockholders to contest a voluntary petition filed on behalf of the corporation by its officers and directors, upon a showing that the object of the proceeding was to avoid the effect of a judgment obtained by stockholders against the corporation and directors for the appointment of a receiver for the corporation, and for an accounting by the directors for fraudulent mismanagement.

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

In the matter of the Hargadine-McKittrick Dry Goods Company, voluntary petitioner in bankruptcy. Christian J. Zeitinger and others appeal from an order of adjudication and an order denying their right to intervene. Reversed.

For opinion below, see 239 Fed. 155.

Randolph Laughlin and Matt G. Reynolds, both of St. Louis, Mo. (Julian Laughlin and Chase Morsey, both of St. Louis, Mo., on the brief), for appellants.

Charles A. Houts, of St. Louis, Mo., for appellee.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. This is an appeal from a decree, entered February 6, 1917, adjudicating appellee a bankrupt on its voluntary petition, and also from an order denying to appellants the right to intervene in said proceeding.

The appellee was first adjudicated a bankrupt on January 6, 1917, on its voluntary petition, and a receiver of its property appointed. Subsequently, on the same day, the order of adjudication and the order appointing a receiver were vacated, and a hearing ordered on the voluntary petition for January 13, 1917. On January 6, 1917, the board of directors of appellee adopted a resolution authorizing and directing the president and secretary of appellee, or either of them, to execute on behalf of the corporation an instrument in writing, admitting the inability of said company to pay its debts and its willingness to be adjudged a bankrupt on that ground, and authorizing the president and secretary, or either of them, to take such immediate steps on behalf of said corporation as would be appropriate to have the same adjudged a bankrupt and a receiver appointed to take charge of its assets. On the same day the voluntary petition in bankruptcy of appellee was prepared, signed, and filed; the same being signed by Martin P. Donahoe, president. Schedule A attached to the petition named the following creditors:

Suit by George H. Allan, of St. Louis, Mo., for shares of profits on the manufacture and sale of bags	$ 30,000.00
Guaranty to Missouri Pacific Railroad Co. on account of its lease on Pontiac Building. Matured claim January 1, 1917	118,577.45
Unmatured claim on the same lease	343,000.00
Salaries due workmen, clerks, or servants for month of January	820.00
Total	$492,397.45

Schedule B showed assets of the value of $300,959.96, one item of which was: Deposits of money in banks and elsewhere, $196,176.73. At the hearing on January 13, 1917, appellants, being stockholders of appellee, presented to the court for filing a petition in intervention, setting forth the petition, findings of fact, conclusions of law, and decree of the circuit court of the city of St. Louis, Mo., in an action commenced in December, 1915, wherein the intervening petitioners were plaintiffs and the appellee and its board of directors were defendants.

It appeared, from the intervening petition and duly certified copies of the record of the suit in the circuit court, that the intervening petitioners, as stockholders of appellee, had commenced an action in said circuit court in December, 1915, against appellee and its board of directors, the general nature and purpose of which was to take from the possession and control of the board of directors all of the assets of appellee of every nature and kind, and to secure an account-

ing against the members of the board of directors for loss, waste, and damage caused by their fraudulent mismanagement of the affairs of the corporation; that appellee was a necessary party to said action in the circuit court, and appeared therein and filed its answer, as also did the board of directors; that upon the assurance by the defendants in the action in the circuit court that the status quo of appellee and its assets would be maintained, and that the same would not be disposed of until the case was finally determined and judgment entered, no temporary injunction was granted or a receiver appointed at the commencement of the action; that the case in the circuit court was finally brought to trial, the trial thereof continuing over a period of four weeks. At the end of the trial the case was taken under advisement, and was held until December 29, 1916, when the court announced its decision to the effect that it would grant an accounting and appoint a receiver, and at the same time fixed the bond of the receiver at $500,000.

Appellee and the board of directors contested the suit in the circuit court at every step. On the day the decision was announced, counsel for the plaintiffs were asked to prepare a decree and submit the same to opposing counsel; the court stating that, if counsel could not agree upon the terms thereof, the court would settle same. On January 5, 1917, the decree was prepared and copies furnished to counsel for the directors and appellee. The circuit court on January 8, 1917, formally entered its judgment and decree, which had been informally announced on December 29, 1916. A receiver was appointed and took possession of all the assets of appellee, in the possession of the board of directors and what is known as the executive committee, and ever since has held the possession of said property subject to the order of the circuit court. It appeared, from the findings of fact, conclusions of law, and decree of the circuit court set forth in the record, that the circuit court adjudged that the board of directors had wasted, misappropriated, and lost the assets of the corporation in many ways, in sums aggregating millions of dollars, for which misappropriation and losses said directors were held accountable and liable, including Martin P. Donahoe, who signed the voluntary petition in bankruptcy as president of appellee; that George H. Allan, who appears in Schedule A as a creditor of appellee, was a defendant in the suit in the circuit court, and was there held accountable in a sum many times in excess of the amount of his claim. It was also adjudicated by the decree of the circuit court that the guaranty of appellee to the Missouri Pacific Company was ultra vires and void, and a fraud upon appellee and its stockholders, and that at the time the petition was filed in that court the directors of appellee had in their possession assets of the actual and potential value of $3,198,000. The circuit court by its decree referred the matters which required an accounting to a referee for report.

The intervening petitioners claimed that to allow appellee to file a voluntary petition and be adjudicated a bankrupt, in the face of this record, would result in the commission of a fraud upon the petitioners in intervention and plaintiffs in the suit in the circuit court, as well as upon the circuit court and the United States District Court,

in which the voluntary petition in bankruptcy was presented; that it was clearly manifest that the only purpose of filing the voluntary petition was to bring about the appointment of a trustee in bankruptcy, who would necessarily be controlled and appointed by the creditors of appellee, if any, in the interest of the directors and other persons who were held liable in the action in the circuit court, and thereby the whole proceedings and judgment in the circuit court would be paralyzed and rendered abortive. The District Judge, in passing upon the right of the interveners to intervene in the voluntary bankruptcy proceeding, said:

"In view of all the facts brought to its attention, this court cannot regard this case otherwise than as an effort on the part of the officers and directors of the bankrupt company to evade the process of the circuit court of the city of St. Louis, and to escape the performance of its decree. No creditor of the bankrupt company seems to feel any concern about the collection of his debt, and the moving parties in the present bankruptcy proceedings are the officers and directors of the company. These are the same persons who by the judgment of the circuit court of the city of St. Louis have been held liable to the company or its stockholders for a large sum of money."

Notwithstanding these views, the District Court denied the right of the interveners to file their petition in intervention and granted an adjudication on the voluntary petition of appellee. The District Court seemed to be of the opinion that it was helpless to prevent what was apparently a fraud on its own jurisdiction, that of the circuit court, and upon interveners, because it was of the opinion that no defense could be made to the voluntary petition in bankruptcy. But the case made by the intervening petition and the exhibits attached thereto was of a broader signification than a mere litigation of the truth of the allegations in the voluntary petition.

The showing made by the interveners did tend to show that the two main creditors named in the voluntary petition were not creditors at all, so that on the face of the record there were only left in Schedule A the salaries to become due for the month of January, 1917, to the clerks and employés of appellee, amounting in all to $820, and as against this Schedule B showed a cash item of $196,000. These facts, however, were brought forward for the purpose of showing that the whole proceeding was fraudulent. There are expressions in the decisions of the courts to the effect that the allegations of a voluntary petition are not issuable; for instance, in Hanover National Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113, the contention was made that to allow the filing of a voluntary petition in bankruptcy without giving notice to any creditor rendered the law unconstitutional, in that it deprived creditors of their property without due process of law. The Supreme Court, in deciding this contention was not sound, used the following language with reference to the allegations of the voluntary petition in bankruptcy:

"These are not issuable facts, and notice is unnecessary, unless dismissal is sought when notice is required. Section 59g [Comp. St. 1916, § 9643]."

The District Court, however, could have safely relied upon the proposition that there is and can be no law or practice which would compel a court of bankruptcy or any other court to become a party

to a fraud. The bankruptcy law provides that upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication, or dismiss the petition. As was said by this court in Ogden v. Gilt Edge Mines Co., 225 Fed. 723, 140 C. C. A. 597:

"Bankruptcy proceedings are in the nature of proceedings in equity, and bankruptcy courts administer the law according to the spirit of equity. Bardes v. Hawarden Bank, 178 U. S. 524, 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Lockman v. Lang, 132 Fed. 1, 6, 65 C. C. A. 621; Id., 128 Fed. 279, 62 C. C. A. 550, 555; In re Broadway Savings Trust Co., 152 Fed. 152, 81 C. C. A. 58. That stockholders of a corporation may, in equity, either sue for or defend on behalf of the corporation, if the directors fraudulently fail to do so, or where they are the beneficiaries of the action, is a well-recognized principle of equity jurisprudence. Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Bronson v. La Crosse R. Co., 2 Wall. 283, 17 L. Ed. 725; In re Swofford Bros. D G. Co. (D. C.) 180 Fed. 549, 553."

The District Judge, in adjudicating upon a voluntary petition in bankruptcy, is not a ministerial, but a judicial, officer, whose first duty is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud. We are of the opinion that the allegations of the petition in intervention are clearly proved by the exemplified copy of the record of the suit in the circuit court, and that it was the clear duty of the District Court, as well as of this court, in order to prevent the perpetration of what clearly would be a fraud upon the circuit court, the court of bankruptcy, and the interveners, to dismiss the voluntary petition of appellee.

The order of adjudication and the order refusing the right to file the petition in intervention are reversed, and the case is remanded, with directions to the District Court to allow the intervening petition and exhibits to be filed, and, upon the same being filed, that an order be entered dismissing the voluntary petition in bankruptcy.

The petition to revise, No. 185, Original, is dismissed.

INTERNATIONAL COTTON MILLS v. PERNOD.

(Circuit Court of Appeals, First Circuit. September 22, 1916.)

No. 1182.

1. MASTER AND SERVANT ⟸204(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—NEW HAMPSHIRE STATUTE.

Under Employers' Liability Act N. H. (Laws 1911, c. 163) § 2, which makes an employer liable for injury to a workman through his negligence, or that of his agents or servants, or by reason of defects in plant, ways, works, or machinery due to such negligence, and provides that "the workman shall not be held to have assumed the risk of any injury due to any cause specified in this section," the right of recovery is still conditioned on proof of want of reasonable care on the part of the master or his employés, and the assumption of risk clause is applicable only where such negligence is shown.

2. MASTER AND SERVANT ⟸107(5)—MASTER'S LIABILITY FOR INJURY TO SERVANT.

The duty of a master to exercise care depends upon the reasonable apprehension of danger, and he may rely upon the exercise by his servants

of ordinary care to avoid such dangers as are properly incidental to the work. He is not 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 himself.

3. MASTER AND SERVANT ⟸107(8)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK—"DEFECT IN WAY."

Plaintiff, an employé in defendant's cotton mill, was engaged in moving a large roll of cloth from a low bench upon a truck. Iron shells or cores three inches in diameter were passed through the center of the rolls in handling. The roll which plaintiff was moving started to roll off the bench, and in moving quickly he stepped upon a core lying in the passageway and was injured. The bench stood beside a passageway 30 inches wide, and it was customary for the workman, after using a core, to leave it on the floor, to be convenient when again wanted. Plaintiff saw this core, and had previously moved it with his foot. *Held*, that the presence of the core in the passageway, where it had been temporarily left by a workman, and which was known to plaintiff, did not constitute a "defect in the way," within the meaning of the statute, or charge defendant with negligence which was the cause of plaintiff's injury.

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by Emiel Pernod against the International Cotton Mills. Judgment for plaintiff, and defendant brings error. Reversed.

Edward C. Stone, of Boston, Mass. (Sawyer, Hardy, Stone & Morrison, of Boston, Mass., on the brief), for plaintiff in error.

Henry B. Stearns and Hiram A. Stearns, both of Manchester, N. H., for defendant in error.

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

BROWN, District Judge. This is a writ of error for review of the rulings of the District Court in an action for negligence.

The plaintiff below was moving a large and heavy roll of cloth from a low bench, 14 inches in height, to a truck, 7 feet long, provided at each end with a standard, 23 inches in height, to receive the ends of the core about which the cloth was rolled. The diameter of the roll was about 28 inches; of the core, 3 inches. The top of the standard was, therefore, at a lower level than the lower surface of the end of the core which was to rest upon it. The transfer of the roll, therefore, did not involve raising the roll, but only guidance of the core of the roll into a standard at a lower level.

The plaintiff had fixed one end of the core on its standard, while the whole weight of the roll was supported by the bench, and was about to swing the other end of the roll, and to drop and guide it to its standard. Evidence as to the weight of the roll affords slight indication of the amount of exertion required of the workman in making the transfer.

The plaintiff testified that before he was in a position to handle the roll it started of its own accord and rolled off. He was off his balance when it rolled, and started to catch himself by moving his right foot forward, and stepped on a core, which rolled. His injury was a strain.

It was contended by the plaintiff that the core upon which he stepped was under his feet through the negligence of the master in permitting a passageway, 30 inches wide, to be obstructed by the presence of cores, and that this was a defect or insufficiency in the ways due to the negligence of the defendant or its employés.

[1] The plaintiff testified that he knew of the presence of some cores in the aisle or passageway, and that he pushed them back with his heel just before the accident. It is contended, however, that the defense of assumption of risk is inapplicable because of the New Hampshire statute (Laws N. H. 1911, c. 163, §§ 1, 2):

"Section 1. This act shall apply only to workmen engaged in manual or mechanical labor in the employments described in this section: * * * (b) Work in any shop, mill, factory or other place, on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory, or other place, five or more persons are engaged in manual or mechanical labor. * * *

"Sec. 2. If, in the course of any of the employments above described, personal injury by accident arising out of and in the course of the employment is caused to any workman employed therein, in whole or in part, * * * by the negligence of the employer, or any of his or its officers, agents, or employés, or by reason of any defect or insufficiency due to his, its or their negligence in the condition of his or its plant, ways, works, machinery, * * * equipment, or appliances, then such employer shall be liable to such workman for all damages occasioned to him. * * * The workman shall not be held to have assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed."

Under this statute the defense of assumption of risk is abolished only in cases where the injury is attributable to negligence, and the liability of the master is still conditioned upon negligence. Seaboard Air Line Co. v. Horton, 233 U. S. 492, 501, 502, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. His responsibility is still limited to the exercise of reasonable care by himself and his employés. In Labatt's Master and Servant, vol. 2, § 666, it is said of a similar act:

"So far as regards the character of the actual physical conditions which warrant the inference of culpability on the part of the immediate actor, whether he be the master himself or an employé, the evidential prerequisites to establishing a right to indemnity are essentially the same under the statutes as at common law."

[2] In considering whether there has been a failure to exercise reasonable care, we cannot ignore the fact that the duty to exercise care depends upon the reasonable apprehension of danger, and that the master may rely upon the exercise by his servants of ordinary care to avoid such dangers as are properly incidental to the work. The master is not 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 himself. Kreigh v. Westinghouse & Co., 214 U. S. 249, 256, 29 Sup. Ct. 619, 53 L. Ed. 984.

The risk of injury from his own failure to exercise such ordinary care as is necessary to avoid an obvious danger arising in the prog-

ress of the work is a risk still assumed by the employé; for the master cannot be held negligent merely because the work involves danger unless the servant takes precautions which any intelligent man would see to be appropriate under the circumstances.

[3] The evidence failed to show any defect in the permanent fixtures or arrangement of the working place. The passageway, or aisle, was 30 inches in width, and the benches forming the aisle but 14 inches high. The cores, which were iron shells 6½ feet long, 3 inches in diameter, and weighing about 40 pounds, were appliances in use in handling the rolls, and in the course of the work were put into and taken out of the rolls. When taken out, it was usual to put them between the benches in the aisle. As they were heavy, it was convenient to the work to have them near at hand for use.

The temporary disposition of these cores in the aisle was not proved to have been unnecessary or improper, having regard to the work in hand. On the contrary, the only witness, a witness called by the plaintiff, who gave testimony relating to this subject, testified that this was the handiest place for them. Furthermore, they were movable; and in fact just before the accident the plaintiff did move one of them by kicking it. Their presence was known, they could be moved to such extent as was necessary to secure proper standing room, and there was no evidence to show that the plaintiff, by the exercise of ordinary care, could not have given himself ample standing room for his work, or that any urgency of the work prevented him from doing so.

The case, therefore, differs essentially from one in which there is some unreasonable and unnecessary obstruction, having no proper relation to the work, and falls within that class of cases which hold that those conditions which, in all kinds of industrial work are temporarily created by the user of the appliances furnished by the master, are not considered to be caused by "defects," within the meaning of the statute. Labatt's Master and Servant, vol. 2, § 675.

Assuming that the plaintiff was properly found by the jury not to be guilty of contributory negligence, the injury must then be regarded as due to accident rather than to the master's negligence.

The plaintiff also claimed negligence in respect to the condition of the movable standard of the truck, and of an iron pipe handle, so called; but there is an entire failure of evidence to show that the roll fell on account of either of these alleged defects.

There was nothing to justify a finding that the fall of the roll was due to the defendant's negligence, nor, so far as appears from the charge, was the case submitted to the jury on that issue.

We are of the opinion that upon all the evidence the plaintiff was not entitled to recover, and that the refusal of the defendant's request to so charge was error.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers costs in this court.

PUTNAM, Circuit Judge. I concur in the result. Two requests were made by the defendant in the court below that a verdict be di-

rected for the defendant on the entire record. The first request was waived by subsequent proceedings; but the second request should have been granted. A careful reading of the record shows that the case was tried on an allegation of negligence on the part of the defendant below; but while, under the New Hampshire statute, the assumption of risk on the part of the plaintiff might have been in issue, it was not. It is true that the dangerous element at the outset was the cores lying on the floor; but the plaintiff did not permit them to remain as the defendant left them, but, as the record says, "brushed them aside with his foot, and then went along with his work." The causa causans was the rolls in the positions to which the plaintiff below had removed them. There was no evidence that the accident occurred by reason of the rolls being in the location where the defendant below had left them, while the removal of the rolls from the position in which the defendant left them was in no way in the eyes of the law connected with what the defendant below did or omitted to do, but was separated from what the defendant did or omitted to do by intelligent action on the part of the plaintiff below, which in no way arose out of or was connected with what the defendant below has done, and was wholly independent thereof in the eyes of the law. Consequently, the record contained no evidence showing that what the defendant below did was the causa causans, but, on the other hand, showed the reverse.

The verdict should therefore, as matter of law, have been directed for the defendant below under its second motion.

UNITED STATES v. GULLIKSEN.

(Circuit Court of Appeals, Eighth Circuit. June 9, 1917.)

No. 4456.

ALIENS ⇐71½, New, vol. 7 Key-No. Series—NATURALIZATION—CANCELLATION OF CERTIFICATE—GROUNDS.

Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1916, § 4352), provides that the petition for naturalization shall be verified by the affidavits of at least two credible witnesses, who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for at least five years continuously, and that they have personal knowledge that he is of good moral character and qualified to be admitted as a citizen. Section 5 (Comp. St. 1916, § 4353) provides that the clerk shall, if requested, issue a subpœna for the witnesses named by the applicant, but that, in case such witnesses cannot be produced upon the final hearing, other witnesses may be summoned. *Held* that, where one of the witnesses verifying a petition of naturalization testified on the hearing that he had not known the applicant for five years, the substitution in his place of another witness, whose affidavit was not attached to the petition at the time of its filing, was such a departure from the law as caused the certificate of naturalization to be illegally procured and subject to cancellation.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit by the United States against Andrew Gulliksen. From a judgment dismissing the complaint, the United States appeals. Reversed and remanded, with directions.

David J. Howell, Asst. U. S. Atty., of Cheyenne, Wyo. (Charles L. Rigdon, U. S. Atty., of Cheyenne, Wyo., on the brief), for the United States.

Clyde M. Watts, of Cheyenne, Wyo., for appellee.

Before CARLAND, Circuit Judge, and AMIDON and VAN VALKENBURGH, District Judges.

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing on motion the following complaint filed by the United States, for the reason that it did not state a cause of action:

"(1) That on the 15th day of April, 1914, the said defendant, Andrew Gulliksen, being then an alien, filed in the District Court of the United States in and for the District of Wyoming, his petition to be admitted as a citizen of the United States under the provisions of the act of Congress of June 29, 1906, providing for the naturalization of aliens.

"(2) That upon the 1st day of October, 1914, the petition of the said Andrew Gulliksen came on for hearing in said court, and it was thereupon ordered by said court that the said Andrew Gulliksen, defendant aforesaid, be admitted as a citizen of the United States, and a certificate of naturalization, under the seal of said court, was thereupon issued to the said Andrew Gulliksen, and ever since said time the said defendant has claimed and now claims, by virtue of said certificate of naturalization, to be a citizen of the United States.

"(3) That said certificate of naturalization was illegally issued and procured by the said Andrew Gulliksen, and that said court had no jurisdiction to issue a certificate of naturalization to the said Andrew Gulliksen, for the reason that the said petition for naturalization filed by the said Andrew Gulliksen aforesaid was not verified by the affidavits of two credible witnesses who had personally known the said applicant for citizenship, to wit, the said Andrew Gulliksen, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of the filing of his said petition for naturalization.

"That at the time of the filing of said petition for naturalization by defendant as aforesaid said petition was verified by the affidavits of two witnesses, to wit, Charles Warren and F. A. Roedel; that said Charles Warren, in said affidavit, verifying said petition for naturalization, deposed and said: that he had personally known Andrew Gulliksen, the petitioner above mentioned, to have resided in the United States continuously immediately preceding the date of the filing of his petition since the 1st day of December, A. D. 1908.

"That said affidavit of the said Charles Warren is false and untrue, in this: That the said Charles Warren did not personally know the said Andrew Gulliksen to have resided in the United States continuously immediately preceding the date of the filing of his petition for naturalization since the 1st day of December, A. D. 1908, but in truth and in fact the said Charles Warren had known the applicant, the said Andrew Gulliksen, only since the month of September, 1909, and did not know the said Andrew Gulliksen to have resided in the United States prior to the month of September, 1909; and that the said Charles Warren had not known the said Andrew Gulliksen to be a resident of the United States for a period of at least five years continuously immediately preceding the date of the filing of his said petition for naturalization.

"That thereafter the said Charles Warren appeared at the final hearing upon the petition of the said applicant for naturalization as a witness for said applicant, and testified that he did not know said applicant before the month of September, 1909, and had not known the said Andrew Gulliksen since the

1st day of December, A. D. 1908, and had not known the said Andrew Gulliksen for a period of five years immediately preceding the date of the filing of his application for naturalization.

"That thereupon the court, finding the said Charles Warren not a competent witness, permitted the said petitioner, the said Andrew Gulliksen, to procure and use, in the place of the said Charles Warren, Gullik Gulliksen, who testified that he knew the said Andrew Gulliksen to be a citizen of the United States for a period of five years continuously immediately preceding the date of the filing of the petition of the said Andrew Gulliksen for naturalization. That the said Gullik Gulliksen was not a witness whose affidavit had been attached to the petition of the said Andrew Gulliksen at the time of the filing of the same or at any time.

"That the affidavit of the said Charles Warren, attached to and filed with the petition of the said applicant for naturalization as aforesaid, was not the affidavit of a credible witness who had known said applicant for a period of at least five years immediately preceding the date of the filing of said petition.

"Wherefore plaintiff prays that this court make an order setting aside and canceling said certificate of naturalization and citizenship issued to the said Andrew Gulliksen, defendant aforesaid, on the 1st day of October, 1914, and directing the clerk of this court to transmit a certified copy of such order to the Division of Naturalization of the Bureau of Immigration of Naturalization, Washington, D. C."

Paragraph 3 of subdivision 2 of section 4 of the act of June 29, 1906, reads as follows:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States."

Section 5 of the same act reads as follows:

"That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

The appeal was argued and submitted at a former term of the court and a decision postponed until the Supreme Court should decide certain questions certified by this court in the case of the United States v. Solomon Louis Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853. On the 9th of April, 1917, the last-named case was decided, and it was there held that a certificate of citizenship may be set aside and canceled in an independent suit brought under section 15 of the act of June 29, 1906 (Comp. St. 1916, § 4374), and that the presentation of a petition for naturalization on final hearing in open court and the hearing thereof subsequently passed to and finally held in the chambers of the judge adjoining the courtroom, on a subse-

quent day and at an hour earlier than that to which the court had been regularly adjourned, was not a hearing in open court as required by section 9 of said act (Comp. St. 1916, § 4368). It was further said:

"An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare. * * * No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the government may challenge it, as provided in section 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

We think, in view of the above language and decision, that we must hold that the substitution of the witness Gulliksen in place of the witness Charles Warren under the circumstances detailed in the complaint was such a departure from the requirements of the law as to cause the certificate of naturalization which resulted to be illegally procured. United States of America v. Ginsberg (April 9, 1917) 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; In re Aprea (C. C.) 158 Fed. 702; In re Welsh et al. (C. C.) 159 Fed. 1014; In re Wolf (D. C.) 188 Fed. 519; United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353.

The judgment below, therefore, is reversed, and the case remanded, with directions to overrule the motion to dismiss and allow the defendant to answer the complaint, if he shall be so advised.

MEYER v. PACIFIC MACHINERY CO.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2928.

1. SALES ⟸479(7)—CONDITIONAL SALE—EVIDENCE.
   In an action for the possession of sawmill machinery claimed to have been delivered to defendant's predecessor in interest under a conditional contract of sale, with retention of title until paid for, evidence *held* to sustain a finding that the machinery was delivered under a contract reserving title.
2. SALES ⟸473(1)—CONDITIONAL SALE—RESALE—BONA FIDE PURCHASER.
   Where machinery sold under a contract of conditional sale was sold by the buyer's assignee for the benefit of creditors, a purchase by the cashier of a national bank made for the bank on account of its claim against the buyer lacked the essential elements of a bona fide purchase for value.
3. SALES ⟸477(1)—CONDITIONAL SALE—TITLE TO PROPERTY—WAIVER AND ESTOPPEL.
   Where the seller of machinery under a contract of conditional sale wrote a letter to the buyer stating that its lien was based on the theory that the buyer's refusal to give a machinery contract which could be filed under the registry law would not deprive it of the security which it would have lost had it failed to file such contract, and thereafter brought an unsuccessful suit in equity against the buyer claiming an equitable lien by

reason of the buyer's failure to comply with its conditional sale contract the letter and the suit did not waive the seller's claim of title to the property or estop it from asserting it, where there was no proof that the buyer had changed its position or in any way acted thereon.

4. FIXTURES ⟸22—CONDITIONAL SALE—MILL MACHINERY—"FIXTURE."

Mill machinery attached only by bolts and screws, and which could be removed without injury to the mill, was not a fixture within L. O. L. § 7414, which could not be removed.

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

In Error to the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Action by the Pacific Machinery Company against F. T. Meyer. Judgment for plaintiff, and defendant brings error. Affirmed.

Dolph, Mallory, Simon & Gearin and Hall S. Lusk, all of Portland, Or., and C. D. Latourette, of Oregon City, Or., for plaintiff in error.

Ira Bronson, J. S. Robinson, and H. B. Jones, all of Seattle, Wash., for defendant in error.

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

GILBERT, Circuit Judge. The defendant in error was the plaintiff in the court below in an action to recover the possession of certain sawmill machinery, claiming that the same was delivered to the Oregon City Lumber & Manufacturing Company, the predecessor in interest of the plaintiff in error, under a conditional contract whereby the title was to remain in the vendor until paid for. The parties will be designated herein plaintiff and defendant, as in the court below. On April 29, 1909, the plaintiff submitted to the lumber company the following proposition:

"We propose to furnish you machinery in accordance with attached specifications for the sum of $4,695, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be $1,500 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four, and five months, dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 8 per cent., notes to be indorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally."

The proposition was accepted in writing, and $100 in cash was paid to the plaintiff. The machinery was thereafter manufactured, and was delivered from time to time until July 23d, when the last installment was delivered. Upon that date the plaintiff made out a statement of the items and the cost thereof, amounting in all to $6,328.54, stating that $2,035.54 was due upon execution of the contract, and asking for a check for that amount less the $100 already paid, and that notes for the remainder be signed, "also contract." Accompanying the statement was a contract to the effect that the sale was conditional, and that the title was to remain in the vendor until the conditions were complied with. The lumber company refused to sign the contract or

to make the check, or to execute the notes, claiming that the lumber company was entitled to a discount for delay in shipping the machinery, and for changes therein, and that the contract submitted was not the contract agreed upon. On October 28, 1909, the lumber company made a general assignment of its property for the benefit of its creditors. On April 20, 1911, the assignees sold the mill property to the defendant. It was the contention of the defendant that the machinery was sold to the lumber company unconditionally, and that title thereto passed, that the defendant purchased the same without any notice or knowledge of the adverse claim of the plaintiff, and that neither the assignees in insolvency nor the defendant had any knowledge or notice of any defect in the lumber company's title to the property.

[1] As to the original understanding between the contracting parties of date April 29, 1909, the testimony is contradictory. The president of the lumber company testified that there was no agreement that the sale should be conditional. The agent of the plaintiff testified that he explained to the lumber company that, as a great part of the machinery was made up specially, it would have to be sold on a contract, retaining in the plaintiff the title to the machinery until it was paid for. The court below made no finding of fact as to this controverted point, but found that the words in the original proposition "transaction to be covered by machinery contract," together with the fact that but $100 was paid, and the absence of appropriate words of sale in the written proposal, sufficiently indicated that there was no intention to pass title at the time, and that the sale was conditional.

In view of the circumstances so alluded to by the court below and the testimony in the case, we find no ground to disturb the conclusion of that court that the machinery was delivered to the lumber company under an agreement and understanding that the title was to remain in the vendor until the machinery was paid for.

[2] We think also that the positive testimony of the agent of the plaintiff that notice of the plaintiff's claim was given to the defendant prior to the sale, when considered in connection with the uncertain denials of that testimony on the part of the defendant, justifies the conclusion that such notice was given. The defendant was the cashier of the First National Bank of Oregon City, and the property was bid in by him for the bank, on account of a large claim which the bank held against the lumber company. The purchase so made on behalf of the bank lacked the essential elements of a bona fide innocent purchase for value.

[3] Nor do we think that the evidence sustains the contention of the defendant that the plaintiff has waived its claim of title to the property or is estopped to assert the same. The contention is based: First, on a letter which the plaintiff wrote to the lumber company on November 13, 1909, in which the writer said that the plaintiff's position with reference to being "entitled to a lien upon the machinery which we put in the mill is based upon the theory that the refusal of the mill company to give us a machinery contract such as we could file under the registry law, will not be held by the courts to deprive us of the security which we would undoubtedly have lost had we failed to file such a con-

ditional sale through our own laches"; second, upon the fact that on September 28, 1911, the plaintiff brought an unsuccessful suit in equity against the lumber company and the defendant herein, alleging that the machinery had been delivered, that the transaction was secured by conditional sale contracts, that the lumber company never complied with its agreement, and that by reason of the facts the plaintiff has claimed an equitable lien upon the machinery. These facts, in the absence of proof that the defendant, in reliance thereon, changed his position in regard to the subject-matter of the controversy, or in any way acted thereon, are insufficient to establish waiver or create estoppel.

[4] The defendant contends that, when it bid in the property, the machinery had been made a fixture in the mill, and that therefore it cannot now be removed, citing section 7414, Lord's Oregon Laws. But the evidence shows that the machinery is attached only by bolts and screws, that it can be removed without injury to the structure, and that it is not a fixture within the meaning of the law. Landigan v. Mayer, 32 Or. 245, 250, 51 Pac. 649, 67 Am. St. Rep. 521; Henkle v. Dillon, 15 Or. 610, 17 Pac. 148.

The judgment is affirmed.

CHICAGO, M. & ST. P. RY. CO. et al. v. CLEMENT.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2900.

1. RAILROADS ⟸344(1)—CROSSING ACCIDENT—LAST CLEAR CHANCE—COMPLAINT.
   Complaint in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held* to state a cause of action under the last clear chance doctrine.
2. RAILROADS ⟸350(33)—CROSSING ACCIDENT—LAST CLEAR CHANCE—QUESTION FOR JURY.
   Under the evidence in action for death from collision, at railroad crossing, of engine with inclosed milk wagon, *held*, that whether the company had the last clear chance to avoid the accident was for the jury.

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Action by David Clement against the Chicago, Milwaukee & St. Paul Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The defendant in error was plaintiff in the court below in this action, there brought against the present plaintiffs in error as defendants, to recover for the loss of his son's earnings from the time that he was run over and killed by an engine of the Chicago, Milwaukee & Puget Sound Railway Company to the time he would otherwise have attained his majority. The jury awarded the plaintiff damages in the sum of $2,500, which amount the trial court ruled, on motion made for a new trial, was excesssive to the extent of $1,000. The excess was remitted by the plaintiff under permission granted in an order of the court, and judgment was entered for the plaintiff for $1,500 and costs.

George F. Shelton, Fred J. Furman, and A. J. Verheyen, all of Butte, Mont., for plaintiffs in error.

B. K. Wheeler and James H. Baldwin, both of Butte, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The only point made on behalf of the plaintiffs in error that we think worthy of mention is the contention that neither the complaint as amended nor the evidence justified the recovery on the ground that the defendant railway company had "the last clear chance" to avoid the fatal collision, and negligently failed in its duty to do so—the pleading and the evidence being based on that doctrine.

[1] In effect, the amended complaint alleges that at the time of the accident the deceased was of about the age of 15 years; that the defendant Woods was the locomotive engineer in charge of the engine, and the defendant Chappell was foreman of the engine crew, and was riding upon the engine operated by Woods, and directed its movements; that at about 4 o'clock in the morning of November 5, 1912, the boy was riding in an inclosed milk wagon drawn by a pair of horses which he was driving, and going in a northerly direction on Montana street in the city of Butte, Mont., toward and near the intersection of the railway company's tracks with the said street, and was not observant of the approach of the train passing along the track in a westerly direction, the engine of which train, in charge of Woods and Chappell, was being used at the time for switching purposes in the yards of the railway company; that both the engineer and Chappell saw the boy coming directly in the path of the engine, and that he was in danger of being struck by it, and that the boy was "unobservant of the approach of the said engine," and, after so seeing the danger, negligently drove the engine against the vehicle in which the boy then was, without giving him any warning of the approach of the train, and without lowering the gates which were at the said crossing; and that by reason of the said negligent operation of the engine the boy was so injured that his death resulted therefrom. We see nothing lacking in these allegations to constitute a cause of action.

[2] It appears from the evidence that at the time of the accident the engine was going westerly and backing, drawing 12 cars loaded with coal and coke, while the boy with the team was approaching the crossing on a road running northerly. East of the crossing, and extending to within a few hundred feet of it, there was a curve in the railroad, and there was also a slight grade there. The night was clear and crisp—cold enough for some frost on the rails. Woods, the engineer, was at his place in the cab, and Chappell was standing on a running board at the rear end of the engine to give the engineer such warnings as should be needed. The testimony of both of those men was given, as well as that of other witnesses.

According to the testimony of the engineer, before reaching the curve the train was moving at about 8 miles an hour, when he applied a little air to the brakes in order to take the curve properly, which

reduced the speed to about 6 miles an hour. No sand was applied for the reason, as stated by the engineer, that in rounding the curve the pipes would have thrown the sand outside of the rails; but there was other testimony that some sand would have fallen upon the rails. While on the curve, and when, according to the testimony of Chappell, about 400 feet from the crossing, the usual crossing signal of the road in question was given, consisting of one long and two short blasts.

Chappell testified, among other things, that he first saw the team when the train reached the point where the view was unobstructed, at a distance of about 330 to 340 feet; that it was going at a little jog of a trot of about 4 miles an hour, which was not slackened; that he could see that the lines were slack. "I could see the lines," said the witness, "after I—I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued in their same gait all the time that I seen them, until the engine struck the wagon." Chappell also testified that at the time of the collision the train was going about 5 miles an hour.

Neither Chappell nor the engineer, according to their testimony, saw the boy at all; but the engineer testified that he also saw that the lines were slack when he got within about 75 feet, and that the horses did not slacken their speed at all until the accident happened. He further testified as follows:

"When I got within about 150 feet or 200 feet of the crossing, I see a team driving up there along the road. The team was approaching at a pretty fair trot; I should judge the team was going 5 miles an hour. It was a covered wagon. I did not see any driver then. I first saw the occupant of the wagon after we stopped, and I got off of the engine and went back and met Mr. Chappell, and we went back to where the boy was laying between the cars; that is the first time that I saw anybody."

Chappell testified, among other things, that when he gave the first signal to the engineer to slow up he was approximately 150 feet east of the crossing, and that when he gave the signal to stop he was from 75 to 100 feet from the crossing; that there was what is called a stopcock on the back of the engine, about a foot away from where he was standing, the opening of which would have enabled the engine to have stopped quicker, which stopcock he failed to open; that he did not "realize that it was necessary, as the engineer could work the brakes from the engine with the same effect as opening the angle cock, until it was too late for me to reach down and open it with my hand," but that before jumping he tried to kick it open, but failed.

The engineer, Woods, also testified that when he got within 75 feet of the crossing, and saw that the team showed no signs of stopping, he did everything in his power to stop the engine; "that is," said the witness, "I throwed the air in the emergency; that is all that I could do. At that time the bell was ringing; the bell was ringing at the time of the collision. I observed the rails after the accident; when I got off the engine I noticed they were frosty. I did not use sand that

morning; it was on a curve; there was no use using sand, on account of the pipes are bent so that it would just throw it to the side of the rail."

There was also testimony given tending to show that, at the speed at which the train was moving at the time in question, it could have been stopped within from 15 to 25 feet; and Chappell testified that it could have been stopped within from 25 to 40 feet. There can, of course, be no doubt that the boy was guilty of contributory negligence; but his peril, according to the testimony, being known to the operators of the train, whether or not the company had the last clear chance to avoid the accident was, in view of the evidence, a question for the jury. Great Northern Railway Co. v. Harman, 217 Fed. 959, 133 C. C. A. 631, L. R. A. 1915C, 843, and numerous cases there cited.

The instructions upon that question given to the jury by the court below were full, clear, and correct, and we must, accordingly, affirm the judgment.

The judgment is affirmed.

MATTERS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 11, 1917.)

No. 4626.

1. CRIMINAL LAW ⊜278(1)—PLEAS IN ABATEMENT—IRREGULARITY IN DRAWING OF GRAND JURY.

   The right to file a plea in abatement for irregularity in drawing the grand jury, months after the indictment was returned, is not absolute, but subject to the sound discretion of the court, and its refusal to rule on such a plea, filed without leave seven months after the indictment was returned, and after two prior pleas had been ruled on, was not error.

2. BANKS AND BANKING ⊜257(3)—EVIDENCE—RELEVANCY.

   On the trial of an indictment charging a violation of the national banking law (Rev. St. § 5209 [Comp. St. 1916, § 9772]), by aiding and inducing the president of a national bank to issue a certificate of deposit without consideration to the bank, which defendant used in part payment of an indebtedness of his own, evidence showing the entire transaction between defendant and his creditor, who was a widow, and tending to show that he attempted to defraud her, was irrelevant to the issue, and its admission was prejudicial error.

In Error to the District Court of the United States for the District of Nebraska; F. A. Youmans, Judge.

Criminal prosecution by the United States against Thomas H. Matters. Judgment of conviction, and defendant brings error. Reversed.

John L. Webster, of Omaha, Neb., for plaintiff in error.

A. W. Lane, Sp. Asst. U. S. Atty., of Lincoln, Neb. (T. S. Allen, U. S. Atty., of Lincoln, Neb., on the brief), for the United States.

Before HOOK, SMITH, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Matters was convicted and sentenced upon an indictment which in 20 counts charged him with violating

section 5209, Rev. St. (Comp. St. 1916, § 9772). The indictment was attacked by motion to quash and by demurrer. The ruling of the trial court in sustaining the indictment is assigned as error, but counsel have not seriously pressed the assignment, further than to draw our attention to what seems to counsel a misconception on the part of the trial court of the essential elements of the crime denounced by the statute. We have examined the indictment and have no doubt of its sufficiency.

[1] The indictment was returned on June 8, 1914, and on December 19, 1914, counsel for defendant, without leave of court, filed a third plea in abatement. The trial court refused to rule upon this plea, and its refusal is assigned as error. The right to file a plea in abatement for irregularity in the drawing of the grand jury, so long after the return of the indictment, was not absolute, but was subject to the sound discretion of the trial court. Its refusal to rule upon the plea was equivalent to a refusal to allow the plea to be filed. In view of the fact that there had been two prior pleas in abatement ruled upon, and that the third plea was presented more than 7 months after the indictment was returned, there was no error in the refusal of the court to consider the plea. Agnew v. United States, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; Lowden v. United States, 149 Fed. 673; Moffatt v. United States, 232 Fed. 522, 146 C. C. A. 480; United States v. Rintelen (D. C.) 235 Fed. 787.

The sixteenth count of the indictment charged Matters with aiding and abetting one Luebben, president of the First National Bank of Sutton, Neb., in the misapplication of the funds of the bank, with the intent on the part of each to injure and defraud the same. It was alleged in this count that Luebben as president, without any consideration passing to the bank from any one, on June 4, 1913, issued a certificate of deposit at the request of Matters, payable to the order of one Mary E. Johnson, for the sum of $1,500; that Matters delivered the certificate of deposit to the payee thereof in payment of a debt and obligation owing by Matters to said Mary E. Johnson; that the amount of said certificate was subsequently paid by Luebben as president of the bank to the payee, without any consideration passing to the bank therefor. Matters at the trial did not dispute that the certificate of deposit was delivered by him to Mary E. Johnson in part payment of his personal debt, but contended that the certificate was obtained from the bank in a legitimate way. The prosecution, for the purpose of proving the charge made in the sixteenth count, placed Mary E. Johnson, the payee named in the certificate of deposit, upon the stand as a witness. Her testimony, reduced to narrative form, covers over 20 pages of the record, and cannot be detailed in this opinion. It is sufficient to say, however, that the witness, over the repeated objections and exceptions of counsel for Matters, was allowed to narrate the history of a financial transaction between herself and Matters, extending over a period of 3 years and 6 months prior to the issuance of the certificate of deposit.

The witness was allowed to testify that the debt of Matters to her was originally contracted early in the year 1910, by the delivery by

her to Matters of $2,500, the proceeds of her husband's life insurance, upon the representation by Matters that he would invest the money in Dakota lands and would double the money in a year, and that he would return it to the witness at any time on 30 days' notice; that when the year expired she asked Matters for a return of the money, but was put off from time to time until about the middle of December, 1912, upon the plea that sales had not been good; that at this time some of her friends undertook to assist her in securing the return of the money; that Matters finally promised to pay her the money on a particular day, and on that day she went to see him accompanied by Mr. Burkett and Mrs. Edwards. On that occasion, although Matters declared he had the money, he refused outright to pay the witness anything, for the reason, as he said, that he had not been given the proper notice; that Matters and the witness were members of the same church; that, when she was unable by her own efforts to obtain the repayment of the money from Matters, she took the matter to the church, and later she went to Matters' office, accompanied by the pastor and three members of the church, and that on this occasion prayer was offered up that Matters might be made to see the errors of his ways and repay the money; that the witness told Matters that he would sell his soul for a mess of pottage; that at this last interview Matters demanded an additional 30 days' time, and insisted upon writing the notice to be given by the witness to Matters that he should repay the money; that in writing this notice he incorporated what purported to be a receipt for a mortgage which the witness never had seen, and purporting to be signed by parties of whom she never had heard. In the brief of learned counsel for the government, the following observation is made in regard to this paper:

"The date of this was February 17, 1913, and was transparently an artful attempt to shift the form of the obligation, and to get away from the real character of the indebtedness."

The witness was further permitted to testify that the money was not paid at the expiration of 30 days, and about April 9, 1913, the witness went again to the office of Matters, accompanied by E. G. Jones; that the witness had visited the office of Matters for the purpose of collecting this money hundreds of times; that finally, upon the advice of Mr. Jones, the witness received from Matters, in settlement of her indebtedness against him, not only the $1,500 certificate of deposit, mentioned in the sixteenth count, but also another certificate of deposit, issued by the Sutton National Bank, for $2,000; that the certificate for $2,000 was unpaid when the bank failed; that witness received from Matters a deed for 160 acres of land in Banner county, Neb., on account of the certificate for $2,000; that she was never satisfied with the settlement, and had never been able to sell the Banner county farm for anything.

[2] If counsel for the government make the argument to us that the writing of the paper on February 17, 1913, was transparently an artful attempt to shift the form of the obligation and to get away from the real character of the indebtedness, it is very easy to infer what use was made of all this testimony before the jury. Matters

was not on trial for defrauding or attempting to defraud a widow of the life insurance money of her husband, and we think it was clearly prejudicial error to allow the whole transaction between the witness Mary E. Johnson and Matters to be investigated. The average citizen rightfully has little patience with those who violate the laws which regulate the banking institutions of the country, and for this reason, in this class of cases especially, the evidence should be confined to the allegations of the indictment.

It is claimed by counsel for the government that the evidence was relevant upon the question of the intent of the defendant in securing the issuance of the certificate of $1,500, for the reason that it showed that Matters was embarrassed and unable to pay his debts. We are of the opinion that, conceding the insolvency of Matters was material to the inquiry before the court, it did not justify the admission in evidence of the whole history of the transaction between Mary E. Johnson and Matters. The primary effect of the evidence was to show that Matters had attempted to defraud Mrs. Johnson out of her money. The effect, if any, of the evidence upon the real issue in the case being tried was so incidental and small that it would be lost, so far as the jury was concerned, in the presence of those features of the testimony to which we have adverted. The introduction of the evidence in our judgment prevented a fair trial.

There are many other grave errors assigned in the record, but as there must be a new trial, and the errors complained of may not occur again, we do not find it necessary to consider them.

For error in the admission of the testimony heretofore described, the judgment below is reversed, and a new trial ordered.

WHITE, Immigration Com'r, v. TOM YUEN.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2776.

ALIENS ⇐32(8)—DEPORTATION OF CHINESE—SUFFICIENCY OF IDENTIFICATION —STATUTE.

The mere ex parte statement of a resident of Mexico that he was a policeman there, and, when shown a photograph, stated that he knew the original, and had seen him at a race track in Mexico seven or eight months before he made the statement, the identification from the photograph not being made in the presence of its original, a Chinese sought to be deported for having entered the United States from Mexico in violation of Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 7, 25 Stat. 479 (Comp. St. 1916, § 4308), was not sufficient legal foundation for an order of deportation.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Petition for habeas corpus by Tom Yuen against Edward White, as Commissioner of Immigration at the Port of San Francisco. From

an order for petitioner's discharge, the Commissioner of Immigration appeals. Order affirmed.

See, also, 230 Fed. 656.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellant.

John L. McNab and Timothy Healy, both of San Francisco, Cal., for appellee.

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

HUNT, Circuit Judge. In August, 1915, Tom Yuen, a Chinaman, was arrested at Los Angeles charged with having re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the proper return certificate, and with having entered the United States in violation of section 36, Immigration Act February 20, 1907, c. 1134, 34 Stat. 908 (Comp. St. 1916, § 4285). Section 7, referred to, provides, among other things, that no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officers the return certificate conforming to prescribed requirements. If he possesses such certificate, he may be readmitted only at the point from which he departed the United States. After Tom Yuen's arrest there was an investigation before the immigration authorities, and it resulted that finally it was found that he had entered the United States from Mexico near El Paso, Tex., without inspection, about August 1, 1915, and re-entered in violation of section 7 of the exclusion act of September 13, 1888. The Secretary of Labor issued a warrant of deportation. Tom Yuen then applied for a writ of habeas corpus before the District Court at San Francisco, and set up that he had not had a fair and impartial trial and hearing by the immigration officers. His particular complaint was that there was no evidence that he had entered the United States within the last three years preceding the date of his arrest by the authorities; that he had resided in the United States as a registered Chinese laborer, having been registered at New York on March 2, 1894, and that he was the holder and owner of Chinese laborer's certificate of residence No. 28667. The commissioner of immigration at San Francisco denied the averments of the petitioner with respect to illegal detention, and by stipulation the testimony, evidence, exhibits, and record had and taken at the hearing before the immigration officials were made part of the record and submitted to the District Court. The court held that the petitioner was illegally restrained as alleged in his petition, and ordered his discharge. The commissioner of immigration appeals.

At the examination before the immigration officials the alien said that he had entered the United States at San Francisco about the year 1882; that he went from San Francisco to New York and remained in New York fourteen or fifteen years; that he then returned to San Francisco for a few months, and then went to Lordsburg, N. M., where he lived continuously for six or seven years working at night in a restaurant owned by Tom Tong; that he went from Lordsburg to Los

Angeles, where he was arrested. It is admitted that when arrested he had in his possession laborer's certificate of residence 28667 issued to Tom Yuen, laundryman, 264 West Forty-Seventh street in New York, March 21, 1894. He denied that he had ever been to Mexico. Several persons, Chinese and others, testified before the immigration authorities that they had never seen or heard of Tom Yuen at Lordsburg; on the other hand, some Chinamen and a Mexican, one Marquez, stated by affidavits filed that they had known and seen the man in Lordsburg for some years preceding July, 1915. The only direct evidence that Tom Yuen was seen in Mexico was an ex parte statement by M. O. Acosta, of Juarez, who said that he was a policeman at Juarez, and when shown a photograph of the alien said that he knew the original of the photograph, and had seen him at a race track in Juarez in the latter part of December, 1914, and the early part of January, 1915, or seven or eight months before he made his statement.

The issues in the case are very close to those presented in Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159, recently decided. That was the case of a Chinaman, laborer, ordered deported, and who applied for habeas corpus. The order of deportation was based upon the ground that the alien had entered the United States from Mexico in violation of section 7 of the before-mentioned act, without producing the proper return certificate. We there quoted the several pertinent provisions of the Immigration Act of 1888 and 1907 and the amendments, and held that the mere statement of one in Mexico who identified a photograph of the accused Chinaman, the identification from the photograph not being made in the presence of the accused, and with no opportunity in the accused to examine the identifying witness concerning the statements he makes, is not a sufficient foundation for an order of deportation under the Chinese exclusion law, and said:

"As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases; but we may properly consider the jurisdictional question of law whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under section 21 of the Immigration Act. In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review."

Counsel for the appellant make the point that the order of deportation of the Secretary of Labor was based also upon the ground that Tom Yuen was in the United States in violation of Act Feb. 20, 1907, 34 Stat. 898, having entered in violation of section 36 thereof without the inspection required by the act of all aliens, including Chinese, and argue that a finding in accordance therewith is sufficient to support the order of deportation. Section 36 (4285) provides in part that an alien who enters the United States except at the sea ports thereof or at such places as the Secretary of Labor shall designate, shall be deported as provided by sections 20 and 21 of the Immigration Act (Comp. St. 1916, §§ 4269, 4270). But, as we have found that there was no sufficient showing that the Chinaman ever entered the United States from Mexico, there is no sustained premise upon which the contention can rest.

The order appealed from is affirmed.

MOK NUEY TAU v. WHITE, Immigration Commissioner.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2944.

1. ALIENS ⟸32(2)—DEPORTATION—JURISDICTION OF EXECUTIVE DEPARTMENT. A Chinese alien who secured admission into the United States in violation of any of the provisions of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, may be deported on an order of the Commissioner of Labor under section 20 of that act (Comp. St. 1916, § 4269), at any time within three years.

2. ALIENS ⟸32(8)—PROCEEDINGS FOR DEPORTATION—FAIRNESS OF HEARING. Proceedings for deportation of a Chinese person *held* not unfair, and an order of deportation *held* sustained by the evidence.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus proceedings by Mok Nuey Tau against Edward White, Commissioner of Immigration for the Port of San Francisco. From an order denying his petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On November 9, 1915, the appellant, then nine years of age was admitted to the United States as the foreign-born son of Mock Juck, who was a native-born citizen of the United States residing at Oakland, Cal. A month after his arrival he went from San Francisco to the state of Alabama, where seven months later he was arrested on the executive warrant of the Secretary of Labor and was ordered deported on the ground that he was an alien found in the United States in violation of the act of February 20, 1907, as amended by the act of March 26, 1910 (36 Stat. 263, c. 128 [Comp. St. 1916, §§ 4244, 4247]). He appeals from the order of the court below sustaining a demurrer to his petition for a writ of habeas corpus.

[1] It is contended on behalf of the appellant that if he is illegally in the United States he is entitled to have that fact determined by the judicial branch of the government, and that the Secretary of Labor is without jurisdiction. The contention cannot be sustained. In United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354, it was held that Chinamen who had entered the United States surreptitiously, in a manner prohibited by section 36 of the Immigration Act of February 20, 1907 (Comp. St. 1916, § 4285), were subject to be deported by the Secretary of Commerce and Labor under the provisions of that act. Section 20 of the act provides that any

alien who shall enter the United States in violation of law shall, upon the warrant of the Secretary of Commerce and Labor, be taken into custody and deported to the country whence he came, at any time within three years after the date of his entry into the United States. The appellant, if the charge is true that he "secured admission by fraud, not having been, at the time of entry, the minor son of a member of the exempt classes," came in violation of that section of the Immigration Act of 1907, and is subject to deportation as provided in that act. Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159.

[2] It is contended that the hearing was unfair, in that no opportunity was given the appellant to be represented by counsel until after he had been subjected to an examination. It appears that at the close of his examination the appellant was informed that the warrant of arrest provided that he might be released on a bond in the sum of $1,000, and he was asked if he had friends who would give the bond. He answered: "Yes, Loo Yut is looking after that for me." And when he was informed that he had the right to be represented by an attorney, and asked if he wished to avail himself of that right, he said: "I don't understand that. I will see Loo Yut." Loo Yut was thereupon examined. He testified that the appellant was living with him at Alexander City, that Mock Juck was the appellant's father, and that he had corresponded with Mock Juck, who resided at Oakland, Cal. Loo Yut, when he was informed that the appellant, when told that he had the right to be represented by an attorney, had said that he would see him (Loo Yut) about it, answered: "No, I will not employ a lawyer now. I will wait and see what they do in Washington." The appellant was then released on a bond in the sum of $1,000, to obtain which Loo Yut deposited $1,000 in cash.

The proceedings before the immigration officials are not required to conform to judicial procedure. It was not necessary that the appellant be represented by a guardian ad litem. It was proper to subject him to an examination. He was not entitled to be represented by an attorney at the preliminary examination. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165. The examination furnishes no evidence that any unfair advantage was taken of him. He was called upon to answer the same questions which he had answered eight months before on his application for admission. His answers were widely different from those which he had given before. It was a legitimate inference which the officers drew from the wide and marked discrepancies between the answers that the appellant had been coached for his prior examination, and that in the interval he had forgotten what he had been taught to say. It would serve no useful purpose to review the discrepancies in detail. They were sufficient to justify the conclusion that the appellant had secured admission to the United States through fraudulent representations. The fact that the inspector in charge added that since the hearing information had been obtained, to the effect that the appellant was the son of Loo Gee of Birmingham, Ala., and that Loo Yut was his uncle, and that the information was received in a confidential manner from one Chung Kee

Lung, "but no statement could be secured from him for obvious reasons," does not appear to have influenced the final decision.

The discrepancies in the appellant's statements are sufficient to answer the contention of his counsel that the warrant of deportation was unsupported by evidence.

The judgment is affirmed.

ROSS, Circuit Judge (concurring). I concur in the judgment and the opinion of the court, except in that clause thereof which holds that the appellant "was not entitled to be represented by an attorney at the examination."

THE SAMARINDA.

(Circuit Court of Appeals, Fourth Circuit. July 24, 1917.)

No. 1523.

COLLISION ⊂=94—OVERTAKING VESSELS—FAULT.

A collision between an overtaking and the overtaken vessel in a channel at least 600 feet wide *held* to have been due solely to the fault of the overtaking vessel, which was much the larger, in changing her course more than was necessary at a bend in the channel, so as to converge on the course of the smaller vessel, although the two had been running side by side for two miles.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suits in admiralty for collision by C. W. Visser, master and claimant of the steamship Samarinda, and the Kingdom of the Netherlands, against the steamer Brandon, the New England Coal & Coke Company, claimant, with cross-libel against the Samarinda. Decree for respondent and cross-libelant, and libelants appeal. Affirmed.

For opinion below, see 237 Fed. 252.

R. E. Lee Marshall, of Baltimore, Md., for appellant Visser.

John Henry Skeen, of Baltimore, Md., for appellant The Kingdom of the Netherlands.

Edward E. Blodgett, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on brief), for appellee.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. A collision occurred on May 30, 1916, about 4:25 p. m., nearly opposite buoy C–1–B in the turn between Brewerton channel and Cut-Off channel in the Patapsco river, between the Dutch steamer Samarinda and the American steamer Brandon. Both ships were full loaded; the Brandon with coal, the Samarinda with grain belonging to the kingdom of the Netherlands. Both ships were badly damaged, and a loss on the cargo of the Samarinda was sustained by the owner thereof. In the court below libel and

amended libels were filed by the master and claimant of the Samarinda against the Brandon, by the New England Coal & Coke Company, sole owner of the Brandon, against the Samarinda, and by the kingdom of the Netherlands, as owner of the cargo on the Samarinda, against the Brandon. The usual order of consolidation was made, a hearing in open court had, and the matter comes here on appeal from the lower court's decree ascertaining the Samarinda to have been solely in fault.

The Brandon was much the smaller vessel. She left her anchorage first. At the entrance of the Ft. McHenry channel she was at least three-fourths of a mile ahead of the Samarinda; but the latter, being the faster vessel, gained on her until, after passing the turn buoy marking the intersection of the Ft. McHenry with the Brewerton channel, the Samarinda was not more than half a mile behind. There she gave the passing signals, which were answered by the Brandon. The Samarinda came up with the Brandon about opposite the entrance to the Sparrows Point channel, something like a mile and a half from the point where the passing signals were exchanged. Instead, however, of passing each other, the two vessels for the next 2 miles ran side by side in Brewerton channel. This channel was 600 feet wide. The Brandon was on the starboard and the Samarinda on the port side of the channel's center line, and each claims to have run within from 40 to 75 feet of the buoys on their respective sides. They must have been, therefore, from 300 to 400 feet apart. The engines of neither of the vessels were touched until shortly before the collision, when those of the Samarinda were speeded up and those of the Brandon slowed down. Under all ordinary conditions the Samarinda at the point of collision should have been more than a quarter of a mile beyond the Brandon. It is impossible to definitely determine why she was not. In our view of the case it is not necessary for us to attempt to account for this anomalous situation.

Side by side the two ships came to the Turn channel, which is 1¾ compass points more southerly than the Brewerton. Here both ships changed course, the Brandon making a very natural and obvious 1¾-point change in order to conform to the course of the channel, which kept her course still only about 50 feet from the channel buoys on her side. On the other hand, the Samarinda changed her course 2 full points, which inevitably caused her to converge to the extent of a quarter compass point upon the course of the Brandon. In the distance from buoy 3–B, where this change was made, to 1–B, where the collision occurred, this convergence reduced the distance between the ships 140 feet. At the time of the collision the ships were not to exceed 160 feet, and more likely not more than 60 feet, apart. The Samarinda had forged ahead about two-thirds of her length, or 300 feet. Then it was that the bow of the Brandon sheered in and struck the Samarinda with her anchor and the bluff of her bow about 68 feet forward of her stern. The contest in the case has waged over the inducing cause of this action on the part of the Brandon; she claiming that it was inevitable by reason of the suction force exerted over her, the smaller vessel, by the much larger one. On the other hand, the Samarinda charges it was either deliberate or the result of insufficient

rudder area, by reason of which she steered badly, and was liable to and did get out of hand and control.

In our judgment the learned judge who heard the cause below justly and rightly reached the conclusion that the fault was that of the Samarinda in changing its course, after running side by side for 2 miles with this smaller vessel, so as to converge upon and bring about a condition where she must either pass or crowd the Brandon out of her course in the channel, or run the risk of the collision which occurred.

We cannot more clearly and concisely set forth the reasons for this conclusion than has been done by the trial judge in these words:

"Doubtless the 2-point change by the pilot of the Samarinda was the one usually there made. Under ordinary circumstances, it is a convenient one. An inspection of the chart will show that such change would bring the Samarinda to the entrance of the Cut-Off channel on the starboard side of the channel, the proper position for her to take with reference to vessels which might be coming up inward bound. But the same inspection will show that there was no necessity to make such a change in course when it was made, for the buoy line on the northern and easternmost or Samarinda side of the Brewerton channel extends more than a half a mile beyond 3–B to 14 K, and there was plenty of room for the pilot of the Samarinda to keep entirely clear of the course of the Brandon. In view of the proximity of the latter vessel, the Samarinda had no right to put herself on a course which would necessarily converge upon that of the Brandon. Of course, if the Samarinda drew ahead of the Brandon sufficiently to be clear of her before she came close enough in any wise to embarrass her navigation, no harm would result; but when the Samarinda chose unnecessarily to lay her course toward that of the Brandon, she, the overtaking vessel, assumed any risk which that maneuver might occasion. In view of the way in which the two vessels had kept side by side for 2 miles or more, the pilot of the Samarinda was not justified in assuming that, before the two courses came close together, he would be well ahead of the Brandon and out of her way. It is true that the Samarinda was the faster vessel, and he not unlikely knew that fact; but, if he did know it, he should also have appreciated that something out of the ordinary was happening, when the two ships had for so long kept side by side. The widening of the channel at the time gave him an opportunity to break whatever force was keeping the two vessels together, by putting a greater distance between them. He decided to bring them close together."

The decree appealed from will be in all respects affirmed.

Affirmed.

QUAN YOU v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2945.

1. ALIENS ⇐32(2)—DEPORTATION OF CHINESE—JURISDICTION.
The Commissioner of Labor has authority, under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (Comp. St. 1916, § 4269), to order the deportation of a Chinese alien found illegally in this country, within three years after his entry.

2. ALIENS ⇐32(8)—PROCEEDINGS FOR DEPORTATION OF CHINESE—FAIRNESS OF HEARING.
Proceedings for deportation of a Chinese alien *held* not unfair, and an order for his deportation sustained by the evidence.

⇐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 First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Quan You, otherwise known as Low June, against Edward White, Commissioner of Immigration at the port of San Francisco. From an order dismissing the petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The judgment from which this appeal comes sustained a demurrer to a petition in behalf of Quan You, otherwise known as Low June, a native of China, for a writ of habeas corpus, and dismissed it.

[1] This Chinese alien was ordered deported by the Secretary of Labor on the ground that he was found to be illegally in this country, and the first of the two points made in support of the appeal is that the secretary had no jurisdiction in the premises, and that the person so charged to be illegally in the United States was entitled to have the fact determined by the judicial branch of the government. That point is well answered by the cases of Backus v. Owe Sam Goon, 235 Fed. 847, 149 C. C. A. 159, and United States v. Woy You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

[2] The only other point made on behalf of the appellant is that the hearing of the question before the executive officers of the government was unfair, in that he was not "notified of his right to inspect the record, or being informed of the evidence presented against him, or of his right to be present at any future hearings to be had, and being prevented by the inadequacy of his arraignment from knowing how he could be benefited by having counsel to defend him." The record shows that it was stipulated by and between the attorneys of the respective parties that the original immigration record should be considered as part and parcel of the petition for the writ of habeas corpus, and that record was so considered by the court below, and has been brought and submitted here, pursuant to the same stipulation.

Rule 22, promulgated by the Bureau of Immigration of the Department of Labor, provides in part (subdivision 4, paragraph "b") as follows:

"During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief.

If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor."

Referring to that rule, this court said in the case of Wong Back Sue v. Connell, 233 Fed. 659, 662, 147 C. C. A. 467, 470:

"While this rule may be so arbitrarily applied by immigration officials as to deprive an alien of a full and fair hearing and violate his fundamental rights, as shown in Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47, in our opinion the rights of the petitioner herein have not been transgressed. His examination appears to have been simply and fairly conducted. The questions asked were confined to material matters, and were expressed in very direct language, apparently used with no desire on the part of the inspector to entrap or oppress or 'catch' the alien. The question, therefore, is whether the fundamental rights of the alien were infringed by the action of the immigration officer in not telling the alien that he could inspect the warrant of arrest and that he had a right to counsel, and inquiring if he wished to avail himself of the right, until after direct preliminary examination of the alien by the inspector had been practically ended. If there were nothing in the record to counteract the injustice of such a course of procedure, we would be very strongly disposed to hold that the alien was not given a fair hearing, as required by law. But it expressly appears that, before any testimony was heard by the inspector, the warrant was read and explained to the alien, and that he was advised of the nature of the proceedings, and that he could be released on bail during their pendency. And while it would seem to be just that prior to a hearing before the immigration officials an alien should also be told of his right to have counsel at the hearing, yet, considering the information given to this petitioner, we cannot say that omission to tell him of his right until after material questions were put and answered invalidated the whole proceeding."

Applying the foregoing observations, with which we are entirely satisfied, to the voluminous record of the proceedings had and taken before the executive officers in the present case, which included the testimony of the petitioner, we think it too obvious to admit of doubt that at the time the appellant obtained, in June, 1912, a return certificate from the government, based upon the representation that he was a member of a certain mercantile firm in California (upon which certificate he was admitted upon his return to this country in 1916), he was not a merchant, but a laundryman in the state of Alabama, and had been such for a number of years, and to which character of labor he returned upon coming back to the United States, and in which he was engaged at the time of his arrest.

It is unnecessary to refer in detail to the record, which we think shows that he had sufficient opportunity to present whatever case he had, and that the order for his deportation was in accordance with the requirements of the law.

The judgment is affirmed.

CHEW HOY QUONG v. WHITE, Immigration Com'r.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917. Rehearing Denied October 8, 1917.)

No. 2926.

1. ALIENS ⟸32(11)—HEARING ON APPLICATION FOR ENTRY—REHEARINGS.
On application of a Chinese alien for entry, the commissioner has jurisdiction to order rehearings until the facts are sufficiently developed to afford a basis for his judgment.
2. ALIENS ⟸32(12)—DEPORTATION OF CHINESE—DENIAL OF ADMISSION—FAIRNESS OF HEARING.
An order denying admission to this country of a Chinese alien *held* to have been made after a fair hearing and to be sustained by the evidence.

Appeal from the District Court of the United States for the Southern Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Chew Hoy Quong against Edward White, Commissioner of Immigration at the Port of San Francisco. From an order sustaining a demurrer to the petition, petitioner appeals. Affirmed.

Dion R. Holm and Roy A. Bronson, both of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The court below sustained a demurrer to the petition of the appellant for a writ of habeas corpus on behalf of Quok Shee, who he alleged was his wife, and who had been denied admission to the United States and ordered deported to China. The proceedings before the immigration officials touching the right of Quok Shee to land were presented in court and deemed a part of the petition.

[1] The appellant contends that the records show, and that the fact was that Quok Shee was denied a full and fair hearing, and that the commissioner exceeded his power, in that after a first hearing and a favorable report by an immigrant inspector, a second hearing was ordered, and a contrary conclusion was reached. As to the latter contention, it appears that on September 5, 1916, the immigration inspector who conducted the first hearing recommended favorable action, notwithstanding that he noted a discrepancy in the testimony. Six days later the commissioner ordered a rehearing, and on September 15, 1916, upon the evidence thereupon adduced, the inspector reported unfavorably to the applicant, and on the same day the commissioner found that the existence of the relationship claimed was not established to his satisfaction, and denied the application. We entertain no doubt that the commissioner had jurisdiction to order rehearings until the facts were fully developed, or at least sufficiently developed to present a basis for his judgment. We find nothing in the record to justify the charge that the hearing was not full and fair.

[2] The appellant contends that the case should have been reopened to afford him opportunity to explain the discrepancies in the testimony of the appellant and Quok Shee. The application to reopen was denied for the reason, as stated, that there was no apparent ground for assuming that any contradictory statements appearing in the record were due to a misunderstanding of the questions propounded, and that the newly proffered affidavit of the appellant was not new evidence, within the meaning of the regulations. The appellant's contention that the testimony was disregarded, and that there was no substantial evidence on which to base the order cannot be sustained. While it is true that the appellant and Quok Shee agreed in their testimony as to very many of the points concerning which they testified, it is also true that as to certain items there were distinct contradictions. They claim to have lived together as husband and wife for a period of seven months before leaving China. In their testimony they differed as to the number of times the appellant visited his native village during that period, as to the number of times that the adopted son of the appellant visited him, as to the question whether a member of the firm occupying the building in which they lived accompanied them to the steamer, as to who occupied the second floor of the building in which they lived, as to whether there was a fourth floor to the building, and as to other matters of like nature. In view of those discrepancies, it should not be said, as a matter of law, that there was no evidence to justify the conclusion of the immigration officials. They deemed those discrepancies "important and material," and their conclusion does not appear to rest upon the suspicious fact, adverted to in the report of the Assistant Commissioner General, that the appellant was 56 years of age, while Quok Shee was but 20, which omission or postponement on the appellant's part to comply with the ancient and established usage and customs of Chinese until so late in life was said to lend "suspicion to the relationship," since "Chinese customs frown upon the marriage of old men with young girls."

The judgment is affirmed.

UNITED STATES v. CANNON et al.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

PUBLIC LANDS ⇐120—SUIT FOR CANCELLATION OF PATENT—PROOF OF FRAUD.

A finding of the trial court on conflicting evidence, on the trial of a suit for the cancellation of a homestead patent, that the evidence did not support the allegations of fraud, affirmed.

Appeal from the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Suit in equity by the United States against Harry Cannon and Walter D. Storey. Decree for defendants, and complainant appeals. Affirmed.

Burton K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and James H. Baldwin, Asst. U. S. Atty., of Butte, Mont., for the United States.

C. L. Harris and Johnston & Coleman, all of Billings, Mont., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The United States brought suit against the appellees to cancel a patent issued to the appellee Cannon on June 26, 1911, for a homestead entry made by Cannon on May 1, 1909, on land which thereafter, on August 5, 1912, Cannon conveyed to the appellee Storey. The complaint alleged that Cannon obtained the patent by fraudulent representations made in his final proofs as to his residence on the land and his cultivation thereof, and that Storey purchased with full knowledge of the fraud. The court below, upon the conflicting evidence, found for the appellees, and dismissed the complaint.

The appellant contends that the court erred in finding that the evidence was insufficient to sustain the allegations of the complaint. We have carefully examined the testimony, which was all taken in open court, and we think the case is clearly one for the application of the rule that the findings of fact of a court of equity will not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or grave mistake has been made in the consideration of the facts. The contention of the appellant rests upon certain suspicious circumstances in the case, and the negative testimony of witnesses who at intervals traveled across the premises so occupied as a homestead, between May, 1909, and January, 1911, and did not see the homestead claimant occupying the same nor discover evidences of his occupation other than the fact that some of the land had been cultivated. The suspicious circumstances relied upon are that prior to 1909 Cannon had been in Storey's employment; that prior to that year Storey had made a homestead entry on the same tract of land; that when Storey relinquished his homestead claim on May 1, 1909, he and Cannon went to the land office on the same train, and immediately after Storey's relinquishment Cannon filed his homestead entry; that during the time between entry and patent, Cannon was engaged in training horses on the premises of Storey, about a mile and a half from the homestead, and for that purpose rented stable room from Storey, for which he paid by the day, and a part of the time boarded at Storey's, for which he paid by the week; that the cultivation of the land was done by Storey, who furnished teams and seed for that purpose on an agreement whereby he was to receive the whole of the crop; that 16 months after making his final proof, Cannon, in consideration of $1,000, conveyed the lands to Storey. All these facts are reconcilable with the theory that the appellees acted in good faith. It was shown, and it was not contradicted, that after final proof Cannon made substantial improvements on the place and resided there for more than a year, and there was evidence, which the court below credited, that Cannon, prior to the final proof, continuously resided upon the land, although he was not continuously present thereon, and there

was evidence tending to show that the improvements and cultivation of the homestead after entry and before final proof were not substantially misrepresented to the officers of the land office.

The decree is affirmed.

MIAMI COPPER CO. v. MINERALS SEPARATION, Limited.

MINERALS SEPARATION, Limited, v. MIAMI COPPER CO.

(Circuit Court of Appeals, Third Circuit. May 24, 1917.)

Nos. 2180, 2181.

1. PATENTS ⟸328—INFRINGEMENT—PROCESS OF CONCENTRATING ORES.
The Sulman, Picard, and Ballot patent, No. 835,120, for a process of concentrating ores, known as the air flotation process, which consists in mixing the powdered ore with water containing a fraction of 1 per cent. on the ore of oil having an affinity for the ore particles, impregnating the mixture with air, agitating the same until the oil-coated mineral matter forms into a froth composed of air bubbles, and separating the froth from the remainder of the mixture, construed, and claims 1 and 12 *held* infringed.

2. PATENTS ⟸232—INFRINGEMENT—PROCESS PATENT.
A defendant, having used the steps of a patented process until, if it stopped there, it would produce the result of the patent, cannot avoid infringement by taking an additional step, even though that step, if taken alone, avoids the patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 365.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF CONCENTRATING ORES.
The Sulman, Greenway, and Higgins patent, No. 962,678, for a process of concentrating ores, which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral frothing agent, agitating the mixture to form a froth, and separating the froth, the difference between such process and that of patent No. 835,120 being in the employment of a mineral frothing agent, instead of oil, was not anticipated and discloses invention. Claims 1, 2, 5, and 6 also *held* infringed.

4. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF CONCENTRATING ORES.
The Greenway patent, No. 1,099,699, for a process of concentrating ores, which is a modification of that of patent No. 962,678, was not anticipated, and discloses patentable invention; also *held* infringed.
Buffington, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Suit in equity by the Minerals Separation, Limited, against the Miami Copper Company. Decree in part for each party, and both appeal. Reversed on complainant's appeal, and affirmed on defendant's appeal.

For opinion below, see (D. C.) 237 Fed. 609.

Henry D. Williams, William Houston Kenyon, and Lindley M. Garrison, all of New York City, Frederick D. McKenney, of Washing-

ton, D. C., and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Walter A. Scott, of Chicago, Ill., Louis Marshall, of New York City, George Gray, of Wilmington, Del., Thomas F. Sheridan, of Chicago, Ill., and John F. Neary, of Wilmington, Del., for defendant.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. These are appeals from a decree of the District Court in an action brought by Minerals Separation, Limited, a corporation of Great Britain, against the Miami Copper Company, a corporation of Delaware, charging infringement of United States Letters Patent No. 835,120, issued to Sulman, Picard and Ballot, November 6, 1906; No. 962,678, issued to Sulman, Greenway and Higgins, June 28, 1910; and No. 1,099,699, issued to H. Greenway, June 9, 1914, and owned by the plaintiff.

Of the claims in suit the court found claims 1 and 12 of the first patent valid and infringed, and claim 9 invalid; claims 1, 2, 5 and 6 of the second patent valid and infringed; and claims 1 to 12 of the third patent invalid. The decree being in parts adverse to both parties, both appealed, presenting for review the same claims, excepting claim 9 of patent No. 835,120, with respect to which the appeal is abandoned.

As both parties are appellants, we shall speak of them as they stood in the court below.

The three patents in suit, to which we shall refer in the order of their issue as first, second and third, are for processes relating to water concentration of ores. They have for their object, stated generally, the separation of metalliferous matter from gangue or barren matter in ore pulp, by means of oils, fatty acids or other substances which have a preferential affinity for metal over gangue. The first patent, while employing the known selective affinity of oil for metal, is based upon a discovery that that affinity is greatest and metal recovery highest when the proportion of oil to ore is relatively least, and upon the disclosure that that property or characteristic may be brought into action and commercially utilized by agitating the ore-bearing pulp until a foam or froth arises to the surface, carrying with it and holding for recovery the extracted metal.

The process of the second patent is distinguished from the process of the first in that the frothing agent is soluble and develops in solution (when agitated to a froth) a selective affinity for metal similar to that of oil, the insoluble frothing agent of the first patent.

The characteristic of the process of the third patent is that concentration may be effected in the cold and without the aid of acid by the admixture of an aromatic hydroxy compound such as phenol or cresol in the place of the insoluble and soluble frothing agents of the other patents and by agitation of the pulp to a froth.

We are aware that this very brief statement of the distinguishing features of the three patents is technically inadequate and will be understood only by those familiar with the history and development

of the art of ore concentration. As that art has been extensively considered and elaborately discussed by scientists and courts both in this country and abroad in cases in which the invention in suit was involved,[1] we shall not make even a summary of the art or rehearse the history of this litigation as it has progressed in widely separated parts of the world, but shall rather adopt the whole litigious literature of the invention as matter preliminary to the consideration of the particular issues in this case, repeating only so much as may be necessary to throw light on this new chapter.

First Patent.

[1] The invention of the first patent in suit is based upon a discovery of an wholly unexplained phenomenon arising from the agitation of ore pulp containing oil and air in certain proportions. This was a discovery in an art in which it was well known that the elements of oil, air and agitation possessed certain characteristics and produced certain results.

Haynes in British patent No. 488 of 1860 first suggested the use of oil in water concentration of ores by pointing out the affinity which oils have for metallic substances in preference to gangue. Carrie J. Everson showed by Letters Patent No. 348,157, that a small quantity of acid in the pulp aids oil in distinguishing between metal and barren material with which it comes in contact. Elmore (Letters Patent No. 676,679), Kirby (Letters Patent No. 809,959), Froment (British Patent No. 12,778 of 1902), Cattermole (Letters Patent No. 763,260), Sulman and Picard (Letters Patent No. 793,808), and others, employed the known affinity of oil for metal in ore concentration processes by using oil in proportions varying from 2 per cent. to 300 per cent. on the ore and recovering the oil-coated metal particles by causing them to rise to the top or sink to the bottom of the pulp.

Agitation of oil-impregnated pulp was old in the art. It was employed by Haynes, Everson, Cattermole, Froment, and Sulman and Picard. In these processes, agitation was either gentle or thorough, but never great, and while always employed to produce a thorough oiling of the metal, it was used in different degrees for the sole purpose of causing the metal particles to rise or sink.

Air and other gases were also known and were developed in the form of bubbles to supplement the natural buoyancy of oil and to assist

[1] British Ore Concentration Syndicate, Ltd., v. Minerals Separation, Ltd., 25 R. P. C. 741, High Court of Justice, Chancery Division, affirmed after intermediate reversal in the Court of Appeals by the House of Lords in Minerals Separation, Ltd., v. British Ore Concentration Syndicate, Ltd., 27 R. P. C. 33; Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., Supreme Court New South Wales, 31 R. P. C. 216, 217; Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., 31 R. P. C. 206, Privy Council British Empire; Minerals Separation, Ltd., v. Hyde, 207 Fed. 956 (D. C. Montana); Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 C. C. A. 576 (C. C. A. 9th Circuit); Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286; Minerals Separation, Ltd., v. Miami Copper Co., 237 Fed. 609 (D. C. Delaware).

the oil-coated particles to the surface. This use of air was disclosed by Froment in 1902 and again by students of the University of California in the California Journal of Technology in 1903, and by Sulman and Picard in the patent referred to (No. 793,808), commonly called the Bubbles Patent.

Thus it may be stated generally that in the prior art, oil was used for its known selective affinity for metal, agitation to mix the oil with the metal, and air to supplement the buoyancy of oil in raising oil-coated metal particles to the surface. To this extent had the art of oil flotation advanced when the patentees entered it, having reached the commercial stage in only two processes, Elmore and Cattermole, representing respectively metal-flotation and metal-sinking processes, and having reached the stage of success in none.

The Elmore process was known as the bulk-oil or oil-buoyancy process. It required from 100 per cent. to 300 per cent. of oil on the ore, that is, from 2,000 to 6,000 pounds of oil to 2,000 pounds of ore, and called for a gentle movement or agitation of pulp in a way that would bring the oil and metal in contact without breaking the oil bulk, and relied for metal recoveries on the buoyancy of the oil (due to the lesser specific gravity of the large volume) to raise and hold on the surface the metal which by affinity it had extracted from the ore. This was an oil-flotation process. It was not successful because the cost of the considerable quantity of oil used and not recovered made its practice commercially prohibitive.

The Cattermole process was just the reverse of Elmore. While this process depended upon the utilization of the same selective affinity of oil for metal, the quantity of oil was relatively small, being from 3 to 6 per cent. on the ore; but the agitation was considerable, having for its object not the retention of the oil in bulk as in Elmore, but its separation and thorough distribution through the pulp, with the object and result of causing the metal particles to be brought together and agglutinated with the metal slimes, forming granules of a size and specific gravity sufficient to cause them to sink, where they were recovered while the gangue was carried off the surface by an up-flow. This was the metal-sinking process. It had a doubtful success in the concentration of copper and zinc ores of high metal content, but like the Elmore process it was impracticable because unprofitable for the concentration of ores of medium and low grades.

It was while the patentees were engaged in developing this process with a mechanical appliance known as a Gabbett Mixer, by which the pulp was agitated, that the discovery of the first patent was made. It was found that when the proportion of oil was reduced below 2 per cent. the agglutination of Cattermole ceased, and metal recoveries ceased also. This so disturbed the theory upon which the patentees were working that they at once embarked on a series of experiments, in which the quantity of oil was progressively reduced from the Cattermole proportion and the agitation varied in intensity and duration. In experiments with oil in proportions just under the Cattermole proportion nothing resulted. The Cattermole concentration was lost and no other concentration was obtained. When in the line of experiments,

the proportion of oil to ore was reduced to 1.5 per cent., a "float" appeared. At 1.04 per cent. "still more float" appeared. At .32 per cent. the "float vastly increased." At .10 per cent., the float again "vastly increased." It thus developed that in using oil at .10 per cent. or even at .05 per cent. on the ore, and after violently agitating the pulp from two and one-half to ten minutes, there arose to the surface when the pulp was brought to rest a thick froth or foam of oil-coated air bubbles carrying oil-coated metal particles to the extent of about 90 per cent. of the metal content, the foam being sufficiently stable to permit removal and metal recoveries.

This was an entirely new result based upon a phenomenon then unknown and still unexplained. It constituted discovery. It was a discovery that promised what has since been accomplished—a change in the art of oil flotation from laboratory experiments and mill failures to commercial success. Its great value especially in zinc and copper ore concentration met with world-wide recognition. The art immediately adopted it and paid tribute to it, either by yielding to the patents covering it or by challenging them in litigation commensurate in scope and importance with the field of the discovery itself. The grounds upon which the validity of the patents was attacked were, first, that the phenomenon was already known, and second, that the patents disclosed no novel means for reducing it to practical use. With the decision of the Supreme Court sustaining the validity of the patent, the two grounds of attack disappeared, leaving open, however, the question whether the discoverers have wholly covered their discovery by a patent, and if not, then how far have they appropriated it to their exclusive use, within the principle that in its naked sense a discovery is not patentable and can be embraced in and controlled by a patent only when and to the extent that its principle is developed into invention by the disclosure of a medium or means which brings it into practical action. Morton v. New York Eye Infirmary, 5 Blatchf. 116, Fed. Cas. No. 9,865.

The particular medium by which and through which the discoverers brought into practical action and put to practical use the principle of their discovery, is a process disclosed in their patent. The process described by the claims in suit, including the elements we have numbered and the distinguishing features we have italicized, is as follows:

"1. The herein-described process of concentrating ores which consist (1) in mixing the powdered ore with water, (2) adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore), (3) *agitating* the mixture *until* the oil-coated mineral matter *forms* into a froth, and (4) separating the froth from the remainder by flotation.

"12. The process of concentrating powdered ore which consists in separating the minerals from gangue (1) by coating the minerals with oil in water containing a fraction of one per cent. of oil on the ore, (2) *agitating* the mixture *to cause* the oil-coated mineral *to form* a froth, and (3) separating the froth from the remainder of the mixture."

The claims disclose the process. The specification, as usual, throws light upon the process by distinguishing it from the prior art, describ-

ing its operation and result, and referring to illustrations of its practice in two apparatus, in one of which agitation and consequent aeration and fomentation are accomplished by mechanical means.

The validity of this patent and of its equivalent abroad has been widely attacked and ultimately sustained. As our task is to interpret the scope of the United States patent we shall concern ourselves only with the decisions of the courts of this country.

The first suit on the patent was brought in the District Court of the United States for the District of Montana. Minerals Separation, Ltd., v. Hyde, 207 Fed. 956. The validity of the patent was attacked on the ground of anticipation by the prior art, but the court held the patent valid and found invention in the novel and useful combination of oil, air and agitation. Minerals Separation, Ltd., v. Hyde, 207 Fed. 956, 961.

The United States Circuit Court of Appeals for the Ninth Circuit, reversing on appeal the decree of the District Court, found the patent invalid, on the ground that its only novelty lay in the reduced quantity of oil, that this was an improvement only in degree and therefore did not involve invention. Hyde v. Minerals Separation, Ltd., 214 Fed. 100, 130 C. C. A. 576.

The case was then removed by certiorari to the Supreme Court of the United States, and while there awaiting hearing, the action at bar was instituted in the District Court of the United States for the District of Delaware. Minerals Separation, Ltd., v. Miami Copper Co. (D. C.) 237 Fed. 609.

In this case the District Court held the patent valid and infringed, finding (in opposition to the Circuit Court of Appeals for the Ninth Circuit) patentable invention in the use of oil in the minute proportion of the patent.

Shortly thereafter the Supreme Court heard argument and entered a decree in Minerals Separation, Ltd., v. Hyde, 242 U. S. 261, 37 Sup. Ct. 83, 61 L. Ed. 286, by which it reversed the decree of the Circuit Court of Appeals for the Ninth Circuit and held the patent valid, finding invention, as we read the opinion, in the co-action of the critical proportion of oil and air effected by "an agitation greater than and different from that which had been resorted to before," resulting in a froth concentrate of economical value.

Following the decree of the Supreme Court in Minerals Separation, Ltd., v. Hyde, this case was argued before us. The decree of the Supreme Court, with its accompanying opinion in the Hyde Case, materially changed the aspect of this case on appeal by contracting, and in a sense expanding, the issues as tried by the District Court. It disposed of the issue of validity, which had been vigorously contested in the court below. But in disposing of that issue upon grounds different from those upon which the District Court based a like judgment, the question of infringement was acutely enlarged. Upon the finding by the District Court that patentable invention resides in the critical proportion of oil, the admitted use of oil in that proportion by the defendant was manifestly controlling in its finding of infringement, although the defense extended to the whole of the defendant's practices. But under the finding by the Supreme Court in the Hyde Case

that invention resides not alone in the critical proportion of oil but also in air and agitation, we are called upon to construe the patent in the light of that finding and determine whether the defendant's practices of aeration and agitation in connection with its admitted use of the critical proportion of oil, are within or beyond the scope of the patent.

It is to be noted and kept in mind that the Supreme Court did not construe the patent or determine its scope, for it had no occasion to do so. In the case before it, infringement was so clear that it had to be found if the patent was valid. The validity of the patent, therefore, was the only seriously controverted issue before the Supreme Court.

In deciding the issue of validity, the Supreme Court disposed of the prior art as anticipations by reviewing by general classification its processes together with the process of the patent, and in so doing used expressions which the parties have severally employed in support of and in opposition to their respective contentions. The plaintiff maintains that the language of the Supreme Court supports its broad contention, that:

"Whenever the modifying agent of the patent (oil) is used, a person infringes who gets air into the pulp in any fashion and agitates the mixture by any means to a sufficient extent to cause the mineral particles to attach themselves to air bubbles and to rise therewith above the top of the mixture in a collection of bubbles and metal particles, to wit, froth."

The defendant maintains that the agitation, in which the Supreme Court found invention, is agitation produced by mechanical means, and that any one, who, though using the modifying agent of the patent in the critical proportion, introduces air into the pulp otherwise than by beating it in, and who agitates the pulp to a metal-bearing froth by any means other than mechanical, or who otherwise obtains the result without any agitation whatever, is beyond the scope of the patent and escapes infringement.

Considered in the light of what the Supreme Court said and what it did not say, it is clear that the positions of both parties are extreme. The contention of the plaintiff at least omits the very definite limitation of the patent to the results obtained by the use of oil within the described proportions, and also the equally definite disclosure of an agitation in violence and duration greater than before employed, while the defendant misinterprets words of description as words of limitation.

The Supreme Court said that:

"The process of the patent in suit, *as described and practiced*, consists in the use of an amount of oil which is 'critical' and minute as compared with the amount used in prior processes * * * and in so impregnating with air the mass of ore and water used by agitation—*'by beating the air into the mass'* as to cause to rise to the surface of the mass, or pulp, a froth, peculiarly coherent and persistent in character. * * *"

By this expression the defendant maintains that the Supreme Court did not merely repeat testimony describing and showing how the process was practiced, but used the words as their own, and thereby interpreted the patent and limited its scope to the introduction of air into the pulp "by beating the air" into the pulp by the specific mechanical means illustratively shown by the drawings of the patent. We

do not so interpret this expression. In the first place the patent nowhere uses the words "by beating the air into the mass." Therefore these words, as quoted by the Supreme Court, were not quoted from the patent, but were taken from the testimony of a witness who used them in describing the process as discovered and developed by the patentees. This being so, we do not think these words, as used by the Supreme Court in describing the process, can be construed as a limitation upon the process.

It further appears that the Supreme Court, in distinguishing the process of the patent from processes of other patents relied on as anticipations, found that the lifting force which separates metallic particles of the pulp from other substances resides chiefly "in the buoyancy of the air bubbles introduced into the mixture *by an agitation greater than and different from that which had been resorted to before.*" By this expression the defendant insists that the court explicitly limited the patent to agitation caused by mechanical means, thereby excluding from its scope such agitation by pneumatic means as was used in part in the defendant's practice. As this expression is susceptible of an entirely different meaning, presently to be considered, we find nothing said by the Supreme Court which indicates that it limited the agitation of the patent to agitation by mechanical means.

The defendant further maintains that the Supreme Court gave to the patent a narrow construction when it used these words:

"While we thus find in favor of the validity of the patent, we cannot agree with the District Court in regarding it valid as to all of the claims in suit. As we have pointed out in this opinion, there were many investigators at work in this field to which the process" of the patent "in suit relates when the patentees came into it, and it was while engaged in study of prior kindred processes that their discovery was made. While the evidence in the case makes it clear that they discovered the final step which converted experiment into solution, 'turned failure into success' (The Barbed Wire Patent, 143 U. S. 275 [12 Sup. Ct. 443, 36 L. Ed. 154]), yet the investigations preceding were so informing that this final step was not a long one, and the patent must be confined to the results obtained by the use of oil within the proportions often described in the testimony and in the claims of the patent as 'critical proportions' amounting to a fraction of 1 per cent. on the ore. * * *"

We are inclined to the opinion that by this expression the court intended a limitation only upon that one feature of the patent to which the expression was addressed. The District Court had held valid certain claims in which the proportion of oil was described simply as "a small quantity," and the Supreme Court in reversing that finding and holding those claims invalid, used the quoted words of limitation in confining the patent to the results obtained by the use of oil in the critical proportions of less than 1 per cent.

From this recital of the litigation of the invention of the first patent it appears that in construing the claims of the patent we are greatly aided by the opinion of the Supreme Court in being told with authoritative finality that the process involves invention and in being shown in which of its elements invention resides; but it is equally clear that in determining the breadth and scope of the claims, we are without the aid of any adjudication in which their scope has been decided or even considered.

The elements of the patent in which invention is found are oil, air and agitation. These were old in the art, possessing as we have shown, known characteristics and functions, and had they performed in the process of the patent no new or different function or had they produced no new or different result, it is clear they would have anticipated the patent and defeated its claim to invention. But a finding by the Supreme Court that the invention was not anticipated by the old uses and results of these elements is in effect a finding that these elements as used in the process of the patent perform or develop new uses and functions or produce different results. And such we find to be the fact.

The invention, as we have said, is founded upon a discovery. Its patentability depends upon the medium disclosed in the patent by which the force or principle of the discovery is brought into action. Three new uses of old elements are disclosed by the patent, producing a new result. The first relates to oil.

The affinity of oil for metal was known, and though old, was employed in the invention; but that this affinity in a given condition is greatest when its quantity is relatively least or that the affinity increases with the decrease of oil below a given quantity (less than 1 per cent.) is the soul of the discovery and was wholly new. But the discovery did not consist of this alone. The newly discovered phenomenon of the minute quantity of oil is not a chemical phenomenon. Oil in pulp in minute quantity if inert and left alone will do nothing and produce nothing. Something must be done to develop it. The phenomenon not being susceptible of development by chemical change, is developed by physical change of the pulp. As a medium or means of producing that change and creating the condition under which the phenomenon arises, the patentees pointed out—agitation.

The agitation of the patent does several things, old and new. It mixes the oil with the metal of the ore. This is old. Then by its greater intensity and longer duration it stirs the pulp into a froth, developing at once its own new use as a frothing means and still another new function of oil—that of a frothing agent. Both are new.

But froth is made of air as well as oil. Air in bubbles is used for its old function of assisting or escorting metal particles to the surface. But it is also used for the entirely novel purpose of supplying one of the essential elements of froth, froth being the new result intended.

Thus oil is used for its newly discovered characteristics of greater metal affinity when in minute quantity and for its new function as a frothing agent; air for the new purpose of supplying an element of froth; and agitation for its new purpose of bringing the two together and causing them to co-act and produce the new result of a metal-carrying froth. In other words, in so employing these old elements for new purposes, the new things which the patentees told the art are that a radical decrease of oil in conjunction with a radical increase of agitation, develops to its highest potentiality the known affinity of oil for metal and produces a physical change in the pulp in the form of a froth by which metal recoveries are made possible and commercially profitable. The importance of these disclosures, scientifically and commercially, is manifest.

In approaching a consideration of the scope of the patent, we lay aside those features of the discussion in which the plaintiff demands by broad construction the highest reward for a great contribution to a feeble art, and in which the defendant, contending for a narrow construction, emphasizes the servitude of a great art to a patent monopoly. The rights of an inventor and of an art in an invention are established by law and are not affected by other considerations. Speaking generally, the statutes give an inventor a patent monopoly of his invention to the extent of his patent disclosures, and to that extent the art is servient to his monopoly. Everything touching the invention not disclosed by the patent is free to the art without regard to the value of the inventor's contribution. So the question of law in this case, involving as it does large interests and perhaps far-reaching commercial results, is no different from similar questions constantly appearing in controversies of smaller compass. The question simply is whether certain practices come within the scope of the patent claims. But the question of infringement has grown far beyond the borders of the case and we are really asked both by the plaintiff and defendant to determine the scope of the patent in such terms as will inform the art as well as the owners of the patent the precise field covered by the patent and the extent of the field left free to the art. Such a decision to be useful must of course be predicated upon facts that make it legally possible, for otherwise we encounter the futility and the mischief of construing a patent in general terms and without reference to the occasion or thing which calls for its interpretation. To avoid this error we shall confine ourselves to the precise issues of this case as developed by the evidence, and without regard to other considerations we shall construe the patent with reference to the particular practices which are represented by one party to be within its scope and by the other to be beyond it.

The defendant practiced four processes of ore concentration, using in all the fomenting agent of oil in the critical proportion of the patent. Two processes were practiced before suit was instituted, the third during the progress of the trial, and the fourth after the record had been completed and the trial closed. As the infringement found by the decree relates to the processes appearing in the record, only those processes are before us on appeal.

First Process.

The defendant company owns and operates a large porphyry copper mine at Miami, Arizona. The ore is low grade and of a kind peculiarly responsive in concentration to the process of the patent.

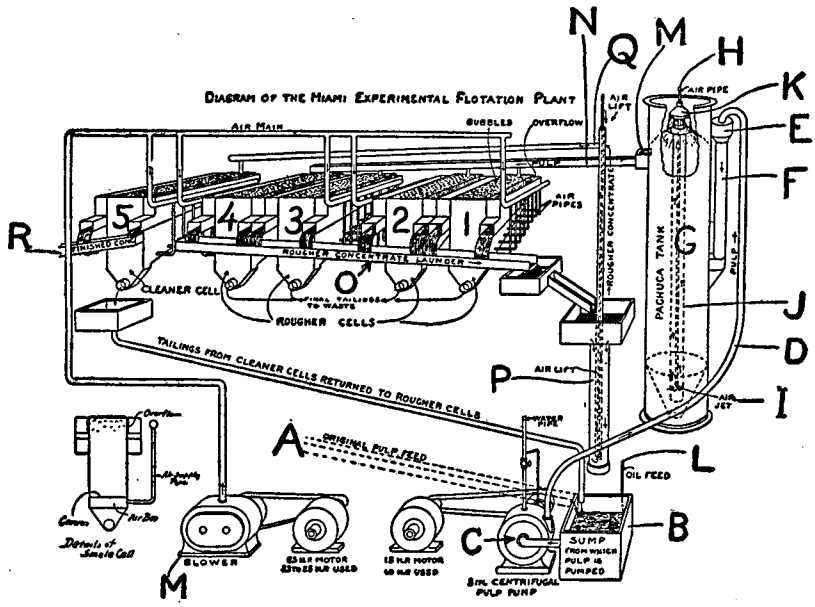
The defendant employed a metallurgical mining engineer to develop and install in its reduction works an oil-flotation concentration plant. The engineer made repeated visits to the mill of a neighboring copper company, a licensee of the plaintiff, studied the process of the patent there in practice, and reproduced it in the mill of the defendant. This was a small plant, of a capacity of but two tons per hour or forty-eight tons per day, operated during the period from December, 1913, to August 5, 1914. It was used evidently more as a testing or experimental

plant for another process then being developed than for commercial purposes.

This constituted the defendant's first process, and as infringement was not disputed, we affirm without discussion that part of the decree holding infringement by this process.

Second Process.

On August 7, 1914, two days after the discontinuance of the first process, the defendant started its second process in a plant which it had constructed during the practice of the first. This plant may best be understood by a diagram furnished by the defendant and by its own detailed description of its operation appearing in its brief:



"The material treated in the flotation plant at Miami is received through the launder or trough *A*, the same bearing the legend 'Original Pulp Feed.' This material is a freely flowing pulp, and flows into the box or tank *B*, upon which the following inscription appears, 'Sump from Which Pulp is Pumped.' The oil or other modifying agent is supplied to the pulp through the pipe *L*, marked 'oil feed.' A centrifugal pump *C* raises the pulp from the sump *B*, and forces it upwards through a pipe *D*, from which the pulp passes into an inlet funnel *E*. The pulp flows from the funnel *E* downward through a pipe *F* and enters the Pachuca tank *G* through the side thereof, as shown in the drawing. A small air pipe *H* extends downwardly from the top of the Pachuca to a point near the bottom thereof, where it delivers an air jet at the point designated *I*. The small air pipe *H* is surrounded by a larger pipe *J*, open at both ends. There is an annular space between the pipes *H* and *J*, and the air entering the lower end of the large pipe *J*, through the pipe *H*, permeates the pulp contained in the pipe *J* with small bubbles, which have the effect of forming a mixture of air and pulp of lower specific gravity than the

pulp alone. The lightened column of air and pulp in pipe *J* rises and is projected against a conical deflector *K*, and then falls into the main body of the Pachuca. The circulatory movement of the pulp in the Pachuca tank has the effect of thoroughly mixing the oil with the pulp. The pulp flows from the top of the Pachuca tank into a box *M*, whence it is conducted by the launder or trough *N* to the air cells, marked *1*, *2*, *3* and *4*.

"The air cells *1*, *2*, *3* and *4* are similar in construction. The bottom of each cell consists of four plies of canvas, beneath which are eight air compartments, separate and distinct from each other, extending in a series from end to end. The canvas bottom of the machine is inclined, thus making the cell deeper at one end than at the other, and it is for the purpose of getting an even distribution of air that the eight compartments are used, it being obvious that if there were a single air compartment most of the air would escape at the shallow end, where the water pressure is least. Air under slight pressure is supplied to the compartments beneath the cells *1*, *2*, *3*, *4* and *5*, by means of a blower designated by the letter *M* upon the drawing. The air is conducted through a pipe marked 'Air Main' from the blower, and branch air pipes, shown most plainly at the right of cell No. 1, conduct the air to the several compartments beneath the cells. The degree of air pressure necessary is quite slight, and, as stated by Mr. Yerxa, it is necessary to use merely enough pressure to overcome the hydrostatic head of the pulp and to force the air through the permeable medium, that is, the canvas bottom.

"The air so pumped beneath the canvas bottoms of the cells *1*, *2*, *3*, *4* and *5* passes upward through the pores of the canvas into the pulp, and the bubbles rise through the pulp in a manner similar to the rising of the bubbles through a glass of carbonated water."

For the purpose of this discussion, the details of the apparatus and of its operation, may be simplified by referring to its four essential parts: *C*, centrifugal pump; *E*, a break or open space between the pipe of the pump and the Pachuca tank which does not appear on the diagram or in the defendant's account of the operation; *G*, Pachuca tank and its appliances; and *1*, *2*, *3*, *4* and *5*, Callow cells.

Before following the steps or rather the flow of the defendant's process, we should have in mind the theory of its practice. The defendant maintains that the process of the patent is "an *agitation* froth process," that is, a process by which the desired metal-bearing froth is obtained by agitating pulp containing the critical quantity of the frothing agent (oil) "to cause" the froth to arise or "until" a froth is formed. It says that its process, in contradistinction to the process of the patent, is a *"bubbles* process" (containing the same critical quantity of the same frothing agent), by which air, introduced into the pulp from below, passes through the pulp "without any agitation whatever," and arises to the surface in short-lived evanescent metal-bearing bubbles forming a *"foam."* It maintains that by introducing air into the pulp by sub-aeration it produces a foam or froth otherwise than by agitation, that nowhere in the process is there agitation, or that, at most, there is only such agitation as appears in the prior art.

Agitation "to cause" a froth or agitation "until" a froth is formed, being the disclosed means of the patent to produce the phenomenon of the critical quantity of oil, and aeration without agitation being the defendant's claimed means of causing or obtaining the same phenomenon from the same critical proportion of oil in the form of an evanescent foam, the controversy revolves around the elements of aeration and agitation.

C. Centrifugal pump. The first step in the defendant's process was a centrifugal pump. The defendant claims its one function was that of lifting the pulp (containing oil in the critical proportion of the patent) from one floor of the mill to another, and that in doing so the pulp was neither agitated nor aerated. Opposed to this contention and to the testimony supporting it was testimony that a centrifugal pump drawing air and liquid was the most common type of agitator and aerator of the cyanide art before the Pachuca tank was invented; that in the defendant's apparatus, air was drawn with the liquid into the pump in large quantities; and that in revolving at the rate of 850 revolutions per minute the pulp was violently agitated and measurably aerated.

Reconciling the conflicting testimony as best we may, we are forced to the conclusion that the pump revolving at the rate of 14 revolutions per second could not well avoid agitating the liquid it hoisted; that the agitation was violent; that air was drawn in with the liquid and that to an extent the pulp was aerated within the sense of the agitation of the patent and also by the very mechanical means or its equivalent to which the defendant insists the patent is limited.

E. Break in the circuit. At the point *E* in the pipe between the pump and the Pachuca tank there was a break not appearing in the diagram, permitting the pulp, arising from the pump in its agitated and partially areated state, to drop for a space through the air into a larger pipe, whence it was carried to the Pachuca tank. While this was not a prominent feature of the defendant's process it was of sufficient consequence for the defendant to use it. It had the effect of producing further agitation of the pulp in its fall and further aeration arising from that agitation. It was known as splash agitation, its principle appearing in the early attempts to purify water by aeration. We are satisfied that this constituted agitation and aeration by agitation, and again by mechanical means to which it is sought to limit the patent.

G. Pachuca tank. The pulp twice agitated and aerated was then carried without stopping into a Pachuca tank. This appliance, briefly described, is a tank 18 feet 6 inches high by 4 feet in diameter. Descending in its center are two pipes or columns, one within the other, and in operation compressed air is released through the inner one, sending the fluid in an upward current through the outer one until it strikes with force an overhanging cone or umbrella, which causes it to splash and fall back into the tank, to be subjected again and again to the same revolving movement for a period of time measured by minutes.

The Pachuca tank was taken from the cyanide art, where its one function was agitation and aeration, or rather aeration by agitation. Although agitation is denied by the defendant to be a part of its process, it cannot be seriously contended in the face of the testimony and of the demonstration of the action of the Pachuca tank before us, that the force of compressed air to which the pulp in the tank is subjected, does not cause agitation and very violent agitation.

But the defendant contends that the agitation of the patent is lim-

ited to agitation occasioned by mechanical means, and as the agitation in the Pachuca tank is caused by pneumatic means, it is beyond the scope of the patent. This contention is based not alone upon the words of the Supreme Court which we have already discussed, but upon the relation of a mechanical device to the discovery of the invention.

It appears that in the experiments in which the discovery was made, the inventors agitated various mixtures by an apparatus known as a Gabbett Mixer, and when they came to reduce their discovery to invention and patent it they illustrated diagrammatically "one form of apparatus suitable for carrying this invention into practice," which included such a mixer. The patentees did not attempt to patent a mechanical means by which their process could be practiced. This is obvious, for the means illustratively shown was a mechanism already patented (No. 444,345, Gabbett Mixer 1891). Nor did they attempt or intend to limit their patent to any mechanical means. Their patent was for a process. But without regard to their intention, did they in fact so limit it? That depends upon what they disclosed by their patent.

By their disclosures they first told the art that a maximum metal recovery could be had from a minimum oil content. Up to the time of this disclosure that was an unknown phenomenon. But this disclosure alone, interesting as it was, would have been valueless to the art, and would not have entitled the discoverers to a patent, until they told how and by what medium that phenomenon could be brought into practical use. Knowing this, they then told the art by the same disclosures that the minute quantity of oil, besides possessing an affinity for metal, was a frothing agent, and when used as such the phenomenon appeared in the froth it developed. But the patentees did not stop with the disclosure that fomentation is the condition out of which the phenomenon arises, but proceeded by further disclosures to tell the art that the way to produce the desired fomentation is by agitating the pulp containing the frothing agent. But agitation of certain kinds for certain purposes was well known, so they went further and told what was not known, namely, that the agitation requisite to fomentation of the character desired, is agitation "greater than and different from that which had been resorted to before," that is, greater than the more or less brisk or vigorous test-tube agitation of early patents and of the Cattermole process, and different from the revolving gentle agitation of the Elmore bulk-oil process, and that it must be violent in character and extended in duration in order that air (the other element of fomentation) might be brought into the fluid and into coaction with the minute quantity of the frothing agent. They thus disclosed not only agitation but the kind of agitation as the medium or means by which the principle of their discovery could be reduced to practice. Agitation was thus made the practical element of their patented process, and by their patent disclosures they told the art that agitation was the secret by which the principle of their discovery could be unlocked and used.

If the same principle can be turned to use and the same results obtained without agitation, or by an agitation which is not the equivalent

of the agitation of the patent disclosures, we may have another question; but when the critical quantity of oil is used and fomentation is produced by agitation, which in degree of violence and in duration is substantially that of the patent, clearly it is indifferent whether it is attained by mechanical or other means, for the patent deals with agitation as a means of developing the discovery, not with means for developing agitation.

Accepting the teaching of the patent with reference to agitation as a means, the defendant employed it, certainly in three, if not in four, of the steps of its process. In the first and second, agitation was obtained by mechanical means; in the third (the Pachuca tank), by pneumatic means. It is upon this difference in means to produce agitation that the defendant, in part, defends the charge of infringement. But what it sought and what it got by the use of the Pachuca tank was agitation, and that is what the patent told it to get, and we conceive it makes no difference whether it got it by mechanical or pneumatic means. We see no difference between the blow of a paddle and the blow of a blast of air as means to produce agitation. And the defendant itself shows there is no difference between the two in procuring the agitation of the the patent, for by agitating the pulp in the Pachuca tank by pneumatic means with an intensity and for a period of time sufficient to aerate the pulp, the defendant got the precise metal-bearing froth of the patent. This was unintentionally and accidentally shown on one occasion when the Pachuca tank was cut out of the process and the pulp brought to rest. The characteristic froth of the patent arose at once and formed in a collar two feet thick. In view of the agitation to which the pulp had been subjected, we must assume that it was the result of that agitation.

Thus far the defendant did everything that is disclosed by the process of the patent. It used the critical quantity of oil. This is admitted. It agitated the pulp by one means and another with an intensity and for a time sufficient to change the physical character of the pulp, as intended by the patent, and developed in it the quality of producing an air-bearing froth, which it did when permitted to come to rest. But in the practice of the defendant, agitation was not stopped or even arrested in the Pachuca tank. The pulp was carried in circuit without stopping and without abatement of agitation into Callow cells, carrying with it the air content accumulated by the agitation of the centrifugal pump, the air drop and the Pachuca tank.

1, 2, 3, 4, 5. Callow cells. As a last step, the pulp was conveyed into Callow cells. A Callow cell is a rectangular tank with a sloping bottom made of canvas, through the perforations of which compressed air ascends in myriads of air bubbles through the liquid it contains. By this process, the defendant contends it pursued a practice taken from the prior art and entirely outside the scope of the patent.

In this connection much stress has been placed by the defendant upon the prior art, on the theory that as the Supreme Court found the invention not anticipated, all that the prior art contains is open to it without the hazard of infringement. This position is unobjectionable.

It is clear that if the defendant practiced the process of the patent and obtained a different result, or if it practiced a different process and obtained the same result, it did not infringe. To do this it was free to resort to a practice of the prior art or to a practice new to the art. It chose to rely upon a practice of the prior art, which, though producing the same result in metal recoveries as that of the patent, it maintains differed from it in its steps and means. It was based upon Patent No. 793,808 granted to Sulman and Picard (two of the patentees of the patent in suit), and commonly called the Bubbles Patent. This patent, though it never reached the mill, has been extensively discussed by experts and counsel. Air is introduced into the bottom of a tank similar in shape to that of a Callow cell. Near the bottom is a perforated helical worm or tube, through which, while revolving, air is permitted to escape and ascend in bubbles to the surface. As the pulp is modified by oil (not the critical quantity of the patent) the air bubbles and metal particles are coated with oil, whereupon the oil performs its known affinity for metal and air its known characteristic to ascend and assist the oiled metal to the surface.

While there is a similarity in principle between the mere introduction of air in the Callow cell and in the Bubbles tank, the purpose for which air is injected and the function which air performs after it is injected are altogether different in the two. Before the pulp is put into the Bubbles tank it is agitated for the purpose of mixing the oil and coating the metal particles, and when that is done it is turned into the Bubbles tank where the air bubbles, liberated through the perforations of the coil, attach themselves to and escort the oil-coated metal particles to the surface, where they are carried off by skin flotation. In the Callow cell of the defendant's process (the claimed equivalent of the Bubbles tank) air was used for another purpose. The pulp first agitated to the potentiality of the critical quantity of oil and air of the patent was carried into the Callow cell, and with its elements thus fully developed was subjected to an air blast, which did two things, resulting in a third. First, the air blast further aerated or super-aerated an already fully aerated pulp by driving into it myriads of air bubbles, and second, caused an agitation which while considerable was not violent, resulting in a foam, which persisted so long as air pressure was maintained, and which had a metal-bearing quality and sufficient stability to permit recovery by overflow.

A peculiar feature of this step in the process and upon which the defendant earnestly relies to distinguish it from that of the patent, is, that if the pulp agitation of the Callow cell is arrested by withdrawing the air pressure, the foam immediately subsides and the froth of the patent does not arise as it did when agitation was arrested in the Pachuca tank. This is true. It is equally true that in this fourth step, aeration is direct and is not the result of or caused by agitation. On the contrary, agitation results from aeration, and such agitation, though present in some measure, is not even approximately of the violence and duration of the agitation of the patent. The operation in the Callow cell certainly possesses these distinguishing features

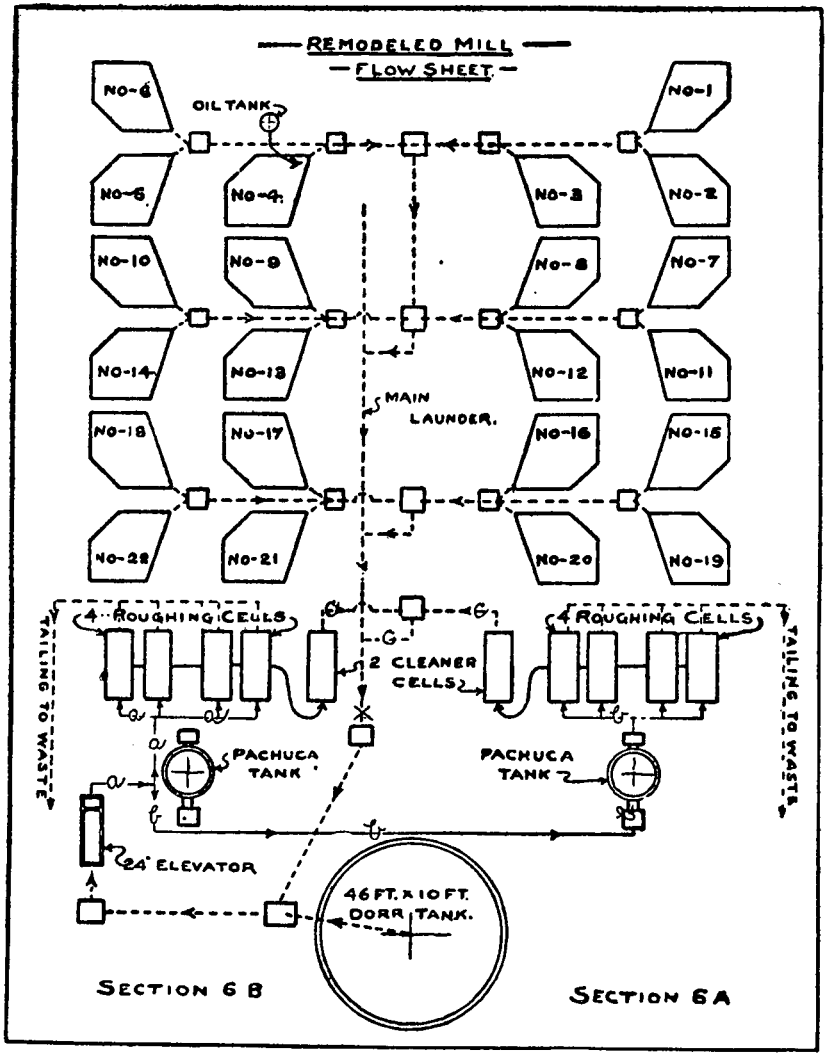
from operation of the process where aeration is caused by agitation. Emphasizing this difference in its favor, the defendant pressed further and urged that the operation of the Callow cell was not dependent upon the precedent treatment of pulp in the Pachuca tank, and that the same results could be obtained from the Callow cell without such previous agitation and aeration. This assertion is based upon an experiment made by the defendant in the presence of representatives of the plaintiff when the Pachuca tank was cut out of the system and pulp from the centrifugal pump was shunted directly into the Callow cells, with the result that the Callow cells continued to perform their function of supplying air bubbles, agitating the pulp to a degree and forming an overflowing metal-carrying foam. But the metal carried over was not assayed and we do not know what were the commercial results of the test. We know, however, that this was but an experiment and after the experiment had been concluded, the defendant returned immediately to its practice of using the Pachuca tank. Nor are we informed as to what would happen if the centrifugal pump had also been cut out, because whether in the mill or in the laboratory, so far as we have been shown, it appears that *before* the Callow cell (or Bubbles tank) is called upon to perform its task, the pulp is always pre-agitated and pre-aerated in some fashion and to some extent. Even in the demonstrations of the Callow cell and the Bubbles tank made before us in court, the defendant's demonstrator caused the pulp to be violently agitated by a *Gabbett Mixer,* the illustrated means of the patent, for a period of time measured by a stop-watch before it was turned into the cell and tank.

[2] Notwithstanding the defendant's testimony is silent as to what a Callow cell would do to pulp that had not been previously agitated and aerated, and notwithstanding all Callow cell demonstrations before us were made with pre-agitated and pre-aerated pulp, the case for the defendant was largely argued as though its process consisted solely in passing thoroughly mixed but quiescent pulp directly into Callow cells, where it received its first and final aeration without previous or present agitation, resulting in a metal-bearing foam with characteristics different from those of the froth of the patent. We find nothing in the evidence or in the demonstrations which justifies that argument. If the only agitation to which the pulp was subjected (after such agitation as in the prior art was necessary to mix the oil and ore) was the agitation of the Callow cells, we would not say that that agitation amounted to or was the equivalent of the violent agitation of the patent disclosure and constituted infringement; but in the process we are considering and upon which the decree we are reviewing was based, the Callow cells were not the whole process but were merely the last of four distinct parts of the process, the other three being the process of the patent or its fair equivalent. Having used the process of the patent in the first three steps in developing in the pulp the potentiality of the critical quantity of oil and air and in bringing the pulp to the point where, if permitted, it would produce the result of the patent, we feel that the defendant cannot escape infringement by taking an additional step, even though that step if taken alone avoids the patent.

Third Process.

The third process of the defendant was developed and put into practice during the trial and constituted one of the defenses to the charge of infringement. There is little difference between it and the second process. It is shown by the accompanying reproduction of a blueprint of the apparatus in which it was practiced:

BLUE PRINT OF NEW MIAMI MILL.



The plant is shown to comprise two independent sets of flotation cells, one at the right and the other at the left of the drawing. The flotation cells are designated: "4. Roughing Cells" and "2. Cleaner Cells." Adjoining each group of cells is a Pachuca tank. The operation begins upon the 22 concentrating tables, so numbered upon the drawing. The material rejected by these tables is treated by the flotation process. The flow of pulp in the tables through the launders takes place by gravity until the pulp reaches a bucket elevator, which is the substitute for the centrifugal pump in the second process. When the pulp is raised by the elevator to an upper floor it is divided and flows in equal parts into two Pachuca tanks, thence to the Callow cells, where metal recoveries are obtained by froth overflow.

The value of this process, as a defense, is found in an experiment to which it was subjected. The plant was arranged in two groups of identical members. In the experiment, one group was operated with the Pachuca tank as planned. In the other, the Pachuca tank was cut out and the pulp conveyed directly from the elevator to the cells. The result was no apparent difference in the action of the pulp and little difference in the assays of the metal recoveries, that difference, curiously enough, being in favor of the group in which the Pachuca tank was not used. The evidence of the fact and of the effect of this experiment was not contradicted, except, perhaps, by the defendant itself, by returning at once to its previous practice of using both Pachuca tanks, and in pursuing that practice to a time beyond the trial. This fact places the third process in the position of the second, where we have found that agitation and aeration of the Pachuca tank is the agitation of the patent, and amounts to infringement.

Fourth Process.

The fourth process is not in the record and was not considered by the District Court in reaching the decree now before us on appeal. It was brought to our attention during the argument by counsel, who said that in the process developed by the defendant after the trial, and now practiced, the Pachuca tanks are eliminated, the pulp being delivered directly from the bucket elevators to the Callow cells. While we are loath to omit from our consideration and judgment anything affecting this very important patent and the art to which it relates, we feel, nevertheless, that we cannot consider and adjudge with propriety or authority a process with respect to which the plaintiff has had no opportunity to produce testimony and which was not embraced in the decree we are reviewing.

We find no error in the decree of the District Court holding valid and infringed claims 1 and 12 of the first patent in suit.

Second Patent.

[3] The second patent involved in this suit, No. 962,678,—also for improvements in ore concentration,—was applied for on April 30, 1909, was issued on June 28, 1910, to Sulman, Greenway and Higgins, and has not been judicially passed upon except by the court below.

Its particular object is "to separate certain constituents of an ore such as metallic sulfids from other constituents such as gangue when the ore is suspended in a liquid such as water."

It is also an air-froth flotation process but differs from the first patent, although both processes may be, and both actually are, employed conjointly. Its essential feature is the use of a mineral-frothing agent in solution, and the method will be best understood by turning to the specification:

"According to this invention the crushed ore is mixed with water containing in solution a small percentage of a mineral-frothing agent (that is of one or more organic substances which enable metallic sulfids to float under conditions hereafter specified) and containing also a small percentage of a suitable acid such as sulfuric acid, and the mixture is thoroughly agitated; a gas is liberated in, generated in, or effectively introduced into the mixture and the ore particles come in contact with the gas and the result is that metallic sulfid particles float to the surface in the form of a froth or scum, and can thereafter be separated by any well known means. Among the organic substances which in solution we have found suitable for use as mineral-frothing agents with certain ores are amyl acetate and other esters; phenol and its homologues; benzoic, valerianic and lactic acids; acetones and other ketones such as camphor. In some cases a mixture of two such mineral-frothing agents gives a better result than a single agent. The above mentioned mineral-frothing agents are all more or less effective in the presence of an acid such as sulfuric acid and are given as types but are not intended to form an exhaustive list of suitable organic substances which may be used in this manner and for these objects. On the other hand there are many organic compounds which in solution will not effect the result described, such as some sugars, dextrin, saponin, albumen, ox gall, etc., and a simple test is required in the case of varying ores or materials to determine which organic compound is most suitable.

"The following is an example of one method of carrying this invention into effect: Water containing a small percentage of sulfuric acid in solution, say from .2 per cent. to 0.5 per cent., and containing in solution a small quantity say 0.1 per cent. of one of the foregoing organic substances (say amyl acetate) is, with finely pulverized ore, introduced into an agitating apparatus, in the proportion of say 3 parts by weight of water to 1 part by weight of ore. The agitation is carried out in such a way as thoroughly to disseminate air through the mixture which is thereafter discharged into a spitzkasten. It is found that a coherent froth or scum floats on the surface of the water in the spitzkasten. This froth contains a large proportion of the metallic sulfids but is substantially free from gangue. Any well known means may be employed for collecting the froth. If desired the tailings can be re-treated by the same process with or without the addition of fresh quantities of the organic materials referred to. The action may in some instances be improved by heating the mixture. * * *

"Several agitation vessels are placed in series. These may conveniently be large vats separated by partitions having openings at the bottom so that the liquid may pass from one to another. Each vessel is provided with a rotatable stirrer which is conveniently of the form shown in the drawing. Each stirrer is carried on a spindle rotated at a high speed by any convenient means. Crushed ore or similar finely divided mineral is fed into the first vessel through any convenient ore-feeding device, * * * and water is also fed into the vessel. A small proportion of acid, such as sulfuric acid, may be introduced into the water from the feeding vessel, and a small proportion of one or more other soluble substances which enable metallic sulfids to be floated by air under the conditions hereafter specified, may be introduced from the feeding vessel. The liquid containing ore in suspension is vigorously agitated in the agitation-vessels and escapes at the outlet highly charged with air.

"A settling apparatus consisting of one or more spitzkasten is placed immediately at the outlet from the agitation apparatus. As shown in the drawing, the spitzkasten has a launder to receive the floating froth which passes away through the outlet. The liquid and the sunken material pass out through the outlet at the bottom of the spitzkasten. The level of the liquid in the spitzkasten is slightly above the lip. Within the spitzkasten is placed an inclined baffle or guide-plate, which may be made adjustable, extending upward from below the inlet and arranged to direct the stream of ore-particles and air-bubbles toward the surface of the liquid in the spitzkasten.

"Hitherto many proposals have been made for the wet concentration of ores involving the addition to the liquid in which the ore is suspended of an immiscible liquid. For example in the patent granted to Cattermole, Sulman & Picard, United States No. 777,274, dated December 13, 1904, is described a process of ore concentration in which metalliferous particles were coated with a thin film of a fatty or resin acid or a phenol or a cresol by introducing the alkaline compounds of these materials into an acid liquid whereby these materials were liberated in an immiscible or insoluble condition and adhered to the mineral particles. In another known process the powdered ore suspended in water, preferably acidified, is mechanically brought to the surface whereby the particles are exposed to the air and it is found that the metalliferous particles float on the surface while the gangue sinks. In this known process the selective flotation of the metalliferous particles is not due to the metalliferous particles being coated with a selective agent, that is to say, the selective flotation is due to the properties of the metalliferous particles themselves when exposed to air or other gas and brought onto the edge or surface of water preferably acidified.

"The present process differs from the two before mentioned types and from other known concentration processes by the introduction into the acidified ore pulp of a small quantity of a mineral-frothing agent; i. e., an organic compound in solution of the kind above referred to and by the fact that the metalliferous particles are brought to the surface in the form of a froth or scum not by mechanical means but by the attachment of air or other gas bubbles thereto.

"In the frothing processes hitherto known the substances used to secure the formation of a mineral-bearing froth has been oil or an oily liquid immiscible with water. According to this invention the mineral-frothing agent consists of an organic compound contained in solution in the acidified water.

"We do not confine ourselves to the proportions above given, the best proportion can in each case be easily determined by trial.

"It is well known that certain of the organic substances we have referred to are not soluble in water in all proportions and that if used in excess might partly remain insoluble in the acidified water and might become mechanically affixed to the metalliferous particles of the ore. We disclaim any such use of these substances and only claim them in such amount as will enable them to dissolve in the acidified water."

The claims in issue are the following:

"1. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture to form a froth and separating the froth.

"2. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture to form a froth and separating the froth."

"5. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form froth and separating the froth.

"6. The herein described process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form a froth and separating the froth."

The difference between the two patents may be shortly stated to be this: The first process rests upon the use in very small quantity of an oily substance that does not dissolve in water, coupled with agitation of the pulp, and this succeeds in producing a special froth that is remarkably effective in recovering the minute particles of ore. The second process does not employ oil, or an undissolvable substance; on the contrary, the "mineral-frothing agent" must be in solution, and ex vi termini must therefore be dissolvable. The specification disclaims the use of so large a quantity that part of it remains undissolved. The "mineral-frothing agent" is further limited by describing it as "one or more organic substances which enable metallic sulfids to float under conditions hereinafter specified"; and, as this general statement does not convey specific information, the patentees give several examples of organic substances that are found to be suitable for use in solution. In passing we may note that claims 1 and 5 are broad enough to cover inorganic frothing agents also, but as no such agent is yet known this feature need not now be considered. Just how or why this solution with the needful agitation produces the froth, is not certainly known; but the fact is, that (to use the language of the brief):

"* * * Its effect [is] to produce a similar action of air bubbles in the attraction of metallic particles, a similar levitation of the metallic particles, a similar persistence of the bubbles, a similar reliable adherence of the air bubbles to the metallic particles, and a similar capacity for final separation of the metallic particles by their overflow, still in attachment to air bubbles, at the top of a vessel containing the pulp."

An observable difference in effect is that the froth of the second patent is composed of bubbles much smaller than the bubbles of the oil process.

We may also note that while the addition of an acid to the mineral-frothing agent is described as part of the process, this was at that time a usual practice, and in any event is not an element in the claims now in issue. The agitation is to be thorough, but in the same connection the means for bringing this about is described in terms that are wide and inclusive. The air or other gas is to be "liberated in, generated in, or effectively introduced into, the mixture," in order that the ore particles may come into contact with the gas and as a result may float to the surface in the form of a froth or scum which can be separated afterward by any well known means. The object of introducing the air or other gas into the mixture is such agitation of the pulp as will produce the desired froth, but the claims are not confined to a particular device or a particular degree of agitation. But of course, the agitation must be thorough and it must be effective, these being matters for experiment but always with the ultimate object of bringing the sulphid particles to the surface and holding them there in the grasp of a froth.

We do not find it necessary to discuss the question of validity; our

conclusion is, that the patent discloses invention and has not been anticipated. As in the case of the oil process, the patentees seem to have taken "the final step which converted experiment into solution, turned failure into success." Minerals Separation Co. v. Hyde, 242 U. S. 261, 37 Sup. Ct. 82, 61 L. Ed. 286. And we find nothing in the prior art that can be held to anticipate. The real question upon this patent also is the question of infringement, and here as well as there the decision turns upon the kind and degree of agitation employed by the defendant. We need not dwell upon the subject, for as the defendant used both processes conjointly it is evident that what has been said about the infringing agitation in the oil process must also apply to the same agitation when considered in reference to the second process. There is this difference, however; as pointed out above, the agitation of the second process is so described as to cover expressly a wider range of means and degree than is expressly covered by the first process, and therefore needs less aid, if any, from the doctrine of equivalents. For the reasons given in discussing the oil patent, we think the defendant's practices there described infringe also the process now under consideration.

Third Patent.

[4] The third patent involved in this suit, No. 1,099,699,—also for improvements in ore concentration,—was applied for on June 30, 1911, was issued on June 9, 1914, to Henry Howard Greenway, and has not been judicially passed upon except by the court below. As stated in the specification, its process is "a modification of the invention described in U. S. Patent to H. L. Sulman, A. H. Higgins and myself, No. 962,678, granted June 28, 1910," which is the second patent here in suit. Greenway's particular object was "to separate certain constituents of the ore such as copper sulfides (for example in the form of copper pyrites or metallic copper natural or reduced) from other constituents, such as gangue where the ore is suspended in a liquid such as water." After describing the process of No. 962,678, as one "applicable generally to the recovery of metallic sulfides and like floatable metalliferous matter and in case of lead and zinc sulfides to which the process has been largely applied" and stating that in such process "it is necessary for efficient working that the pulp should be lightly acidified, and in most cases in practice the pulp is heated," the patentee disclosed his discovery, namely, that both acids and heat can be dispensed with, saying that "it is now found that with copper ore such as an ore containing copper pyrites effective separation is obtained in the cold without the use of acid by employing as mineral frothing agents, aromatic hydroxy compounds such as phenol, cresol, or mixtures containing the same." Upon this disclosure the claims here in issue were granted, illustrative of which claim 12 is for "a process of concentrating ores which consists in mixing a powdered ore containing copper with neutral water containing in solution a minute quantity of cresol, agitating the mixture in the cold to form a froth and separating the froth." In the court below the patent was held invalid and agreeing as we do with

the conclusion reached by it in reference to the first and second patents, we are the more inclined to follow its decree in reference to the third patent. But an examination of the proofs satisfies us that the process disclosed in this patent was a substantial departure from processes of the prior art. The heating of water is a matter of large moment in large operations, and the use of acid is a matter of constant and considerable expense. By wholly dispensing with both by the use of a minute quantity of hydroxy compounds, the patentee has disclosed an original and novel plan which has broadened and made more simple the agitation process of air flotation. The length of this opinion, rendered necessary in the full discussion of the first patent, is the sufficient warrant for our refraining from a detail discussion of the proofs and reasons which lead to our conclusion as to the novelty and inventive character of Greenway's discovery, and we therefore limit ourselves to stating that after full consideration we have reached the conclusion that his patent is valid, and, for the reasons stated in discussing the first patent, is infringed by the defendant.

It is ordered that the part of the decree of the District Court holding valid and infringed claims 1 and 12, and invalid claim 9, of Letters Patent No. 835,120, and holding valid and infringed claims 1, 2, 5 and 6 of Letters Patent No. 962,678, be affirmed, and that the part holding invalid claims 1 to 12 of Letters Patent No. 1,099,699, be reversed, and that a decree in accordance with this opinion be entered.

BUFFINGTON, Circuit Judge (dissenting). Putting aside all minor incidents, this case in my judgment, involves one broad, basic and far-reaching question, and that is whether any and all advance and improvement in the sphere of air flotation in mineral recovery for the next few years shall be subjected to what will practically be a blanket claim for any use of air as a flotation agency.

The claim which we are asked to construe and apply is for:

"The *herein*-described process of concentrating ores, which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore), agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

I say, putting aside all minor incidents, for it is perfectly clear that if all kinds of air flotation and all kinds and degrees of agitation are covered by this claim, the infringement of the defendants is self-evident by their use of compressed air which produces some agitation and causes air flotation. To my mind, and for reasons I shall now discuss this claim should not be awarded this sweeping scope which will paralyze the subsequent development of a great art.

Now, if any broad right to monopolize all air flotation with a limited use of oil but an unlimited use of agitation exists, it arises by virtue of a contract made between these patentees and the government; and that contract is embodied in the claim of the patentees, made by them and conceded by the government, the other of the contracting parties.

and the consideration for that claim is the required statutory disclosure made by the patentees—

"* * * of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise and exact terms as to *enable* any person skilled in the art. * * * to make, construct, compound, and use the same, * * * and he shall particularly *point out* and *distinctly claim* the part, improvement, or combination which he claims as his invention or discovery."

Turning now to the patent itself, which has been held valid and described by the Supreme Court as "patentable, as new and original as it has been found useful and economical," let us inquire, first, what was the new thing disclosed, for therein we have the consideration for the claim; and, second, what claim was allowed in consideration of such disclosure. This line of approach is to my mind imperative, first, because while an invention may be broader than a claim, a claim can never be broader than an invention. Finding from this claim that it concerns two things, oil and agitation, we must necessarily turn to the specification and there ascertain what was the new disclosure as to oil and agitation. In substance, it was the disclosure of a process in which a hitherto unused minimum of oil and a hitherto unused maximum of agitation were used. Each of these disclosures was summed up by the Supreme Court in these words:

"The process of the patent in suit, as described and practiced, consists in the use of an amount of oil which is 'critical,' and minute as compared with the amount used in prior processes, 'amounting to a fraction of one per cent. on the ore,' and in so *impregnating with air* the mass of ore and water used by agitation—'*by beating the air into the mass*'—as to cause to rise to the surface of the mass, or pulp, a froth, peculiarly coherent and persistent in character, which is composed of air bubbles with only a trace of oil in them, which carry in mechanical suspension a very high percentage of the metal and metalliferous particles of ore which were contained in the mass of crushed ore subjected to treatment. This froth can be removed and the metal recovered by processes with which the patent is not concerned."

It will thus be seen that, first, the quantity of oil; secondly, the character of agitation; and, thirdly, the resultant froth—constituted the disclosure. Apart from the authoritative statement of the Supreme Court as to what was the invention of these patentees, which of course controls us, it is clear, both from the proofs, the physical facts, and a general knowledge of the art, that such was the case, and that this discovery is bottomed on agitation—the new kind of agitation disclosed—which made possible new extension of well-known properties and capacities of oil into fields oil had not reached by any previous methods of agitation. And it follows, if agitation of maximum character is the dominating factor that made possible the use of a minimum of oil, that claims which specify the use of oil and of agitation must not be read in a way that ignores the new and disclosed agitation, which was not only the only specific agitation, but the only generic agitation the patentees disclosed. For it is perfectly clear that, if the art of air flotation to-day had stopped where the disclosure of this specification left it, the only method of air flotation would be

the agitation disclosed in the patent. The specification does not purport to disclose or to make use of any newly discovered property of oil. Let that fact be clearly understood. That oil had three qualities was well known prior to this patent—first, that oil had an affinity for metal particles; secondly, that the oil covering the metal was of infinitesimal thinness; and, third, that oil has no affinity for and will not coat gangue. Such being the known action of oil, viz. its affinity and its capacity for thus thinly coating it, and for not coating gangue, it is manifest that whenever oil, gangue, and metal particles are mixed only a minute quantity of oil was needed to coat and actually did coat the mineral particles. The larger quantities of oil used were not needed or used to coat, but to float, the minerals. These facts are proved by the testimony of Sulman, hereafter quoted and alluded to in the House of Lords opinion, referred to later as an agitation which "assists the process of minute quantities of oil reaching minute particles of metal." But while the small quantity of oil used as a metal covering was a fact, the significance of that fact was not recognized in the preceding practice, for the manifest reason that in such art there was no use of oil alone for metal-covering purposes, but it was used for the double purpose—first, of oil covering; and, second, oil flotation. When, therefore, the patentees disclosed a process in which the oil necessary for flotation was dispensed with, the requirement of a small amount of oil for purely coating purposes became at once apparent and assumed a new significance. This was referred to by the Supreme Court when, in distinguishing it from the prior art, it said:

"The small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes," etc.

From these considerations it will be seen that oil required and used for covering or coating the mineral particles, was precisely the same in quantity and function in prior practice and the practice of this patent. But what did happen was that the violence and duration of the agitation brought more particles into contact with oil than when the agitation was less violent. What, then, was the disclosure? This is clearly shown by the patentees in their specifications, where they show the *nature of their improvement* by contrast with the prior practices of the Cattermole patents. These proofs show that the present discovery was made while working on the process disclosed by Cattermole and the specification recites its relation to Cattermole. Turning, therefore, for information to Cattermole's patents, I find Cattermole's process was one where oil was used for the double purpose, viz.: First, such small quantity as was necessary for metal particle covering; and, second, such large quantity as was necessary for metal particle flotation. I say "for metal particle flotation" advisedly, for, while the process finally ended in the metal particles finding their way to the bottom and the gangue to the top, yet, as a necessary precedent step to making the metal particles go to the bottom, they were first floated upward, so as to enable them to *there* nucleate or agglomerate in such

numbers that their combined weight overcame the buoyant capacity of the oil and they sank to the bottom of the vessel. These several actions are set forth by Cattermole, as follows:

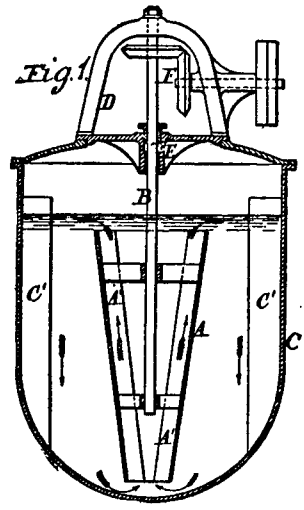
"The invention depends upon the application of the following facts: First, when a mixture of powdered metalliferous matter and gangue is treated with oil suspended in water—that is to say, in emulsion—*the oil has more or less selective action and will coat the particles of metalliferous matter in preference to the particles of gangue*, while the particles of gangue will be wetted by the water; second, if the water which is mixed with the oil is acidulated with mineral, fatty, or other acid the *selective action of the oil will thereby* be rendered more marked and decisive; third, if the proportion of oil is kept within reasonably low limits (differing in different cases, according to the nature of the mineral to be treated and the consistency and nature of the oil) and if the mixture of water, oil, metalliferous particles, and gangue be *thoroughly agitated* the metalliferous particles which have become coated with oil will adhere together and form granules, which granules, partly by reason of gravity and partly on account of their bulk, as compared with the individual grains of gangue, will offer ready means for separation in an upcurrent separator, a jig, or other similar appliance."

At this point it should be noted that as the patentees, in order to explain their disclosure, by reference make the Cattermole patent part of their specification, as the agitation used by the patentees was a step in the Cattermole process, and the Supreme Court found the patentees used and disclosed "an agitation greater than and different from that which had been resorted to before," and also that "the extent of the agitation of the mass had been increased as the experiments proceeded until the series of the Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute," an inquiry into the character of the new kind of agitation used and disclosed by the patentees becomes essential to a due understanding of the disclosure made. As recognized and stated by the Supreme Court, this agitation consisted in the patentees speeding up a Gabbett mixer to 1,000 to 1,100 revolutions per minute. The extent of the agitation of the mass had been increased as the experiments proceeded until, as stated by that court, the "series of Gabbett mixers, fitted with the usual baffles, were speeded at from 1,000 to 1,100 revolutions per minute." It is apparent that this tremendous agitation speed through a mushy substance like pulp could only be reached by some special appliance impelled by powerful mechanism, since no ordinary paddle mechanism could stand the strain and furnish the power to meet such a requirement. We accordingly find that this was done by the patentees speeding up to hitherto unused speed, the device known and used in Cattermole's process. Instead of seeking to move the whole pulp mass by rotating paddle pressure on the whole mass—a thing which, owing to the length of the paddle required, would be impossible—Gabbett, as shown by his patent No. 444,345, segregated a part of the pulp. This segregated part alone he moved by paddles, and thereby set up a centrifugal force in the pulp in such segregated section, and thus made the centrifugally moving pulp itself the agency for moving the pulp on the outside of this inner dividing vessel. His device was built in two forms, one of which expelled the pulp at the top and the other at the bottom. Referring to the top expelling device,

shown by Figure 1, which, as we shall hereafter see, these patentees necessarily declined to use, its operation is as follows:

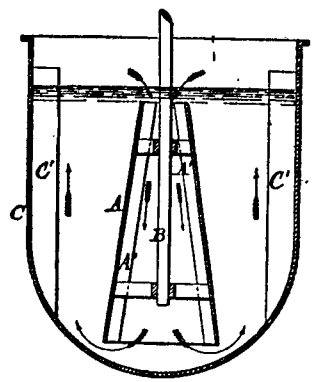
"*A* is a conical shell, having internal ribs A^2 and mounted on a shaft *B*, by which it is suspended within the vessel or tank *C*, containing the liquid to be acted upon, the shaft being carried at its upper end by a bracket *D* and guided by a bush or stuffing-box *E* on the cover of the vessel *C*. Assuming this vessel to be charged with liquid to the level indicated and the shell *A* to be rotated by suitable gearing, such as indicated at *F*, then the body of liquid within the shell being carried round with the same by means of the ribs *A'* the centrifugal force will cause the liquid to rise along the inclined inner surface of the shell and to be ejected into the surrounding liquid when arriving at the upper edge thereof, while at the same time the pressure of the surrounding column of liquid in the vessel *C* will cause fresh quantities of liquid to enter the lower end of the shell *A* to make good the quantity discharged at the top. Thus a continuous circulation and consequent mixing of the liquid will be effected, as indicated by the arrows."

Fig. 1.



That is, the machine discharged at the top. Its paddles being submerged in the segregated pulp, it could not beat in air. But neither Cattermole, nor the patentees, who adopted Cattermole, used the top *outlet* type of Gabbett's device above described, but did use the other or top *inlet* type shown in Figure 9, although both moved the pulp in the same way, but in opposite directions. Selecting the top inlet or cone type shown in Figure 9 of Gabbett's two forms, although both machines and agitators were, with the exception named, counterparts, there was a functional advantage in the top inlet type used which was vital to the working of the present patentees' process. And that there was a functional disadvantage in the top outlet type which would have been fatal to the working of their patent will, for reasons hereafter stated, be made clear. The only point now made is that the agitation, and the only agitation which the patentees disclosed as embodying the agitation of their process, was an agitation of one of two particular kinds, namely, one where they utilized their agitation power on a small zone of segregated pulp and where, for functional reasons, as we shall hereafter see, they applied such agitation to this segregated pulp as it was traveling in one direction; that is, downwardly. At this point we recall, as

Fig. 9.



before stated, that Cattermole's object was to nucleate or agglomerate into a mass, the individual, oil-coated mineral particles, or, as summarized by the Supreme Court, "agglomerating the oil-coated concentrate into granules heavier than water, so that they will sink to the bottom of the containing vessel." As stated in the patent, "the more oil is used, the larger, softer, and less numerous the granules." It was in the use and experimentation of this process that the discovery of the patent in suit was made, and these experiments were duly reported (see volume 4, page 22 and following) from time to time. From these reports it will be seen that the agitator used was of the cone-shape, upper-intake type already described and shown in Figure 9. By March, 1903, they found the value of both violent and protracted agitation, and that such protracted and violent agitation was effective to coat the mineral particles with oil:

"Somewhat *violent* agitation is now required for a *few minutes*; the time being *dependent* upon the *efficiency* of the agitation, and varying from two to five or eight minutes, *whereby* the oil is released from the gangue and *attaches itself exclusively to the mineral.*"

Later, that is, in March, 1904, when a speed of 988 cone revolutions was reached and the effect of agitation effecting air-flotation was noted, where under the head of "Flotation Factor Used," it was said:

"* * * The coarse sands, when passing through the last two mixers, were allowed to be *beaten well with air* by keeping the liquor low in the mixers *and* using *fast agitation*, with baffles in. The concentrates were then found to be floated *up* in the outcast if only a general up current were used."

The underscoring of the words "and" and "up" and the phrase "beaten well with air" and "fast agitation" show that the significance of violent agitation and the entraining of air was in the path of experimentation following the basic feature of the subsequent disclosure of the specification. In March, 1905, under the head "Influence of Peripheral Velocity of Cone"—and it must not be overlooked that "cone" was the word which described the inlet top (Fig. 9) of the Gabbett mixer—it was said:

"An increase in the peripheral velocity of the *cone* causes a decrease in the time required for granulation, a point being reached after which this decrease is slight."

From this entry it will be seen that increase of agitation was still regarded as and was the factor which was leading toward the discovery afterwards made and disclosed in the specification. In the next report both the speed and the type of Gabbett's agitation is again emphasized by contrasting—

First. The low speed of the Gabbett as useless.

Second. The Gabbett *cone* mixer alone and with baffles added as an additional agitation agency.

Third. The inability of a centrifugal pump speeded higher than a Gabbett mixer to furnish the agitation requisite.

These points are all outlined in said report as follows:

"*The influence of the speed and type of agitation* becomes a factor of great importance to our recent experiments. Speeds of rotation (with a small Gabbett) varying from 3 to 500 revolutions per minute, *proved almost useless.*"

This shows the necessity of high speed agitation.

Continuing, the report said:

"We then made a series of baffles which were placed in the Gabbett and which were 'solid'; i. e., they occupied the *greater free space* of the Gabbett vessel from the glass sides up nearly to the working surface of the cone. They were found to be disadvantageous as they gave *too violent* agitation, and set up large eddy currents in front of each baffle, greatly reducing rotation speed of the liquor in the Gabbett and adding *water friction* to such an extent to the rotating cone, that the power required to drive the latter was more than doubled. On replacing these solid baffles by the *ordinary type of thin rod baffles*, the granulation period was much improved, and the power consumed in driving the cone fell again to the normal."

This, to our minds, shows that, although the baffles increased the agitation, they precluded the kind or quantity of agitation desired. Manifestly the stoppage and delay of the pulp in eddies caused by the baffles stopped the steady and more frequent passage of the pulp through the cone, and this lessened the amount of agitation in the segregated zone where the air was beaten in.

Continuing, the report adds:

"We have also carried out a series of experiments with a small centrifugal pump in place of a Gabbett, to determine whether this gives a better form of agitation than the cone. * * * The following figures were obtained by Mr. Leechman yesterday in comparison with the Gabbett, and show the latter to be distinctly preferable to the centrifugal pump experiments. We may say the centrifugal pump used was only a small one, having about a 4½ to 5 inch chamber, but it was speeded up to about *1,200 revolutions per minute. The pump therefore had a considerably higher peripheral speed than* the Gabbett used in parallel tests."

From this it will be seen that by a process of elimination it was becoming evident that the agitation desired was only obtainable on a *cone* or *top outlet* Gabbett mixer, and that the violent agitation by solid baffles and by the higher speed of a centrifugal pump were both objectionable.

In the light of subsequent events, it is quite evident why this was the case. In the first place, the top inlet or cone Gabbett mixer, by the rapidity of revolution formed a hollow air chamber around the shaft, into which air was drawn down and was there beaten by the paddles into and aerated the pulp. It is also clear that if solid baffles were used on the sides of the outer chamber, the rapid flow of the pulp would be measurably stopped and it could not pass as often through the cone, and therefore was not subjected to as much air beating as when the baffles were not used, as manifestly all the air beating in took place in the cone. And lastly, while in the Gabbett mixer the revolving paddles in the cone were able to strike and beat the air into the surrounding pulp, it is evident the blades of the centrifugal pump, *being necessarily wholly immersed in pulp,* had no contact with air or an opportunity to beat air in. In other words, by its blade submerging, the centrifugal pump had no more power or opportunity to beat air into the blade-enveloping pump than would have been the case had the paddle blades of a Gabbett mixer with a *top outlet* (see Figure 1), whose blades would also be wholly immersed in the outflowing stream, been used.

It will here be noted that as the centrifugal pump was the sole form of agitation used in this particular stage of the experiments, and, as it was discarded by the experimenters, that, tested by the acts of these patentees, no logical grounds existed for their counsel now planting themselves on the position that the pulp lift of a centrifugal pump is the air agitation of their disclosure and claim.

In the next report, March 16th, under the head "Influence of the Percentage of Oil," we find the effect of oil reduction is noted:

"The effect of diminishing the percentage of oleic acid is to alter the type of oiling; the higher percentages producing granules. and the lower froth. Six per cent. of the oleic acid on the mineral is sufficient to form good granules without much froth. * * * 0.62 per cent. oleic acid on the mineral is insufficient to form any granules, and nearly the whole of the mineral comes to the surface, on stopping the cone, as froth."

It will thus be seen that it was agitation, and agitation of a selected type and speed, that gradually led up to the May 3, 1905, report, where the invention was definitely recorded. And when this was done it was accredited to the agitation indicated. That report says:

"We beg to hand you herewith a statement of the new method of oil concentration which we have been engaged in investigating and working out in detail, for the purpose of your forwarding to Mr. Courtney and his staff in Australia. It will be best to start with a short statement of the principle on which the process depends. In determining the lowest limit of oleic acid which could be employed in granulating, it was found that granulation practically stopped at a range of about 0.5 per cent. of oleic acid on the mineral (60 mesh Broken Hill), in an acid circuit somewhat below 1 per cent. in strength. A certain amount of black mineral froth was, however, noticed as a result. On successively decreasing the amount of oleic acid *below* 0.5 per cent. it was found that, whereas granulation ceased, there was a growth in the amount of mineral float-froth under these conditions, and that the production of such float-froth appeared to reach a maximum when about 0.1 per cent. of oleic acid on mineral was used. This froth on collection was found to consist of oiled mineral slimes *mechanically holding more or less coarse* (oiled) mineral particles, the froth carrying between 70 to 80 per cent. of the total mineral present in the charge. * * * The froth produced is not due to any action of the acid circuit upon traces of calcite present in the ore; i. e., not to the liberation of any gas in the charge by means of the dilute acid employed in the circuit. It has been located, on the contrary, *to the air introduced by the Gabbett cone during agitation, the air attaching itself to the oiled mineral slimes and to a large proportion of the coarse mineral particles, although both these materials can only be coated with an infinitesimal amount of oil;* i. e., oleic acid. That the formation of froth is due to *air inclusions during the agitation*, and not to carbonic acid or sulphuretted hydrogen is proved by the following experiences: * * * The plant consists of a series of Gabbett mixers fitted with the usual baffles, and speeded at from 1,000 to 1,100 revolutions per minute as regards the cone. These Gabbett mixers are identical in every respect with those used for the original Cattermole process. * * * The operations are therefore summarized as follows: *Gabbett agitation* in the usual way with 0.1 per cent. oleic acid"

—thus themselves coupling with their invention at its birth the name of Gabbett and Gabbett agitation, which they now seek to avoid.

This terse and complete summary of the discovery in "*Gabbett agitation* in the usual way with 0.1 per cent. oleic acid" is also the summary of all that is set forth in the specification of the patent in suit, and further and other than "Gabbett agitation in the usual way with 0.1 per

cent. oleic acid" the long specification discloses no method or suggestion of other agitation, and gave none to the art. Such specification starts with reference to the Cattermole patent, from which we have quoted, Nos. 777,273 and 777,274, and states that in the former:

"Oil varying from 4 per cent. to 6 per cent. of the weight of metalliferous metal present is agitated with an ore pulp so as to form granules which can be separated from the gangue. * * * We have found that if the proportion of oily substance is considerably reduced—say to a fraction of 1 per cent. on the ore—granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum."

Such was the discovery the patentees embodied in the two claims here in issue, viz.:

Claim 1:

"The herein-described process of concentrating ores which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of 1 per cent. on the ore), *agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation.*"

And claim 12:

"The process of concentrating powdered ore which consists in separating the minerals from gangue by coating the minerals with oil in water containing a fraction of one per cent. of oil on the ore, *agitating the mixture to cause the oil-coated mineral to form a froth, and separating the froth from the remainder of the mixture.*"

It will be observed that these two claims do not themselves cover any complete, workable process of concentration disclosed in the specification, but are separate steps or elements in the process of workable concentration described in claim 3, which in addition to the above elements includes the elements of acid and heat. And that the extract quoted above, embodied in claims 1 and 12, was not a complete concentration process but merely certain elements or steps of it, is made clear by the patentees, for, after reciting that "there is a tendency for a part of oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum," they add:

"This tendency is dependent on a number of factors. Thus the water in which the oiling is effected is preferably slightly *acidified* by adding say a fraction of 1 per cent. up to 1 per cent. of sulphuric acid or other mineral acid or acid salt, the effect of this acidity being to prevent gangue from being coated with oily substance, or, in other words, to render the selective action of the oil more marked. * * * Again, we have discovered that the tendency for the *oily substance to disseminate* through the pulp and the rapidity with which the metalliferous matter becomes coated is increased as the pulp is *warmed.*"

It will thus be seen that the workable concentration process which the patentees gave the art, was one in which the "flotation of mineral particles" was dependent on a number of factors, viz.: First, Gabbett agitation; secondly, 0.1 per cent. of oleic acid; thirdly, 0.1 per cent. sulphuric acid; and, fourth, heated pulp. And the workable process embodied all these four elements used in the method of working the invention, which the patentees necessarily showed in compliance with

the statutory requirements that they "shall file in the Patent Office a written description of the same, and of the manner and process of * * * using it, in such * * * exact terms as to enable any person skilled in the art * * * to use the same," suggests that they regarded all four elements as constituting their workable process, and indeed they attribute to heat the permeating and rapid coating of the minerals with oil.

Complying with the statutory requirement, the patentees say:

"The following is an example of the application of this invention to the concentration of a particular ore. An ore containing ferruginous blende, galena, and gangue consisting of quartz, rhodonite, and garnet is finely powdered and mixed with water containing a fraction of 1 per cent. or up to 1 per cent. of a mineral acid or acid salt, conveniently sulphuric acid or mine or other waters containing ferric sulphate. To this is added a very small proportion of oleic acid (say from 0.02 per cent. to 0.5 per cent. on the weight of ore). The mixture is warmed, say, to 30° to 40° centigrade, and is *briskly agitated* in a cone mixer or the like, *as in the processes previously cited*, for about *two and one-half to ten minutes*, until the oleic acid has been brought into *efficient contact* with all the mineral particles in the pulp. When agitation is stopped, a large proportion of the mineral present rises to the surface in the form of a froth or scum which has derived its power of flotation *mainly from the inclusion of air bubbles introduced into the mass by the agitation, such bubbles or air films adhering only to the mineral particles which are coated with oleic acid.*"

It is urged that this is but a sample method of showing how their process was workable. But the sample element consisted in the particular treatment given to a particular character of ore. It was not a sample of one of many possible kinds of agitation, for the kind of agitation applicable to all kinds of ore was concededly of one sort, namely, as therein stated, "briskly agitated in a *cone mixer or the like,* as in the processes previously cited." And the testimony of those who made the discovery and made the disclosure shows that the way, and the only way, they discovered and disclosed, was a definite kind of agitation, and that this definite kind of agitation made their disclosed process workable. Indeed, that maximum of agitation and minimum of oil, increase of agitation and decrease of oil, were axioms in this process is made clear by the proofs. As the amount of oil was decreased, the amount of agitation had to be increased. In that regard, Sulman, one of the patentees (volume 1, p. 53), says:

"The first requisite of any oil concentration process is to obtain efficient contact between the oil and the mineral and suitable methods must be employed to effect this. Where the oil is in large relative quantity to the mineral, *violent agitation is unnecessary*, and may be very harmful. With decreasing proportions of oil more vigorous agitation or mixing *is necessary to insure such efficient contact of oil with the mineral particles.* The agitation may therefore be said to be roughly proportioned to the work to be done in bringing about contact between large or small quantities of oil in regard to the mineral."

His evidence (page 54) is that in the Gabbett mixer of the cone type he first saw produced the froth of the specification:

"The apparatus that I first saw the agitation froth produced in as described on the specification referred to was the ordinary Gabbett apparatus consisting of a vessel with rotating cone and with suitable baffles. The cone was rotated at a high rate of speed, about 1,000 revolutions per minute."

The use of the ordinary speed of the Gabbett mixer to effect the intermingling of the oil with the mineral particles, and the use of superadded speed for the purpose of entraining air and producing froth, is made clear by the testimony of Picard, another of the patentees. Thus (page 109) in answer to the question:

"Q. In carrying out the process which the patent in suit purports to disclose, is there anything distinctive about the mode of agitation of the oiled pulp as compared with the agitation used in applying the Cattermole process, wherein the purpose is to granulate and precipitate the valuable mineral?"

—Picard says:

"In actual fact the same apparatus was employed for both purposes during my connection with the experimental work on the two processes. In the patent in suit it is *more essential to beat in air*, which is not an important point, and *rather to be avoided*, in the Cattermole process, where the object *was only* to mix the various ingredients, air not being one of them."

And he adds (page 110):

"We already knew from the first test that the cause was due to reducing the quantity of oil much below that hitherto employed, and observation of the froth clearly indicated that the air which had been beaten in played an important and *essential* part in the production of this new phenomenon. I presume that further investigation work was carried on, but in my opinion the invention may be said to have been completed after that first operation. * * * I had no idea, prior to this, that by reducing the quantity of oil to the limits which were used in this experiment that such a result would be obtained. I, of course, knew that air would float mineral, previously oiled; but it was not anticipated by me hitherto that this particular result would be obtained if *air were beaten in*, in the manner in which it was done in making this test."

John Ballot, the third patentee, also emphasizes (volume 1, p. 118) this "intentional beating in of air" caused by violent agitation, where in answer to the question:

"And when you saw the work in progress from March 1, 1905, onwards, as referred to by you in your answer to question 29, was this the first occasion upon which you had been informed as to the use in an oil flotation process of the *intentional beating in of air* for the purpose of promoting flotation?"

—he says:

"*The intentional beating* in of air to produce or promote the flotation of froth which was developed by that process was certainly not known until the fact had been actually discovered by using a very small quantity of oil, say 0.2 or 0.1 per cent., and agitating it for a certain time, and then leaving the mixture to stand that the whole froth rose to the surface. By 'discovered' I mean until the experiments had established the fact that this extraordinary phenomenon was every time reproduced by using the small quantity of oil, *violently agitated*, and then leaving it to stand, when the mineral rose to the surface in the form of dense froth."

He adds:

"We considered it established, and that the principal cause of flotation, or *perhaps the entire cause of flotation*, was *due to air beaten* into the pulp, assisted, of course, by the other agents."

Indeed, the discovery of beating air by agitation into the pulp as the groundwork of the discovery, and therefore of the resultant disclosure, is summed up by the witness Ballantyne (volume 1, p. 225) in the words:

"After *violent agitation in such a way as to introduce air into the pulp, the agitation lasting several minutes*, the pulp was brought to rest and immediately a coherent and persistent froth rose to the surface. Although I was closely familiar with all the earlier processes of ore concentration in which oil had been used, * * * the production of this agitation froth was to me little short of a miracle."

In this development it will be seen that Mr. Ballantyne makes the violent agitation of the cone mixer the basic step in these words.

But not only was the testimony of these witnesses that this air-beating or air-entraining agitation was the agency which produced a froth of a hitherto unknown type, but we have the authoritative view of the Supreme Court that the *lifting force* of the bubbles is to be found not in the quantity of oil used, but in the maximum of agitation, "greater than and different from that which had been resorted to before." We think the agency of this air-beating-in agitation as the functional cause of air flotation, is made clear by the Supreme Court. In that regard that court says:

"The small amount of oil used makes it clear that the lifting force which separates the metallic particles of the pulp from the other substances of it is not to be found principally in the buoyancy of the oil used, as was the case in prior processes, but that this fact is to be found, chiefly, in the buoyancy of the air bubbles introduced into the mixture by an agitation *greater* than and *different* from that which had been resorted to before and that this *advance* in the prior art and the *resulting* froth concentrates so different from the product of other processes make of it a patentable discovery as new and original as it has proved useful and economical."

In quoting and approving the decision of the House of Lords, 27 R. P. C. 33, the Supreme Court alluded to the dual functional capacity of the patentees' agitation: First, as a mixer of oil with the mineral particles (the function of Gabbett agitation at normal speed); and, secondly, the formation of air cells by air entraining (the function of Gabbett agitation at abnormal speed). The extract thus quoted with approval from the English decision, is:

"They [the patentees of the *Agitation Froth Process* of the patent in suit] are not promoting a method of separation which had been before described, but they are engaged upon a new method of separation. Istead of relying upon the lesser specific quantity of oil in bulk they rely upon the production of a froth by means of an agitation which not only assists the process of *minute quantities* of oil reaching *minute* particles of metal, but *forms a multitude of air cells*, the buoyancy of which air cells, forming around single particles of the metal, floats them to the surface of the liquid."

And that agitation of a particular kind, and not agitation of any kind, was the disclosure of the specification, is shown by Dr. Liebman, who says:

"I believe that 500 or 600 revolutions are quite sufficient for the Cattermole process (metal sinking). But I believe that at least 1,200 revolutions per minute *are necessary* for the process of the patent in suit in the same apparatus."

From the above review, it is clear that the basis of this invention was agitation, and of agitation of a particular type and power, and that such type and kind of agitation gradually led to the further discovery that all oil, except the minimum required for mineral coating, could not be dispensed with. That the invention cannot be based on the

use of a minimum of oil alone is clear, for the stress laid on agitation in the specification, and its presence as an element in the claim here in issue, forbid any such holding, and the further fact that a claim based wholly on the use of a fraction of 1 per cent. of oil for coating minerals was abandoned during the prosecution of the patent, to wit:

"The process of concentrating powdered ore which consists in separating the minerals from gangue by coating the minerals with oil in water containing a fraction of 1 per cent. of oil on the ore, and recovering the oil-coated minerals."

Seeing, then, that no change occurs in the character of the oil itself, in the amount required to coat the metal particles, or the affinity of the particles when coated, it follows that the essence of this patent lies in the agitation by which this low percentage of oil is made available. Now, what was the nature of this agitation? It had a number of characteristics:

First, it was produced by machinery of high power operating on mechanism revolving at high speed. This mechanism was a special type; i. e., a *top-inlet* or *cone* Gabbett mixer which embodied certain features, each of which was necessary to the successful working of the invention disclosed: (a) The application of the mixer to the pulp was confined to such restricted zone of the pulp as was inside the cone; (b) to this cone-restricted zone the air had access; (c) the speed of the agitation was raised to a hitherto unused point; (d) the air in the chamber was by the speed of the agitator beaten into the pulp segregated in the cone; (e) in addition to high speed, time was required, the agitator being revolved from 2½ to 10 minutes before the entrance of air appeared in froth; (f) the agitator was of such novel, individual, and inventive character as to warrant the grant of a patent; (g) the agitator was of such special type and speed that the froth it produced was also of a new type, or, as the Supreme Court said, "utterly different from any froth known before."

But, because the claims here in controversy use the word "agitation," without description or limitation, it is argued that the term should be used in a broad, generic sense, and cover any and every agitation which results in the air flotation of mineral coated particles. Put into practical commercial application, this means a monopoly of the principle of air flotation of oil-coated minerals, with the one exception, namely, where 0.1 per cent. or more of oil is used. To our mind, this use of the literalism and verbiage of this one word "agitation" to foreclose this whole great controversy loses sight not only of the spirit of the patent law, but also of the principles on which this contract—for a contract with the government is what this claim is—should itself be interpreted, for in construing that contract we must construe it as a whole; that is, the claims plus the specification, and not the claims minus the specification. We must also consider the claims in the light of the evolution of experiment that led up to the discovery, and consequently to the disclosure.

It is argued here that no sort of agitation is specified in the specification, that the phrase or idea of beating in air is not even mentioned in the specification, that there is no mention of any specific form of agi-

tation, and that therefore there is no qualification or limitation to be given to the type or kind of agitation. But this loses sight of the fact that the patent is based on the Cattermole process, and that that process and the patentees used a Gabbett mixer, and when the word "agitation" was used in the specification it referred to what the patentees had used in making their discovery, and was well understood by persons versed in the art, and when they spoke of the production of froth by agitation they meant precisely what they reported in their experiments, to wit:

"The froth produced is not due to any action of the acid circuit upon traces of calcite present in the ore; i. e., not to the liberation of any gas in the charge by means of the dilute acid employed in the circuit. It has been located, on the contrary, to the *air introduced by the Gabbett cone during agitation, the air attaching itself to the oiled mineral slimes and to a large proportion of the coarse mineral particles, although both these materials can only be coated with an infinitesimal amount of oil; i. e., oleic acid.* That the formation of froth is due to *air inclusions* during the agitation, and not to carbonic acid or sulphuretted hydrogen, is proved by the following experiences."

It is quite evident not only that this was the precise word and the disclosed sort of "agitation" they had in their minds when they disclosed their discovery. Moreover, we think that courts and judges have held this was the meaning of "agitation." In passing upon the validity of the patent, the Supreme Court explained what the patentee's invention was, and defined the agitation of that discovery as "beating the air into the mass." This beating of air into the mass by the Gabbett mixer being the sense in which that word was used in the specification, and no disclosure or suggestion of any other agitation being made, the burden is certainly on the patentees to show that, when the word "agitation" was used in the claim, it meant anything else than the agitation disclosed in the specification, to wit, that of the Gabbett mixer or its substantial equivalent. For the word "until," in "agitating the mixture *until*," aptly described the "two and a half to ten minutes" of the directions of the specification during which a Gabbett mixer was to be operated before the froth was produced. In so holding, we do not minimize, belittle, or underrate the very important discovery these inventors made. But the great discovery they disclosed was based on two facts—oil of a certain kind, and agitation of a certain kind. The quantity of oil was less than a tenth. The agitation was by beating in the air until a froth came. That was the extent of their discovery, their disclosure, and their claim. Within those limits they are entitled to protection. Beyond that the art has a right to progress and improve.

So regarding the claim, we turn to the defendants' plants, as to first of which, namely, the one in operation when the bill was filed, there can be no question. It is simply a replica of the plaintiff's process, used as a Gabbett mixer, as did Hyde in the case in the Supreme Court, and, so far as it is concerned, infringement, and an accounting should be decreed. But as to the defendants' second plant I cannot agree that the claims in question cover it. I shall not enter into a detailed description of its working, but at present restrict myself to saying that the basic feature of the defendants' process is the sub-aeration of the pulp through the agency of compressed air. There is no air expansion as an agitating agency in plaintiff's process. They beat

no air into the pulp; they introduce compressed air into the pulp, and avail themselves of the instant expansion of that air to form a different kind of bubble from that of the patentees, and they get a different kind of froth. And the crux of the case may, as we view it, be stated in this way: If the defendants were applying for a patent for concentrating ore, which consisted in sub-aerating a mixture of ore and a fraction of 1 per cent. of oil through the agency of compressed air, would such process be anticipated by the plaintiffs? The test of that question is, not whether the product of two processes is the same, but whether the steps of the two processes are substantially the same. Addressing ourselves to that question, I have reached the conclusion that the defendants' process approaches the problem in a wholly different line from the patentees, and, while the result is the same, that result is reached by steps or means acting in a different way and by a different method. Physically the defendants' method substantially and functionally consists in the liberation of air under light pressure, seven pounds' compression, into the pulp mixture. Physically, by the turn of a stopcock this light pressure is turned on, and instantly aeration and bubble forming begins, and agitation follows. The physical difference between the two systems is as striking in its way as it would be if a person, standing on the stern of an ocean steamer and seeing the maelstrom caused by the 100 a minute revolutions of a screw, should be told that these revolutions, the screws themselves, the shaft, and the ship's great engines, could be taken out of the ship, and their places supplied by a tank of air under mild compression. And yet that is just what these defendants have done. They have eliminated, not 100, but 1,000, revolutions a minute of the Gabbett mixer; they have eliminated the shaft, couplings, and power machinery which was necessary to actuate this; and for it they have substituted the stopcock of a tank filled with air under light compression. Defendants have eliminated such a distinctive element of plaintiff's process that it was patented. The physical difference between the means employed is well illustrated in this way: Suppose the owner of the Gabbett agitator were to sue the defendants for infringement by the use of a compressed air apparatus; could an expert be found so rash as to even suggest that the two were substantially equivalent? Not only are the two not mechanical equivalents, but it is evident that in the two processes the Gabbett mixer and the compression tank work on wholly different principles. The Gabbett mixer uses agitation to beat the air in, in order to thereafter produce bubbles; and that only after several minutes' work produces bubbles, and these bubbles only rise after the several minutes' agitation goes on. In other words, in plaintiff's process bubbles are the product of agitation. In the defendants' practice the expansion of the air itself, on its release from compression, at once creates bubbles, and the instant rise of these bubbles to the surface at once sets up agitation. In other words, the defendants' bubble causes agitation, while in the patentees' agitation causes bubbles. In the one there is a gentle agitation of the fluid, caused wholly by the expansion of air when released from compression. In the other there is no expansion of the air; it is simply beaten into the mixture by the action of the arms of the Gabbett mixer. In the plaintiffs' process the agitation forms the air cells,

and only after several minutes' physical exertion; in the defendants' the air, on its release from compression, by its own inherent power, forms the cell, and forms it instantly.

It has been suggested that in defendants' process the air is shot into the mixture like a bullet from a gun, and that there is no difference between shooting air into a mixture with a gun and beating it in with a paddle. But it is manifest that the defendants' practice is not the shooting in of a violent air blast, but is in allowing air under slight compression to escape from such slight compression at the bottom of the tank. To have the compressed air strike the top surface of the pulp would not lead to any bubble introduction, and consequently to no subsequent agitation by rising bubbles, for such bubbles as would be formed would already be near the surface. It will thus be seen that the introduction of compressed air is necessarily made at the bottom of the pulp vessel, and it is also apparent that no such *sub-air* introduction, which characterizes the defendants' process, could be effected by the Gabbett beating in of the air, for in such case the moving blades of the mixer would have to be wholly immersed in water, and, as we have seen heretofore, such immersion forbade the use of the top-outlet form of Gabbett agitation shown in Figure 1. These differences in form and principle, the difference between a hurricane and a zephyr, the spread between the maelstrom action of a swift-moving mechanism and the bubbling, seeping action of air released from compression at the foot of a tank, and then in the case of the Callow cell oozing or seeping its way between the threads of a canvas, are so different in degree of violence and mode of action that one would naturally expect some difference should evidence itself in their product.

And such is the case. In the defendants' process the bubbles rise at once to the surface; but they are so frail that they absolutely require the continuous support of other bubbles. For in case the air is shut off below, and the upward bubble stream stops, those on the surface at once disintegrate. The defendants' bubbles are ephemeral; they are matured at birth; and, like all such creations, lack self-sustaining power. On the other hand, the plaintiffs' bubbles evidence themselves at the surface in a froth which is only formed after from 2,500 to 11,000 revolutions of the mixer (2½ to 10 minutes of 1,000 to 1,100 revolutions), but when so gradually formed are so self-sustaining that they last for days and are so tough that they support a shovel. If the production of such froth by such a protracted and violent agitation was a contribution of inventive and novel worth to ore concentration, and apart from all authoritative decision that is our estimate of the goal it reached, then for another to reach that same goal without making the tough, persistent, shovel-carrying froth, and without using the thousands of revolutions of powerful machinery, absolutely required to produce it, is also a contribution of inventive and equal worth to ore concentration. And the best evidence of its worth, of its simplicity, and of its effectiveness is the fact that the plaintiffs themselves use it and concede its superiority. Concededly valuable as sub-aeration is, it is certain the ore-concentration art never would have had it, if we were dependent on the plaintiff's patent to give it to the art. Not only did the patent in suit not disclose it, but, if anything, their disclosure

pointed away from rather than to the probability of the use of compressed air. Thus in their specification they take pains to avoid the imputation even of using gas as a flotation agency, and ex majore cautella give notice that "it is to be understood that the object of using acid in the pulp according to this invention is not to bring about the generation of gas for the purpose of flotation thereby"—a statement the Supreme Court referred to as evidencing that their work tended not in the line of introduction of gas, but "to the presence of the air introduced into the mixture by the *agitation* which had been resorted to, to mix the oil with the particles of crushed ore."

Indeed, that the use of compressed air with their concentration process was not in the patentees' concept is strikingly shown by the fact that, had they had any such use in view of the power of compressed air to do the work of the Gabbett mixer, their suggestion of the possibility of its use was almost challenged by the use to which they suggested it could be put to in the second and third spitzkasten, where no mixing or separation was required. They there say:

"An alternative method for the recovery of any sunk oiled metalliferous matter which may be deposited in the second and third spitzkasten is as follows: The products suspended in circuit liquor are removed from the spitzkasten and placed in a vessel in which they are submitted to an *additional pressure of air or other gas* of from, say, one to two atmospheres or over. On relief of such pressure the bubbles of air or other gas *so generated* throughout the mass at once sweep to the surface thereof all the metalliferous matter in the form of a froth which can be separated as before. This idea is not claimed broadly in this case, but forms the subject-matter of an application filed by us on January 9, 1906, serial No. 295,326."

Of course, whatever ideas they had on the subject were embodied in another application, and offered no basis for a claim in this patent; but even this suggested use of compressed air as a flotation agent to these experienced men suggested to them no use of that agency in the process of this patent. It remained for some other engineer, in this case the defendants' experimenter, to discover and disclose it. This view is emphasized by the fact that five years after this patent was applied for, and two years after it became the owner of it by assignment, the plaintiff joined with one Hoover in applying for a British patent for such use of compressed air. In that patent the patentees themselves emphasize the points we have made, saying:

"This method of introducing the gas may have three functions: (I) The *gas* may *bring about* the necessary agitation of the mass. (II) The gas, being in a state of very fine division, is effectively brought into contact with every mineral particle, thus *clearly differentiating the process* from that of the patent where the mechanical stirrers caused the agitation and *thus preceded bubbles*, while here *bubbles preceded and caused agitation.*"

In the patent in suit the mechanical action of the stirrers, kept up for ten minutes, brought about air being brought into contact with the mineral particles, while by the subgaseous process, the gas being in a state of fine division through seeping through the canvas, is, as said above, "brought into contact with every mineral particle." The fact that the present plaintiffs, five years after the grant of the patent, joined Hoover in taking out this patent, in itself shows that it then regarded the sub-air process as one not covered by the patent in suit, and

may well cause a court to hesitate to give a construction to the patent in suit which is at variance with the plaintiffs' conduct in taking out this Hoover patent.

To me it seems clear that the field of discovery the patentees disclosed was not the broad principle of air flotation, for concededly that principle was known before. What they did disclose was an original method of using the broad principle of air flotation in a particular way. That method was by beating air into pulp with a minimum of oil. They showed how the beating in of air could be effected, and they showed a novel froth product as a result of this beating-in process. In their process air was the product of agitation, and not the agitating agent. In their process bubbles did not appear until protracted agitation was ended. Not only was it produced by agitation, but it did not appear until agitation ceased. It will thus be seen that air was in no way an agitation agency in the plaintiffs' process, in its specification, or in its claims; but the agitation disclosed therein was wholly the physical agitation of an extraneous mechanical process. Now, this occupancy of the field of air flotation, novel, useful, and inventive, the plaintiff disclosed and should be awarded. But, by occupying this part of the field, the process of entraining air by mechanical beating in, the plaintiff did not foreclose all further advance in air flotation. Air flotation as a recognized principle was known before this patent, and by discovering one way to utilize that principle the patentees did not bar all other ways of making use of that principle. If they had discovered the broad principle of the capacity of oil to coat minerals and to reject gangue, if they had first discovered the coating of air bubbles with oil, if they had first shown that oil-coated minerals and oil-coated bubbles would unite and rise to the surface, we could regard them as first comers into a newly discovered field, and as entitled to make all further progress in that art servient to those who created it.' And while this has been done in some notable instances, it is nevertheless true that even great and notable steps in a great art can be disclosed by patentees without blocking all further progress in that field. In that regard we are admonished by the later rulings of the Supreme Court in patent causes, which began with Westinghouse v. Boyden, that even such a great invention as the instantaneous stoppage of every car on a great freight train, an invention which is at the bottom of the movage of tonnage to-day, did not bar other inventors from showing other means of using air to accomplish the same result. And such holdings as Westinghouse v. Boyden and the like seem to us the true principle which should govern the administration of the patent law, namely, giving full protection to the full limit of the disclosure made, and refusing to extend that limit so as to bar further advance by others. Applying that principle to the present case, I would hold that the step of the process "agitating the mixture until the oil-coated mineral matter forms into a froth" meant the novel air-entraining agitation which the patentees disclosed and did not cover the novel air-releasing agitation which the defendants disclosed.

In accordance with these views, and in support thereof, I am constrained to record my respectful dissent to the opinion of the court.

FRANK F. SMITH METAL WINDOW HARDWARE CO. v. YATES.

(Circuit Court of Appeals, Second Circuit. June 6, 1917.)

No. 267.

1. PATENTS ⟸326(2)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.
A defendant cannot avoid the consequences of violating an injunction against infringement by doing so through the agency of a corporation organized by him.

2. PATENTS ⟸326(1)—INFRINGEMENT—VIOLATION OF INJUNCTION—PROCEEDINGS FOR PUNISHMENT.
While the question of infringement by a machine, which has been modified after a decree and injunction against the original machine, will not be tried on a motion to punish for contempt, if the change is substantial, it may be so dealt with where the change is clearly only colorable.

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

Suit in equity by the Frank F. Smith Metal Window Hardware Company against John W. Yates. From an order and decree adjudging defendant in contempt for violating a decree granting an injunction against manufacture and sale of sash pivots for windows, defendant appeals. He also seeks to review the District Judge's action in denying a rehearing of the motion to punish for contempt. Affirmed.

See, also, 216 Fed. 361; 216 Fed. 359, 132 C. C. A. 503.

The following is the opinion of District Judge Augustus N. Hand in the court below:

A decree was granted by this court, adjudging complainant's patent, No. 970,656, granted to Frank F. Smith for a transom adjusting device, valid and infringed. Frank F. Smith Metal Window Hardware Company v. Yates, 216 Fed. 361. This decree was affirmed by the Circuit Court of Appeals in a decision reported in 216 Fed. 359, 132 C. C. A. 503. The cause was then referred to William Parkin, as master, whose report awarding treble damages to the complainant was confirmed. A decree for $2,464.98, including damages and costs, was thereafter made against Yates. The latter transferred his business to a corporation known as John W. Yates, Incorporated. This transfer was adjudged by this court in fraud of Yates' creditors, and a retransfer to the trustee in bankruptcy of Yates, who had filed a voluntary petition in bankruptcy, was ordered. The foregoing sum of $2,464.98 was then paid, and the decree setting aside the transfer vacated. Yates is now resuming his old course of persistent infringement and seeks to defend himself on the grounds that (1) complainant's patent is invalidated because of the Bogenberger prior use; (2) that the transom adjusting device in question does not infringe the patent in suit; (3) that if the patent is infringed, the infringing device is not manufactured or sold by the defendant, but by the John W. Yates, Inc., a corporation.

The complainant sought to reopen the case after final hearing because of the Bogenberger prior use. It is claimed that Bogenberger had a device similar in all respects to complainant's and that his invention was as early as April, 1907, whereas the date of complainant's invention is said to have been July of that year. Affidavits were submitted to Judge Learned Hand for the purpose of securing the admission of testimony as to this use, and he refused to reopen the case by reason of anything which was brought to his notice relating to the Bogenberger invention. I can see no relevancy in discussing the Bogenberger device at this time. The validity of the patent in suit has been established and the very affidavits relied upon are nothing more than copies of those heretofore unsuccessfully in-

troduced by the defendant before Judge Learned Hand. Furthermore, the copies of the affidavits offered fail to meet the burden devolving upon one seeking to establish a prior use by that convincing proof which the law requires. Something more than the mere statement of a man that he was the prior inventor of an article in all respects like the complainant's is necessary to supply that proof beyond a reasonable doubt which has been held to be necessary to render a patent right granted by the government invalid.

The stop which the John W. Yates, Incorporated, is putting out, defendant insists is not an infringement of the patent. His argument is based on the contention that in complainant's device there is an offset between the stop and the pivot of the latch, which brings them so far out of alignment that the pivot is subjected to a leverage which is likely to break or weaken it. The defendant insists that his new latch is so arranged that the body of the sash plate, instead of the pivot, takes the impact of the latch against the limit stop, thereby relieving the pivot from the shock and strain of the impact. In the present device manufactured by John W. Yates, Incorporated, the latch is upon the sash frame and the stop upon the window frame, just as in complainant's device, so that the infringement seems even clearer than that adjudicated by this court upon the trial, for there the latch was upon the window frame and the stop upon the sash. A careful inspection of the new infringing device would seem to indicate that the strain upon the pivot is not lessened, or the pivot reinforced to any degree which a practical use of the device requires, if at all. Even if I am wrong, these changes on the part of Yates are but slight improvements in the structure. This latch and stop attain the same result as complainant's in the same way, and the utmost he could claim would be certain narrow improvements which he is seeking to patent. These particular features, if patented, complainant might not have a right to use, but their presence in the new Yates' device would not avoid infringement of complainant's structure.

I am of the opinion that Yates is again attempting to deprive the complainant of the results of his invention, and that the reinforcement of the pivot, and the lessening, if any, of the leverage against it, furnish no basis for an escape from the charge of infringement. The defendant is undoubtedly guilty of infringement. He appears to be in charge, at least of the manufacturing end, of the business of the corporation, to which he transferred his assets. This transfer has already been held by this court to have been nothing more than a cover to avoid his creditors. He cannot escape his legal obligations by violating an injunction through the agency of a corporation, or even as an active employé in its business.

The infringing device comes so clearly within the claims of the adjudicated patent, and so closely resembles the old transom adjusting device, which was heretofore held to infringe, that I do not deem it necessary to take testimony as to the matters arising upon this motion, as was done in the case of Sundh Electric Co. v. General Electric Co. (D. C.) 217 Fed. 583. In the case of Bonsak Machine Co. v. National Cigarette Co. (C. C.) 64 Fed. 858, Judge Lacombe held that a question of infringement should not be tried on a motion to punish for contempt when the new machine is made under a patent issued after an injunction is granted. The defendant claims to manufacture under the Bogenberger patents, which antedate the injunction.

In the case of Crown Cork & Seal Co. v. American Cork Specialty Company, 211 Fed. 650, 128 C. C. A. 154, the Circuit Court of Appeals said that it was the practice in this circuit—"not to deal with modifications of a machine held to be an infringement, on motions to punish for contempt, unless the change was plainly a mere colorable equivalent; if the change was substantial fairly arguable as to its being covered by the patent, it has been the practice to leave the patentee to an application to enjoin its use." While it is possible that the defendant may have believed that the new device escaped infringement of the patent nevertheless the distinctions were so slight that I regard the new transom adjusting device as a mere colorable equivalent of the old, and for that reason hold that the defendant should be adjudged guilty of contempt of the injunction heretofore issued, and that the motion to restrain the manufacture and sale of the new infringing device should be granted. I shall not, however, hold the defendant as for a criminal contempt,

but shall limit the order to be made against him, as was done in the case of Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 Fed. at pages 132–134, 134 C. C. A. 418, to a reimbursement of complainant's damages, costs, and expenses, including any damages on account of sales of the infringing device.

Settle order on notice.

Samuel E. Darby, of New York City, for appellant.

Stephen J. Cox, of New York City, for appellee.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. [1] The record shows a persistent and disingenuous purpose on the part of the defendant to appropriate the invention of the complainant. It also shows an emphatic recognition of the value of the invention by the courts of this circuit.

The patent in controversy is No. 970,656, granted to Frank F. Smith September 20, 1910, for an improved pivot and pivoting mechanism for use in connection with fireproof windows whose sashes and frames are made of sheet metal. The District Court for the Southern District held this patent valid and infringed in an action against the defendant. This court affirmed the decree and a master has stated the damages to be $2,464.98. The defendant Yates, after the decree against him, transferred his business to a corporation known as the John W. Yates, Incorporated. This transfer was adjudged by the District Court to be in fraud of Yates' creditors and a retransfer to Yates' trustee in bankruptcy was ordered. The District Judge refers to Yates as a persistent infringer. His defenses to this action are that the patent is invalid because of a prior use by Bogenberger, that the new device does not infringe and, if it does, the device is made not by John W. Yates, but "John W. Yates, Incorporated," a corporation.

The court held that no new defense is presented in the present controversy. It is argued that the new stop which the so-called corporation is putting out is not an infringement because of some inconsequential changes. All this is thoroughly treated in Judge Augustus Hand's opinion and need not be reconsidered. The addition of the word "Incorporated" to the defendant's name does not enable him to escape the charge of infringement. The transfer to the corporation was adjudged a fraud upon creditors and the defendant was properly ordered to transfer all the property to the trustee in bankruptcy. The denial of the motion to reopen the case to receive evidence of the so-called Bogenberger prior use was within the discretion of the court. The device in controversy is the mechanical equivalent of the device which this court held to be an infringement of the Smith patent. We are unable to find any proof in the record showing that Yates owned or was licensed under the Bogenberger patent. Mere assertion is not proof. We are not required upon an appeal from an order of this character to discuss hypothetical questions not warranted by the proof. We do not find any proof that the defendant was licensed under the Bogenberger patent or that he now owns that patent. We have, however, examined the model of Bogenberger's apparatus submitted to

us, together with his patent, and after such examination consider it clear that Yates has neither made nor imitated Bogenberger's device, but has put out in the face of an injunction something which, within the narrowest range of mechanical equivalency, is the plaintiff's patented mechanism.

[2] It is admitted that where after decree and injunction a defendant's machine is reorganized by more than merely colorable changes, it is the better practice, if infringement thereby is asserted, not to proceed as for contempt, but to require plaintiff to bring a new action or seek a supplemental injunction. Crown Cork, etc., Co. v. American Cork, etc., Co., 211 Fed. 650, 128 C. C. A. 154. No such point arises here. Yates' present apparatus is scarcely a colorable change from that which was enjoined; a finding which requires that the order under review be affirmed with costs.

O. K. TOOL HOLDER CO. v. J. H. WILLIAMS & CO.

(Circuit Court of Appeals, Second Circuit. April 17, 1917.)

No. 210.

PATENTS ⇐328—INFRINGEMENT—TOOL HOLDER.

The Grant patent, No. 802,206, for a tool holder, covers only minor improvements, and, as limited by the prior art, *held* not infringed.

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

Suit in equity by the O. K. Tool Holder Company against J. H. Williams & Co. Decree for defendants, and complainant appeals. Affirmed.

On appeal from a final decree dismissing the bill which alleged the infringement by the defendant of letters patent No. 802,206, granted October 17, 1905, to Charles W. Grant, assigned to the complainant. The complainant appeals from that part of the decree which dismisses the bill for noninfringement. The defendant has not appealed from that part of the decree declaring the patent to be valid.

Clifton V. Edwards, of New York City, for appellant.

Fraser, Turk & Myers, of New York City (Arthur C. Fraser, Henry M. Turk, and Eugene V. Myers, all of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The Grant patent in suit, No. 802,206, relates to a type of tool holder illustrated in a prior patent to Grant, No. 677,350, dated July 2, 1901. The object of the later patent is to simplify and cheapen the construction and improve the operation of the holder of the prior patent.

The complainant commenced business in 1901, and for about four years manufactured under the prior Grant patent of July, 1901. The business was not successful because of the inadequacy of the holder.

This situation led to the production of the holder of the patent in suit. Prior to 1912 the defendant purchased about 75 tool holders from the complainant, made under the patent in suit and in 1912 it brought out the alleged infringing device, which is the subject of this controversy. The patent has two claims and both are involved. They are as follows:

"1. A tool holder comprising a body having its forward end provided with a hole to receive the shank of a tool, said body having a recess *15* and a recess *18* at right angles thereto, a locking plunger in recess *15*, the relative construction of the plunger and recess being such as to permit only longitudinal movements of the plunger, a plunger in recess *18* having an incline adapted to engage the rear end of the plunger, and means for moving the plunger into engagement with the locking plunger whereby the latter is forced into engagement with the tool to lock the tool to the holder.

"2. The combination with a tool holder having a body provided with a recess *15*, and with a recess *18* at right angles thereto, an abutment to form a support for a tool, and having a hole at right angles to recess *15*, of a tool having an enlarged portion adapted to rest upon the abutment and having a shank to engage the hole. a locking plunger in recess *15*, said recess *15* being above the abutment, a plunger in recess *18* and having an incline adapted to engage the rear end of the locking plunger, and means for actuating the plunger in the direction of its length whereby the locking plunger is caused to lock the tool."

The only question is whether the defendant's holder infringes these claims. The record shows that the field of invention was largely occupied when Grant entered it with his application of November 29, 1904, which covers a slight improvement only over the prior art. The object to be obtained was not a difficult one in view of the progress which had previously been made in this and analogous arts. It was simply to provide a suitable holder for a machine tool. The prior art shows numerous constructions where the tool is clamped in situations similar to that shown in the Grant patent in suit.

Smith's British Patent of 1867, Bracke's Swedish Patent of 1902, Cooper's patent of 1866, all show devices for holding the tool in position by means quite similar, in the method of operation and in the result obtained, to those described and shown in the Grant patent in suit. So, too, the so called headed-tool holders were known prior to the date of the Grant invention. The "Old Williams tool" of 1901 as shown in the blue print, Exhibit N, was completed prior to October, 1902. Muehlberg, in 1900, produced a tool for use in a lathe for boring or reaming having two cutters; when operated in a lathe only one of these cutters could be used at a time.

Without pursuing the subject further, it seems obvious that with the tools alluded to, and others which appear in the prior art, there was no room for a broad generic invention when Grant entered the field. The defendant's tool holder which is alleged to infringe both of the claims of the Grant patent in suit is made under a patent to Amborn dated October 26, 1915. It will be seen by an examination of the claims of the Grant patent that the first claim contains the following:

"The relative construction of the plunger and recess being such as to permit only longitudinal movements of the plunger, a plunger in recess *18* having an incline adapted to engage the rear end of the plunger, and means for moving the plunger into engagement with the locking plunger."

The defendants do not have any means for preventing the locking plunger from having other than longitudinal movement in the recess *15*. The next element which defendant omits is the plunger in recess *18*. The cam which it substitutes has a rotary movement only. The defendant does not have the means shown in the patent for "moving the holder into engagement with the locking plunger."

The second claim is not infringed because two of its elements are not found in the defendant's structure, viz., "the plunger in recess *18*," which is the same plunger referred to in almost identical language in the first claim. The defendant insists that it does not have the "means for actuating the plunger in the direction of its length" which is one of the elements of the claim. The defendant substitutes a cam for a plunger and does not use the nut *21*. The brief for the defendants states the situation, as we understand it, as follows:

"Grant in this patent limited himself voluntarily and necessarily to one of two well recognized types of locking devices very well known for tool holders, viz.: (1) A wedging plunger lock; (2) a rotary eccentric cam lock. Grant recognized that his invention related to the first of these two types and limited his claims thereto. Defendant's structure relates to the second of these two types and is wholly outside of the Grant patent."

Concededly the field of invention in this class of tool holders was an exceedingly limited one. Improvements had been going on for nearly half a century, by a steady evolution. When Grant applied for his patent in 1904 there was no chance for a broad generic patent. Headed tools and bar tools were well known and although they were simple in construction and easily understood there was room, perhaps, for patented improvements. Of course no improver was entitled to a patent which dominated the entire art.

In Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008, the Supreme Court said:

"It is obvious from the foregoing review of prior patents, that the invention of Bristol, if his snap hook contains a patentable invention, is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specification, and to the purpose indicated therein."

In New Home Sewing Machine Co. v. Singer Mfg. Co. (C. C.) 68 Fed. 224, the court said:

"The patentee is not entitled to the liberal treatment accorded to a pioneer. He has made a small advance in the art and has informed the public of the precise nature of his improvement. He must abide by the language of the claim as he has chosen to write it."

The defendant's tool is made under the patent to Amborn No. 1,158,100 which raises a presumption, at least, that its elements are not mechanical equivalents for the elements of the claims of the Grant patent. We are of the opinion that the Grant patent cannot be construed as covering a generic invention but only minor improvements and that the defendant's tool holder does not infringe.

The decree is affirmed with costs.

MUNGER v. PERLMAN RIM CORP.

(District Court, S. D. New York. June 20, 1917.)

No. 99.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PNEUMATIC WHEELS.
The Munger patent, No. 638,588, for a combined elastic and pneumatic tire, claim 4, which relates to means of securing the base or rim detachably to the wheel through the tapering of their adjacent surfaces, was not anticipated, and discloses an operative and commercially useful device, and is not limited to any precise taper nor to a taper which extends entirely across the width of the felly or of the rim, but covers any angle or extent of taper which accomplishes the desired end, which is the ready removability of the rim while holding it secure against accidental displacement. Said claim also *held* infringed.

2. PATENTS ⇐234—INFRINGEMENT—EQUIVALENCY.
When two machines are alike in their functions, combinations, and elements, it is unnecessary to establish infringement to go further and inquire whether they are alike or unlike in their details.

3. PATENTS ⇐289—SUIT FOR INFRINGEMENT—LACHES.
Delay in bringing suit for infringement may be excused when it was due to the financial inability of complainant to institute and maintain the litigation, and where defendant has not been prejudiced by the delay.

4. PATENTS ⇐222—INFRINGEMENT—SUIT FOR DAMAGES—NOTICE.
Where articles made under a patent are marked as required by Rev. St. § 4900 (Comp. St. 1916, § 9446), no further notice to an infringer is required to sustain a suit for damages for the infringement.

In Equity. Suit by Louis De F. Munger against the Perlman Rim Corporation. On final hearing. Decree for complainant.

William A. Redding and William B. Greeley, both of New York City, for plaintiff.

Edgar M. Kitchin and Melville Church, both of Washington, D. C., for defendant.

MANTON, District Judge. By a bill of complaint filed September 12, 1916, the plaintiff seeks to recover money damages resulting from the alleged infringement of letters patent No. 638,588 dated December 5, 1899, granted to the International Wheel & Traction Company as the assignee of Louis De F. Munger. This patent was subsequently assigned back to Louis De F. Munger shortly prior to the commencement of this action. The patent expired December 5, 1916. The relief sought is a decree decreeing that the patent in suit is valid as to claim No. 4 thereof, and infringed by the defendant as to the same claim. The basis of recovery sought is that of a reasonable royalty.

[1] The plaintiff calls the patent in suit a "combined elastic and pneumatic tire." It covers two separate inventions, and this is conceded by counsel for the defendant. The first of these two distinct inventions relates to the manner of securing the rubber tire to a metallic base or band, and is not involved here. The second of these inventions, and the one concerned here, relates to the manner of securing the metallic tire base on the felly of the wheel as stated in the specifications, "so that these parts may be practically self-united, exerting but

slight strain on the bolts securing the base, and so that the base and the tire can be readily and quickly attached to and detached from the felly without the use of special apparatus and while keeping the tire in a state of inflation." The apparent thought of the patentee was to have an easily demountable rim or tire base. His specification refers to the construction of the felly and tire base to assist in the work of slipping the tire on or off the wheel for the purpose of attachment or detachment and in removing the band or tire after it has been placed in position. In referring to the new construction, he says:

"In removing the band it is merely necessary to back off the base slightly from the felly, when it can be easily slipped down and off the inclined surface."

The metallic base is described as "adapted to be detachedly connected to the wheel," and the specifications expressly state:

"It is obvious that various modifications in the form of my improvement may be made without departing from the idea of my invention."

From this it is argued that the structure which is shown in the drawings and described in the specification of the patent is therefore to be regarded as merely illustrative of one possible embodiment of the "idea of my invention," and not as the only form in which the invention can find expression. The specification further describes the invention as:

"The face of the felly is slightly inclined or out of angle with the axis; the outer diameter of the wheel being the smaller to form a tapering fit for the tire base to assist in the work of slipping the tire on and off the wheel for the purpose of attachment and detachment; this angle being slight and hardly discernible in the drawings. The outer side of the base is also longer than the other so as to form an inclined undersurface which will conform to the felly and make the tapered felly described."

Claim No. 4 of the patent in suit relied on is as follows:

"In combination with a tapered felly, a tire, an annular ridged base to which said tire is secured, said base having a tapered undersurface and fitted on said felly substantially as described."

This claim analyzed is found to cover in combination the following elements: First, a tapering felly; second, a tire; and, third, an annular ridged base to which said tire is secured, said base having a tapering undersurface and fitted on said felly.

The defendant manufactures and produces under its patent known as No. 1,052,270, issued February 4, 1913. The defense claims: First, inoperativeness; and, second, noninfringement; and, third, invalidity. The defendant's patent was considered in Perlman v. Standard Welding Co. (D. C.) 231 Fed. 453, and later in Id., 231 Fed. 734, 146 C. C. A. 18. There its patent was held valid and infringed. But the application of the plaintiff's claim to the specific embodiment of the invention shown in the drawing of the patent and in Plaintiff's Exhibits 17, 28, and 30 is obvious.

From the specifications as quoted above the claim need not be restricted to the specific embodiment, and can be interpreted to cover what the plaintiff claims for it under the doctrine of equivalents.

[2] The rule is well established that, when two machines are alike in their functions, combinations, and elements, it is unnecessary to go further and inquire whether they are alike or unlike in their details. Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586.

The patent need not be restricted to the precise relation of the wedge elements shown in the drawing, but is to be interpreted so as to include within its scope the obvious equivalent and arrangement of wedge surfaces in defendant's wheel, the structure of which, so far as it comes within the scope of the invention and suit, performs its function in practically the same way as the patented structure. Johnston v. Woodbury, 109 Fed. 567, 48 C. C. A. 550; Hallock v. Davison (C. C.) 107 Fed. 482.

The plaintiff rests his case upon the proposition that his claim must be so interpreted as to cover within a reasonable range of equivalents that which was new in the art with him, namely, the utilization of the wedge as a means for securing a tire-carrying rim upon a wheel in such a manner that the rim, under tension, produced by the wedge action, hugs the felly tightly when in use, and can be removed readily by freeing the wedge surfaces. Nor should his claim be limited to a structure in which one wedge surface extends all the way across the face of the felly, and the other wedge surface extends all the way across the inner face of the rim, any more than it should be limited to a structure in which the tire is vulcanized on the rim or base, nor to a structure of which the tire forms a permanent part. It should be taken to mean only a rim adapted and intended to have a tire secured therein with such degree of permanence as to resist accidental displacement under ordinary conditions of use. This range of liberality was given to the present defendant by Judge Hunt in Perlman v. Standard Welding Co., supra, where he held that the wedge moving inwardly parallel with the axis of the wheel was the equivalent of the screw mounted radially in the felly and moving outward against the rim.

I am satisfied from the proofs that the plaintiff has shown by credible testimony that in the practical operation of the wheels and rims made under the patent there was no such sticking of the rim on the wheel as to prevent its removal with the ordinary tools carried on the road, and that such a degree of utility exists which justifies sustaining the patent against the claim made by the defendant of inoperativeness, and that therefore the patent has commercial utility.

In Johnston v. Woodbury, 109 Fed. 567, 48 C. C. A. 550, Judge Gilbert said:

"We do not think, however, that the appellant [plaintiff] should be limited in his invention to the use of the angle which appears in the drawings. The specification contains no designation of a specific angle, and it is clear that the patentee contemplated that the angle should be such as would successfully overcome the defects which his invention was designed to remedy. The idea of his invention was to place the rods at an angle, at any angle that would give the necessary oscillatory movement to prevent the banking of the pulp upon the traveling belt, and at the same time not throw it over the sides. The specification clearly indicates this."

See, also, Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72.

The plaintiff produced two wheels (Exhibits 29 and 30), one with a metal felly, and the other with a wooden felly, both made up in exact conformity with the drawing of the patent in suit as to the taper of the felly and the rim. Although this taper was slight, the removal in court was performed with ease, and from the testimony the fact was established that experimental rims made in Hartford in 1890 were removed without difficulty. Thereafter rims were made in a commercial way at the plant of the Munger Vehicle Tire Company at New Brunswick, N. J., and the testimony warrants the finding that these rims were made, sold, and used under the patent in suit, marked with its date, and were readily detachable from the wheels after actual and continued use. I think that the objection urged by the defendant as to the sticking of the rim is not well founded, and, so far as concerns the life of a present-day tire on the Munger rim, it would be quite feasible to adapt the present-day tire to the Munger rim. The invention in suit relates not to the adaptation of the tire to the rim, but to the means of securing the rim detachably upon the wheel.

As to the infringement claimed by the plaintiff, the plaintiff claims that the flange at the rear of the defendant's wheel is a wedge flange, and that it forces the rim further and further away from the wheel, that is, from the cylindrical portion of the wheel which lies between the "little outer wedges" at the outer edge and the wedge flange at the inner edge. In both wheels the further the rim is pressed on the tapered wedge felly or the wedge flange of the felly the further the rim is pressed outwardly or away from the axis of the wheel, and the more is increased the state of tension of the rim which is desired in both cases in order that the rim may hug the felly or its wedge flange the more tightly and be held more securely in place. The only difference in structure is that in defendant's wheel there is an annular strip between the two edges of the felly with which the rim is not in contact, being held therefrom by the wedge flange or at the inner or rear edge, and the "little outer wedged" at the outer or front edge. The defendant's wheel is forced further from this metal strip of the felly, but the distance by which it is so forced is limited by the resistance to the stripping offered by the rim, and is immeasurable except by the most delicate instrument. The only result secured by forcing the rim laterally on the wedge flange is the placing of the rim under tension, and the closer hugging of the wedge flange by the rim which is the purpose of, and the result obtained by, the wedge action of the plaintiff's patented structure. This is well exemplified and shown by Plaintiff's Exhibit 4 offered on the trial. It is a sketch prepared by the witness Duryea, plaintiff's expert, and this sameness of purpose and function is well pointed out in Mr. Duryea's testimony.

The embodiment of defendant's wheel is found in Mr. Munger's contribution to the art, to wit, the utilization of the wedge as a means for securing a tire-carrying rim under tension on an automobile wheel so that the rim shall hug the wheel tightly and be held firmly in position while at the same time it can be detached readily by freeing the wedge surface. Reading claim 4 of the patent in suit, together with the disclosure of the specifications and interpreted with a reasonable range

of equivalents, in my opinion, covers the structure of defendant's wheel. The felly is tapered at one edge, having a wedge flange to be the equivalent of a wedge surface formed on the felly itself. The rim is an annular ridged base, and is adapted and intended in use to have the tire secured to it with a degree of permanence sufficient to resist effectually the accidental displacement of the tire. The rim has a tapered undersurface slightly rounded, but possessing the function of a wedge surface co-operating with the wedge flange of the felly, whereby the rim is forced outwardly and put under tension as it is pressed on by the operation of the bolts and nuts. Upon this rim the tire is placed.

I am satisfied, therefore, that the plaintiff's exhibit (defendant's wheel) infringes the claim in suit. But the defendant claims that the patent is invalid in view of the prior art and because of two patents, one issued to Perkins & McMahon, No. 3,037, dated April 10, 1843, and the other, the British patent of Carberry, No. 7318, in 1895. Defendant's counsel claims that the Perkins & McMahon patent was not limited to car wheels, but was a structure applicable to other vehicles, and that certain set screw bolts were provided for the purpose of bending the rim and wheel together, but the evidence is convincing that this rim of the car wheel could not be placed on or removed from the wheel in the sense suggested by counsel for the defendant, to wit, with the ease or with the ordinary tools, nor would the rim and wheel come apart if the screw bolts were not there, and in no sense was there the ready demounting of the rims; indeed, they could only be removed by great pressure as by hydraulic power. There was, therefore, no possibility of practical use for other than railroad purposes of a wheel with a rim held on merely by bolts with the method of mounting exhibited in the patent in suit. I am satisfied that this patent furnishes no warrant for the conclusions urged by the defendant's counsel. This patent was set up by the defense in the suit of Perlman v. Standard Welding Co., supra, where Judge Hunt said that:

"Patents Nos. 4447–1846, and No. 405710–1889, showing railway car wheel structures with rims intended for being mounted permanently, ought not to be regarded as fairly in the prior art under examination. It strikes me that such structures apply to a foreign art. But, if I am wrong in so regarding them, still they could not be claimed to disclose a solution of a problem in the art of automobile wheels. In the car wheel art the object was to get the rim on just as tight as it could be put on and to mount it nearly with permanency, and in doing so the greatest amount of contact surface was provided between the rim and the wheel body of the car wheel."

In passing it might be noticed that in Judge Hunt's opinion he refers to the Munger patent in considering the prior art, saying that Munger's structure was of little use because the rims became so attached to the wheel body that it required much more labor to remove it than to take the tire from the rim. Evidently Judge Hunt did not have the opportunity for experiment and observation that was afforded this court in the consideration of the merits of the Munger patent, or I think he would have reached a conclusion other than that which is voiced in his observation in this opinion.

The Carberry patent does not show a construction which embodies the inventive thought of the patent in suit, to wit, the securing of a tire-

carrying rim under tension by wedge action upon the wheel body whereby the rim hugs the felly band tightly. There is a distinction between placing the tire-carrying rim under tension and placing it under compression, which is important. When the rim is under tension, it holds itself in place on the wheel through contact under pressure with the felly or its wedge elements, but when the rim is under compression, it is held in place only by those elements, namely, the radial bolts of the Carberry patent which pass through the felly into the rim. If these bolts break off, the rim comes off. I do not think that the Carberry patent anticipates the patent in suit, because it does not disclose the inventive idea covered by that patent. Therefore I conclude that neither of these patents alone can be regarded as sufficient to invalidate the claim in suit or as teaching the art how to realize the advantages of the Munger invention, and offer no defense of invalidity to the plaintiff's claim.

[3] The delay in bringing suit is urged as a last defense and is, of course, a serious one. The bill of complaint was filed September 20, 1916. The patent in suit did expire December 5, 1916, but the long lapse of time is accounted for by the financial inability of the plaintiff herein and his predecessors in interest to bear the expense of a patent litigation. The record discloses efforts to finance the National Wheel & Traction Company, to which the invention covered by the patent was assigned. This company was a promoting or holding company with a small capital. Thereafter the Munger Vehicle Tire Company was organized in December, 1899. This company did manufacture some of the wheels under the patent in suit at New Brunswick, N. J. It is sufficient to say that financial difficulties arose between this and the Rubber Goods Manufacturing Company, bankruptcy proceedings were instituted, and considerable litigation ensued. All the assets of the Munger Vehicle Tire Company were turned over to the National Wheel & Traction Company; the patent in suit remaining in the ownership of the National Wheel & Traction Company. There was considerable negotiation to obtain capital, but in January, 1902, the Munger Automobile Tire Company was organized, located at Trenton, N. J., taking over the physical assets of the National Wheel & Traction Company, excepting the patent in suit. It was not until the latter part of 1915, after bankruptcy proceedings were instituted against the Munger Vehicle Tire Company, that the plaintiff obtained an assignment of his patent, and thereafter obtained sufficient funds to institute this suit.

These circumstances, although briefly stated, show the financial inability of the plaintiff and his predecessor in title to bear the expense of the litigation, and was sufficient to excuse the delay in bringing the suit. Columbia Graphophone Co. v. Search Light Horn Co., 236 Fed. 135.

In Taylor v. Sawyer Spingle Co., 75 Fed. 301, 22 C. C. A. 203, Judge Wales said:

"It has never been held that mere laches, unaccompanied by circumstances which amount to an equitable estoppel, shut out a party from all relief in a court of equity. Knowledge of and long-continued acquiescence by complain-

ant in an infringement may, in special cases, be fatal on a motion for a preliminary injunction, but will not, on a final hearing, prevent the court from granting such relief as may be just and equitable."

[4] Notice of the existence of the patent was given by the plaintiff by marking the manufactured product under the patent with the date of the patent. This was placed upon the wheels manufactured commercially by the Munger Vehicle Tire Company, and was sufficient notice within the meaning of section 4900 of the Revised Statutes.

For the foregoing reasons, a decree will be granted in favor of the plaintiff and against the defendant, directing the defendant to account before a master, and the plaintiff may recover a reasonable royalty upon the patent in suit under the rule established in Dowagiac Mfg. Co. v. Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398.

BECKWITH BOX TOE CO. v. GOWDY et al. (three cases).

(District Court, D. Massachusetts. August 5, 1916.)

Nos. 628–630.

1. PATENTS ⟸117—SUIT FOR INFRINGEMENT—TITLE TO SUPPORT.
The issuance of a patent to one named as assignee of the applicant is prima facie evidence of title in such assignee.
2. PATENTS ⟸328—INVENTION—PROCESS OF LASTING SHOES.
The Davis patent, No. 749,267, for improvement in the art of lasting boot or shoe uppers, the object of the described process being to form a box toe is void, as not distinctly disclosing anything novel and patentable over the process as previously practiced.
3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BOX TOES FOR SHOES.
The Butterfield patents, No. 1,070,406, for a method of making stiffened foreparts of boot and shoe uppers, and No. 1,124,694, for a box toe, the product of such process which by using a stiffening composition in the fibrous toe blanks that may be softened sufficiently for lasting merely by the application of a degree of heat not injurious to leather, were not anticipated and disclose a meritorious invention, which effects a saving in time and cost of manufacture over old processes; also *held* infringed.
4. PATENTS ⟸27(1)—ANTICIPATION—PATENTS IN NONANALOGOUS ARTS.
That a patentee has taken an idea from a prior inventor does not necessarily negative invention, where he has adapted it to perform a different function in a nonanalogous art.

In Equity. Three suits by the Beckwith Box Toe Company against one Gowdy and others. On final hearing. Decree for defendants in first suit, and for complainant in second and third suits.

Benj. Phillips, Alfred H. Hildreth, and W. Orison Underwood, all of Boston, Mass., for plaintiff.

Albert M. Rollins, of Brocton, Mass., and Geo. P. Dike, of Boston, Mass., for defendants.

DODGE, Circuit Judge. In each of these suits the defendants are charged with infringement of a different patent alleged to belong to the

plaintiff company. The patent in question in the first case is No. 749,267, issued January 12, 1904, to Oscar C. Davis, assignor of one-half to George E. Keith. In the second case it is No. 1,070,406, issued August 19, 1913, to Frank E. Butterfield, by Eugene M. Butterfield, administrator of Frank E., deceased, assigned to the plaintiff company. In the third case it is No. 1,124,694, issued January 12, 1915, to Frank E. Butterfield, by Eugene M. Butterfield, administrator, assigned to the plaintiff company.

[1] A preliminary question is as to the sufficiency of the plaintiff's proof to establish its title to the three patents sued on. Assuming title in Davis and Keith to the Davis patent, subsequent successive assignments from them and from their assignee have vested that title in the plaintiff; but to show that Davis ever assigned half of it to Keith, there is only the patent itself, issued as above stated. Also, for its title to the two Butterfield patents the plaintiff relies on the patents themselves, issued as above stated to it as assignee, without producing any assignment to it of either, before issue, by Frank E. Butterfield or his administrator. The defendants contend that, in the absence of the above-mentioned assignments from the applicant, the proof is not complete. My ruling must be that the patents themselves are prima facie evidence of title in the assignee named. Walker on Patents (4th Ed.) § 495; Whitcomb v. Coal Co. (C. C.) 47 Fed. 655; U. S., etc., Co. v. Butez (C. C.) 140 Fed. 556; Money Weights, etc., Co. v. Toledo, etc., Co., 199 Fed. 905, 906, 118 C. C. A. 235. It is to be presumed, in view of Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504, Railroad Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948, that the patent office had before it assignments sufficient to pass title from the applicant to the assignees named, until the contrary is shown. I find nothing requiring a different conclusion in Wende v. Horine (C. C.) 191 Fed. 620, cited by the applicant, which decides only that an applicant may sue in his own name under Rev. Stats. § 4915 (Comp. St. 1916, § 9460), notwithstanding that he has assigned his application. Paine v. Trask (C. C.) 56 Fed. 231, 233, decided in this circuit in 1892, and Eastern, etc., Co. v. Keystone, etc., Co. (C. C.) 164 Fed. 47, consider only what proof is requisite of the execution of an assignment after issue. I hold, therefore, that the plaintiff has made sufficient proof of its title to each of the three patents sued on.

The Davis patent, 749,267, is for "art for lasting portions of boot or shoe uppers." It has three claims, all in suit. The Butterfield patent, 1,070,406, is for a "method of making stiffened fore parts of boot and shoe uppers." It has only one claim. The Butterfield patent, 1,124,694, is for a "box toe and blank therefor." It has six claims; 1 and 6 only are in suit.

[2] 1. The Davis patent is for a process. Each claim begins with the words, "That improvement in the art of lasting boot and shoe uppers which consists in"—after which the various steps of the process claimed are stated, in substance as below:

(Claim 1) Incorporating in the unlasted upper a blank made of felt treated with a waterproofing stiffening fluid.
Lasting the upper to form or mold the blank.
Permitting the blank to dry, whereby its stiffness is increased.

(Claim 2) Simultaneously lasting the upper and a stiffener blank made of felt saturated with a waterproof stiffening material in solution, so that the blank is soft and flexible, thus forming or molding the blank while the latter is soft.

Subsequently allowing the stiffening material to harden and stiffen the lasted and formed upper.

(Claim 3) Saturating a stiffener blank made of felt with a soluble waterproof stiffening material.

Incorporating the stiffened blank in an unlasted upper.

Dissolving the stiffening material of the blank by means of a solvent to soften the blank.

Lasting the upper, thus forming or molding the blank while the latter is soft.

Subsequently allowing the stiffening material to harden and stiffen the lasted or formed upper.

The defendants do not dispute that they have made and sold felt box toe blanks, stiffened with soluble waterproof stiffening fluid, namely, shellac dissolved in alcohol; and the evidence shows that they have sold such blanks, knowing them to be intended for use in the manufacture of box toe shoes, by incorporating them into the uppers of such shoes, softening them before lasting by the application of alcohol holding more shellac in solution, and drying the uppers thus containing them, after the lasting operation. This was contributory infringement of the Davis patent, at least of its third claim, if said patent and claim are valid.

The defendants say the patent is invalid, because it purports to cover two alternative processes without distinction—one in which the waterproof stiffening material or fluid is applied to the felt blank and the shoe lasted while the felt is still soft by reason of such application, (claims 1 and 2); another in which the felt is dried after such application and subsequently resoftened by further application of a like material or fluid before lasting (claim 3). This is said to be failure to comply with Rev. Stats. § 4888 (Comp. St. 1916, § 9432), in that the improvement claimed is not particularly pointed out and distinctly claimed; and a failure which prevents the public from knowing just what the improvement in the art of lasting, etc., is, which the patentee claims to have invented.

Read by themselves, claims 1 and 2 describe only a process familiar in the art of lasting long before Davis' alleged invention. This the plaintiff is understood to admit; at any rate, the evidence shows it to be true. But the plaintiff says that according to the specification, the stiffened and waterproof blank is to be dried before incorporation in the upper and thereafter softened again before being lasted; that claims 1 and 2 must therefore be so understood; and that in any event claim 3 must be held valid, whether the other two claims are valid or not, because it requires "the stiffened blank" to be incorporated in the unlasted upper and its "stiffening material" to be then "dissolved," so as to soften the blank before lasting. This contention requires close scrutiny of the specification.

It is to be observed that in the specification the "chief object" of the invention is stated as below, and that no other object is stated:

"To provide a boot or shoe upper with a box toe which is capable of being freely and accurately conformed to the toe portion of the last by the last-

ing operation, and of thereafter becoming relatively stiff, so as to retain the form imparted to it, and which shall, when stiffened, possess such a degree of elasticity or resilience that the toe portion of the upper will not be liable to be permanently distorted or indented by ordinary external pressure applied in such direction as to force the toe portion of the upper inwardly."

The above object was attained, so far as I can see, by the previous familiar method above referred to of applying the waterproofing stiffening fluid to the blank after its incorporation, just previous to the lasting. Nothing essential to its attainment seems to me added by the specification.

The patentee next states that his invention consists "in the herein described improvement." Precisely what that improvement is, is left to be gathered from the above and from the description then following; there is no express language which distinctly points it out.

The description is only of "the preferred mode of procedure." According to it, the stiffening blanks are to be cut from a sheet of felt. That use of this particular material was new with Davis is not suggested, and the evidence proves the contrary. The felt is to be saturated with the waterproof stiffening material, preferably before the blanks are cut from it, and allowed to harden; the only advantage thereby secured being, so far as the specification shows, that a blank so stiffened can be skived or scoured in a machine, to reduce its margin. That stiffening it for such prupose is, or could be, claimed as a patentable improvement, is not suggested. The blank "with its hardened stiffening" is to be next subjected to the action of a solvent, and, after that, either to be incorporated, so softened, in the upper, in ways suggested, or to be incorporated first and then dipped into the softening solvent. Lasting is to follow while the blank is soft. The lasted upper is to be dried "to again harden the stiffening material and cause it to impart the relative stiffness desired to the box," or, in other words, to accomplish what, according to the disclosure, is the chief and only object of the invention, as has already appeared.

Lastly, the inventor states it to be obvious that stiffening material in solution may be applied during lasting, to increase the stiffening effect desired for his above-stated purpose.

I can find no distinct indication in the specification that the drying of the blank or of the felt out of which it is cut after saturation, so that it may be softened again just after or just before incorporation and before lasting, is disclosed as an improvement invented by Davis. And in claim 3 the utmost indication of anything of the kind is in the words "incorporating the stiffened blank in an unlasted upper," which according to the disclosure, as has appeared, is only one way of practicing the invention supposed to be disclosed; incorporation of a softened blank being just as much a way of practicing it. If the disclosed improvement upon existing practices is to be taken as consisting in drying as above, I am unable to believe it a patentable improvement. It seems to me to involve only mechanical skill in adaptation, not inventive thought, whatever the practical advantages secured by it. There has been no proof that these in themselves are of such importance as would assist the claim that it is a patentable improvement.

For want of any sufficiently distinct statement of what was new with the patentee in the process described, which in its declared purpose and essential features is only that previously familiar; and because no detail in which it can be said to differ seems to me to rise to the dignity of patentable novelty, I am obliged to regard the patent as invalid. But, conceding its validity, equitable reasons appear why these defendants ought not now to be treated as infringers upon it.

From its issue in January, 1904, until the present bill was filed March 11, 1915, the defendants have been constantly making and selling the stiffened felt blanks above mentioned, for use in the above manner, and have been developing and extending their said business; all this with the knowledge of the owners of the patent. Neither of the successive owners has ventured meanwhile to interfere by legal proceedings. There has not, however, been acquiescence for 11 years in the defendants' above doings; on the contrary, nearly 2 years after the patent issued the defendants entered into a license agreement with the original patentees, to continue, unless abrogated by either party, according to the agreed provisions, during the unexpired term of the patent. In this agreement the defendant acknowledged previous infringement and agreed to pay stipulated monthly royalties to Davis and Keith while the agreement remained in force. It was dated December 14, 1905, and the defendants paid royalties under it until April, 1907, after which they declined to pay on the ground that others were infringing the patent as much as they were without being called to account. Demand for payment thereupon made, first by Davis and Keith, afterwards by their attorneys, was ignored by the defendants; but Davis and Keith had taken no action to enforce any rights claimed either under the agreement or under the patent up to the time of their transfer of the patent to the plaintiff, March 12, 1914; nor did the plaintiff take any action against the defendants thereafter until March 11, 1915, as above. Eight years of acquiescence is thus the most that the defendants can assert; but, under the circumstances, I must regard it as enough to require the above conclusion.

The license agreement is not now in force; the plaintiff having repudiated it, in any event, by bringing this suit for infringement of the patent. But that it had been long before treated by both parties as abrogated seems to me the only reasonable conclusion from the fact that Davis and Keith have acquiesced so long in its repudiation by the defendant upon the ground that unlicensed persons were being permitted to defy the patent without objection. That it estops the defendants in this case is not claimed. It affords the plaintiff, at most, only evidence of a former admission of validity in the patent. Tate v. Baltimore, etc., Co., 229 Fed. 141, 143 C. C. A. 417.

The above requires dismissal of the bill in the first of the above suits (No. 628) and there may be a decree in that case accordingly.

[3] 2. The Butterfield patent, No. 1,070,406, is also for a process, viz., "Method of making stiffened foreparts of boot and shoe uppers." The Butterfield patent, No. 1,124,694, is for "box toe and blank therefor," being the box toe produced by said process and the blank prepared for use in it; the latter being claimed as a new article of manu-

facture. The first patent has only one claim; the second has six, but only claims 1 and 6 are in issue. For most of the questions arising under either of these patents it will be sufficient to consider the disclosure made in the first patent. The object of the invention is stated in the same terms in both, as follows:

"To enable a properly stiffened and durable fore part to be produced more perfectly and quickly than heretofore, and to reduce to a minimum the cost of producing a stiffened upper forepart."

The above object is to be accomplished, according to the disclosure, by saturating a box toe blank of fibrous absorbent material, preferably felt, but capable, whatever the material, of absorbing a fluid stiffening composition. The composition is to be adapted to be softened by a degree of heat which will not injure the upper leather. An alcohol solution of shellac, eight pounds to the gallon, mixed with a solution of borax in hot water, in the proportions 1 ounce of borax to two ounces of water, is indicated as suitable for the purpose. The saturated blank, dried so as to be relatively hard and stiff, is to be assembled, with the other parts forming the upper, in suitable relation to the last. They are to be then heated to a degree not high enough to injure the leather, preferably from 110 to 120 degrees F. Lasting is to be done while the blank is in the softened condition thus produced. After lasting, the box toe is to be allowed to stiffen by cooling. It is further directed that the stiffening composition be capable of resisting the heat of the body, so as not to be softened by ordinary use; also that it be practically insoluble in water.

Only one of the claims in suit, however, contains mention of this last requisite. The blank covered by claim 6 of the second patent is to be, among other things, "unaffected by moisture."

The single claim of the first patent is for the method of making stiffened foreparts which consists in:

Incorporating in the unlasted upper a stiffener blank, comprising absorbent, fibrous material containing a stiffening composition or material adapted to be softened by a degree of heat not injurious to leather and to be stiffened by cooling.

Heating the blank to soften it.

Lasting the upper while the blank is heated and soft.

Allowing the box toe to stiffen by cooling.

The above process varies from the previously familiar practice, or from anything described in the Davis patent before considered, in that the stiffened blank is to be softened by heat, instead of by a solvent, and not by heat in general, but heat within a defined range of temperature; i. e., heat above that produced by the wearer's body, but less than that which will injure leather, and correspondingly in that the stiffener used is to be such as will not soften below the former, but will soften below the latter, temperature. By this method of softening the drying necessary after a softening solution has been used is dispensed with, and an advantage in time and cost of manufacture is secured.

The defendants fail to satisfy me that this is not an improvement involving invention, patentable to the first inventor. I am unable to

agree with their contention that nothing beyond good judgment and skill in selection of material were involved in devising it. Its commercial value is fully established by the evidence.

The defendants say it was anticipated. They rely here upon previous practices testified to of softening shellac stiffened blanks by the use of hot water or of steam; also upon several prior United States patents, principally that to Graber, No. 691,462, January 21, 1902, a patent not cited in the Patent Office proceedings upon the Butterfield applications.

The only use shown of hot water for softening stiffened blanks was by dipping them into it before assembling and lasting the upper; the blanks so stiffened having been stiffened with shellac in solution only, uncombined with any substance adapted to vary or regulate its softening point. The water was used to soften, not only the stiffening, but the entire blank, when not uniformly stiffened, as was often the case; and drying after lasting was apparently involved. How steam was used did not distinctly appear, the only testimony about its use coming on cross-examination from one of the plaintiff's witnesses; but whether it was steam, or heat produced by steam, that was used, no adaptation of the blank to soften within a given range of temperature was shown.

As to the Graber patent, it belongs to an art not very closely analogous, being for a "composition for stiffening fabrics," in order, as the inventor declares, to make them waterproof, antiseptic and adapted for use for a variety of purposes. The fabric, saturated with a described composition, stiffens when dry, is then waterproof and antiseptic to a high degree, and, heated, may be given any desired shape, in which it will stiffen when cooling. The uses suggested for fabrics so stiffened are splints for surgical bandages, stiffening for garment lining, roofing material, pliable fabric for surgical supporters and braces, and lining for boots and shoes, as well as garments. The ingredients of the stiffening composition, in proportions by weight as below, which proportions may be varied according to the density and degree of stiffening desired, are:

Ethylic alcohol	192
Lac (shellac)	128
Ricinolein (castor oil)	2
Borate of soda	2

Although in the above composition there is only about half as much shellac per gallon as in the Butterfield composition, and a small proportion of castor oil not therein found, it will stiffen felt box toe blanks sufficiently for lasting (or can be made to do so with slight variation), and will also soften at a temperature low enough to permit their use in the Butterfield process, but not low enough to soften in ordinary use, according to the defendant's uncontradicted testimony.

[4] I do not find in Graber's patent any sufficient indication of an intent on the inventor's part to adapt his composition for stiffening box toe blanks, or for the production in fabrics stiffened with it of the degree of rigidity requisite for that purpose. The nondrying oil which distinguishes his from Butterfield's composition, and which must be

present in some substantial quantity in order to keep the composition within the patent, however its proportion be varied relatively to the other ingredients, and the suggested use of his composition for producing pliable fabric, forbid the conclusion that such rigidity was one of his objects. I am therefore unable to accept the defendants' contention that Butterfield describes only a new use of Graber's invention. If Butterfield can be said to have made any use of the idea disclosed by Graber, the function which he adapted it to perform in the art of producing box toes was to my mind sufficiently new to prevent Graber's patent from being regarded as an anticipation. Forsyth v. Garlock, 142 Fed. 461, 73 C. C. A. 577; Fitchburg Duck Mills v. Barrell, 214 Fed. 777, 131 C. C. A. 189. And if Graber's patent does not anticipate the patents in suit, none of the other patents upon which the defendants rely can in my opinion be regarded as anticipations; nor is discussion of them in detail considered necessary.

The felt blanks made and sold by the defendants under the name of "Victor Box Toe" (Defendants' Exhibit B) were sold, as they knew, to be incorporated in box toe shoes by Butterfield's patented process. The composition used by the defendants to stiffen them. or at least some of them, consisted of shellac, resin, and alcohol. In some cases reclaimed shellac was used, which has a lower melting point than ordinary shellac; but the difference does not appear to be of importance for the purposes of the case. Nor does it seem to me that the rosin used by the defendants, instead of the borax specified in Butterfield's preferred formula, can substantially differentiate their composition from that which Butterfield described. If these conclusions are right, contributory infringement of the claim in suit is proved in No. 629, and infringement of both claims in suit is also proved in No. 630. In those cases there may be decrees accordingly.

J. E. BAKER CO. v. KENNEDY REFRACTORIES CO. et al.

(District Court, E. D. Pennsylvania. August 29, 1917.)

No. 1613.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—MAGDOLITE.

The Baker patent, No. 1,063,102, for a product called by the patentee magdolite, obtained by first burning dolomite rock in a cupola and then roasting it in a rotary kiln, is void as not for a new material or product, the so-called magdolite being in fact dolomite given a fuller and better treatment by double burning, which renders it a good substitute for Austrian magnesite in the steel industry; also *held* not infringed.

In Equity. Suit by the J. E. Baker Company against the Kennedy Refractories Company and others. On final hearing. Decree for defendants.

Cyrus N. Anderson, of Philadelphia, Pa., L. S. Bacon, of Washington, D. C., and Frederick P. Fish, of Boston, Mass., for plaintiff.

J. H. Brickenstein, of Washington, D. C., and Fraley & Paul, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. Aside from any purely legal view of this controversy what has been called "the human-side view" is Janus-faced. The plaintiff advances, as he is justified in doing, this strong claim of merit that at a very critical stage in the experience of the steel industry, which is now of such overwhelming importance to our country and through it to the cause of humanity throughout the world, he came forward with a substitute for Austrian magnesite, the want of which would have crippled, if not paralyzed, that branch of the steel industry which has heretofore been dependent upon it for refractory materials. The benefit thus conferred upon mankind is so impressive in its mere statement that upon its importance we need not enlarge. The defendant, on the other hand, asserts, as it also has justification in doing, that the plaintiff cannot be given the exclusive property rights for which he asks without doing violence to principles of law the disregard of which has the most far-reaching consesequences. Thus stand the general considerations which bear upon this controversy.

The question of the strict legal rights of the plaintiff is open to the application of arguments of almost equal weight. The right is claimed under letters patent No. 1,063,102 issued May 27, 1913. This is a product patent. The exclusive right of the plaintiff to the process, also claimed as an invention, by which this product is produced, is not here in controversy. The questions to be answered may be formulated as involving the inquiry whether this product is merely the result of a natural process, or whether it be a thing manufactured, and whether the product secured by the defendant, if it be a manufactured product, is the same as the product patented by the plaintiff. The shorter the path is made which leads the mind to a judgment upon either of the propositions advanced in the answer to these questions, the greater the satisfaction with which the mind rests upon the conclusion, whatever it is. There is either little room for discussion between the questions and their answers, or the questions are made so broad and the material for discussion, if it is all admitted, is so abundant that the discussion becomes interminable. The reasons which lead one to a conclusion may be stated in such small compass as that we have barely, if anything, more than a statement of the conclusions reached. A statement of all the considerations which enter into a discussion of the correctness of the conclusions thus reached is almost unending. Reduced to its simplest statement, what the plaintiff came upon (and thus in consequence in the true etymological sense invented) was that dolomite, after being burned in an ordinary cupola and then reburned in a rotary kiln, made a practically good substitute for Austrian magnesite for certain refractory uses. The inventor himself thus defines his contribution to the art. He had been burning dolomite in a cupola and selling it for its then limited uses. He tried to expand the field of its usefulness by using a rotary kiln. The experiment was a failure in the sense that he had no appreciably better result. The thought which proved to be a very happy one for him and for the steel industry, occurred to him to reburn the dolomite in the rotary kiln after it came from the cupola. The result was most satisfactory and gratify-

ing. Here, beyond doubt, we had invention and a most valuable result. A most useful art had been most helpfully, as well as most opportunely, promoted, and to the inventor of this process of making this new product (if it be a product), or in any event of producing this new result, justly belongs all the encouragement which the law in the exercise of the most liberal policy consistent with its being a wise policy can bestow.

The line of distinction which must be drawn is one such that, short of mere trade terminology, our language does not supply us with words or phrases by which to denominate the things which lie on either side of this line except words of broad generalization. The expressions "raw" dolomite, "roasted" dolomite, "burned" rock, "double burned," and the like suggest, rather than convey, to our minds the thought with which the defendant seeks to impress us. Expressions, on the other hand, which in like manner bring up the thought of a new material, an article of manufacture, a product in the production sense of something produced or created, are employed by the plaintiff. The choice of expression is crystallized in the word "magdolite" as the name by which this new material is designated. We do not see that anything is gained by the use of a baptismal name beyond getting the mind into an habitual attitude toward the subject. Habitually speaking of dolomite which has been subjected to a heating process as "magdolite" tends to create and to deepen the impression that the resulting thing differs from roasted dolomite. There is, in the act of christening, the implication of a new material. Why otherwise give it a name? Such a name is, however, but the guinea stamp, and does not change or affect in any way the thing stamped except the change which is wrought by the fact that the thing has been thus stamped.

The argument addressed to us by counsel has shaken, but has not altered, the conviction that this patentee discovered no more than what he describes his discovery to have been. He found that cupola burned dolomite which had certain limited uses as a substitute for magnesite if re-roasted and thereby more thoroughly burned became a fuller and for all practical purposes a full substitute. He further found that the use of a rotary kiln in the second burning produced satisfactory results. The conviction which lingers in the mind, if it does not remain wholly unshaken, is that to give the discoverer of this result a product patent is to grant him an exclusive proprietary right to the mere result of the operation of natural causes. The legislator who was framing a patent law might be well asked to weigh the consideration that such a discovery was new, and that the fruit of it had the highest value and utility, and that a real contribution had been made to the possessions of mankind, and that the contributor should be rewarded. The man who discovers that and how any natural product may be artificially made has made a like contribution. The distinction between process and result is clear. The grant of an exclusive proprietary right to the one and its denial to the other involves no inconsistency of attitude or treatment, because the fact remains that, although the process is new, the result is old.

We confess to a feeling of hesitation in stating adherence to the conclusion indicated. This is due to several considerations, each of which has its influence upon the mind. One is the experience of this patent in the Patent Office as disclosed by the file wrapper. Another is the argument addressed to us by counsel for plaintiff. The least which can be said of it is that it stops, if it does there stop, only just short of convincing power. Still another is the seeming reluctance of the able and experienced counsel for defendant to plant the defense upon this finding, or at least the seeming preference to rest it upon the finding next considered. When one is confronted with the fact that there is a concurrence in the conclusions reached by highly trained and ripened judgments which differs from the conclusion to which your own mind inclines, the correctness of your own conclusion may well be doubted, and it cannot be put forward except with reluctant hesitation. None the less one charged with the duty and responsibility of making a finding must make it according to the convictions of his own judgment, and no matter how much he might prefer to yield it to the judgment of others, he cannot do so unless that judgment be authoritative and binding upon him as controlling. We therefore state our conclusion to be, and content ourselves with a restatement of the conclusions already indicated, that to uphold the validity of this patent would grant to the patentee an exclusive ownership in what is a mere result of the application of natural forces and processes, and that validity must be denied on the principle supporting the rulings in many cases to which Evans v. Warren Bros., 240 Fed. 696, — C. C. A. — is a sufficient reference. The brief submitted by defendant presents the thought with clarity. In contrasting the results attained the plaintiff is truly said to have found a way of supplying the trade with a well-burned dolomite, and although the defendant may have found a way to supply a more thoroughly burned dolomite, the latter product was still a burned dolomite, as was that of the plaintiff. Improvement in quality or advancement in degree, if there be such, does not change the character of the thing produced. The thought expressed is clear enough, but it gives firmer adherence to the other thought that precisely the same contrast can be made between the "standard" product and "magdolite." If kendymag be simply, at the most, a better grade of magdolite, then magdolite is simply a better grade of cupola burned dolomite.

The other question involved, or that of infringement, calls for, as it seems to us, the same answer. It resolves itself into the question of identity of results, and this is in turn determined by the finding of whether magdolite be a new material or merely dolomite which has been subjected to heat. If it be a new material possessing the individual characteristics of being a uniform product free from (for the purposes of its intended use) objectionable ingredients and having the quality of rejecting moisture, or of being slow to absorb it, then it is just what kendymag is. The processes by which the magdolite and kendymag results are reached differ in this. Magdolite, viewing the whole treatment to which it is subjected, starts as a dolomite rock, and, preserving its integrity as rock, remains dolomite to the end. There are

during the process changes in form. The rock is, for a purpose, broken into fragments of a substantially uniform size, which may be described as the size of the stone broken for use as railroad ballast. This is a step toward the size to which the rock is reduced to be used, and yet large enough to meet the conditions of cupola burning to which it is next subjected. It is then further reduced in the size of the fragments and subjected to a further burning in a rotary kiln. The addition of iron may be ignored, although in another aspect of the case this has an important bearing upon the merits of the claim of the patentee. The result is magdolite in name and well "roasted" or well "burned" or "double burned" dolomite in fact, if described with respect to the treatment to which it has been subjected, or is "shrunk" dolomite if described with respect to one effect the subjection to heat has upon it. The defendant (dealing with his process in general terms) disintegrates the rock, reducing it to powder and following an intimate mixing by means of or without dissolving it in water, and the burning of it under very high temperature conditions secures a cindered product or kendymag. This is claimed to be a synthetic product. The integrity of the rock has been destroyed. It is no longer rock, but a product made from dolomite, and is no more rock than cement or rather cinders which are ground into the cement of commerce is the rock from which it is obtained. The two results, therefore, belong to different arts, and the defendant's product properly to the calcining art, with which the result attained by the plaintiff has no concern.

That the motive of production is the same and the uses to which the things turned out can be and are intended to be put the same is aside from the legal point involved. The point is met by the fact that the fruits of the efforts of each are different, and, assuming each to be a product, the one is not the other, and in consequence the producer of the one is not trespassing upon the field which properly belongs to the producer of the other. We might feel sure that kendymag is a true synthetic product, and magdolite, as described in the patent application, merely burned dolomite, if one feature of this case had been made clearer than it has been. The furnace practice in the use of dolomite was to add iron. There was apparently a difference of opinion whether this addition of iron was of any real advantage. It would further seem that no one troubled himself to find out why it was a help if it was one. The use of iron played no part in the process described in the patent application of the plaintiff, and no added iron entered as an ingredient of his patented product. He had in use two rotary kilns differing, so far as the evidence discloses, only in size. More out of deference to what he thought to be a prejudice of the furnace men in the use of iron than to any belief that magdolite would be thereby improved, he added a small percentage of iron. He was not able to discover any appreciable difference in the output. He did find, however, that the output of the larger kiln was increased, or at least the operation of the kiln was facilitated. He found also that the result was the reverse of this in the use of the smaller kiln. Thereafter plaintiff's practice was to add iron in the operation of the one kiln and not the other, and the magdolite he sold to the trade was a mixture of the

two outputs. Kennedy, in his process, adds iron, varying the percentage according to the character of the rock which from time to time his quarries supply; the rock output not being uniform. He also does not seem to have recognized the fact, if it be one, that the added ingredient gave anything of value to the product. He also regarded its use as a yielding to the prejudices of the furnace men, and valued it merely as a "talking point" in reaching the trade. There is room, however, for the finding that iron plays a part in rendering both magdolite and kendymag an acceptable substitute for magnesite. The iron enters into chemical combination with the other ingredients or some of them forming in the kendymag process, through the intimate and thorough mixing of the material and its subjection to a very great heat, a true synthetic product, spoken of in the record as a ferrate. In the magdolite process the effect is limited to the outer surface of the particles of rock into which the dolomite is crushed, incasing them in an envelope or skin. The result is in each instance a lessened tendency to absorb moisture. Two consequences flow from this. One is that each product is improved. The second is that the products are different. One process begins with dolomite and ends with a resultant output, which is still the same rock that has been more or less thoroughly burned and thereby the water and carbonic acid driven off and the particles shrunk, but preserving its integrity as rock. The other process begins with selected portions of the rock to the pulverized material of which iron in the proper proportion is added and the two so thoroughly mixed and subjected to such heat as that the process ends in a clinkered product which is not dolomite rock, but made up of ferrates, silicates, and aluminates of lime and magnesia which could not be found in the natural rock. The two products are not the same, although they possess in varying degrees the same qualities and characteristics.

We find the fact to be, as asserted by the plaintiff, that magdolite and kendymag considered as a product is each "uniform, free from objectionable ingredients, and slow to absorb moisture." We find, however, that the possession of these qualities springs from different causes. In magdolite the particles of rock are shrunk, and in some of the commercial product incased in the skin or envelope spoken of and thus made repellant of water for a time. The water is held back from contact with the material of which the particles are composed. When it gains entrance, as it does in time, the material slacks. In kendymag the product itself is one which possesses the quality or characteristic of water resistance and does not slack.

There is no occasion to follow the very interesting discussion of all the considerations which bear upon the questions involved in this case. The argument is in able hands, and may be so left. In reaching the conclusion adverse to the plaintiff which we have reached, we have done so on the merits of the questions involved, as they have appealed to us, uninfluenced by the consideration which is met by the very sensible and patriotic suggestion made by the plaintiff that any injunction process to which the plaintiff was found to be entitled be suspended and made inoperative during the duration of the war. We acknowledge further

to a feeling of gratification that in denying plaintiff's claim to a products patent we leave wholly unaffected his claim of a property right in the process patent which is not before us. The ruling now made affects only claims 2, 3, 4, and 5 of letters patent No. 1,063,102, issued May 27, 1913.

The formal conclusion is that the billl of complaint of the plaintiff should be dismissed for want of equity; and it is so decreed, with costs to the defendant.

WAGNER v. MT. CARMEL IRON WORKS.

(District Court, M. D. Pennsylvania. June Term, 1915.)

No. 216a.

1. PATENTS ⟸314—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.
A court of equity will not dismiss a suit for infringement, in which an injunction and accounting are asked, after a hearing on the merits, because it does not appear that the infringement was continued.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—JIG FOR COAL WASHERS.
The Falkner, Schultz & Wagner patent, No. 977,087, for a jig for coal washers, *held* not anticipated, valid, and infringed.

In Equity. Suit by John F. Wagner against the Mt. Carmel Iron Works for infringement of letters patent No. 977,087, for a jig for coal washers, granted to Henry W. Falkner, Franklin Schultz, and John F. Wagner on November 29, 1910. Decree for complainant.

R. S. & A. B. Lacey, of Washington, D. C., John O. Ulrich, of Tamaqua, Pa., and R. W. Bishop, of Washington, D. C., for plaintiff.

Voris Auten, of Mt. Carmel, Pa., for defendant.

WITMER, District Judge. [1] This is a suit on a patent brought by John F. Wagner against the Mt. Carmel Iron Works, to restrain infringement of such patent and to recover profits and damages. The bill is in the usual form, and the answer consists of a general denial of its respective allegations, asserting also that the plaintiff was not lacking full and adequate relief at law, wherefore this court was without equity jurisdiction. This objection was not pressed on argument of counsel, and if seriously intended may be dismissed, by noting that the bill of complaint, praying for an accounting of profits, also asks for an injunction to restrain infringement, and the court, having jurisdiction at the inception of the suit, would not, after hearing on the merits, dismiss the bill, even though it did not now appear that the infringement is continuous, Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Goldschmidt Thermit Co. v. Primos Chemical Co. (D. C.) 225 Fed. 769.

[2] The answer also in a general way sets up invalidity, want of patentable invention, prior use, and a denial of public use. In the absence of other notice, these defenses are not pleaded with the particularity required by section 4920, Rev. Stat. (Comp. St. 1916, § 9466). However, in the absence of evidence rebutting the presumption of

validity evidenced by the patent, it must be concluded that the patent is valid and that the patentees are the inventors of the invention claimed.

True, some evidence has been introduced attempting to show prior use in the form of a jig known as the "Crist jig." If under the pleadings this defense could be considered, it need only to be said that this jig does not anticipate, being dissimilar in construction and operation in the material parts under consideration in this case. It remains that the only and the real defense in this case is that of noninfringement.

The plaintiff's invention consists of an improvement in jigs used in coal washeries for separating the slate from the coal. The patentees, Henry W. Falkner, Franklin Schultz, and John F. Wagner, the former having since the grant assigned their interest in the patent to the latter, expressed themselves in the specifications as to the purpose or object of the invention, as follows:

> The object of the invention is to provide a jigger of simple, compact, and durable construction, in which the separation of slate and other foreign matter from the coal is effected more thoroughly and economically than heretofore.
>
> A further object is to provide a coal separator, the jig pan of which is mounted for both vertical and horizontal movement in the washing tank; said pan having its rear end stepped, so as to impart a rolling movement to the coal over the bed of slate, and thus permit the ready discharge of the coal at the front of the machine.
>
> A further object is to provide a novel form of gate or cradle for automatically controlling the discharge of slate from the jig pan to the washing tank; the construction of the jigger being such as to permit the separation of both cube and flat or flake slate.
>
> A still further object of the invention is generally to improve this class of devices, so as to increase their utility, durability, and efficiency.

After describing the invention in its construction, operations, and minor details, the patentees set forth their claims of invention, the first two of which only are said to have been infringed:

> 1. In combination, a tank, a jig screen suspended within the tank and having its feed end provided with steps, the treads and risers of which are perforated, and means for gyrating said screen in a vertical plane.
>
> 2. In combination, a tank, a jig screen suspended within the tank and having its feed end provided with steps, the treads and risers of which are perforated, that portion of the screen between the steps and the discharge end thereof being substantially in one plane, and means for gyrating said screen in a vertical plane.

The complete machine in which the invention of the patent is incorporated comprises a frame supporting a stationary tank, in which is a body of water, generally running water, sufficient in quantity to approximately fill the tank. In this tank is suspended a jig pan, which is movable vertically and longitudinally within the tank, and into which the coal and slate, as brought from the mines, is delivered at one end. The operation of the pan effects a separation of the slate and coal, and means are provided for permitting the coal and slate to be discharged upon separate conveyors, by which they are carried away and disposed of in a manner not material to the issue herein. In the embodiment of the invention which is illustrated in the patent in suit, the jig pan is shown suspended from hangers on eccentrics, which are provided on

two shafts journaled on the top of the frame and connected by chain and sprocket gearing, so that as the shafts rotate the eccentrics will act on the hangers to move the jig pan up and down and also back and forth within the tank. One of these shafts is equipped with a band pulley, so that power may be transmitted to the jig from an engine or motor. At its feed end, the jig pan has a stepped construction, and the bottom of the pan, as well as all the parts of the stepped portion, are perforated, so that, as the pan moves within the tank, the water may rush through the perforations and act upon the coal and slate to effect separation of the same.

The specifications of the patent say the jig pan is mounted for both vertical and horizontal movement in the tank and has "its rear ends stepped so as to impart a rolling movement to the coal over the bed of slate"; that the mounting of the pan permits "free oscillatory movement of the pan in both a vertical and horizontal plane"; that the "stepped portion" of the pan "has the effect of kicking or feeding the coal in a forward direction, and also has a tendency to turn the light particles of slate edge down, thus permitting the separation of flat or flake slate, as well as cube slate"; and that during the gyrating movement of the jig pan the free coal will be discharged.

The invention, summarily expressed, lies in the stepped portion of the bottom of the sieve or jig pan nearest the feed end with perforations in this stepped portion and means for imparting to the sieve or pan oscillatory or gyratory motion. It is through this stepped and perforated portion of the pan, by the action of the water forced through the openings and thus acting upon the coal and slate, that the object to be attained is accomplished. Have these elements in principle and result been carried into and appropriated by the defendant in the construction of its machine?

The jigs manufactured and sold by the defendant, and said to constitute infringement, are known as "B. & K. jigs," originally patented January 9, 1912, to George W. Keller, Charles Brassington, and Abraham Brassington (No. 1,014,308), and afterwards, October 22, 1912, embodied in patent No. 1,041,800, to same parties, including one Harry D. Kastenbader.

The evidence discloses, and it is interesting to note, that Keller and the two Brassingtons were employed at the Midvalley Colliery, where Kastenbader was superintendent, and that these persons were familiar with the installation and operation there of the plaintiff's jig several years before the date of their alleged invention; that they there, from the patent in suit, obtained the fundamentals on which they constructed their jig, in so far as the same is here under consideration, is not doubted. This is apparent from an inspection of their machine, their letters patent, and their testimony in this case.

Like the patent in suit, defendant's machine, their alleged invention, also has a jig box or sieve, suspended for movement up and down longitudinally in a stationary tank containing water, which brings about the separation of coal and slate by their stratification, due to their difference in specific gravities. This bottom or sieve furthermore has a stepped portion at the feed end of the jig box, which corresponds

to and performs the functions of the bottom of the jig in the patent in suit. True, the drawings of plaintiff's patent and the jig as installed have two steps at right angles with the base, whereas the defendant's has but one step, slightly inclined; however, plaintiff's patentees claim a stepped construction without regard to numbers or degree of inclination, and answering the same purpose as defendant's, possibly in a different degree of efficiency, their device must be held as the equal and like defendant's in the accomplishment of the ultimate end to be attained.

Defendant's witnesses, the alleged patentees named, attempted to differentiate their infringing jig from the design and function of the stepped construction of the bottom of defendant's jig, as claimed in the patent and explained by plaintiff's witness, Earl Wagner, and plaintiff's expert, Charles J. Williamson, in that the action of the water, coming through the riser or step, imparts a rolling motion to the slate and coal in the sense that it forces it ahead, and turns the flat slate on its edge, and brings it to the bottom of the pan, forcing it toward the slate discharge, accomplishing at this point the greater part of the separation of material. In this they have not succeeded. Both the jig pan in suit and the infringing device are so suspended and operated in the water tank as to afford movement of the jig pan first in one direction and then in the opposite direction, slightly shifting the same from a higher to a lower level, and alternately, thereby causing a gyrating or oscillatory movement of the pan, with the result, on the riser portion of the stepped part of the pan, of emitting jets of water into the jig pan, and against the material therein as it comes into the feed end of the jig pan.

That the action of the stepped portion of the B. & K. jig performs the functions of plaintiff's jig, as stated by Earl Wagner and Mr. Williamson, is also confirmed by the specifications of the B. & K. jig patent (No. 1,014,308, pp. 1, 2) over the signatures of defendant's witnesses, Keller and Brassington, wherein it is stated:

"As the coal and slate are deposited in the rear end of the receptacle, the coal is floated by the jets of water which enter through the perforations in the rear curved end of the bottom plate, which strikes the water with considerable force in the oscillatory movement of the receptacle."

Again:

"The coal is fed into the receptacle from a suitable hopper at the rear end thereof, and is first separated at this point; the action of the water in the oscillation of the receptacle floating the coal, while the heavier particles of slate drop upon the bottom plate."

It may be that defendant's jig has some slight advantages in construction and operation over plaintiff's, yet it remains that the plaintiff's idea or conception of a jig, as embodied in claims 1 and 2, "the means of gyrating the screen in a vertical form," and the stepped construction of the bottom of the screen have been appropriated, and therefore the exclusive right granted by his patent has been invaded.

It follows that plaintiff's bill will be sustained, and a decree may be submitted in accordance herewith.

MIX v. NATIONAL ENVELOPE CO.

(District Court, E. D. Pennsylvania. September 5, 1917.)

PATENTS ⇐210—IMPLIED LICENSEE.

An employé, salesman of defendant envelope manufacturer, having induced it to manufacture and sell the envelope which he had invented without putting any limitations on its rights, it was given an implied license to make and sell to its customers, subject to which plaintiff, assignee of the patent with notice, took.

In Equity. Suit by Frank E. Mix against the National Envelope Company. Hearing on bill, answer, and proofs. Bill dismissed.

A. S. Ashbridge, Jr., of Philadelphia, Pa., and F. A. Whiteley, of Minneapolis, Minn., for plaintiff.

Henry P. Erdman and George K. Helbert, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. Following the very complete analysis of this case and the orderly arrangement of the questions involved, presented by counsel, we are led to one question which, if answered favorably to the defendant, is the only question with which it is concerned. The question may be presented by an outline statement of the facts out of which it arises, or by a formulation of the equitable principles upon which it is based. The latter method is somewhat academic, but a clear view of the legal principle better enables us to see whether or not it is applicable under the special facts of this case.

The Constitution and laws of the United States give the fullest recognition of the wisdom of the policy outlined in the constitutional provision relating to useful inventions and discoveries. The promise of reward held out is the grant of a monopoly or exclusive proprietary right for, a limited time in and to the thing invented. Not every valuable discovery earns the reward, and it is often not claimed when it is earned, and sometimes, when it is claimed, there are other considerations which compel its denial. There are usually two things which enter into the commercial value of an invention. There is, first, the invention itself. There must be the creation of a thing before it can have a value. Next, and often of more commercial importance, is the bringing of the invention to the knowledge of possible users, and through this the creation of a commercial demand.

The man who has made a real invention of value has the right to the grant of a patent monopoly; but he must add the further contribution of effort and expense which will give a commercial value to the thing invented. If, without claiming his right to a patent, he makes his invention public, and encourages others in its use, out of which there springs a commercial demand, he thereby forfeits the right which he would otherwise have. The justification for this is clear, because the granting of his belated application would permit him to appropriate, not merely the value which his own efforts had contributed to an article of commerce, but that which sprang from the efforts of others also. An inventor cannot be permitted to give his invention to

the public, in order to create a commercial value, and afterwards withdraw his gift, if he finds it to his advantage so to do. We have, therefore, the doctrine of a dedication to the public.

Whether there has been a dedication is a question of fact. Within the time allowed in which to make his application for a patent, there is no presumption of an abandonment of his right. The abandonment must be proven as a fact. After the time limitation has passed, the burden shifts, and is upon him to show the preservation of his rights. What is essentially the same principle is applied in the relation of the inventor to an individual. An employé, who makes an invention of value in the work of his employer about which he is employed, and invites his employer to engage in its manufacture for use or sale, cannot deny to his employer the right thus exercised. This thought is expressed in the doctrine of implied license. It is really the doctrine of dedication, with the employer substituted for the public, and is based upon the same equitable considerations.

The common sense of justice, which all men have, is, as a rule, a safe guide to follow, and this sense of justice would condemn the action of any employé who first led his employer into making outlays to introduce to customers of the employer and to build up a valuable trade in a before untried invention, and, after the trade has been established, to take away from the employer, not only the right to make use of the invention, but the trade built up by the employer, and many of his old customers along with it. The sense of injury under which such employer would smart would be inflamed if such a thing were done by a rival trade competitor, who had become the alienee of the employé's invention. The sum expended by the employer might be so large as to give emphasis to the wrong, but the amount of the money involved would not control its essential character. The principle of law which would afford protection to the employer against such a wrong would have our acquiescence, even without the sanction of rulings made in adjudged cases. The principle, however, has abundant sanction, as a reference to the following cases, among many which could be cited, will show: R. S. § 4899 (Comp. St. 1916, § 9445); Anderson v. Eiler, 50 Fed. 775, 1 C. C. A. 659; Schmidt v. Foundry Co. (D. C.) 218 Fed. 466; Solomons v. U. S., 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667.

The principle, then, being established and vindicated, it only remains to inquire whether it has application to the present case under its facts. A wrong, such as indicated above, might be done under circumstances which would make it appear glaring and flagrant. There might be other circumstances which, to a greater or less degree, would so obscure our view of it that the wrong might not be perceived. There are some such circumstances in this case. To begin with, the employer here does not seem to have recognized any inventive merit or commercial value in the idea of putting out the style of envelope which the plaintiff's assignor claimed to have invented. The claimed invention was so far from being given a cordial reception that positive discouragements were thrown in the way of the employé, who at least thought he had hit upon something of value. It is human nature to think well of our ideas because they are ours, and we resent the rejection of them, es-

pecially if they are rejected upon presentation. This employer, indeed, further seems to have tried out this special style of envelope without believing it to have any other merit than that the employé, who thought it to be good, would thereby become a more zealous and pushing selling agent.

It is a further fact that, entertaining the opinion of the envelope which they did, the officers of the defendant company made no effort to extend the sale of this envelope, merely filling orders for them when received, but attaching no importance to the trade which might be built up in them. It was the wholly natural and to be expected consequence that the employé would take his ideas to a more appreciative market. To the extent, great or small, however, to which the envelope was introduced to the defendant's trade, and especially to their old customers, to that extent the sale of the right to make and vend, if an exclusive one, transferred, not merely the control of the claimed invention, but also of defendant's established trade. That they should seek to hold their old trade, by continuing to supply it with what they had before supplied, is likewise natural, and their feeling that they had the right so to do is one which would also command ready sympathizers. This right we think to belong to them as a legal right.

The conclusion reached does not impair the proprietary right of the plaintiff to this invention, if it be one, except to the extent indicated. The plaintiff took the right assigned to it subject to the equities to which it was subject. Nor does the ruling affect, except to a like extent, the right of alienation which goes with his property right. He cannot, however, regrant to one what he has already granted to another. The patentee owned whatever property he had in his claimed invention. He might have withheld it entirely from his employer. He might have sold or given it absolutely. He might have sold or given a license to make and to vend. He could not, however, sell or give that which was the equivalent of such a license and withdraw it to the prejudice of his donee. When the defendant made and sold the envelope, the exclusive right to make or sell which the plaintiff now claims, the defendant either was a trespasser or had a license from the patentee so to do. That the defendant was not a trespasser is clear. The alternative proposition is likewise clear. If the patentee meant not to have granted a full license, but one which he could withdraw at will, he should have so limited it at the time. The licensee could then have determined whether it would build up a trade which might be diverted to a commercial rival, and bargained for such rights of ownership or license which would protect its trade, or refuse the limited right offered.

The proposition resolves itself into this: The patentee granted, without restriction or limitation, the right to the defendant to make and to sell to its customers this patented envelope; and, having received the consideration for the grant, he cannot now write into it limitations which were not in the bargain when made. What the patentee cannot do, his alienee with notice cannot do. That an assignee of the patent had this notice could be found as a fact, because it took the patent with knowledge of the fact of what had previously been done. The controversy relates to letters patent No. 1,125,864,

issued January 26, 1915. The question of the validity of the patent does not concern the defendant, if its rights are not affected thereby. For this reason, the other questions discussed in the argument may be left as they are.

The bill of complaint is dismissed for want of equity, with costs to the defendant, and a formal decree to this effect may be submitted.

GENERAL ELECTRIC CO. v. INDEPENDENT LAMP & WIRE CO.

(District Court, D. New Jersey. February 4, 1915.)

1. PATENTS ⟸292—INFRINGEMENT—DISCOVERY—EQUITY RULE.
In a suit for the infringement of a patent, containing 23 claims covering process and 11 covering a product, wherein the answer denied the infringement, plaintiff's interrogatories, under equity rule 58 of the Supreme Court (198 Fed. xxxiv, 115 C. C. A. xxxiv), whether defendant had manufactured, sold, or used "incandescent electric lamps having filaments of drawn tungsten wire," following the language of a claim of the patent, whether defendant had made, sold, or used certain forms of tungsten metal, as described in certain claims of the patent, and whether defendant, in its manufacture of tungsten filament electric lamps, had used any processes covered by certain claims of the patent, except for typographical errors, were proper, and, if amended to conform to the patent, should be answered; but an interrogatory as to whether defendant would deliver a certain tungsten filament lamp made by it to plaintiff's counsel for use in the cause is not within the rule, and will be stricken out.

2. PATENTS ⟸292—INFRINGEMENT—DISCOVERY—FORM OF QUESTIONS.
On the issue of infringement, it was no objection to plaintiff's interrogatories, propounded under such rule, that it would be difficult, if not impossible, for any officer of defendant company to answer them, because they were matters for expert opinion; and it was no valid objection that the terms and words used in the interrogatories and claims were susceptible of one or more meanings, because the answer could be in the alternative, and qualified to cover all of the susceptible meanings.

3. PATENTS ⟸292—INFRINGEMENT—DISCOVERY.
Interrogatories propounded by plaintiff, under such rule, as to facts material to the support of the action and presumably within defendant's knowledge, not seeking to discover evidence, but whether defendant's process and product was covered by the claims of plaintiff's' patent, and not seeking defendant's opinion of the construction to be given to plaintiff's patent, are proper, even though a construction may eventually be given to the claims which will make the answers useless to plaintiff.

In Equity. Suit by the General Electric Company against the Independent Lamp & Wire Company. Motion to strike out interrogatories propounded by plaintiff, under equity rule 58 of the Supreme Court, denied, and defendant ordered to answer.

Howson & Howson, of New York City, for plaintiff.

William A. Megrath and Cornelius C. Billings, both of New York City, for defendant.

HAIGHT, District Judge. This suit is for an infringement of letters patent No. 1,082,933, granted to W. D. Coolidge December 30, 1913. The answer denies infringement. One of the issues, there-

fore, is whether the defendant does infringe. The plaintiff's patent contains 34 claims, the first 23 of which cover a process and the last 11 a product.

[1] The first interrogatory asks whether the defendant had manufactured, sold, or used "incandescent electric lamps having filaments of drawn tungsten wire." It follows exactly the language of the twenty-fifth claim of the patent. The third interrogatory contains six subdivisions, all of which are, in effect, whether the defendant has made, sold, or used certain forms of tungsten metal, such as described in the twenty-eighth, twenty-fourth, twenty-sixth, twenty-seventh, thirty-third, and thirty-fourth claims of the patent respectively. The fourth interrogatory in effect asks whether the defendant, in the manufacture of tungsten filament electric lamps, or for other purposes, has used any or all of the processes covered by claims 1 to 23, inclusive, of the patent. It contains 23 subdivisions, each of which relates to a particular claim. The language of the respective claims is followed exactly, except in two respects (both of which I conceive to be typographical errors), viz.: In the thirteenth subdivision the words "sintering the body," which appear in claim 13 of the patent, do not appear in the interrogatory; and in the eighteenth subdivision the words "lower limit" are used in the claim, but the words "lowest limit" in the interrogatory. The second interrogatory asks whether the defendant will produce a certain tungsten filament lamp made by it, and deliver it to the plaintiff's counsel for use in this cause.

I think all of the interrogatories, with the exception of the second, are proper, and should be answered, provided that subdivisions 13 and 18 of the fourth are amended to conform with the claims of the patent to which they relate. These may be amended accordingly, or otherwise they will be stricken out. The second interrogatory does not seem to me to come within the provisions of rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), and it will therefore be stricken out.

[2] The objection of the defendant to the other interrogatories seems to be that it will be difficult, if not impossible, for any officer of the defendant company to answer them, because the answers must be found in expert opinion. If the interrogatories are in other respects proper, this does not seem to me to be a valid objection to them. If a question cannot be answered, it is proper for the person to whom it is addressed to state that fact. In that event, if the plaintiff still pressed for an answer, the court would probably have to determine whether or not it could be answered. Manifestly, an interrogatory should not be stricken out merely because of the representation of counsel that it is difficult or impossible of answer by the person to whom it is propounded. It would also seem very unusual, indeed, if there were not some officer of the defendant corporation, which is engaged in manufacturing, who could not disclose whether or not, in the manufacture of certain articles, certain processes were used and certain products manufactured. It is also urged that the terms and words used in the interrogatories and claims are susceptible of one or more meanings; but this is not a valid objection, because the answer can be in the alternative, and qualified so as to cover all of the meanings which the term or word is susceptible of bearing. In addition, it

must be assumed that terms and words used in a patent have a well-defined meaning in the art of which the patent is a part.

[3] I think all of the interrogatories are clearly within the provisions of rule 58. They seek to elicit facts material to the support of the action. Plaintiff, in order to sustain his action, must prove infringement. The interrogatories seek to elicit facts, presumably within the knowledge of the defendant, which will tend to prove whether or not the defendant infringes. They do not seek to discover evidence, but rather the fact whether the product of the defendant and the process which it uses is that covered by the claims of the plaintiff's patent. They do not pry into the case of the defendant, except in so far as they seek to elicit facts which are necessary in support of the plaintiff's case. They do not, as counsel for the defendant seems to assume, ask for the defendant's opinion of the construction to be given to the plaintiff's patent. It may be that a construction will eventually be given to the claims which will make the answers to the interrogatories quite useless to the plaintiff; but this is no valid objection to the interrogatories, nor can the proper construction be determined in advance of the final hearing. As far as my research has extended, interrogatories such as these have uniformly been held proper by the English courts under order 31 of the English equity rules of practice, which is in substance the same as equity rule 58 of the Supreme Court. Benno Jaffé, etc., v. Richardson, 10 Reports British Patent Cases, 136, is an example. For a long while a statute, similar to this rule, has existed in the state of New Jersey, and these interrogatories, under the decisions of the courts of New Jersey construing the statute of that state, would be proper. Watkins v. Cope, 84 N. J. Law, 143, 86 Atl. 545.

The view which I entertain is not at all at variance with that expressed by Judge Sanborn in P. M. Co. v. Ajax Rail Anchor Co. (D. C.) 216 Fed. 634. The second, third, and fourth interrogatories in that case (which were propounded by the defendant) sought to elicit from the complainant its opinion as to the proper construction to be given to its patent. The fact in issue was infringement, and the opinion which the complainant had as to the construction to be given to its own patent was not a fact material to the defense of the action. The explanation given by Judge Sanborn as to why the others were stricken out needs no comment, because it is entirely clear that they did not seek to elicit facts which were material to the defense, especially as the defense upon which they were predicated, apparently, was stricken out by the court. The interrogatories in this case ask that certain facts, which must be peculiarly within the knowledge of the defendant and which are material in support of the plaintiff's case, be divulged; i. e., whether the defendant does certain things which the plaintiff's patent has given it the exclusive right to do. They do not ask for evidence in the sense in which that term is used by Judge Sanborn.

The plaintiff is therefore entitled to an order requiring such officer of the defendant corporation as may have knowledge of the facts sought to be ascertained by the interrogatories to answer all of the interrogatories which I have above held to be unobjectionable; and,

if there be one officer who has knowledge of one set of facts, and another officer of another set of facts, then the respective interrogatories must be answered by the officers who, respectively, have the knowledge. The order will require that the answer be made within ten days from the date thereof. If the parties cannot agree upon the terms of the order, I will settle it upon two days' notice.

In re ATLANTIC BEACH CORP.

(District Court, S. D. Florida. August 28, 1917.)

1. BANKRUPTCY ⊂=140(1)—PROPERTY OF BANKRUPT—RESERVATION OF TITLE —CONSTRUCTIVE NOTICE.
   The petitioner, owner of hotel property, contracted to sell to B., who assigned the contract to a corporation, which later contracted with the F. company to install an ice-making plant and machinery on the premises. By the contract the F. company was to retain title until the machinery was paid for, the machinery to remain personal property. Both of the contracts were duly recorded. Pursuant to the contract of purchase and assignment, petitioner conveyed all of the property, real and personal, to the corporation, and received a purchase-money mortgage. Later the corporation was adjudged a bankrupt and a trustee appointed. The trustee quitclaimed to the petitioner, and later ordered petitioner to pay to the F. company the purchase money or deliver to it the machinery, etc. Gen. St. Fla. 1906, § 2516, provides that the reservation of title under a written contract recorded is valid against purchasers or creditors. *Held*, that the fact that the petitioner recognized the assignment to the bankrupt and made a deed pursuant to the contract did not give it actual or constructive knowledge of the reservation of title by the F. company.
2. BANKRUPTCY ⊂=140(1)—RESERVATION OF TITLE—CONSTRUCTIVE NOTICE.
   The recording of the contract prior to the conveyance to petitioner and the acceptance of the mortgage to secure the purchase money was constructive notice of the reservation of title and binding on petitioner.
3. NOTICE ⊂=5—CONSTRUCTIVE NOTICE—RECORDING OF INSTRUMENTS.
   The recording of an instrument not entitled to record is not constructive notice of its contents.
4. FIXTURES ⊂=22—RESERVATION OF TITLE—CONTRACT—VALIDITY.
   A contract, reserving title in fixtures placed on land, is valid and binding as between the parties and any one dealing with the realty with knowledge thereof.

In Bankruptcy. In the matter of the Atlantic Beach Corporation, bankrupt. Petition by the Florida East Coast Hotel Company to review an order of the referee. Denied.

A. V. S. Smith, Armstead Brown, and Egford Bly, all of Jacksonville, Fla, for the Florida East Coast Hotel Co., petitioner on review.

Marks, Marks & Holt, of Jacksonville, Fla., for claimant.

CALL, District Judge. This cause comes on for hearing upon the petition of the Florida East Coast Hotel Company to review the order of the referee made upon the petition of the Frick Company.

The facts upon which the referee acted may be stated as follows: The Florida East Coast Hotel Company, being the owner of the Hotel

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

property, real and personal, in March, 1913, contracted to sell the same to Brackett. Later Brackett assigned and transferred this contract to the bankrupt, the bankrupt accepting said assignment and binding itself to carry out and perform the terms of said contract. In December, 1914, the bankrupt contracted with Frick Company to install an ice-making plant with the necessary machinery to replace the plant on the premises at the time of the contract of sale to Brackett. Frick Company performed its contract, and the bankrupt paid all the purchase price except $1,395.08, for which on February 15, 1915, a note was given, payable in one year. By the contract Frick Company retained title to the machinery until the same was fully paid for, and further contracted that the machinery should be and remain personal property. Parts of the machinery were attached in a substantial manner to the realty. The contract between the East Coast Hotel Company and Brackett contained a provision that Brackett would maintain at his own expense the premises and buildings and every part thereof in the same good repair and condition as the same were at the execution of the contract (ordinary and reasonable wear that cannot be repaired or replaced, and loss and damage by fire only, excepted). This contract of purchase and the Frick Company contract were each recorded in the public records of Duval county, shortly after each was executed. Pursuant to the contract of purchase and the assignment to the bankrupt, the Florida East Coast Hotel Company, on March 15, 1915, conveyed all the property, real and personal, to the bankrupt, and received from said bankrupt a purchase-money mortgage covering all of said property. Afterwards the Atlantic Beach Corporation was adjudicated a bankrupt, and a trustee duly appointed. Said trustee after an examination disclaimed as to this hotel property and quitclaimed and released all of said property to the mortgagee. Under this state of facts the referee ordered that the Florida East Coast Hotel Company forthwith elect to pay Frick & Co. the balance of the purchase money or to deliver to Frick & Co. the machinery, etc. The Hotel Company seeks a review of this order on three grounds, the first two taking exceptions to part of the opinion filed by the referee with his order. The third takes exception to the order. It is this third ground to which I shall direct my attention.

[1] There are no proofs submitted that the mortgagee in this case had any actual notice of the Frick Company contract. The fact that it recognized the assignment to the bankrupt and made a deed to it pursuant to said contract is not, to my mind, proof of actual notice; nor would such knowledge put the mortgagee upon inquiry to ascertain the existence of it. On the other hand, the sworn answer denies such actual notice.

[2, 3] Was the record of the contract in the public records of Duval county constructive notice to the owner of the land? It is well settled that constructive notice by the record is the creature of the statute. The recording of an instrument not entitled to record is not constructive notice of its contents. Statutes of Florida, § 1832, authorize the record of chattel mortgages, but the instrument on which Frick Company bases its claim is clearly a retention title contract and not a chat-

tel mortgage. Section 2516 of the General Statutes of Florida provides that reservations of title in personal property, whereby possession of same is delivered to the vendee evidenced by one in writing, proved and recorded within two years, to be valid against purchasers or creditors.

In Onyx Soda Fountain Co. v. L'Engle, 53 Fla. 314, 43 South. 771, it was decided that to comply with this statute the deed must have been executed by the vendor, execution by the vendee was not a compliance. The case of Marvin Malsby, etc., v. Gamble, 61 Fla. 310, 54 South. 766, has no application to the instant case.

In Dillon et al. v. Mizell Live Stock Co., 66 Fla. 425, 63 South. 824, the court held that a conditional vendee of personal property, before the expiration of two years, could convey no right to a mortgagee, not possessed by the mortgagor. In other words, that a mortgagor without notice of the conditional sale, before the expiration of two years, acquired no other or greater right than his mortgagor had. In the instant case the contract is under seal and executed by the vendor and acknowledged by said vendor before a notary public and recorded. But it seems to me that the question of notice or record is of no particular moment, in view of the decision in Dillon et al. v. Mizell, etc., supra, if this property remains personal property. The property was delivered presumably on February 15, 1915, and the mortgage executed and delivered on March 15, 1915, one month later. If by its attachment to the realty it becomes real property the above considerations do not apply.

[4] In the instant case it seems to me that there can be no doubt that the engine and machinery for making ice and cooling the different rooms were so attached to the realty as to become a part and parcel thereof, unless the provision contained in the contract with the bankrupt that same should remain personal property is in effect to bind the Hotel Company. It seems well settled by authority that such a provision is binding upon the parties thereto, and any one dealing with the realty with knowledge of such agreement. The Hotel Company in this case was the owner of the property, real and personal, at the time of the making of the contract and installing the machinery. The contract was recorded, and as above noted section 2516 of the general statutes of Florida provided for the recordation of such contracts. Subsequent to such installation the Hotel Company conveyed the property, real and personal, to the bankrupt, and received from it a purchase-money mortgage. Can it, under these circumstances, be said to be a subsequent mortgagee without notice? I think not. I am of opinion that the record of the contract prior to the conveyance to the Hotel Company, and acceptance by it of the mortgage to secure the purchase money, was constructive notice to it of the terms of said contract, and after such constructive notice accepted the mortgage, and cannot now be heard to contend that the provisions of the contract are not binding upon it. The Hotel Company accepted from the trustee in bankruptcy a quitclaim deed, and thus acquired title of the bankrupt vested in the trustee by the adjudication. It therefore occupies in this position the dual position of owner and mortgagee in so far as

Frick Company is concerned, with constructive notice of the retention of title by the vendor, and the provision that the machinery, though attached to the realty, should remain personal property until fully paid for. I bear in mind the provisions of the contract, in pursuance of which the deed was made, but do not think they have a material bearing upon this phase of the question. Had the title remained in the Hotel Company with the contract of sale on record (constructive notice of its terms to Frick Company), the question presented in this case would not arise.

I am of opinion that the order of the referee is not erroneous.

The petition to review will be denied.

MacGLASHAN et al. v. LANGSTON.

(District Court, N. D. New York. August 9, 1917.)

1. PLEADING ⟸248(4)—AMENDMENT—ALLOWANCE.

Plaintiffs' original complaint was on a note for $2.000, and they moved to file an amended complaint. The amended complaint alleged that plaintiffs were a copartnership; that they entered into a contract whereby defendant agreed to build a machine for the manufacture of beaver board; that defendant agreed to be responsible for the quality and quantity of the output of the machine; that plaintiffs agreed to lend him $2,000, for which he was to execute a note; that, if the machine should be successful, plaintiffs would return the note and apply the amount as part payment on the price, but otherwise defendant should pay the note, together with advances made by another for labor, material, etc.; that, after plaintiffs had loaned defendant the amount agreed, the machine proved unsatisfactory, and plaintiffs were obliged to pay the amount of the third person's advances to defendant, and that he failed and refused to discharge the obligation. *Held*, that the proposed amendment should be allowed, a new cause of action arising out of the same transaction being stated, and it being unnecessary for plaintiffs to set out all the evidentiary facts bearing thereon.

2. PLEADING ⟸251—AMENDMENT—ALLOWANCE.

A proposed amendment must stand or fall on its own allegations and statement, and cannot be supplemented by affidavits as to the facts.

At Law. Action by William F. MacGlashan and Harry S. Lewis, doing business under the firm name of Northern Paper Company, against Samuel M. Langston. On motion to amend plaintiffs' complaint, by asserting additional cause of action of the same nature, kind, and quality as that alleged in the original complaint, and growing out of the same transaction. Motion granted.

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

Southworth & Scanlan, of Utica, N. Y., opposed.

RAY, District Judge. The first cause of action of the proposed amended complaint is on a promissory note for the sum of $2,000 dated April 20, 1910, given by the defendant Samuel M. Langston to the Northern Paper Company, a copartnership composed of one MacGlas-

han and one Lewis, but doing business under the name mentioned, Northern Paper Company. The proposed amended complaint contains not only this cause of action, but one alleging the following facts in substance, viz.: That the said MacGlashan and the said Harry S. Lewis were, and now are, a copartnership doing business under the name of Northern Paper Company; that on or about April 16, 1909, the plaintiffs and the defendant entered into a contract whereby the defendant agreed to build for the plaintiffs a certain machine for the manufacture of beaver board for the sum of $3,600, and that in and by said contract the defendant duly promised and agreed that he should be held accountable for the quality and quantity of the output of said machine, and further guarantied that the machine would be free from defects in material, workmanship, and design; that thereafter, and on or about July 20, 1910, the plaintiffs and the defendant entered into a written contract whereby the plaintiffs agreed to loan to the defendant the sum of $2,000, for which defendant was to execute and deliver his promissory note payable three months from date, and it was further agreed that, if at the maturity of the note the machine should be running successfully and doing its work in accordance with the guaranty, plaintiffs would return the note to the defendant, and apply the $2,000 as part payment for the machine, but if said machine did not prove successful and operate according to the guaranty, that the defendant would pay the note at maturity, with interest, "together with advances made by J. P. Lewis for labor, material, transportation charges, advances to salesmen," etc.; that the defendant did build the pasting machine and deliver same to the mill of the J. P. Lewis Company, but that said machine was defective in workmanship, material, and design, and failed to operate in that it would not paste paper boards together and cut the same, and that because of defects the machine has never been operated; that, pursuant to the said agreement of July 20, plaintiffs did loan to defendant the sum of $2,000, and a promissory note therefor was made and delivered by the defendant, and that between the 5th day of February, 1910, and the 1st day of June, 1917, said J. P. Lewis Company advanced and paid the sum of $3,798.36 for labor, material, transportation charges, advances to defendant's workmen and storage of said machine, "which sum plaintiffs were obliged to pay and did pay to said J. P. Lewis Company, and which said sum defendant duly promised and agreed to pay to plaintiffs in and by said contract dated July 20, 1910, but that notwithstanding his said promise defendant has failed, neglected, and refused to pay the said sum of $3,798.36, or any part thereof, and that the whole thereof is now justly due and owing from defendant to plaintiffs."

The plaintiffs demand judgment for $5,799.90, with interest on said $2,000 from the 20th day of July, 1910, and with interest on the balance from June 1, 1917.

[1] The defendant challenges this second proposed cause of action as failing to state a cause of action against the plaintiffs, and that therefore the amendment should not be permitted. But the proposed complaint alleges that in case the machine did not operate as guaranteed,

the defendant agreed to pay plaintiffs, not the Lewis Company, the advances made by J. P. Lewis Company, and alleges that the advances were made and that plaintiffs were compelled to pay said advances and did pay same; and if this be true, it is difficult to understand why, under the contract, the defendant is not liable to the plaintiffs for the advances so made. If the defendant made a contract with the plaintiffs to pay these sums of money advanced by J. P. Lewis Company, and plaintiffs have been compelled to pay same and defendant has not paid same, there is, it seems to me, a clear breach of the contract and the defendant is liable. It is not incumbent on the plaintiffs to set out all the evidence bearing on this subject.

[2] Affidavits have been filed as to the facts, but it seems to me that a proposed amendment to the complaint by way of a new or additional cause of action must stand on its own allegations and statements. If the proposed amendment does not state a cause of action, then, of course, it should not be allowed; but if it does, justice demands that the plaintiffs be allowed to plead same as long as it is a matter on contract, as is the first cause of action, and a cause of action arising out of the same transaction. Such an amendment is in the interests of justice, and would obviate the necessity for another suit between the same parties. I think the amendment should be allowed, and it is so ordered on condition that the plaintiffs pay to defendant, within 10 days after being served with a copy of the order allowing the amendment, $10 costs or to cover the expenses of opposing this motion. The plaintiffs should also serve within the same time their amended complaint.

So ordered.

THE RHINE.

THE WINDRUSH.

(District Court, E. D. New York. May 25, 1917.)

SEAMEN ⇐23—WAGES—PAYMENT IN ADVANCE—AMERICAN SHIP IN FOREIGN PORT—STATUTE.

Seamen's Act March 4, 1915, c. 153, § 11, 38 Stat. 1168 (Comp. St. 1916, § 8323), declaring payment of a seaman's wages in advance of being earned to be unlawful and of no effect, applies to payment by an American vessel in a foreign port.

In Admiralty. Two suits—one by Paul Neilsen and others against the Rhine, the other by John Hardy and others against the Windrush. Decrees for libelants.

Silas B. Axtell, of New York City, for libelants.

Burlingham, Montgomery & Beecher and Roscoe H. Hupper, all of New York City, for claimants.

VEEDER, District Judge. In the first case Paul Neilsen and nine other seamen sue for the recovery of wages claimed to be due them from the bark Rhine. It appears that they shipped on the American

bark Rhine at Buenos Aires, October 7, 1916, for a voyage to New York, at the rate of $25 per month. It is stipulated that the shipping of seamen on sailing vessels at Buenos Aires is controlled by certain shipping masters, to one of whom the libelants, in accordance with the usual custom and as a means of securing employment, signed a receipt or advance note for one month's wages. These advance notes were presented to the American vice consul at Buenos Aires before the libelants signed the articles, were by him noted on the articles, and, in the presence of the libelants, directed to be paid on account of the wages of the respective libelants. It was further stipulated that, in directing the master of the Rhine to honor such advance notes, the consul was acting in accordance with section 237 of the Consular Regulations of the United States. When the bark arrived at New York the libelants were paid the wages earned, less the $25 advanced. They now seek to recover the sum thus deducted, by virtue of the terms of section 11 of the act of March 4, 1915, entitled "An act to promote the welfare of American seamen in the merchant marine of the United States," which declares such advances to be unlawful and of no effect.

The facts in relation to the case of the barkentine Windrush differ from the above only in respect of the fact that the advance notes are not in evidence, but are noted on the articles.

The sole question involved is whether the statutory provision referred to applies to advances made by American vessels in foreign ports. The original enactment prohibiting advances dates from 1884 (Act June 26, 1884, c. 121, § 10, 23 Stat. 55 [Comp. St. 1916, § 8323]). It was amended three times between that date and the act of March 4, 1915 (namely, by Act June 19, 1886, c. 421, § 3, 24 Stat. 80; Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763; Act April 26, 1904, c. 1603, § 1, 33 Stat. 308), but without material change in any respect here involved.

In Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, the Supreme Court of the United States held, in 1903, that the prohibition applied to advances made by a foreign vessel in an American port. But there have been only two cases since the original enactment in 1884 which cover the issue now raised. In 1884 Judge Addison Brown held in The State of Maine (D. C.) 22 Fed. 734, that this section did not apply to advances made by an American vessel within a foreign jurisdiction. On the other hand, Judge Ervin, sitting in the Southern district of Alabama, has recently held in The Imberhorne (D. C.) 240 Fed. 830, that the section applies to advances made in foreign ports (even by foreign vessels). It would serve no useful purpose to recapitulate the particular considerations urged in support of the opposing conclusions. The arguments in support of one construction of the statute are not susceptible of a conclusive answer by the advocate of an opposing construction; a final conclusion can be based only upon a preponderance of the considerations which serve to disclose the intent of Congress. I shall hold that the statutory provision in question applies to the situation presented here, and that the advances in issue, although made in a foreign port, having been made by vessels of the United States, were unlawful, and may be recovered by the seamen.

Decree for libelants in each case, with costs, for the amount of the advance payments deducted. Under the circumstances, the claim to the penalty specified in Rev. St. U. S. § 4529 (Comp. St. 1916, § 8320), is denied.

THE DELAGOA.

(District Court, E. D. New York. August 1, 1917.)

1. SEAMEN ⟸23—WAGES—RIGHT TO PART PAYMENT—ADVANCES.
   Wages earned, to half of which Seamen's Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322), declares a seaman entitled on arriving at a port before end of voyage, are unaffected by advances before wages are earned, which the act declares unlawful, and provides shall not affect liability for full payment of wages after they are earned.
2. SEAMEN ⟸24—WAGES—PART PAYMENT AT INTERMEDIATE PORTS.
   Under Seamen's Act March 4, 1915, c. 153, § 4, declaring a seaman entitled on demand to receive half of the wages he shall have earned at every port where the vessel, after voyage shall have commenced, shall load or deliver cargo before the voyage is ended, provided that such a demand shall not be made before the end of, nor oftener than once in five days, he, when entitled to make a demand, is entitled to payment of enough, and only enough, taken with what had already been paid, to make up half of what he had earned up to that time.
3. SEAMEN ⟸24—WAGES—PAYMENT AT INTERMEDIATE PORT—TIME OF DEMAND.
   Under such section the demand need not be postponed till five days after arrival at a port, but merely must be not less than five days after the last preceding demand.

In Admiralty. Action by Hans Jacobson and others against the steamship Delagoa. Decree for libelants.

Silas B. Axtell, of New York City, for libelants.
Abbott & Coyne, of New York City, for claimants.

CHATFIELD, District Judge. This action is brought by Jacobson and 10 other seamen, who shipped in Copenhagen, Denmark, upon the Danish ship Delagoa for a round voyage, during which they arrived in New York on November 9, 1916. The Delagoa sailed upon November 22, 1916, and upon November 21st the libelants demanded one-half of the wages at that time unpaid.

[1] The case involves consideration of the validity of advances made prior to arriving in the port of New York and under the articles signed in a foreign port. On this point the court will follow the case of The Imberhorne (D. C.) 240 Fed. 830, The Ixion (D. C.) 237 Fed. 142, and In re Ivertsen (D. C.) 237 Fed. 498, as well as the cases of Neilsen v. The Rhine, 244 Fed. 833, decided in this district upon the 25th day of May, 1917. The amount which was earned was therefore one-half of the wages earned, without regard to advances.

[2, 3] The further question is presented as to the amount "earned." The libelants in this case demanded one-half of the balance unpaid, claiming that they had earned all which had not been paid, and that the word "one-half" did not refer to one-half the total amount of

wages for the voyage, but one-half of whatever was still due. This contention was upheld in The Ixion, In re Ivertsen, supra, and The Meteor (D. C.) 241 Fed. 735, but has been overruled in the cases of The Jacob N. Haskell (D. C.) 235 Fed. 914, The Strathearn (D. C.) 239 Fed. 583, and The London (D. C.) 238 Fed. 645. The statute says:

"The wages which he shall have then earned at every port where such vessel * * * shall load or deliver cargo." Act March 4, 1915, c. 153, § 4, 38 Stat. 1165 (Comp. St. 1916, § 8322).

This cannot be construed to mean that he is entitled to only one-half of the wages which he earns in that port, nor that the five-day period must have expired in port before making the demand. It apparently is intended to provide that no demand shall be made less than five days after the last preceding demand. It also apparently means that he shall be entitled to one-half of the entire amount of wages earned on the voyage, or such payment as will make the payments in total equal that amount. If we read the statute to provide that the seaman shall receive one-half the amount still unpaid, it would follow that the words "earned at every port" would be capable of the construction "earned in the port." The logical meaning is that there shall not be withheld from the seaman more than one-half of the total earnings of the voyage. This is the construction used in the case of The London, 238 Fed. 645, which has now been affirmed in The London, by the Court of Appeals of the Third Circuit, 241 Fed. 863, — C. C. A. —.

It is contended that the libelants in the present action have received more than this one-half. Decree may be entered accordingly as each libelant has or has not received the amount indicated. In the instance of any libelant who has not received one-half part of the total wages then earned for the voyage, the further demand for full wages, upon refusal to pay one-half, entitled them to the full amount, and they should receive this, and not be considered deserters.

No claim for double pay can be sustained, in view of the uncertainty of the interpretation of the statute, and no costs will be awarded.

JENNINGS et al. v. SMITH et al.

(District Court, S. D. Georgia, N. E. D. August 7, 1917.)

COURTS ⇐350—FEDERAL COURTS—PRACTICE—TAKING OF DEPOSITIONS.

Equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) declares that in all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or rule. Rev. St. § 863 (Comp. St. 1916, § 1472), provides for the taking of depositions of witnesses living at a greater distance than 100 miles, or where they are aged or infirm, and declares that the depositions may be taken before a judge of any court of the United States or any commissioner, etc. Aged and infirm witnesses lived more than 100 miles from the place of trial, and without the district in which suit was pending. It was desired to take their testimony before the judge who was to hear the cause while on vacation at the place of the residence of such witnesses. *Held*, that an application to take such testimony would be granted, despite the equity rules.

In Equity. Suit by M. S. Jennings and others against Zadock Smith and others. On application to take testimony. Application granted.

See, also, 232 Fed. 921; 242 Fed. 561.

E. K. Lumpkin and J. J. Strickland, both of Athens, Ga., G. P. Martin, of Commerce, Ga., and Marion Smith, of Atlanta, Ga., for applicant.

SPEER, District Judge. The hearing in this matter was had by virtue of a rule calling upon the defendants' counsel to show cause why the testimony of certain witnesses should not be taken before the district judge, having jurisdiction, at Mt. Airy, a point not within the territorial limits of the district of which he is judge, and where the cause is pending. All of the witnesses whose testimony is sought reside more than 100 miles from Augusta, where the cause must be tried. All reside in the vicinity of Mt. Airy. All of them are very old and infirm.

There was no showing against the application, and the question presented is: Has the judge, under the circumstances, the power to take the testimony at the point indicated? It is true that the new equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) provides that testimony shall be taken by oral examination in open court. This was obviously designed to enable the trial judge to observe the witnesses while testifying, their manner, and all of the possibly trivial, but often important, indicia of conduct when under examination. The Supreme Court, in framing the new rule, doubtless gave great attention to the modifications made in the old English equity practice:

"The viva voce examination of witnesses may take place either before the court, the judge, or his chief clerk, in chambers, or an examiner of the court, or an examiner especially appointed." Fourth Edition of Daniell's Chancery Pleading and Practice, volume 1, page 903.

This rule, of course, allowed the witnesses to be examined before the judge prior to the final hearing. To ascertain the place for such hearing, equity rule 46 must be considered in connection with Revised Statutes, § 863, 3 Federal Statutes Annotated (2d Ed.) 172. This provides for the taking of testimony de bene esse, where the witnesses live a greater distance from the place of trial than 100 miles, or where the witnesses are aged or infirm. Both of these conditions obtain with the witnesses who live in the neighborhood of Mt. Airy, and who, because the judge is at his summer home there, it is now proposed to examine, for the purposes of convenience, to save the cost of travel, and to perpetuate the testimony of the aged and infirm, who according to the course of nature are likely to die at any time.

This statute also provides that:

"The deposition may be taken before any judge of any court of the United States."

It is not understood that equity rule 46 denies a power so indispensable and so long exercised. In other words, where, because the witness resides beyond the limits in which the subpœna of the court is operative, or when he is so aged and infirm that he probably can-

not attend court in person, or it is essential, because of such age and infirmity, to perpetuate his testimony, the court is not by this rule deprived of the power to take his deposition. It is true that the judge might appoint an examiner or commissioner to take the testimony of witnesses of this character or thus situated. It follows that, what he has the power to authorize another to do, he may do himself. The fact that he is the judge who may try the case seems, in contemplation of the forty-sixth equity rule, to make the order sought increasingly appropriate, for the purpose of the rule, as stated, is to enable the judge, wherever it is convenient and feasible, to see and hear the witnesses in person and to observe their manner and demeanor while testifying.

For these reasons, the order sought will be granted.

BOISOT v. AMARILLO ST. RY. CO.

(District Court, N. D. Texas, at Amarillo. July 23, 1917.)

No. 66.

1. EQUITY ⟸409—FINDINGS OF MASTER—CONCLUSIVENESS.
   The rule that, where a master is appointed with the consent of all parties to hear evidence and report his findings of fact, such findings of fact are conclusive on the court, unless unsupported by any legal evidence or contrary to all the evidence, cannot be extended to cover findings of fact on issues not at the time made by the pleadings.
2. STREET RAILROADS ⟸37—DUTY TO PAVE ROADBED—EFFECT OF ACCEPTANCE OF FRANCHISE.
   Where, at the time of the granting and acceptance of a franchise to a street railroad company, a city ordinance was in effect requiring such companies, on the paving of a street, to pave between its rails and to a distance on each side, such ordinance becomes a part of the contract, and its validity cannot be attacked by the company, and the duty to construct or pay for such pavement may also be imposed by the terms of the franchise, independently of any general ordinance.
3. STREET RAILROADS ⟸37—DUTY TO PAVE ROADBED—EFFECT OF ACCEPTANCE OF FRANCHISE.
   The obligation of a street railroad company to pave its roadbed, imposed by its franchise or by ordinance in effect when it accepted its franchise, is contractual and independent of any general statute or ordinance authorizing special assessments for such improvements.
4. STREET RAILROADS ⟸37—DUTY TO PAVE ROADBED—EFFECT OF INSOLVENCY.
   That a street railroad company is insolvent does not relieve it from the obligation to pave its roadbed assumed by acceptance of its franchise.
5. STREET RAILROADS ⟸53—INSOLVENCY—LIEN OF CITY FOR PAVING ASSESSMENT.
   Where a street railroad company failed to pave its roadbed in a street as ordered by the city and required under its franchise, because of insolvency and a receivership, the city may enforce a lien for the cost of such paving against the property or its proceeds when sold.
6. STREET RAILROADS ⟸55—INSOLVENCY—SUSPENSION OF OPERATION BY RECEIVER.
   In a suit to foreclose a mortgage and sell the property of an insolvent street railroad company, the court will not authorize its receiver to suspend operation of the road where the franchise is still in force.

In Equity. Suit by Emile K. Boisot, trustee, against the Amarillo Street Railway Company, in which the city of Amarillo intervened. Decree for complainant and intervener.

The plaintiff trustee, alleging himself to be the holder of $125,000 first mortgage bonds of the defendant company, asked the appointment of a receiver. The company filed answer admitting the facts alleged, and with its consent a receiver was appointed. Thereafter the city of Amarillo intervened, and alleged that the city had duly passed an ordinance providing for the paving of Polk street, and had levied an assessment against the defendant company for its proportional share of the paving, aggregating $6,050, being the cost of the paving of that portion of the street between the rails of the street railway and extending two feet beyond; that the general manager of the company, at a meeting called to consider the assessment, made no objection to the same, but, on the contrary, agreed that the company would pay its proportional cost of the paving and place an extra concrete base, or foundation, under its tracks as required by the ordinance; and that it thereafterward made the necessary excavation along its tracks for such work, but did not put in the paving or have it done; that the city has had the remainder of the street paved. The prayer is that the receiver be ordered to have the paving put in, and, in the alternative, that the special assessment levied against the street railway company be recognized as a first lien, and that the city be paid out of the proceeds of the operation of the street railway, or out of the proceeds of the sale of the property, the amount of its lien, in preference to the bondholders and other creditors.

In answer to this intervention, the plaintiff, defendant and receiver of the railway company, alleged that the Amarillo Street Railway Company was insolvent; that it was then, and had been for several years, operating at a loss; that the pavement, if made, would not add to the value of the company's property, as the street railway was of no value as a going concern; that Amarillo had a population of between 15,000 and 18,000 inhabitants, which had increased some in the past few years, but, owing to the large number of automobiles, the income of the street railway company had not increased proportionately, but had rather fallen off, with no reasonable hope of any substantial increase; that it would be inequitable to force it to do the proposed paving; that the money necessary to borrow in order to do such paving could never be paid out of the earnings of the company, but only out of the proceeds of the sale of the property, and that the enforcement of such paving would amount to a confiscation and taking of its property without due process of law, in violation of the federal Constitution. It was further urged, as to the extra base to be put under the track, that no estimate of the cost was included in the assessment, and for this and other reasons it is not a valid lien; that the paving of the track has not been done, and therefore the lien has not been completed.

It appears that the original franchise for the construction of the street railway was granted in 1906 to Harris & Brock, who assigned it to the present company. The franchise provided that, whenever streets occupied by the tracks should thereafter be paved, the portion of the street occupied by the track, to the width of the length of the cross-ties, should be supplied by Harris & Brock, their successors and assigns, with paving material of uniform quality and depth with the rest of the street. Later, in 1910, in an ordinance, accepted by the company, extending the life of the franchise from 25 to 40 years, this provision of the original franchise was again recited as one of the considerations for the extension of the franchise.

With the consent of all parties, the court appointed a special master "to hear evidence and seasonably make his report thereon." Over the protest of plaintiff, the evidence took a wide range, going into the question of the organization of the defendant corporation and the legality of the bonds sued on. The master found that the company had been originally incorporated with a capital stock of $250,000, of which amount the stockholders paid in only $45,000, and that certain of the stockholders had advanced approximately $60,000 to the corporation; but it was not clear as to whether this $60,000 was

in payment of stock subscribed, or a loan by the stockholders, as contended by the plaintiff. His finding was that stock was subsequently issued for the $60,000, and that the stockholders who advanced the amount were given the company's notes, and subsequently $98,500 in bonds, and that this $98,500 of an issue of $125,000 was all of the bonds disposed of by the company; that in 1913 the original owners of the stock of the railway contracted to sell the stock and physical properties of the company to Henry L. Daugherty & Co. for $150,000, free of all debts, and, in compliance with the contract, the $98,500 of bonds were paid off and taken up, but not canceled, and delivered to Henry L. Daugherty & Co.; that Daugherty & Co. transferred the bonds to the Cities Service Company, which, in turn, in anticipation of the paving, transferred them to G. Gordon Brownell, which latter transfer was a simulation, made for the purpose of foreclosing the mortgage, and that said bonds are not a debt of the street railway company; that the city of Amarillo never levied an assessment against the street railway for the costs of the extra eight-inch subbase, and therefore has no lien for same, but that the ordinance making assessments for street paving proper, aggregating $6,050, was duly passed, and the city had a valid lien to cover same; that but for the lease of a suburban park, no longer used, for $4,000 per annum, the company would have paid operating expenses.

The master stated that it did not appear that the company had been paid for all of the $212,000 of the capital stock reported to the Secretary of State for the years 1913, 1914, and 1915, and recommended that the receiver be instructed to investigate how much of the capital stock had been paid for, and by whom and in what manner.

The plaintiff, the defendant, and the receiver excepted to the report of the master on the ground that, under the order appointing him, he was not authorized to make any findings of fact or conclusions of law, but simply to take the evidence and report same, and they therefore prayed that such findings of fact and conclusions of law be stricken out. In the alternative, plaintiff excepted specifically to practically all of the findings of the master.

The city of Amarillo filed an amendment to its intervention after the report of the master, denying that the plaintiff had ever sold its bonds in the amount of $125,000, and denying that it had ever been paid anything for the bonds sued on, also denying that Brownell was the bona fide purchaser of such bonds for value, and that defendant company owes the bonds, or the interest thereon, which amendment plaintiff has moved to strike out.

Under an order of the court, the receiver temporarily filled in with gravel the excavated space between the rails.

The receiver, after the hearing, filed a petition praying that the street railway company and all physical properties of the company be sold, for the reason that the company was absolutely insolvent, and was being operated at a loss, its actual operating expenses, not including interest on its indebtedness, exceeding its revenue by about $138 a month. He also filed an application for leave to stop the operation of the company's cars.

M. Cammack, of Amarillo, Tex., and Frueauff, Robinson & Sloan, of New York City, for the plaintiff.

Thomas F. Turner, of Amarillo, Tex., for defendant and receiver.

Kimbrough, Underwood & Jackson, of Amarillo, Tex., for intervener, City of Amarillo.

JACK, District Judge (after stating the facts as above). The order appointing the master did not in terms provide that he should report his findings of fact and conclusions of law, but he was authorized to "hear evidence and seasonably make his report thereon," and it was evidently so understood at the time by the parties themselves, as evidenced by the fact that at the beginning of the taking of the evidence the master, when asked by counsel for the receiver as to whether or

not the documents filed should be copied into the record, replied that the transcript should contain sufficient data to show what his findings were based on; that the original documents might go up with the transcript, but that he wanted the record "full enough to show that his findings have some basis in the evidence." Again, later in the examination, when adjourning to await the production of certain documents, the master announced that he wanted definite data for definite findings, if he could get it. Although counsel thus had notice that the master would make findings, no objection was made to his authority to do so, nor was any objection made until the master's report was filed.

[1] It is well settled that, where a master is appointed with the consent of all parties to hear evidence and report his findings of fact, such findings of fact are conclusive, unless unsupported by any legal evidence or contrary to all the evidence, and that only the master's conclusions of law, under the circumstances, are reviewable on exceptions. Hattiesburg Lumber Co. v. Herrick, 212 Fed. 834, 129 C. C. A. 288. This rule, however, based on the prior consent of all parties, cannot be extended to cover findings of fact on issues not at the time made by the pleadings.

The answer of the defendant admitted all of the allegations of plaintiff's bill, and the petition of intervention made no attack on the validity of the plaintiff's claim, but merely asserted the superior right of the city. Therefore the findings of the master, in so far as they relate to the bonded indebtedness of the plaintiff company, the amount of its capital stock subscribed and paid in, and the validity of the claim of plaintiff, should be stricken out.

As stated by the master, the record is very confusing as to the nature of the purchase by Daugherty & Co. In a general way, it was testified that Daugherty & Co. bought the bonds, stock, and physical properties, but no deed from the company of its physical properties was produced. Nobles, one of the chief original stockholders, first testified that the bonds were paid when the property was sold; but later, after refreshing his memory and examining the books of the company, he testified that the bonds themselves were sold, and, as a matter of fact, they have never been canceled, which of itself tends to negative the idea of payment.

The defendant company is the same corporation that it was then and it apparently still owns its railway. The reasonable conclusion from the testimony is that the stockholders, who were likewise bondholders, sold Daugherty & Co. the stock and bonds, and, indirectly, they thus acquired control of its physical properties. I am therefore of the opinion that the bonds outstanding, to the amount of $98,500, are binding obligations of the company. Really, however, the matter is of little importance, for the reason that the Daugherty interests own all the stock of the railway company, and also own, or did own, the bonds—if they are in fact valid existing obligations—as well as practically all other outstanding indebtedness due by the railway company. The city has no interest to contest plaintiff's claim, which is admitted by defendant, because, if established, it is secured by a lien of superior rank to the mortgage indebtedness.

No objection was made to the master's finding that the cost of the extra subbase was not included in the assessment, and that the city therefore has no lien for same. Thus, the only claim now urged by the city is its lien for the paving of the space occupied by the track, with material of the same character and to the same uniform depth as that used in the paving of the remainder of the street.

[2] The receiver, the plaintiff, and the defendant, in opposition to the claim of the city, urge that the paving ordinance of the city is unconstitutional, because it requires the paving to be done by the street railway company, and no provision is made by which the city may either waive the requirement of the company, or lessen the cost of it, even though the assessment should operate unjustly to the company, and that the street railway company, being insolvent, could obtain no benefit from the paving, and the burden imposed would therefore be unreasonable and unwarranted.

Counsel further urges that the charter of the city of Amarillo, in effect at the time the franchise was granted to the street railway company, provided for an assessment of three-fourths of the cost of street paving against the abutting property on the front-foot plan, unless, in the opinion of the city commission, such rule should operate unjustly in particular cases; but that no such exception was made in the charter as to the assessment against the street railway company, which was arbitrarily required by the charter to pave the entire space between the rails and for two feet beyond. As this provision, however, was in the charter at the time the franchise was granted and accepted, the street railway company has now no cause for complaint. Not only was this provision in the city charter, but the street railway company expressly and specifically assumed this obligation by the very terms of its franchise and by the terms of the ordinance extending the life of the franchise. It did not have to accept the franchise, nor the subsequent extension, but, when it did do so, the above-quoted provision of the city charter, and the paving provisions of the ordinances granting and extending the franchise, respectively, became valid and binding obligations.

In the work of Paige & Jones on Taxation by Assessment, par. 599, the law is thus stated:

"The charter offered to a street railway company operating its cars on the surface often requires such company to pave between its tracks, and in some cases for a certain distance on either side. If the street railway company accepts and acts under such charter, it is bound to pave, or pay the cost of paving as so provided." Citing Worcester v. Worcester Consl. St. Ry. Co., 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591, affirming City of Worcester v. Worcester Consl. St. Ry. Co., 182 Mass. 49, 64 N. E. 581; New Orleans City & Lake R. R. Co. v. La. ex rel. City of New Orleans, 157 U. S. 219, 15 Sup. Ct. 581, 39 L. Ed. 679; State ex rel. City of New Orleans v. New Orleans, C. & L. R. Co., 42 La. Ann. 550, 7 South. 606; Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898; Springfield v. Springfield St. Ry. Co., 182 Mass. 41, 64 N. E. 577; City of Benton Harbor v. St. Joseph & Benton Harbor Street Ry. Co., 102 Mich. 386, 60 N. W. 785, 26 L. R. A. 245, 47 Am. St. Rep. 553; City of Rochester v. Rochester St. Ry. Co., 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773; Storrie v. Houston St. Ry. Co., 92 Tex. 129, 46 S. W. 796, 44 L. R. A. 716.

Furthermore, it is well settled that a city, independent of such charter provisions, may stipulate in a franchise granted a street railway company a provision that the company shall pave the part of the street on which its tracks are located at its own expense, or pay for such pavement if done by the city, and such a provision, when a franchise is accepted, becomes a binding contract between the city and the railway company. Washington & Georgetown Railway Co. v. District of Columbia, 108 U. S. 522, 2 Sup. Ct. 865, 27 L. Ed. 807; Chicago v. Sheldon, 76 U. S. (9 Wall.) 50, 19 L. Ed. 594; Perine v. Forbush, 97 Cal. 305, 32 Pac. 226; Schmidt v. Market Street, etc., 90 Cal. 37, 27 Pac. 61; New Haven v. Fairhaven, etc., 38 Conn. 422, 9 Am. Rep. 399; West Chicago Railroad Co. v. Chicago, 178 Ill. 339, 53 N. E. 112; State ex rel. Keith v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041; Marshalltown, etc., v. Marshalltown, 127 Iowa, 637, 103 N. W. 1005.

The consideration for such a contract may be the granting of the franchise or the extension of one previously granted, as was the case in West Chicago Street Railway Co. v. Chicago, 178 Ill. 339, 53 N. E. 112. The acceptance of such a franchise completes the contract.

The defendant's contention that the assessment against it for street paving was invalid for the reason that it was insolvent, that it was operating at a loss, and its tracks would have to be torn up and sold, and that it could, therefore, receive no corresponding benefit, is not sound.

[3] The company's liability is independent of the paving statute authorizing special assessments for local benefits. It rests on the contractual obligation of the company, and the many cases cited by learned counsel holding that assessments made without regard to special benefit are violative of the Constitution have no application.

[4] As the company is insolvent, the only parties really in interest are the city of Amarillo and the plaintiff. The latter acquired the bonds sued on subject to the paramount right of the city under its contract, and has no cause for complaint now that the city insists on a strict compliance with that contract. The insolvency of the defendant corporation does not release it from its obligations. If it made a bad contract, like an individual it must suffer the consequences.

Counsel cite a number of cases holding that mandamus will not issue to force a street railway company to perform a public duty where it has not and cannot obtain the funds necessary to do the same. This is very true. The courts will not do a vain thing. Mandamus is not the proper remedy; but there is nothing in the cases cited to warrant the conclusion that the railway company is therefore released from such obligation. The obligation nevertheless continues to exist, and it is only a question of the city's remedy.

[5] Finally, it is urged that the city has never matured its lien by completing its paving of a portion of the street occupied by its track, and that, if it has any remedy, it is in a suit for the cost of the paving after the same shall have been put down by the city. It was the duty, as we have seen, of the street railway company itself to put down the paving instead of merely filling in the excavation with loose gravel pending the termination of this litigation. The paving was not done

by the city because of this very receivership and the demand herein urged that the receiver be ordered to have the work done. The court, under these circumstances, will order the street railway, and all of the properties, assets, and franchises of the street railway company, sold to pay and satisfy the mortgage bonds sued on, to the extent of $98,500, with interest and costs, with a recognition of the prior lien of the city of Amarillo to the amount of its claim, $6,050, that amount to be held out of the proceeds of the sale to be paid to the city on completion of the paving. In the meantime the request of the receiver to stop the operation of the cars is denied.

[6] The receiver and plaintiff have not asked that the franchise be sold, believing the same of no value, and taking it for granted that the purchaser would prefer to tear up the tracks. It is by no means certain, however, that such a course would be thought advisable by the purchaser, despite the fact that the railway is now being operated at a loss. It might be considered good business to continue to operate notwithstanding present losses, taking chances on making a good profit with the future growth of the city.

Pretermitting, at this time, any discussion of the right of the city to demand that the purchaser at such sale continue to operate the cars in compliance with the defendant company's franchise obligations, the sale of the properties and franchises is ordered to be made without prejudice to such right as the city may have in the premises.

In re CROSS.

(District Court, N. D. New York. September 5, 1917.)

1. CHATTEL MORTGAGES ⇐8—PLEDGE OR MORTGAGE.
   Construed together, a note given for a loan declaring that the maker has deposited or pledged as collateral security for its payment a certain number of cases of peas in storage at a certain warehouse, and authorizing a sale of the property if the note is not paid at maturity, and an instrument of same date stating that the maker assigns all his right, title, and interest in said peas on account of said loan, constitute a pledge and not a chattel mortgage.
2. PLEDGES ⇐11—TRANSFER OF POSSESSION.
   There is a sufficient transfer of possession of pledged cases of peas, in the warehouse of a third person, where the pledgee in writing notifies the warehouseman thereof, and requests him to recognize only releases signed by it, and he by written reply promises so to do.

In Bankruptcy. In the matter of John M. Cross, bankrupt. Claim of the City National Bank of Syracuse, as pledgee, for proceeds of goods, allowed.

This is a proceeding, on an agreed and stipulated state of facts, to determine the right and title to the sum of $3,028.40 as between Frank B. Hodges, trustee in bankruptcy, and the City Bank of Syracuse, now on deposit in the City National Bank, and which is the proceeds of the sale of certain cases

of peas, and which sale was made pursuant to an order of this court dated November 16, 1916, and which directed the deposit of such proceeds in a special fund in such bank to take the place of such peas, and which sale was made without prejudice to the rights of the parties claiming same; the lien of the claimant, the City Bank of Syracuse, if any, to attach to such proceeds. The facts appear in the opinion.

Costello, Burden, Cooney & Walters, of Syracuse, N. Y., for trustee.
Levi S. Chapman, of Syracuse, N. Y., for claimant.

RAY, District Judge. [1, 2] The claimant, City National Bank of Syracuse, N. Y., contends that, at the time of the bankruptcy of Cross, it held the cases of peas, the right to the proceeds of which is in question here, under a valid pledge of same, evidenced by writings, and accompanied by the necessary delivery, as collateral security for a loan of $2,500 cash, made to the bankrupt by said bank on the 4th day of October, 1916; while the trustee in bankruptcy contends that the transaction and writings constituted a chattel mortgage only, unaccompanied by immediate, or any, delivery of the property, and that, as the papers constituting the mortgage were not filed as required by the New York statute, same is void as to the trustee in bankruptcy and creditors, and that the trustee is entitled to the whole of the proceeds of such sale. The trustee also contends that, if the transaction between Cross and the bank was a pledge of the property or intended as such, there was no sufficient delivery of the property to make it valid or effectual as such. There is no question that the money was loaned by the bank.

The bankruptcy proceeding was instituted October 25, 1916, on which day Frank B. Hodges was duly appointed receiver of the bankrupt's estate, and on the 26th day of December, 1916, he was duly appointed and qualified as trustee. October 4, 1916, the City Bank of Syracuse loaned to John M. Cross, the now bankrupt, the sum of $2,500 cash, and took from him his promissory note reading as follows:

"$2,500.00 Syracuse, N. Y., Oct. 4, 1916.

"One month after date I promise to pay to the order of City Bank twenty-five hundred dollars for value received; payable at the City Bank of Syracuse, with use.

"I have deposited or pledged as collateral security for the payment of this note

Corporation.	Issue.	Numbers.
3,134 Doz. cans peas or 1,567 cases in storage at Cont. Can Co. Plant.		

"The margin of collaterals hereunder shall always be kept good as at present, and at not less than 25 per cent., and in default thereof, this note shall immediately become and be payable on demand; and I hereby give to the holder hereof full power and authority to sell or collect at my expense all or any portion thereof, at any place, either in Syracuse, New York, or elsewhere, at public or private sale, or otherwise at holder's option, on the nonperformance of the above promise, and at any time thereafter, without advertising the same or otherwise giving me any notice. In case of sale thereof, public or private, the holder may purchase without being liable to account for more than the net proceeds of such sale, and any surplus arising in any manner from said collateral may be applied on any other indebtedness now or hereafter owing by me to said bank for which I am or may be liable in this manner. John N. Cross."

And also another written paper signed by said Cross, which reads as follows:

"Continental Can Company.
"Syracuse, N. Y.

"John M. Cross Statement.

30	cases	#1	Fancy	June	peas.
123	"	#2	"	"	"
215	"	#3	"	"	"
475	"	#4	"	"	"
215	"	#3	Med.	"	"
38	"	#2	"	"	"
40	"	#1	Fancy	"	"
147	"	#2	"	"	"
73	"	#4	"	"	"
215	"	#3	"	"	"

"1567 cases (2 dozen to the case), or 3134 dozen @ $.95 per dozen, $2,977.30, less $1.00 per 1,000, label allowance, or 37,608 by $1.00..... $37.61

$2,939.69

"Stored at the Continental Can Co., Cor. E. Washington St. and University Ave., Syracuse, N. Y., insured for $3,000.00.

"I hereby assign all my right, title, and interest in the above-described property on account of loan of $2,500.00 secured this day.

"Oct. 4, 1916. John M. Cross."

On that day the cases of peas mentioned in said papers were stored in the warehouse of the Continental Can Company at Syracuse, N. Y., as the property of Cross, where they had been for some time. On the same day, and after loaning such money and taking such papers, the said bank, by its authorized officers, mailed to said Continental Can Company a letter reading as follows:

"October 4, 1916.

"Continental Can Co., Syracuse, N. Y.—Gentlemen: There has been assigned to this bank 1,567 cases of peas placed in storage with the Continental Can Company by John M. Cross. We hereby request that you recognize releases signed only by this bank for goods delivered. Kindly acknowledge receipt of this letter stating that you are complying with our request.

"Very truly yours, A. N. Ellis, Vice-president."

This was received by said Can Company, which on the 7th day of October, 1916, sent to the said City Bank a letter in reply, which it received, reading as follows:

"Continental Can Company. Oct. 7, 1916.

"The City Bank, Syracuse, N. Y.—Gentlemen: In reply to your favor of the 4th inst., in reference to the 1,567 cases of peas stored in our warehouse, belonging to Mr. John M. Cross, beg to advise that we have taken out of this stock nineteen cases which Mr. Cross has sold to some of our people at this plant, leaving a balance of 1,548 cases now in storage. As requested by you, we will only recognize release signed by you for the removal of these goods.

"Yours very truly, Continental Can Company, Inc.,
"Arthur G. Chase, Secretary."

The said Can Company took out the 19 cases of peas mentioned in this letter, and the balance of such peas remained where they were in the storehouse of said Continental Can Company. The receiver, on his appointment, claimed the remaining 1,548 cases so in storage, and that same were not subject to any valid pledge or lien. So far as ap-

pears, there was no physical delivery or handling of said peas, or of any part of same, at the time said writings were signed and delivered to the bank, or at any time thereafter, until the Can Company removed its 19 cases, the others remaining as and where they had been until sold by the receiver under the order of the court.

The two papers executed and delivered by Cross to the bank clearly gave to it the right to take physical possession of and remove the cases of peas. Kramer v. Haeger S. W. Co., 123 App. Div. 316, 108 N. Y. Supp. 1. The letter and directions sent to the Continental Can Company was an exercise of dominion over such cases of peas, and notice of its right on the part of the bank to the warehousemen, but not a physical taking possession. The letter sent the bank by this Can Company was a recognition on its part of the rights of the bank in and to the peas, whatever they were, and constituted a promise to retain possession and control thereof for the bank; that is, hold for and subject to the orders of said bank. It was not an express promise, but constituted an implied promise, to do this, for it says, "As requested by you, we will only recognize releases signed by you for the removal of these goods" (peas). If, thereafter, the Can Company held for the bank for "possession and delivery may be made to and kept by an agent of the pledgee," the bank had possession. Jones on Collateral Securities (3d Ed.) § 23, p. 31. While the mere statement, oral or written, that property is pledged, accompanied by necessary possession, does not necessarily make the transaction a pledge, the real essence of the contract will be regarded and enforced. Moors v. Kidder, 106 N. Y. 32, 12 N. E. 818; Ward v. Sumner, 5 Pick. (Mass.) 59. In Jones on Collateral Securities (Pledges) (3d Ed.) § 13, p. 21, it is said:

"Contracts substantially the same in terms may be construed either as mortgages or pledges under different circumstances, according as the one security or the other will best effectuate the intentions of the parties, and subserve the purposes of justice."

In the next section, § 14, p. 21, the author says:

"The law favors the conclusion that a transaction is a pledge when there is doubt whether it is a pledge or a mortgage."

See Bank of British Columbia v. Marshall (C. C.) 11 Fed. 19.

The three essential elements of a valid contract of pledge are: (1) The possession of the pledged property must pass from the pledgor to the pledgee, or to some one for him; (2) the legal title to the property must remain in the pledgor; (3) the pledgee must have a lien on the property for the payment of a debt or the performance of an obligation due him by the pledgor or some third person.

In Christian v. Atlantic, etc., R. Co., 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589, the opinion of the court, per Mr. Justice Bradley, says:

"The ground on which it is contended that this may be done is that the property is affected by a pledge, and may therefore be dealt with in rem. But a pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other

documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals; and they may be used in the same manner as pledges properly so called. If there is no transfer attached to or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect. These propositions are so elementary that they hardly need a citation of authorities to support them. Reference may be made, however, to Story on Bailments, § 297, et seq.; Casey v. Cavaroc, 96 U. S. 467 [24 L. Ed. 779]."

When the property intended to be pledged is incapable of delivery, but the writing sufficiently describes it to make it capable of identification, and the pledge attempted is as security for the payment of certain notes, this is sufficient to create an equitable lien in favor of such pledgee which may be enforced in equity against general creditors. Chattanooga Nat. Bank v. Rome Iron Co. et al. (C. C.) 102 Fed. 755, 758; 3 Pom. Eq. Jur. § 1235. But here these cases of peas were capable of physical delivery. Was not there a sufficient delivery in this case, surrender of control and dominion, to constitute a valid pledge? When this contract was entered into between Cross and the City Bank, the property was in storage in the warehouse of the Continental Can Company, a third person. The warehouseman was notified of the change of interest therein by the bank, and requested to thereafter hold and not deliver the property to any person, except on its written order. The warehouseman in writing promised to so hold the property, as we have seen, for and subject to the order of the bank only. There can be no question that Cross intended to give the bank dominion and control over these cases of peas, as security for the payment of the note and interest. Cross must have expected that the bank would exercise such dominion for such purpose, and his further consent, that the Can Company thereafter hold possession for the bank instead of himself until the note was paid, was unnecessary. The note says: "I have *deposited or pledged as collateral security* for the payment of this note 3,134 dozen cans peas, or 1,567 cases, in storage at Cont. Can Co. plant." Then follows the authority to sell, etc., in case of default in payment of the note. True, in the other paper signed by Cross and delivered to the bank with the note it is stated: "I hereby *assign* all my right, title, and interest in the above-described property on account of loan of $2,500.00 secured this day. [Signed] John M. Cross." But the two papers must be read and construed together as one whole and as constituting the contract or agreement between the parties. If these, read together, constitute a chattel mortgage on the peas, that is an end of the claimant's case, as neither paper was filed as required by the New York statute in the case of chattel mortgages, and, if not filed, a chattel mortgage, in New York, is void as to creditors and the trustee in bankruptcy of the mortgagor. This is now settled. Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885; Karst v. Gane, 136 N. Y. 316, 32 N. E. 1073; Tooker v. Siegel-Cooper Co., 194 N. Y. 442, 87 N. E. 773. But I do not think these papers read and construed together constitute, or were intended to be, a chattel mortgage. The note itself in express terms provides for a sale of the property, etc., in case the note is not paid at maturity, and also denominates the transaction as a pledge as collateral se-

curity for the payment of the note or debt, and the writings are not in the language of a chattel mortgage. "In case of doubt whether a transaction by which personal property is given as security is a pledge or is a sale, mortgage, or absolute assignment, the law favors the conclusion that it is a pledge." 31 Cyc. 797, and cases there cited; Jones on Collateral Securities (3d Ed.) § 14, p. 21, and cases there cited. "Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge." 31 Cyc. 787, and numerous cases there cited; Barber v. Hathaway, 47 App. Div. 165, 62 N. Y. Supp. 329, affirmed 169 N. Y. 575, 61 N. E. 1127; Herrmann v. Central Car Trust Co., 101 Fed. 41, 41 C. C. A. 176 (C. C. A. 2d Circuit). In this last case the Circuit Court of Appeals, per Shipman, C. J., said:

"In view of the facts in the case in regard to the discharge of the debt against the railway company by the Car Trust Company, it may not be absolutely necessary to ascertain whether the contract of January 10, 1890, was a mortgage or a pledge, yet it is important to do so, because it is only upon the theory that the contract was a mortgage that the appellants claim title to the certificates which are a substitute for the bonds. It was not in the form of a mortgage, for it contained no clause of defeasance; but the appellants say that the title was conveyed because the words, 'sell, assign, and transfer,' were used. That is true, and the words ordinarily contained in contracts of pledge, viz. 'to be held as security,' and the promise that upon payment at maturity the Car Trust Company will 'deliver and surrender,' instead of 'reconvey,' the security were also used. The question of mortgage or pledge cannot be determined by selecting two or three words which indicate a conveyance of title, and disregarding other language which is also important; for the question is to be determined by the intent of the parties, as gathered from the whole instrument. Thompson v. Dolliver, 132 Mass. 103."

In National Nassau Bank v. Cleary, 171 App. Div. 540, 157 N. Y. Supp. 696, it is held that:

"An assignment of a chattel mortgage as collateral security for a debt, other than that covered by the mortgage itself, amounts to a pledge of the mortgage, and invests the pledgee with only a special property in the chattels mortgaged."

In the instant case the transfer or "assignment" of the peas was plainly stated to be as collateral security. If, then, there was no sufficient delivery to constitute a valid pledge, the trustee is entitled to the whole proceeds of the sale. Returning to that subject, or point, in the case, is it not true that the law does not demand the doing of vain or unnecessary things? To constitute a delivery or taking possession, was it necessary, in view of what was done, for the bank to go or send to the warehouse of the Continental Can Company and transfer the cases of peas from one room to another, or from one locality to another, or to take them outside the warehouse and then return them? In short, considering what was done, was it necessary to handle the cases of peas, or some of them, physically? As already stated, the warehouseman was notified of the pledge, and requested to hold them subject to the order and direction of the pledgee, which it promised to do in writing. Thenceforth was not the Continental Can Company the agent of the bank, storing the goods for it? Had not Cross, by his writings duly signed, surrendered to the bank his possessory right so

long as the note should remain unpaid? If, with these papers, the representative of the bank had gone to the Can Company and demanded the goods, would it not have been the duty of such company to deliver them? Was not this in legal effect done, and possession and control transferred from Cross to the bank by what was actually written and done? I think the legal possession was actually transferred by the execution of the papers by Cross to the bank and the writing and sending of the letter mentioned to the warehouseman and its reply, it being the actual custodian first for Cross and then for the bank. Can it be said that if A. has an automobile stored in the garage of B., and pledges it to C. by a valid writing delivered to C. as security for a loan then made, and also executes and delivers a transfer of same, which is evidence of right to possession, and C. then writes to B. to hold and store the property for him, as he has the right to it and to its possession, granted by A., and B. writes back that he will so hold, that thenceforth the legal possession is not in C., B. holding and storing for him and no longer holding for A.? Here is a combination of acts and writings relating to a cumbersome article, although there was no physical or manual handling of the property. In First National Bank v. Exchange National Bank (Sup.) 153 N. Y. Supp. 818, it was held:

"An agreement whereby the owner of certain stocks, which are in the possession of a bank as collateral security, transfers them to another bank as a continuing collateral security for the payment to it of any indebtedness then existing or that may thereafter exist on the part of himself or another to said bank, such shares to be deposited with it when surrendered by the first bank, constitutes a valid pledge, even though the certificates remain in the possession of the first bank, because, it being impossible to remove them, their possession by the first bank will be regarded as the possession of the other."

The learned judge who wrote the opinion, speaking of the claim that there was no delivery of the certificates of stock and therefore no valid pledge, said:

"I cannot agree with the learned trustee in bankruptcy in that regard. While it is true that, under ordinary circumstances, it is necessary to have a delivery of the article sought to be pledged before a pledge is complete and effectual, still in a transaction like this, where stock certificates were the subject of the attempted pledge, and where they were in the possession of another party for a specific purpose as collateral security, and where no delivery of possession was at that time possible, the plain intent of the parties to have these stocks pledged for the purpose stated in the agreement between plaintiff and Francis Bacon, dated February 15, 1902, should not be defeated. These certificates represented stocks, but were not the stocks themselves, and it being at that time impossible to deliver them, because of their being held by the defendant Exchange National Bank, a valid pledge was made by the written transfer executed by the owner of the stocks to this plaintiff February 15, 1902. The intention of the parties should be carried out, if that intention can be ascertained from the instrument which was executed by them. A careful reading of it leads to the conclusion that the parties intended that these stocks should be pledged to the plaintiff as a continuing collateral security for the payment to it of any indebtedness of any kind then existing, or that might thereafter exist, on the part of the Waterloo Wagon Company, Limited, or Francis Bacon, to said bank, and it must therefore be held that the instrument of February 15, 1902, was a valid pledge, and not a chattel mortgage; the circumstances surrounding this case justifying the conclusion

that it was also the intention of the parties that the temporary possession by the Exchange National Bank of the stocks in question was also regarded as the possession of the plaintiff, to whom the stocks were pledged by Bacon, February 15, 1902. Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; First National Bank of Waterloo v. Bacon, 113 App. Div. 612, 98 N. Y. Supp. 717; Jones on Pledges (2d Ed.) § 83; 31 Cyc. p. 791, note 67."

When stock has been pledged and the scrip delivered to one party as security for a loan, it may also be pledged to a third party for a further loan, and the possession of the first pledge will be considered the possession of the second pledge through the agency of the first pledgee. The First National Bank of Waterloo v. Bacon, 113 App. Div. 612, 98 N. Y. Supp. 717. Here was an absolute written direction to the warehouseman to hold for the pledgee, and this he in writing promised to do. The instruments signed by Cross and delivered to the bank are not drawn in the form or wording of a chattel mortgage, and there is no defeasance clause or provision. The words are apt and appropriate for a pledge. I am compelled to the conclusion that it was the intention of the parties to pledge the cases of peas to the bank as collateral security for the payment of the note and debt evidenced thereby, and not to mortgage same, and that there was a sufficient delivery under the circumstances, and in view of what was done and the bulky nature of the property, to make the pledge valid and effectual.

In Bowe v. Ellis, 3 Misc. Rep. 92, 22 N. Y. Supp. 369, a case where the goods were in the physical possession of a third person, the court said:

"To prove acceptance and receipt of ponderous and bulky articles by the purchaser, it is not required that there should have been manual delivery by the seller. Atwell v. Miller, 6 Md. 10, 61 Am. Dec. 294. Virtual or constructive delivery is sufficient in any case. Bailey v. Ogden, 3 Johns. [N. Y.] 399 [3 Am. Dec. 509]; Castle v. Sworder, 6 Hurl. & N. 828; Sahlman v. Mills [3 Strob. (S. C.) 384], 51 Am. Dec. 630. All that is required is that the goods be placed within the control and under the dominion of the purchaser (Marsh v. Rouse, 44 N. Y. 643), with intent on the part of both contracting parties to vest the right of possession as owner in the purchaser (Brand v. Focht, 1 Abb. Dec. [N. Y.] 185); and proof of any act or acts from which it may be reasonably inferred that the seller has abandoned possession as owner, and that the purchaser has assumed it, is sufficient evidence of acceptance and receipt to take an oral contract of sale out of the statute of frauds (Jones v. Reynolds, 120 N. Y. 213 [24 N. E. 279]; Gray v. Davis, 10 N. Y. 285), without further proof that the goods were actually transferred from one place to another.

"In the case before us the parties did not specifically agree upon a place for delivery. The place where the chattels were at the time of sale must, therefore, be presumed to have been intended as the place where delivery was to be made. Benj. Sales (4th Am. Ed.) § 682. This was the Stevens House, to which both seller and purchaser had equal access as licensees of the owner or his agent. The chattels were, therefore, upon neutral ground, in the actual physical possession of a third person, and so remained when plaintiff requested defendant to remove them, at the same time informing defendant that they were his. This request was tantamount to a declaration that plaintiff intended to relinquish his lien for the unpaid purchase money and his dominion of the chattels as owner. Thus, there was nothing to hinder defendant from taking possession if he saw fit so to do. That such was his intention was manifest by his promise to remove the chattels, and that his intention was executed and dominion as owner assumed by him was further manifested by his attempted sale to Underhill, acts which were consistent only with his

claim of ownership. Hence there was both receipt and acceptance by defendant, whereby the effect of the statute upon the contract of sale was avoided."

In Macauley v. Hopkins, 35 Hun (N. Y.) 556, there was no delivery at the time, but subsequently it was agreed the property should be shipped to be sold and the proceeds applied in payment of the pledgee's demand, and the goods were shipped accordingly by the pledgor, and it was held that after shipment the pledgor held as agent for the pledgee, and his possession was the possession of the pledgee.

In Young v. Lambert, 18 Wkly. Rep. 497 (1870), cited in Story on Bailments (8th Ed.) 253, it was held:

"Goods left in a warehouse, subject to customs, freight, and storage, and which the warehouseman agrees to hold for the pledgee and deliver to him upon payment thereof, may be considered as sufficiently delivered."

It seems to me while possession, which presupposes delivery by the pledgor and acceptance by the pledgee, is of the essence of a pledge, that the execution of a writing pledging property which is bulky and in the hands of a third person in storage as security for the payment of a present loan of money, accompanied by the execution of another paper transferring the property to the pledgee and which is evidence of right to the possession, and which may be used by the pledgee to secure possession, followed by notice to such third person of the transfer and a request which amounts to an order to hold the property and not deliver it to any other person except on his order, and the warehouseman having the actual physical possession, receives the notice and in writing agrees to so hold and not deliver except as directed by such pledgee, amounts to at least a symbolical delivery and an acceptance by the pledgee—a surrender of dominion by the pledgor and an assumption and exercise of sole dominion by the pledgee. There is no claim here that there was any design or purpose to hinder, delay, and defraud creditors, or that the rights of other parties intervened, or that any credit was obtained thereafter or before by the pledgor on the strength of apparent ownership or possession. There is no evidence that the pledgor at any time after this loan was made exercised any dominion over or made any claim to the property as against the pledgee.

In Third National Bank of Buffalo v. Buffalo German Ins. Co., 193 U. S. 581, at page 588, 24 Sup. Ct. 524, at page 526, 48 L. Ed. 801, the rule is thus stated:

"Possession is of the essence of a pledge in order to raise a privilege against third persons. Casey v. Cavaroc, 96 U. S. 467 [24 L. Ed. 779]; Wilson v. Little, 2 N. Y. 443 [51 Am. Dec. 307]."

In that case there was a mere statement by a borrower from the bank made to the president that his stock in the bank was pledged as security for the loan. It was held that this did not amount to a pledge of the stock, there being no delivery of the certificate, or give the bank any lien thereon as against one subsequently loaning money on the stock in good faith and receiving the certificate of stock as collateral. I think the true distinction between a mere pledge and a chattel mortgage is that in the case of a pledge the possession, actual or symboli-

cal, of the thing pledged, is given to the pledgee as collateral security accompanied by a right of disposition or sale, in event the loan or debt is not paid, there being a special property only in the pledged property transferred, while in the case of a chattel mortgage the whole title is transferred as security for the debt, and which absolute title is subject to be defeated by the performance of the conditions. See Story on Bailments, § 287; Story's Eq. Jur. §§ 1030, 1031; Waterman v. MacKenzie, 138 U. S. 252, 258, 11 Sup. Ct. 334, 34 L. Ed. 923. In Waterman v. MacKenzie, 138 U. S., at page 258, 11 Sup. Ct., at page 336, 34 L. Ed. 923, the court said:

"By a mortgage of personal property, differing in this respect from a pledge, it is not merely the possession or a special property that passes; but, both at law and in equity, the whole title is transferred to the mortgagee, as security for the debt, subject only to be defeated by performance of the condition, or by redemption on bill in equity within a reasonable time; and the right of possession, when there is no express stipulation to the contrary, goes with the right of property. Story on Bailments, § 287; Story, Eq. Jur. §§ 1030, 1031; Conard v. Atlantic Ins. Co., 1 Pet. 386, 441 [7 L. Ed. 189]; Casey v. Cavaroc, 96 U. S. 467, 477 [24 L. Ed. 779]; Boise v. Knox, 10 Metc. [Mass.] 40, 43; Brackett v. Bullard, 12 Metc. [Mass.] 308, 310."

In People v. Scudder, 177 App. Div. 225, 163 N. Y. Supp. 739, the court held:

"A pledge differs from a chattel mortgage in that it does not generally pass title to the thing pledged, [as a mortgage does,] but gives only a lien" to the creditors "while the debtor retains the general property. On the contrary, a chattel mortgage is more than a mere security in that it is in the nature of a conditional sale which operates to transfer title to the mortgagee, to be defeated * * * by a full performance of the conditions imposed on the mortgagee."

In a pledge, as seen, a *special* property is always conveyed to the pledgee, but the entire title, subject to defeasance, does not pass. Hence, as before stated, reading the note and other instrument, executed at the same time, together, and a defeasance clause being absent, I cannot discover a purpose or intent to pass the entire title to the bank subject to be defeated by the payment of the debt. The equities of the bank, who loaned the money to the bankrupt, who had the use of it in his business. it is presumed, are very strong as against the general creditors. But this does not warrant any deviation from the rule that possession must have been delivered. American C. Co. v. Erie P. Co., 183 Fed. 96, 105 C. C. A. 388.

Story on Bailments (8th Ed.) § 297, p. 253, says as to possession:

"There need not be an actual manual delivery of the thing. It is sufficient if there are any of those acts or circumstances which, in construction of law, are deemed sufficient to pass the possession of the property."

When the dominion and control over it is passed with consent of the pledgor, I think it sufficient, especially when the property is in storage in the hands of a third person.

As this money, the proceeds of the sale, has been deposited with the City Bank, the claimant, since the sale, and the bank has had the use of same, interest on the note ought to be computed and paid from such proceeds up to the date of sale and deposit only.

From such proceeds the bank is entitled to the amount of the note and interest thereon to the date mentioned, and the trustee to the balance.

So ordered.

BROWN et al. v. FLETCHER et al. (two cases).

(District Court, S. D. New York. July 20, 1917.)

1. USURY ⊜72—EXAMINATION OF CIRCUMSTANCES.
In determining the merits of the defense of usury, it is essential that the surrounding circumstances, the occurrence at the time of making the agreement through which plaintiffs claim, and the instruments drawn be examined to determine the character of the transaction.

2. USURY ⊜59—CHARACTER OF TRANSACTION AS LOAN—INSURANCE.
Where the beneficiary of testamentary trusts arranged to raise money on his legacy payable in the future, and the parties advancing the funds required that he insure his life as security, a delay of a few days in the actual issuance of the life policies actually arranged for as part of the transaction did not prevent the transaction being a usurious loan on the security of the legacy instead of a purchase of the beneficiary's interest, since the matter of taking out insurance does not affect such transactions as a matter of law, but as a matter of evidence and the intent of the parties, which is as fully shown by a positive arrangement for life insurance to be given at once as by actual issuance of policy.

3. USURY ⊜117—ADVANCEMENT ON LEGACY AS LOAN—SUFFICIENCY OF EVIDENCE.
In actions to declare a right in plaintiffs to portions of the principal of two trust funds created by a will, though defendant's assignment of part of his beneficial interest purported to sell, assign, etc., to plaintiffs' predecessor part of the amount ultimately coming to defendant, evidence *held* to show that the transaction was a loan and the assignment was a mere cloak for usury.

4. USURY ⊜128—CORRUPT INCEPTION OF TRANSACTION.
Assignments of part of the interest of the beneficiary in a testamentary trust, being usurious at inception, the transaction between the beneficiary and plaintiffs' predecessors being a loan, and not a transfer or sale, are corrupt instruments in whosever hands they came.

In Equity. Actions by John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and Conrad Morris Braker. Decree dismissing the bill directed for defendants.

See, also, 203 Fed. 70; 239 Fed. 360.

Fredric W. Frost, of New York City (Herbert C. Smyth, of New York City, Monroe Buckley, of Philadelphia, Pa., and Frederick W. Bisgood, of New York City, of counsel), for complainants.

Safford A. Crummey, of New York City (Selden Bacon, of New York City, of counsel), for defendant Braker.

MANTON, District Judge. Conrad Braker, Jr., died July 21, 1890. His will duly proved, contains the following provisions:

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

"Fourteenth. Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal wherever situated, I give and bequeath to Henry J. Braker the sum of fifty thousand dollars ($50,000), and I direct that the same shall be paid to him within nineteen months from the date of my decease, and that he shall hold the same in trust and securely invested for the special benefit of my son, Conrad Morris Braker, and I direct that the interest or increase on the same or on such amount as shall be unpaid as hereinafter set forth, shall be paid to him quarterly so long as he shall live, but I further direct that if he be living at the expiration of ten years from the date of my decease that the said trustee shall pay to my son, said Conrad Morris Braker, the sum of twenty thousand dollars ($20,000) of said principal, together with any accrued and unpaid interest should there be any, and the same shall be and belong to him absolutely.

"Should my said son be living at the expiration of fifteen years from the date of my decease, I direct that he shall be paid the further sum of twenty thousand dollars ($20,000), together with any accrued and unpaid interest on the said remaining thirty thousand dollars ($30,000) and the same shall be and belong to him absolutely.

"Should my said son be living at the expiration of twenty years from the date of my decease, I direct that the remaining ten thousand dollars ($10,000) of the above-mentioned sum, together with any accrued and unpaid interest on the said remaining ten thousand dollars ($10,000) shall be paid to him and the same shall be and belong to him absolutely.

"Fifteenth. Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal wheresover situated, I give and bequeath to my son Henry J. Braker, the further sum of fifty thousand dollars ($50,000), and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same in trust and securely invest it for the benefit of my said son, Conrad Morris Braker, paying him the interest derived from the same semiannually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

"In the event of the death of my said son, Conrad Morris Braker, before he attains the age of fifty-five years, I direct that the income derived from the said fifty thousand dollars ($50,000) shall be paid semiannually to Florence L. Braker, wife of my said son, Conrad Morris Braker, so long as she shall live and remains unmarried; in the event of her marriage or death, I direct that the said fifty thousand dollars ($50,000) shall be given to my grandchild, Florence May Braker if she then be living, and if she be not living then the said fifty thousand dollars ($50,000) shall be paid to my son Henry J. Braker if he be living, if he be dead, I direct that it sink into my residuary estate."

These two actions are brought to declare a right of the plaintiffs to portions of the principal of the two trust funds created by the foregoing paragraphs of the will. The first will be referred to as equity 10—112, action No. 1, involving the claim of $17,500 under the fifteenth clause of the will, and the second will be referred to as equity 7—231, action No. 2, to recover $10,000 under the fourteenth clause of the will.

Some time prior to April 18, 1901, Conrad Morris Braker, through Charles V. Hellfrich, applied for a loan of $5,000 on some of the deferred interest in his father's estate. Hellfrich admittedly was a broker who made a specialty of raising money on inheritances, securing commissions on insurance from such transactions. He had past experience with Burr and Depue, who were engaged in loaning on inheritances of this character. Braker was correctly described, in a previous litigation involving the collection of moneys loaned under other provisions of his father's will, as incapable of managing his own affairs, and

recognized as such by his father, as indeed the terms of his will would indicate.

On April 18, 1901, Braker executed an assignment in writing to Frank L. Rabe of seven-tenths of all of his right, title, and interest in the contingent remainder bequeathed to him under the fifteenth clause of his father's will. On June 3, 1901, he executed another assignment of all his remaining right, title, and interest (two previous assignments affecting this interest having been made) in the contingent remainder bequeathed to him under the fourteenth clause of his father's will. On October 1, 1901, Rabe assigned to the New York Finance Company, a domestic corporation, all of the interest which he had acquired by reason of the two Braker assignments. Rabe admittedly was a mere dummy and a clerk in the office of Depue. For these assignments Braker received $3,500 in the first case, and $2,500 in the second. Burr and Depue do not agree as to who was the actual lender of the money. Burr claimed that his part in the transaction was that of attorney for certain clients of his, who loaned certain money to Depue and his associates, with which to carry out the transaction. Depue denied that he was the principal.

The New York Finance Company was organized by Burr, Depue, and Cockran. Cockran claims to have acted as attorney holding only a nominal amount of stock, sufficient to become a director. Burr seems to have been the chief stockholder. Depue was president of the corporation, and later Hellfrich became president, and was actively so for two years before Braker met him. At all events this company, as a medium of operation through these men, had a good many transactions of this type. They were of sufficient intelligence and experience to draw agreements and papers such as are presented here in making the claim. These were alleged assignments of the interests under the will. Hellfrich had a separate insurance business for the purpose of securing policies on transactions of the character of those under consideration.

[1] Hellfrich testified that when Braker asked him for a loan he told him it would be impossible to get a loan of $5,000, but that he would find a purchaser for part of his interest. Braker testified that the transaction was a loan. In examining to determine the merits of the defense of usury interposed here, it is essential that the surrounding circumstances, the occurrence at the time of the making of the agreement and the instruments drawn, be examined to determine the character of the transaction.

The money lenders or purchasers of these legacies have had considerable litigation in the courts when they were involved in another transaction as the New York Finance Company, and the language of the court there is of aid in reaching a determination of this question. In Wetzlar v. Wood, 143 App. Div. 311, 128 N. Y. Supp. 501, the court said:

"Every time an assignment was executed by the plaintiff Burr or Depue procured him to verify an affidavit setting forth his interest in the said estates, that he had not transferred it, and that there were no liens or incumbrances thereon, and that it was made for the purpose of inducing the New York Finance Company to purchase a certain part of his interest. The learned trial justice was of the opinion that the plaintiff was concluded by those

affidavits upon the proposition that the transactions were purchases, but the successful effort to complicate the transactions and the procurement of affidavits in advance to support them have exactly the opposite effect to that intended. Legitimate transactions are conducted with more directness and without being bolstered up by affidavits. All of the surrounding circumstances tend to corroborate the plaintiff. The story of Burr and Depue is demonstrably false. The documents themselves furnish strong internal evidence that they were mere covers for usurious loans, and even if there was a doubt as to whether the transaction was a purchase and sale or a loan, its unconscionable character should resolve that doubt in favor of a loan."

Here affidavits of the character described in the foregoing excerpt were secured.

The amount involved in the transaction of April 18, 1901, was $17,500. Braker says that he tried to borrow $5,000. This is not disputed. He further says that he informed Mr. Depue that at 55 years of age he was to receive $50,000. Depue said he would be unable to loan him $5,000, but that he might arrange to get $3,500, but that he (Braker) might not live until he was 55 years of age, and it would be necessary to have his life insured for him or any party that he might name. It was then agreed that insurance to the extent of $15,000 be obtained and a loan of $3,500 made. Depue testified:

That he explained to Mr. Braker that he could not get a loan on his interest; that the security was one that could not be realized on readily. "It was not the sort of security that anybody would be likely to loan any money on, and, as far as I was concerned, I did not want to refer it to anybody. * * * I told him that I would try and arrange for a sale of a certain part of his estate; that I knew some one I could refer to, and I thought perhaps I could make an arrangement."

His plan was to borrow $5,000 in the name of Rabe, a dummy, on the security of but half the assigned part of the legacy of which $3,500 was to be turned over to Braker. He admits that he made the false representation to him that it would be impossible for him to secure a loan on such security. At this time Depue says that he knew that there were loans on one fund to Loeb and Sage amounting to $13,000, although on the face of these assignments to Loeb and Sage they were absolute. Depue here admits that he understood the type of these transactions. According to Braker, his original proposal was that Depue's clients should loan him $5,000 on the security of the $50,000 trust fund under the fifteenth clause, and when Depue said he would loan him only $3,500, he told Depue that, if he only loaned him $3,500, he would assign only $35,000 of the fund under the fifteenth clause, and if he would only loan $3,500, Depue would have to pay the insurance premiums. That Depue intended to get $35,000 is unquestionable. The document which is claimed to be an assignment of the seven-tenths interest of Braker in the $50,000 trust fund under the fifteenth clause started off in form as an assignment, and further along changes into an instrument to bring about an assured payment of $35,000, the purchaser evincing entire unwillingness to take any risk about seven-tenths of the fund amounting to $35,000.

The beginning of the instrument recites the assignment of seven-tenths of the defendant's estate, the right, title, and interest to the principal sum of $50,000. Depue testified:

"XQ. 58. What was the proposal that you submitted? A. The proposal was that he should assign seven-tenths of his interest under a certain clause in the will; I think it was the fifteenth clause, amounting to $35,000. XQ. 59. For how much? A. $3,500. XQ. 60. Is that the whole of the proposition? A. Well, no; the $35,000, it was a contingent interest and a long time to wait, and, as I recall it, at that time we looked into the question of security and had seen Mr. Fletcher and found out that the securities were all there, and that the estate was in good condition, but there were some 12 or 14 years to wait. something of that sort, and it was explained to them that this $35,000 was to be a charge rather than a sale of this seven-tenths, and if this particular clause under the will did not produce the $35,000 for any reason whatever when the estate came into the possession of Mr. Braker, that it was to be charged up on some other clause of the will. XQ. 61. So you were to get the $35,000? A. We were to get the $35,000 in any event provided he lived until he attained a certain age. XQ. 62. Anything further said? A. There was some discussion about insurance. XQ. 63. What was it? A. He was to provide insurance if he could. XQ. 64. Anything further said about it? A. I think not. XQ. 65. Who said 'if he could'? A. Mr. Hellfrich. Mr. Hellfrich was in the insurance business. * * * XQ. 71. Was there any doubt expressed at that time of the possibility of getting insurance on Mr. Braker's life? A. No. XQ. 72. Nothing said to that effect? A. No. XQ. 73. And was there any suggestion as to what policies should be taken out? A. I think that was left to Mr. Hellfrich. XQ. 74. He was an insurance agent? A. He was in the insurance business; yes."

This feature of the transaction does not show intention to make a sale of the legacy. If it were a sale, the buyer would take all chances of depletion of the fund. It evinced a desire on the part of the parties to provide for a payment of money, and that a repayment of the amount advanced plus the difference between that sum and $35,000. The instrument further provides that, if the funds in the two clauses are inadequate, Rabe shall receive $35,000. This is a repayment with usurious interest. For further security, it was arranged that $15,000 of life insurance be secured. An application was signed on April 17th and filed on the 18th. The risk was approved on the 18th. The original policy for $15,000 was modified on April 18th so as to make two policies of $7,500 each; it evidently being intended that one of these policies be assigned as collateral security for the $5,000 loan from Bushnell. The two policies were issued April 23d. The assignment of the legacy is dated and acknowledged April 18. The affidavit accompanying it was verified the 24th of April, and the assignments and the policy bear date on that day. Depue said that $500 of the $3,500 was paid over to Braker on the 18th of April, and $3,000 on the 24th of April. He attempted to support this by showing two checks drawn by Burr on his Philadelphia bank, each payable to the bank itself, one for $500 on April 17th, and one for $3,000 on April 23d. These checks were given to the bank for a draft on New York for Braker. Neither check showed when it was presented or paid. Braker says that he received $3,500 on April 24th in one lump sum, and his cashbook showing the receipt of that money indicates such an entry on the 24th of April as would the affidavit of April 24th and the assignments of the insurance policies. There is nothing to show on the check itself when it was paid.

The issue then must be decided as between the word of Braker and Depue. I concluded that the money was paid on April

24th, the date of the insurance policy and of the affidavit; for I am satisfied by Depue's method of doing business he did not give up any of the money until he had all the papers signed, sealed, and delivered. Kline, the agent of the insurance company, says that the premiums were paid to the company, not by Hellfrich, as he testified, but by its general agent, Mr. Abernathy, and this on May 24, 1901. However, the giving of the policies was originally arranged for, the applications for the policies were signed April 17th, the medical examination had and the risk approved on the 18th, and the same day the application was modified to two $7,500 policies, so that, even if $500 was paid on the 18th, nothing remained to be done to put the policies in force but the payment of the premium. There was the approval of the insurance risk, and there was the delivery of the policies at the time of the payment of the $3,500. The premium was paid out of Braker's $3,500, so that, in fact, he received only $3,000.

[2] The plaintiff's contention that a delay of a few days in the actual issuance of the policies actually arranged for as part of the transaction would prevent the transaction being a loan rests on the misapprehension of the part played by insurance in such transactions. The matter of taking out insurance does not affect transactions as a matter of law, but as a matter of evidence and intent of the parties, and that intent is as fully shown by a positive arrangement for life insurance to be given at once as by actual issuance and delivery of the policy. The insurance was an integral part of the transaction.

Between April 18th and April 24th Rabe borrowed $5,000 from Charles E. Bushnell, Burr's client, on the half interest of the $35,000 charge so obtained from Braker. Rabe also borrowed $10,000 some two months afterward from Mrs. McCollum on the security of the other half interest in the $35,000 and the other fund here involved in the $10,000 suit in action No. 2. This indicates that Burr was in fact the principal in the transaction. It appears, therefore, that Depue's story that he could not obtain a loan of $5,000 was not truthful, and that a loan of $5,000 was procured from Bushnell on the half interest covered by the assignment in action No. 1. The result of the language of the instrument called the assignment is that security was given to Rabe of seven-tenths of the $50,000 fund, and also in the other sum due Braker from his father's estate, assuring to Rabe $35,000.

[3] While the assignment under these circumstances purports to sell, assign, transfer, and set over unto Rabe, $35,000, it is perfectly clear that the transaction was a loan of money, and that the pretended assignment was a mere cloak for usury. The case is similar to Wetzlar v. Wood, 143 App. Div. 311, 128 N. Y. Supp. 501; Mercantile Trust Co. v. Gimbernat, 134 App. Div. 410, 119 N. Y. Supp. 103; Hall v. Eagle Insurance Co., 151 App. Div. 815, 136 N. Y. Supp. 774, and Brown v. Robinson, 173 App. Div. 583, 160 N. Y. Supp. 287.

At the time this loan was secured Braker was in a fit condition for imposition. He was pressed for money, his wife was suffering from nervous prostration, and he was in urgent need of money to pay doctors' bills. His father evidently realized his weakness; for he tied up

his money so that he would not enjoy the benefits of it until he reached the age of 55 years.

I therefore hold that this transaction was a loan, and not a sale, of Braker's seven-tenths interest in his legacy of $50,000 as claimed by the plaintiffs.

The second loan to Braker was in June, 1901. Hellfrich acted as the broker in this transaction, and received the fee which covered a portion of the usurious charge. Why business was not transacted directly by Depue is not explained. Hellfrich brought him to Burr. At this time there was about due the $50,000 under the fourteenth clause, $20,000 of which had already been paid to Braker. There remained to be paid him $20,000 on the 21st of July, 1905, and $10,000 on the 21st of July, 1910. Braker had already borrowed from Loeb and Sage and promised to repay them out of the $20,000 installment due July 21, 1905, $5,000 and $8,000, respectively. Out of this $20,000 installment due July 21, 1905, these payments were made, leaving $7,000 unappropriated. Braker asked to borrow $3,000 or $3,500, agreeing to assign the $7,000 maturing in 1905. Burr refused to advance more than $2,500, and asked for an assignment, not only of the $7,000, the balance of the $20,000 payment, but also of the $10,000 installment maturing July 21, 1910. Thus he was to have $17,000 for a loan of $2,500. Braker testified that he said to him:

"Mr. Burr, you have already $15,000 worth of insurance in the Equitable Life Insurance Society, which will cover you for the loans that you have loaned me."

Burr said there was still $5,000 on his life subject to the assignment of Loeb, and demanded that he put up this and also the other $8,000 life insurance, subject to Sage's claim. Burr offered then to advance $2,500, and Braker says "as a loan." Burr's version is that it was talked of as a sale, and not a loan. A similar assignment of the interests in the estate and affidavits that the transaction was a sale and an assignment of the Loeb policy was taken. This transaction was disclosed by Cockran on the 13th of June, 1901. Braker received $750, Cockran saying that the balance of the money would be received in a few days and paid. Braker waited for about ten days, telephoned to Burr in Philadelphia, and Depue came over in the afternoon with $1,600 more and paid Braker; the remaining $150 Braker says he never received. It was about this time that a loan was made by Mrs. McCollum on the half interest in the $35,000. This transaction was adjudicated as usurious by Judge Greenbaum in the state court in an action against the New York Finance Company, but the plaintiffs herein were not parties to the action. The whole transaction is robed with the same cloak of usury. There was no opportunity for loss in any case or under any possible circumstances, and the principal must be repaid in either transaction.

Rabe had already $15,000 insurance on Braker's life in the Equitable which was an enforceable obligation from the time the money was advanced, and was so intended by the parties. He had also an equity in the policies held by Sage, and he had an additional assignment of the policy to Loeb subject to Loeb's claim, so that he had $28,000 of life

insurance subject only to the claims of Sage and Loeb for $13,000 to protect advances to Braker of $3,500 and $2,500. After the New York Finance Company was organized, Rabe assigned this assignment as well as the first to it. When the payment was made on July 20, 1905, of $20,000 under the fourteenth clause of the will, $5,000 was paid to Loeb, $8,000 to Sage, and $7,000 to the New York Finance Company. While the Sage and Loeb transactions were usurious, payment thereof will not affect the determination of the question in this transaction.

A question similar to the one here involved came up before Judge Hand of this court in Provident Life & Trust Co. v. Austin B. Fletcher et al., 237 Fed. 104. This was an assignment under the fifteenth and sixteenth clauses of the will. There it was held that the transaction was an assignment, and not a loan, but there is very strong intimation in the opinion that, if the plaintiff there was fully protected by insurance, the result would have been different. Judge Hand said:

"I think it clear that the life insurance policies should not be taken as applicable to the transaction of February 25, 1902, and yet it is only if they were so intended that they may be considered upon the question of usury. * * * Moreover, * * * if they had intended the policies to stand as security for the transactions at bar, their intent would have been ineffectual, because the Rabe transactions were void for usury, and with them fell the policies."

The plaintiffs loaned $10,000 to the New York Finance Company and received, as security, an assignment of these two alleged assignments to Rabe, and claim that they received absolute title thereto by reason of the sale at public auction in Philadelphia under a foreclosure of their lien. A note was given by the New York Finance Company for $10,000 maturing July 20, 1910. The collateral agreement was executed extending the maturity of the note to February 15, 1913, in consideration of which extension a further note of $3,333 was given by Brown and Schermerhorn. There seems to be considerable excess interest or charge for this extension in payment of the note. In other words, this transaction had its secret agreement to pay $3,333 extra and indicates that clients of Burr, the plaintiffs, were participating in the proposed usurious benefits. They had notice that the original transaction was not had at sale, that the papers attempted to make it out to be, though the customary separate receipt for the consideration of $1 was given. They do not seem to have made any inquiry from Braker to find out the nature of the transaction or to learn anything about the nominal consideration of $1 mentioned in the receipt. They seem to have been connected with Burr and employed him as attorney for Brown and Schermerhorn to collect from the New York Finance Company, in which he was largely interested. When an action was started in the state court, Burr asserted that the New York Finance Company was the real party while he was acting as attorney for Brown and Schermerhorn in foreclosing on the New York Finance Company, and concealment by Brown and Schermerhorn of their foreclosure sale from Braker indicates that they were not bona fide purchasers. Indeed, Burr seems to be financing the litigation and to be the real party in interest.

[4] I think the rule may be fittingly applied that the papers, being usurious at inception, are corrupt instruments into whosever hands they come. Miller v. Zeimer, 111 N. Y. 441, 18 N. E. 716; Thompson v. Berry, 3 Johns. Ch. 395. There is no claim that the plaintiffs saw the affidavits of Braker and his wife, which accompany the assignments, nor is there any claim of estoppel.

Plaintiffs claim that they placed the matter in Burr's hands to collect from the New York Finance Company (and this really meant to collect from Burr). No payment was made for 3½ years. Mr. Crummey, counsel for Braker, wrote a letter to Brown on April 29th advancing the claim that the assignment was not a sale, but a loan and usurious. This caused activity on the part of the plaintiffs. They did not discuss it with Mr. Crummey by letter or in person, but it resulted in Mr. Burr, representing his clients, foreclosing on these claims and offering them for sale in Philadelphia, and Wolf, a dummy for Burr, purchased at this sale, and this for the plaintiffs. This seems to have been done without notice to Mr. Crummey or Mr. Braker; the advertising was in the Philadelphia papers and Braker, and his attorney lived in New York. I think that, instead of trying to give publicity to this sale, the effort was to guard against notice being received by Braker and to carry it on in secrecy as against him. The relations of Brown and Schermerhorn with Burr in previous transactions in the lending of money satisfies me that the plaintiffs were not innocent purchasers, and cannot rest upon the claim that they did not know the real transaction at the time of the advancing of the money to Braker and the drawing of the instruments in question.

I am satisfied upon all the evidence that the moneys so advanced were loaned to Braker, that a usurious interest was charged, and that they are void. The money lenders here were protected from all loss under all possible circumstances; they were sure to have the principal repaid. This the policies of insurance gave to them. Wetzlar v. Wood, 143 App. Div. 311, 128 N. Y. Supp. 501; Id., 214 N. Y. 639, 108 N. E. 1111; Hall v. Eagle Ins. Co., 151 App. Div. 815, 136 N. Y. Supp. 774; Id., 211 N. Y. 507, 105 N. E. 1085; Hartley v. Eagle Ins. Co., 167 App. Div. 230, 152 N. Y. Supp. 686; Braker v. New York Finance Co., 155 App. Div. 894, 139 N. Y. Supp. 1117; Id., 214 N. Y. 683, 108 N. E. 1090.

The defendants may have a decree dismissing the bill.

HAGLER et al. v. SECURITY MUT. LIFE INS. CO.

(District Court, N. D. Texas. June 11, 1917.)

No. 697.

1. INSURANCE ⟸18—FOREIGN INSURANCE COMPANIES—RIGHT TO DO BUSINESS—CONDITIONS.

A state may impose upon a nonresident life insurance company such conditions precedent to its doing business in the state as it may see fit; and hence statutory provisions requiring the filing of a power of attorney authorizing service on any agent, officer or representative, and providing for service upon any person holding a power of attorney, or by publication, if no such person could be found, are valid and binding on such company.

2. INSURANCE ⟸26—FOREIGN INSURANCE COMPANIES—SERVICE OF PROCESS.

Under Rev. St. Tex. 1895, art. 3064, requiring insurance companies desiring to do business in the state to file a power of attorney authorizing each agent to accept service of process, and consenting that such service shall be valid; article 3070, providing that process might be served upon any person in the state holding a power of attorney, and that if no such person could be found process might be served by publication; and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, making the two articles mentioned conditions upon which foreign insurance companies were permitted to do business in the state, and providing that any such company engaged in issuing policies should be held to have assented thereto as a condition precedent to its right to engage in such business—the revocation by a foreign insurance company of a power of attorney to one of its agents, without the appointment at the same time of any successor, was illegal, and service on such agent was good, especially where the power of attorney was revoked after suit was filed, and seemingly for the express purpose of preventing service on him.

3. INSURANCE ⟸16—FOREIGN INSURANCE COMPANIES—DOING BUSINESS—WHAT CONSTITUTES.

Where, though a foreign insurance company attempted to formally withdraw from a state, it continued to collect premiums on outstanding policies numbering, in 1907, 1,143, and 682 in 1915, and representing insurance aggregating over $2,000,000 on the first date, and over $1,000,000 in 1915, their collection constituted the doing of business in the state.

4. INSURANCE ⟸26—FOREIGN INSURANCE COMPANIES—SERVICE BY PUBLICATION.

Under Rev. St. Tex. 1895, art. 3070, and Sayles' Ann. Civ. St. Supp. 1904, art. 3096ee, if a foreign insurance company's revocation of powers of attorney to its agents defeated service of process on them, then as it had no agent in the state, service by publication was valid, as a stipulation to this effect in the policy would have been binding, and the existing statutes must be read into the policy.

5. STATUTES ⟸225¼—CONSTRUCTION—CONSTRUING STATUTES TOGETHER.

Acts Tex. 31st Leg. c. 108, regulating domestic and foreign insurance companies, and expressly repealing prior statutes relating to service of process, must be construed with the act of 1909, requiring all foreign insurance companies to appoint the commissioner of insurance as their agent for the service of legal process, where the two acts were pending at the same time, and the last-mentioned act, though approved a few days after the first one, went into immediate effect more than two months before the first act was effective.

6. INSURANCE ⟸26—FOREIGN INSURANCE COMPANIES—SERVICE OF PROCESS.

In view of Acts 31st Leg. c. 108, requiring foreign insurance companies to appoint the commissioner of insurance as their agent for the

service of legal process, act of 1909, repealing prior statutes as to the service of process, did not cancel outstanding powers of attorney authorizing a foreign insurance company's agent to receive service of process until such company in lieu thereof gave new powers of attorney to the insurance commissioner.

7. CONSTITUTIONAL LAW ⟸106, 173—INSURANCE ⟸18—OBLIGATION OF CONTRACTS—SERVICE OF PROCESS.

If the Legislature intended to cancel such outstanding powers of attorney, the act was unconstitutional as divesting vested rights and impairing the obligation of contracts, since while the Legislature may make any change it sees fit pertaining to the remedy, the manner of obtaining service, or the procedure at the trial, it cannot deprive plaintiffs altogether of any remedy by divesting the courts of jurisdiction which they had at the time the policies were written.

At Law. Consolidated actions by David S. Hagler and others against the Security Mutual Life Insurance Company. On motions to quash the service of summons. Overruled.

Plaintiffs, administrators of John S. Hagler, deceased, brought two suits in the state court, thereafter removed to this court and consolidated, against the Security Mutual Life Insurance Company, a corporation chartered under the laws of the state of New York, and having its principal offices in the city of Binghamton, said state, to recover $10,000 on an insurance policy issued by said company on the life of the said John S. Hagler, October 3, 1904. Service was had on alleged agents of defendant company, and by publication, which process the defendant has moved to quash, alleging that the parties served were not its agents for the purpose of citation, and, being a nonresident corporation, it could not be brought into court by publication of citation.

At the time of the issuance of the policy the defendant was doing business in the state of Texas, where the policy to Hagler was solicited and delivered. It has since then withdrawn from the state and is soliciting no further business in Texas.

At the time defendant began to do business in Texas, and prior to the issuance of the policy to Hagler in 1904, article 3064 of the Revised Statutes of 1895 was in force, and provided that insurance companies desiring to do business in the state should file with the commissioner of insurance a power of attorney, authorizing each of its agents, officers, and representatives in the state to accept service of any civil process, and consenting that such service of process should be valid. Article 3070 of the Rev. Stat. of 1895 provided that suits might be instituted against any life insurance company in any county where the loss occurred, or where the policy holder resided, and that the process in such a suit might be served upon any person in the state holding a power of attorney from such company, and that if no such person could be found, upon affidavit of that fact being filed, process might be served by publication. By a statute enacted in 1903 (article 3096ee, Sayles' Civil Statutes Supp. 1904), the provisions of the two foregoing articles were made conditions upon which foreign insurance companies were permitted to do business in the state; and it was further provided that any such foreign corporation which engaged in issuing insurance contracts or policies in the state should be held to have assented thereto as a condition precedent to its right to engage in such business.

Agreeably to the foregoing provisions of law, the defendant company on October 3, 1904, filed with the insurance commissioner of the state of Texas a resolution providing that each and every agent appointed by the company in Texas was authorized to acknowledge legal process for the company, and that legal process might be executed on any one of said agents; and further providing that the company did thereby consent that suit might be commenced against it in any county in the state in which loss occurred or in which any agent of the company might reside. Finally, the resolution specifically appointed J. W. McCracken of Ft. Worth, Tex., as its agent for the said state

of Texas for service of legal process. On the very day that this power of attorney was filed, October 3, 1904, the company issued to Hagler, upon an application solicited by the said McCracken, the policy herein sued on.

A few months thereafter the defendant company formally withdrew from Texas, and, effective July 10, 1907, revoked by resolution the power of attorney for the service of process given to McCracken, and appointed Alex. S. Coke, of Dallas, as its attorney in Texas to accept and acknowledge service of legal process "in any cause or causes of action originating in any way prior to the 10th day of July, 1907, or hereafter growing out of any policy contract issued by this company prior to July 10, 1907, but not thereafter. The service upon or acceptance by said Alex. S. Coke of any and all such legal process to be strictly limited as hereinbefore stated." A copy of this resolution was sent to the commissioner of insurance, but, under the advice of the attorney general of the state, he refused to accept and file the same.

No legal proceedings were taken by the defendant company to mandamus the commissioner to receive and file the resolution canceling the old power of attorney and making a new one. The commissioner did, however, file a letter from defendant company giving notice of its withdrawal. See Exhibits Y and A.

After the withdrawal of the defendant company, the Legislature, in 1909, enacted a statute providing that each life insurance company engaged in doing, or desiring to do, business in the state should file with the commissioner of insurance and banking an irrevocable power of attorney, duly appointing said commissioner and his successors in office its agent and attorney in fact for the purpose of accepting service or being served with citations, and consenting that such service should be held valid, such appointment to continue in force so long as said company should continue to do business in the state or to collect premiums from citizens of the state, and so long as it should have outstanding policies in the state, and until all claims of every character held by the citizens of the state or by the state of Texas against such company should have been settled. The defendant company filed no power of attorney under the provisions of this act.

On August 6, 1913, the first of these suits was filed, and service had by publication, plaintiff having failed to find an agent of the defendant upon whom service might be made. Later, McCracken was located and service made on him. He immediately mailed the citation to the defendant company in ample time for it to have answered. On the same day that McCracken was served service was also had on the commissioner of insurance and banking, who at once mailed the citation and amended petition to defendant company.

The case was removed to this court, and a motion filed to quash the service, in which it was alleged that in June, 1907, defendant wholly withdrew from the state of Texas, then terminating its agency therein, and revoked, by resolution of the board of directors, its power of attorney to McCracken and all other agents, who were promptly notified of such action, as was likewise the commissioner of insurance; that prior to July 10, 1907, all of its agents in the state of Texas had been withdrawn, and since that date defendant had done no business in the state of Texas, nor had it had the legal right to do any business therein; that at the date of the institution of the suit it was, and still is, a corporation organized under the laws of New York, with its offices in Binghamton, said state, of which it is a citizen, and a nonresident of the state of Texas, in which latter state it has no property and had none when the suit was instituted; that the service on defendant by publication was ineffectual and void, as was likewise the service on McCracken, whose power of attorney had been canceled prior to such service, and that the service on the insurance commissioner was likewise illegal, inasmuch as he was not the agent or representative of defendant. Thereafter, on April 28, 1914, plaintiffs filed another suit in the state court on the same cause of action, with similar allegations as in the first, and, in addition thereto, substantially alleged the facts as set up in defendant's motion to quash the service in the first suit, and further alleged the appointment of Alex. S. Coke as its attorney for service of process by resolution, which resolution the insurance com-

missioner had refused to receive and file, and that the power of attorney to Coke was revoked in March, 1914, leaving the defendant company without any agent in Texas upon whom service could be had. The prayer was for service by publication, which was made, and, in addition thereto, service was also later made on the said Coke.

This second suit was likewise removed to this court, and defendant filed exceptions to the citation by publication similar to that filed in the first suit, and likewise filed an affidavit by Coke to the effect that his power of attorney had been canceled and notice given him of that fact prior to the time of service on him. The two suits were consolidated for the purpose of trial.

Flournoy, Smith & Storer, of Ft. Worth, Tex., for plaintiffs.
Coke & Coke, of Dallas, Tex., for defendant.

JACK, District Judge (after stating the facts as above). [1] The defendant being a nonresident life insurance company, the state of Texas had the right to impose upon it, as a condition precedent to its doing business in the state, such conditions as it might see fit. Therefore the provisions of the then existing law were valid and binding on defendant. Process was served on McCracken, who had been appointed agent of defendant company, in compliance with the law, at the time it obtained permission to do business in the state.

It is true that prior to the filing of the suit defendant company had passed resolutions, which it mailed to the commissioner of insurance, revoking the power of attorney to McCracken, and appointing Coke agent for the service of process under certain conditions; but the commissioner, acting under advice of the attorney general, had refused to file same, and no legal proceedings, by mandamus or otherwise, were ever taken to force him to do so. Thus McCracken, on the public records, remained the duly authorized agent of defendant company for the service of process.

[2] Even should it be conceded that the revocation of the power of attorney to McCracken, and the appointment of Coke in his stead, was legal and effective, then the final revocation of the power of attorney to Coke, without the appointment at the same time of a successor to him as agent for the company, would not have been legal, and the service thereafter made in the second suit on Coke would have been good; or, if the revocation of the power of attorney to Coke was legal, then the service of process by publication, the company having no agent in the state, would have been valid and binding.

The purpose and policy of the law, requiring foreign insurance companies to name an agent in the state for the purpose of process, is clearly to furnish a means by which the insurance companies soliciting and writing policies in the state may, at all times, be forced to comply with their obligations to policy holders in the state, without the latter having to go to another state to sue.

The statutes as they then existed must be read into the policy, and the giving of the power of attorney held irrevocable, unless, at the same time, a new agent was appointed, or other means provided to give the state courts jurisdiction.

In the case of United States Life Insurance Co. v. Ross (Court of Appeals, 5th Circuit) 102 Fed. 722, 42 C. C. A. 601, which was a Texas case arising under the same statutes, the court held such a power

of attorney irrevocable, unless, at the time of the revocation, a new agent was appointed. In that case the defendant, on the termination of its contract with one of its agents, canceled its power of attorney and gave due notice thereof to the insurance commissioner, who assented thereto, but subsequently wrote the company that the attorney general had rendered an opinion to the effect that the company had no right to so cancel its power of attorney, and he would be governed accordingly. Later the company appointed the insurance commissioner its agent for the purpose of citation, but in the meantime notice had been served on the agent of the company of the taking of depositions, and the question of the validity of the service of notice came up in determining the admissibility of the depositions. Judge McCormick, organ of the court, held:

"In the nature of the case, the appointee, while still alive and capable of being reached, must continue to be competent to have such service made on him until a successor is appointed and has qualified by acceptance. Therefore the fact that the agreement between the plaintiff in error and J. W. Harris terminated, according to its terms, on the 9th of September, 1897, does not necessarily involve or affect that representative capacity in which he was authorized to accept service of legal process, or at least to have service made upon him agreeably to the terms of the statutes of Texas for the protection of the citizens of Texas who held policies of insurance issued by the plaintiff in error, then doing business under and subject to the terms of its permission in that state. One of the vital conditions precedent to obtaining and using such permission was and is that the licensee should have and keep in that state such a representative by whom service could be accepted or upon whom it could be had. We think the commissioner decided, justly and wisely, that the plaintiff in error could not revoke the authority it had granted without substituting another appointee by whom service could be accepted, or on whom it could be made, so as to bind the licensee."

It is true that the Texas statute quoted did not provide that such power of attorney should be irrevocable. This, however, was not sacramental. As a general rule, the principal has the right to revoke the power of attorney at any time, even though it be in its terms irrevocable, subject to the exception that, where the power of attorney is coupled with an interest, or contractual in its nature, or given for a consideration, and for the protection of some one or some interest, as was the case in this instance, it is not revocable at will. Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 590, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686.

[3] Notwithstanding the defendant withdrew from business so far as writing new policies was concerned, it continued to collect premiums on the policies outstanding. The number of policies in force the last of the year 1907 was 1,143, and the amount of insurance $2,649,606, and the number of policies still outstanding October 1, 1915, was 682, and the amount of insurance $1,399,114. The premiums on this amount of insurance were a substantial amount, and their collection constituted doing business within the state.

In Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the court said:

"It cannot be said with truth, as we think, that an insurance company does no business within a state unless it has agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks.

Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force, and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject."

The same doctrine was again affirmed in Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; Mutual Reserve Life Ins. Co. v. Birch, 200 U. S. 612, 26 Sup. Ct. 752, 50 L. Ed. 620; Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782.

The doctrine was not overruled, but rather affirmed, in the case of Hunter v. Mutual Reserve Life Ins. Co., 218 U. S. 585, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686. In that case suit was brought in New York by plaintiff, assignee of five judgments obtained in North Carolina, against defendant company after it had withdrawn from the state, but was still collecting premiums on policies held by residents of North Carolina. The North Carolina law, at the time defendant obtained permit to do business therein, required that it execute an irrevocable power of attorney to the insurance commissioner for the service of process. By a subsequent law defendant company was virtually forced to withdraw, and it attempted to cancel its power of attorney to the insurance commissioner. One of the policies sued on had been issued in North Carolina prior to the withdrawal of the company, and, as to this, it was held that the power of attorney could not be canceled, and that the court had jurisdiction; but, as to the remaining policies issued to citizens of New York and New Jersey, it was held that such policies, not having been issued in North Carolina, and not having been issued under the faith of its laws, were not entitled to their remedial sanction. The court held that the case did not come under the doctrine laid down in the Spratley Case, the Phelps Case, or other cases cited, which were carefully distinguished.

The defendant company in the case at bar itself recognized this distinction, as to suits on policies issued in the state and those issued out of the state, when, in its appointment of Coke as its agent for the purpose of citation, it restricted his authority to suits on policies theretofore issued in the state of Texas.

Under the uniform rulings of the insurance department of Texas, in construing the Texas law, an agent's power of attorney could not be canceled without at the same time appointing another agent in his stead. It is well settled jurisprudence that the construction placed on a statute by the executive officers charged with its execution is entitled to great weight. United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 28 Sup. Ct. 532, 52 L. Ed. 821; United States v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890.

Not only did the defendant company attempt to cancel Coke's power of attorney without appointing another agent, but it did so after the first suit by plaintiff had been filed, and, it would seem, for the express purpose of preventing service of process.

The following is quoted from the testimony of La Due, secretary for defendant company:

"Q. At the date of such revocation (revocation of Alex. Coke's power of attorney), March 17, 1914, did not the company actually know that suit had been filed against it on this Hagler policy? A. At the date of this revocation, March 17, 1914, the company had received the communications from John W. McCracken, dated January 22, 1914 (which inclosed the citation in this case), and from Chas. V. Johnson, dated January 22, 1914 (which inclosed the citation and petition in this suit), but denies that on the date of such revocation, viz., March 17, 1914, any valid suit had been begun against it or valid service obtained upon the defendant company. Q. Did you have personal knowledge of this revocation of Coke's authority being sent? A. I did. Q. Please answer the following question frankly: Was not the revocation of Coke's authority made for the purpose of preventing service upon the defendant company in Texas in the suit brought by Hagler's administrators? Mr. Gregory (attorney for defendant): Question objected to as speculative. Mr. Page (representing plaintiff): Will the commissioner direct an answer to be made? Commissioner: I direct an answer, if he knows. A. I don't know. Q. Do you swear that this was not at least one of the purposes? Mr. Gregory: Same objection. A. I don't know. Q. Has any power of attorney, or authority to receive service, been given to any other person in the state of Texas since the date of the revocation of Coke's authority? A. Not to my knowledge."

In the case of Michael v. Mutual Insurance Co., 10 La. Ann. 737, the court said:

"A foreign insurance company, doing business through an agent in New Orleans, and taking risks in Louisiana, cannot be permitted to frustrate a claim in a Louisiana court, upon a contract made with it, by revoking the power of its agent, on the eve of the institution of a suit for loss, of which it had been notified. Such a proceeding savors of bad faith."

Again, in Pervangher v. Union Casualty & Surety Co., 81 Miss. 32, 32 South. 909, which involved a like question, the court held:

"The contention of the appellee is not to be supported. Having come into the state under conditions prescribed by law, and issued the policy sued on by its agent Moore, it cannot withdraw the agency of Moore, and leave itself without any agent in this regard. To do so would be a fraud upon appellant, and fraud is never tolerated. * * * The appellee could not withdraw his agency so far as to receive service for the company, and its effort in that direction is a nullity."

Again in Fisher v. Traders' Mutual Life Insurance Co., 136 N. C. 217, 48 S. E. 667, it was held:

"The fact that the defendant had ceased to do business in this state, if such is a fact, cannot affect our conclusion. If it had taken out a license to do business in the state, it could neither revoke it, nor could it withdraw from the state, to the plaintiff's prejudice. The statute will not cease to operate as to it until its debts due to citizens of this state are paid."

And again, in Groel v. United Electric Co., 69 N. J. Eq. 397, 60 Atl. 822, the court says:

"It is not necessary to enlarge upon the fatuity of legislation which would permit a foreign corporation to come within the state and transact business upon condition that it name an agency upon whom process should be served, and leave it within the power of the corporation to prevent service by discharging the agent and revoking his authority whenever it pleased, leaving suitors within the state powerless to bring the corporation into court."

[4] If neither McCracken nor Coke, at the time of service upon him, was the legal agent of the company, upon whom citation could be served, then the defendant had no agent in the state for the purpose of citation, and might have been cited by publication under the provisions of article 3070, which was in force at the time of the issuance of the policy, and to the provisions of which it agreed by obtaining a permit and doing business in the state. Article 3096ee, Sayles' Civil Statutes Supp. 1904. A stipulation to this effect in the policy would have been binding, and the case must be considered as though the article was so written into the policy.

In Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, the leading case as authority that a personal judgment cannot be rendered against a foreign company, brought into court by publication of citation, the exception was recognized where the corporation had itself, in advance, consented thereto. We quote from the opinion:

"If that [the litigation] involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his voluntary appearance. Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against nonresidents, is effectual only where * * * property in the state is brought under the control of the court."

See, also, Wilson v. Seligman, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338; Connecticut Mutual Life v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Mutual Reserve v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987.

[5] It is urged, however, and with much force, that the law prevailing at the time the policy was issued, articles 3064 and 3070 of the Revised Statutes of 1895, had been repealed prior to the filing of this suit. This is true. By chapter 108 of the Acts of 1909, making many provisions for domestic and foreign insurance companies, these acts are expressly repealed; but at the time this act of 1909 was pending there was another bill pending expressly providing that all foreign insurance companies should appoint the commissioner of insurance their agent for the service of legal process. This latter act, while approved a few days after the first, went into immediate effect, being over two months before the first act was effective. The two acts must, therefore, be construed together. The Legislature evidently did not intend to leave any gap or interim during which it would not be necessary for any such life insurance company to have an agent in the state for the service of process.

The present law provides that each life insurance company engaged in doing, or desiring to do, business in the state, shall file with the commissioner of insurance an irrevocable power of attorney appointing an agent for the service of process. The defendant company was at that time annually collecting premiums on over $1,000,000 worth of insurance previously issued to citizens of the state. It was its duty under the act to immediately so appoint the insurance commissioner its agent, but it failed to do so. The repealing clause of the first act

of 1909, referred to, must be considered just as it would be were it inserted in the latter act instead of the former, and it certainly cannot be contended that the defendant is not subject to the obligations of either the present law or the repealed articles of the Revised Statutes.

[6] It was evidently not the intention of the Legislature to release nonresident insurance companies doing business in the state from their obligations under the then existing law until they had complied with the provisions of the new law. It was certainly not the intention of the Legislature to itself, by repeal of an old law, cancel outstanding powers of attorney before the insurance companies, then doing business in the state, had, in lieu thereof, given new powers of attorney to the insurance commissioner, under the provisions of the new act.

[7] But, if such were the intention of the Legislature, then such act would be one divesting vested rights and impairing the obligation of contracts, and therefore unconstitutional.

It is urged by counsel for defendant that the repeal of the original articles of the Revised Statutes of 1895 does not in any wise impair the obligation of the contract of insurance, but merely affects the remedy. It is true that the Legislature had the authority to make any change it might have seen fit pertaining to the remedy, or as to the manner of obtaining legal process on defendant, or as to procedure in the trial; but it could not deprive plaintiffs altogether of any remedy by divesting the courts of the state of the jurisdiction which they had at the time the policies were written, and forcing the plaintiffs to go to another state to assert their rights under the contract. Of what avail would be a contract with no court in which to enforce it? It is not a sufficient answer to say that he might sue in a far distant state.

In Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, the court said:

"It was well said in Baltimore & O. Railroad Co. v. Harris, 12 Wall. 65, at 83, 20 L. Ed. 354, at 359, by Mr. Justice Swayne, in speaking for the court in regard to service on an agent that: 'When this suit was commenced, if the theory maintained by counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility.' The court, in view of these facts, was of opinion that Congress intended no such result."

There is no practical difference, in its effect, in taking away a man's right and in taking away the only remedy by which that right can be effectively asserted. When the Duke pronounced judgment against Shylock, graciously sparing his life, but declaring his fortune forfeited, the latter replied:

"Nay, take my life and all; pardon not that;
You take my house, when you do take the prop
That doth sustain my house; you take my life,
When you do take the means whereby I live."

The exceptions to the citations filed in both cases are overruled.

In re SUTTON.

(District Court, E. D. Michigan, S. D. July 24, 1917.)

No. 3118.

1. COURTS ⟸365—UNITED STATES DISTRICT COURT—FOLLOWING DECISION OF STATE COURT.
   In determining whether securing a judgment on two of a series of notes given for motors purchased under conditional sale made in Michigan passed title to the buyer the decisions of the Michigan Supreme Court will be followed.

2. BANKRUPTCY ⟸188(2)—TITLE TO PROPERTY—CONDITIONAL SALE.
   Motors had been purchased by bankrupt under a conditional sale. Part of the price had been paid in cash, and notes given for the balance. The first note had been paid in full and a small payment made on the second. The assignee of the seller recovered a judgment against the bankrupt for the balance due on the second note and the amount of the third note. *Held*, that the taking of a judgment was not an election to make the sale absolute transferring title to the buyer.

In Bankruptcy. In the matter of Del T. Sutton, bankrupt. Petition for the review of an order of the referee in bankruptcy granting the petition of Fred W. Haines for the reclamation of five motors claimed by the trustee to belong to the bankrupt estate. Order of referee affirmed.

Harold H. Emmons, of Detroit, Mich., for petitioner.
Lloyd T. Chockley, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This matter comes before the court on a petition for the review of a certain order of the referee in bankruptcy for the Southern division granting the petition of Fred W. Haines, assignee of the Standard Electric Company, for the reclamation of five motors, claimed by the trustee to belong to the bankrupt estate. The facts, which are undisputed, are thus stated in the certificate of the referee, whose correctness in this respect is not challenged by either party:

"On February 8, A. D. 1915, the Standard Electric Company, a corporation, entered into a contract with Del T. Sutton for the sale of certain motors. Eight dollars fifty-seven cents ($8.57) of the purchase price was paid in cash, and for the balance Mr. Sutton gave 24 notes of fifteen dollars ($15.00), payable one each month. The form of the note was an ordinary promissory note by which the bankrupt agreed to pay to the order of the Standard Electric Company fifteen dollars ($15). The first note of fifteen dollars ($15.00) was paid; five dollars ($5.00) was paid on the second note; but no further payments were made. On October 19, 1915, a judgment was rendered in favor of Fred W. Haines against the bankrupt for twenty-five dollars ($25.00), the balance due on the second note and the amount of the third note, together with the costs of suit.

"All of the other notes are still in the possession and are the property of Fred W. Haines, assignee.

"The contract entered into between the parties provides for the sale by the Standard Electric Company to the bankrupt of five electric motors. It provides the terms of payment, as above specified, eight dollars fifty-seven cents ($8.57) cash and 24 notes of fifteen dollars ($15.00) each, due each month, the

first note falling due March 15, A. D. 1915. So far as material, the other parts of the contract are as follows: 'It is expressly agreed and understood that this order shall not be countermanded and that the goods shall remain and be held by the purchaser as exclusive property of the Standard Electric Company, until the purchase money shall have been fully paid, as agreed herein, notes and drafts not to be considered as payment until they have been redeemed, and if default be made in payment, the goods to be surrendered to the Standard Electric Company, or order, on demand, and all payments forfeited.'

"It was not contemplated by either of the parties at the time of the sale of the motors that said motors were to be resold, but they were purchased for the purpose of being operated in the bankrupt's place of business.

"It was the claim of the trustee that by the bringing of suit and the entry of judgment for two of the notes that thereby the title of the motors passed to the bankrupt. * * *

"The only question to be determined is whether or not the taking of judgment upon 2 of a series of 24 notes, made for the purpose of evidencing the debt due upon contract for conditional sale, the judgment and none of the other notes having been paid, transfers the title to the buyer of property which is purchased for his own use, and not for resale."

[1] If this question has been passed upon by the Michigan Supreme Court, this court will follow and adopt the decisions of that court upon such question. Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Mishawaka Woolen Mfg. Co. v. Westveer, 191 Fed. 465, 112 C. C. A. 109. As was said in the case first cited:

"In bankruptcy the construction and validity of such a contract must be determined by the local laws of the state."

[2] It is urged by the trustee that by reducing two of these notes to judgment the vendors elected to make the sale absolute, and therefore cannot now reclaim the property which was the subject-matter of this contract. In support of this contention the trustee cites two Texas cases, Merchants' & Planters' Bank v. Thomas, 69 Tex. 237, 6 S. W. 565, and Parlin & Co. v. Harrell, 8 Tex. Civ. App. 368, 27 S. W. 1084. Both of these cases involved a transfer of notes received by the vendors in a conditional sale from the vendee, as security for the payment of the purchase price, and it was held in both cases that by such transfer the vendors elected to convey to the vendee title to the property sold under such conditonal sale. This, of course, is a different situation from that presented there. As was pointed out in the case first cited:

The vendors, "having placed the notes beyond their own reach, could not reclaim the property, for, in order to do so, they were obliged to cancel the notes or return them to the vendees. But the effect of the transfer was to assign to the indorsees the right to enforce against the vendee the collection of the notes. This was the only right they did possess, and the vendors intended to confer it upon them by means of the indorsement, and at the same time to divest themselves of all right to the property. Having elected to have the notes enforced and abandoned their right to claim the property, the title vested in Boussel & Seisfield," the vendees.

This decision was followed in the later case cited which involved substantially the same facts.

The trustee quotes from 35 Cyc. 696, as follows:

"The seller cannot resort to more than one remedy, but must elect which he will pursue; and generally an action and recovery of a judgment for the price operates as a confirmation of the sale, precluding the seller from maintaining an action to recover the goods."

On the same page from which this language is quoted are cited in support thereof cases from several states; but among the states referred to as holding contra is included Michigan. The trustee cites and relies upon the case of Button v. Trader, 75 Mich. 295, 42 N. W. 834. In this case one Strub and one Donally were joint owners of certain personal property. Donally sold his one-half interest to Strub, upon conditional sale with reservation of title. Thereafter Strub undertook to sell to the defendants the whole of such property, claiming to be the owner thereof. Strub not having paid Donally for his one-half interest, the latter brought suit against the former, and made the vendees from Strub garnishee defendants.

The vendees paid to Donally the balance of the purchase price, which they had agreed to pay to Strub, and after such payment Donally recognized them as the sole owners of the property. Subsequently the assignee of Strub brought this action against the latter's vendees to recover the amount thus paid by the vendees to Donally. Among other things, the court said:

"Donally, when he found the property passed by Strub as his own to the defendants, if his claim as testified to by him was correct, had two courses open to him to pursue. He could have taken measures to recover his property of the defendants, or he could have affirmed the sale of Strub to them, and looked to Strub for the value of his property. He chose the latter course. He elected to pursue his remedy against Strub, and now has a judgment against him, not only for the full amount of his interest in the property, but for all that Strub then owed him on any account. Having thus elected to confirm the sale of the property by Strub to the defendants, and having recovered a judgment for the value of his interest in the same against Strub, which is now in force, the property was thereby secured in the defendants, and the consideration for the note became a good one. Having elected to place his remedy against Strub, he cannot now turn round, repudiate such election, and maintain a claim to the property."

The decision in this case is clearly inapplicable to the facts in the present case.

The trustee refers to, but seeks to distinguish, the case of Canadian Typograph Co. v. Macgurn, 119 Mich. 534, 78 N. W. 542. In this case the defendant bought a bicycle from the plaintiff under a contract reserving the title to the property in the plaintiff until such bicycle had been paid for. The plaintiff rendered a statement of account to the defendant, and afterwards began an action in assumpsit in a Canadian court based upon such account. The summons was served in Detroit, and a judgment was taken on such summons. It was admitted that this foreign judgment had no force in this country, and also that any property of the defendant in Canada might be seized upon such judgment. Afterwards plaintiff brought this action of replevin against the defendant for the recovery of possession of this property. From a judgment on a verdict directed in favor of the plaintiff, the defendant appealed, assigning error upon the refusal to direct a verdict for the

defendant. In affirming the judgment, the Michigan Supreme Court said:

"Counsel contend that, by bringing assumpsit, the plaintiff elected its remedy, and cannot now resort to replevin. The contract binds the defendant to purchase, and provides for a settlement. It reserves the title in the plaintiff until the settlement is fully satisfied. The record shows an account rendered, though it is not clear that an adjustment of accounts was had; but, whether there was or not, the contract reserves title until the same is satisfied. In the case of Fuller v. Byrne, 102 Mich. 461 [60 N. W. 980], the court held that the fact that a personal judgment was rendered was not sufficient to pass the title. In that case the contract provides that 'the said instrument [a piano] is and shall remain the property of Estey & Camp until each and every of said amounts, and interest thereon, and any judgment rendered thereon, is paid in full.' The language of the contract in the present case is not the same, but we think that it evinces an intention that the title should not pass until the wheel should be paid for. Again, if the doctrine of merger can be said to have any application in such cases, it may be doubted whether anything less than a judgment in a case where the plaintiff has a full and complete opportunity to recover his whole demand against his debtor will suffice. Thus, in the case of Toby v. Brown, 11 Ark. 308, it was held that a judgment against a steamboat, that being a judgment in rem, was not enforceable against the property of the owners, if unsatisfied, and could not be pleaded in bar to a subsequent action."

The trustee quotes the following language from that opinion, as the concluding sentence of the court:

"Furthermore, it is commonly held that a former judgment, unsatisfied, does not merge the original cause of action."

An examination, however, of the opinion, shows that immediately after the sentence just quoted the court said:

"But we need not decide this question, as we think the case within the rule of Fuller v. Byrne, supra."

I am of the opinion that the decision in Canadian Typograph Co. v. Macgurn, controls the present case, and is authority for the ruling and order of the referee.

It is urged that the case of Fuller v. Byrne, cited in the opinion just quoted, is distinguishable from the present case, and is not authority for the decision in Canadian Typograph Co. v. Macgurn, supra.

I cannot, of course, hold that the Michigan Supreme Court erred in basing if it did, its decision in Canadian Typograph Co. v. Macgurn, upon Fuller v. Byrne, even if I were disposed to do so. I think, however, that the court was justified in citing the last mentioned case. In that case plaintiffs had delivered to one Marquardt a piano under a conditional contract of sale containing the following clause:

"The said instrument * * * is and shall remain the property of [said] Estey & Camp until each and every of said amounts, and interest thereon, and any judgment rendered thereon, is paid in full."

This piano was seized and taken from the possession of the conditional sale purchaser, on an execution, and plaintiffs brought this action of replevin against the sheriff to recover possession of such piano. It appeared that before the sheriff had levied his execution, the plaintiffs had brought suit against Marquardt and obtained personal judgment for the amount due on the contract, and it was contended that

plaintiffs had thereby relinquished their right to recover possession of this property. The trial court directed judgment for plaintiffs and the defendants appealed. In affirming the judgment, the Supreme Court said:

"The court below was correct in so finding. The plaintiffs and Marquardt had entered into a contract by which the title to the property was to remain in the vendors until the 'amounts, and interest thereon, and any judgment rendered thereon, is paid in full.' Under this contract the vendors had the right to obtain judgment against the vendee for the amount due, and interest thereon, and the title was not to pass until such judgment was paid. There is no intention shown here to release the lien or pass the title. The mere fact of personal judgment was not, under the contract, to release the lien or pass title, until judgment paid. See Kirkwood v. Hoxie, 95 Mich. 66 [54 N. W. 720, 35 Am. St. Rep. 549] and cases there cited."

In the case of Kirkwood v. Hoxie, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549, referred to in the opinion last quoted, it was held that the mere recovery of a personal judgment by the holder of a mechanic's lien against the owner of the premises covered by such lien, for the amount due by the latter to the former, and secured by such lien, does not necessarily constitute a waiver of the right to enforce such lien, the court saying among other things:

"We may next inquire whether the defendants have waived their lien by taking this personal judgment. A lien once established, the burden is upon the owner of the estate charged to show its relinquishment, and, while this may be inferred from circumstances, it may also be rebutted. It is said by at least one author that 'the question of waiver is always one of intention.' Adams, Eq. 128, 129. If so, it is necessarily one of fact. Cordova v. Hood, 17 Wall. 1-9 [21 L. Ed. 587]; Coit v. Fougera, 36 Barb. [N. Y.] 195. In this case there is nothing to show such intention. True, a personal judgment was taken, but it was accompanied by acts which clearly show an intention to preserve, rather than to relinquish, the lien; and no effort has been made to collect the judgment by the ordinary process of the court. It cannot be successfully contended that the taking of the judgment, alone, would have such effect."

It is finally insisted that the order complained of is contrary to the rule announced in the case of Atkinson v. Japink, 186 Mich. 336, 152 N. W. 1079, which it is urged controls this case. The facts in that case are thus stated in the opinion of the court:

"Plaintiff sold an automobile to defendant for $650. One hundred and forty dollars was paid in cash, and two notes for $185 and $325, respectively, were executed by defendant, payable to plaintiff. Each note reserved title to the automobile in plaintiff until it was paid, with the right to declare the note due and take possession of the car at any time plaintiff deemed himself insecure; to sell at public or private sale, and indorse the amount received upon the note. Plaintiff sold the notes, indorsing them, but not to the same purchaser. The smaller note falling due, plaintiff took it up from the purchasing bank, asked defendant to pay it, who refused to do so."

Plaintiff thereupon brought an action of replevin against the purchaser to recover possession of this automobile. The trial court directed a verdict for plaintiff, and defendant appealed to the Supreme Court, contending, among other things, that by transfer of his note any title which plaintiff might have had by virtue of such note in the machine passed from him to the defendant, as buyer of the machine. In affirming the judgment, the Supreme Court used the following language:

"The idea of a lien reserved by the vendor is not out of harmony with the idea of an assignment of the lien, with the assignment, or sale, of the notes; a passing of the security as a right appertaining to the choses in action. It is reasonable, therefore, to say, and the conclusion is abundantly supported by authority, that whoever held one of the notes as owner possessed also the right, upon default in payment of the note, to possession of the car. What plaintiff will do with the car we cannot know. Treating the sale of each note as an assignment pro tanto of the security, it is to be presumed that he will not invade any right of the holder of the other note. But I think the defendant was not entitled, as against either note holder, to retain possession of the car. As to him it can be sold but once, and the sum received applied upon his debt."

It is readily apparent that this case is not in point here, and that its doctrine is not inconsistent with the rule announced and applied in the decisions previously quoted.

It will, moreover, be noted that in the present case, petitioner did not reduce to judgment, or commence an action for the recovery of the unpaid purchase price of these motors, but sued and recovered judgment on only two of the twenty-four notes received. It certainly could not be contended that the payment of these two notes would have resulted in the transfer of the title to such motors to the bankrupt, and I am of the opinion that the recovery of judgment upon such notes, under the circumstances disclosed, had no such effect. There is nothing to indicate an intention on the part of petitioner to waive his right to reclaim this property.

For the reasons stated, the order of the referee must be, and it hereby is, affirmed.

PENN MUT. LIFE INS. CO. v. HENDERSON et al.

(District Court, N. D. Florida. August 18, 1917.)

INTERPLEADER ⊂=21—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE.

Act Feb. 22, 1917, c. 113, 39 Stat. 929, gives the federal District Courts original jurisdiction of suits of interpleader by insurance companies when it is made to appear that one or more bona fide claimants under a policy reside within the jurisdiction of the court, and that two or more persons, citizens of different states, are adverse claimants, "and such insurance company deposits the amount of the insurance with the clerk of the court to abide the judgment thereof." "Provided that in all cases where a beneficiary is named in the policy, or where the same has been assigned and written notice thereof shall have been given to the company the bill of interpleader shall be filed in the district where the beneficiary may reside." *Held*, that the deposit of the amount of the insurance with the clerk is a condition precedent to the exercise by the court of the jurisdiction granted. Semble that the proviso fixes the venue in the district of the residence of the beneficiary named in the policy or, in case of assignment, of the assignee.

In Equity. Suit of interpleader by the Penn Mutual Life Insurance Company against Winifred Henderson and others. On motion to dismiss bill. Motion granted.

Sterling A. Wood, of Birmingham, Ala., and Watson & Pasco, of Pensacola, Fla., for the motion.

Price & Carter, of Marianna, Fla., opposed.

SHEPPARD, District Judge. The Penn Mutual Life Insurance Company, a corporation of Pennsylvania, seeking to take the benefits of the provisions of chapter 113, Laws of Congress, February 22, 1917 (39 Stat. 929), filed its bill of interpleader against Winifred Henderson individually, and Winifred Henderson, trustee, citizens and residents within the jurisdiction of the court, and against the Rt. Rev. Edward P. Allen (executor of Otto Joseph Dus, deceased), a citizen and resident of Jefferson county, Ala.

It is disclosed by the bill, among other things for grounds of jurisdiction, that Winifred Henderson is the assignee of a certain insurance policy on the life of Otto Joseph Dus, deceased; that the policy had been assigned to the defendant Henderson June 1, 1914, and written notice thereof had been duly accepted by the plaintiff, recognizing the assignee as beneficiary in the policy according to the rules of the company. It is further shown that Otto Joseph Dus died testate February 28, 1916, naming the defendant Allen executor of his last will and testament. The bill then admits liability to one or the other claimants, and disclaims any interest in the fund except that of mere stakeholder of the amount of the policy for the rightful beneficiary, and avers that Winifred Henderson had instituted her action against plaintiff in the circuit court of Escambia county, Fla., upon the policy and assignment; that said Allen had begun a suit as executor against plaintiff in the circuit court of Jefferson county, Ala. The bill then tenders the amount of the policy, $1,089.95, and prays that plaintiff be permitted to deposit said amount into the registry of the court for the party who may be entitled thereto, and that the defendant Henderson and defendant Allen may be enjoined, respectively from further prosecuting their said suits in the state courts of Florida and Alabama, with the usual prayer for process. Suffice it to say, the bill meets the essential requisites of the statute for jurisdiction and of the relief sought. The usual process in chancery issued and temporary injunctions were granted, restraining the defendants from further prosecuting their said actions in the state courts. There was, however, no deposit with the clerk according to the tender of the bill. Three days after filing its bill of interpleader in this jurisdiction, plaintiff exhibited in the District Court of the United States for the Northern District of Alabama, Southern Division, a similar bill, and for like purpose, against the same defendants, making the deposit in that court as tendered. Subpœnas and restraining orders were likewise issued from that jurisdiction and served upon the defendants in both districts.

The objection to the jurisdiction of the court occurs on a motion to dismiss, one ground of which is that the court is without jurisdiction because plaintiff made no deposit in the clerk's office as by the law required. In view of the conclusion reached it will not be necessary to notice other grounds assailing the constitutionality of the act. Whether or not it is within the power of Congress to the extent here attempted, it is clear the intention of the legislative department was to enlarge

the jurisdiction of the District Courts for remedial purposes. Therefore it becomes necessary to ascertain what the act itself provides as conditions precedent to the exercise of jurisdiction. It will simplify an interpretation to pare the act of irrelevant words and amplifications and read it as applicable to the case in hand. It reads substantially:

> District Courts shall have original jurisdiction of suits of insurance companies, on bills of interpleader duly verified, when it is made to appear that one or more persons bona fide claimants against such company reside within the jurisdiction of the court and holds a policy in said company for at least five hundred dollars insurance payable to a beneficiary, or to the heirs, next of kin or legal representative of the insured, and it further appearing that two or more persons, citizens of different states, are adverse claimants to such insurance, and such insurance company deposits the amount of such insurance with the clerk of the court to abide the judgment thereof. Such court shall have the power to issue process to said claimants, returnable as the court shall determine, which shall be served by the marshal of the districts wherein the respective claimants reside. Said courts shall have power to hear and decide upon the said bill of interpleader according to the practice in equity. The court may discharge complainant from further liability upon payment of such insurance as directed, less complainants' actual court costs; and the court shall have power to make such further orders and decrees as may be suitable and issue the necessary writs for the enforcement of its decrees: Provided, that in all cases where a beneficiary is named in the policy, or when the same has been assigned and written notice thereof shall have been given to the company, the bill of interpleader shall be filed in the district where (such) the beneficiary may reside.

It must be assumed that Congress had in contemplation the office and scope, extent and limitations, of the common-law interpleader as generally recognized in the equity practice, and by this legislation has sought to confer upon the District Courts jurisdiction of special cases, and predicates that jurisdiction upon certain expressed conditions made primarily to appear. The statute, besides partaking somewhat of an innovation on the common law, authorizes extraordinary remedies, and should, I think, be construed so as to accomplish the purpose aimed at, yet, being limited to certain cases on certain conditions, those prerequisite conditions enumerated in the act should be made to appear as preliminary to the exercise of jurisdiction.

It is plain from the language of the statute that Congress did not intend to leave the matter of venue in such cases to the will of claimants. In order to protect the insurance company from defending a multiplicity of suits, the statute authorized the insurance company to file its bill of interpleader in a District Court of the United States, "where it is made to appear by such bill that one or more * * * bona fide claimants against such company * * * reside within the jurisdiction of said court." This provision fixes the venue of the suit, in the district of residence of either of the bona fide claimants, except in certain cases embraced in the last proviso of the statute. Undoubtedly if the statute had no further provision in it as to the venue of the action than that above noted, the insurance company might file a bill of interpleader in any District Court of the United States wherein resided a bona fide claimant. Congress, recognizing that the claims of "bona fide claimants" may not stand on a parity, sought in the last provision of the statute to favor one class of claimants; for it is provided that:

"In all cases where a beneficiary or beneficiaries are named * * * or where the same has been assigned and written notice thereof shall have been given to the insurance company * * * the bill of interpleader shall be filed in the district where (such) the beneficiary * * * may reside."

Here the claim of the defendant Henderson is based upon an assignment, of which the insurance company had actual notice, which is made to appear by the bill of interpleader, with attached exhibits showing the insurance company a party to such assignment. The claim of the Rt. Rev. Edward P. Allen is based upon the last will and testament of the insured. It can hardly be doubted that the intention of Congress in adding the last proviso to the statute was for the purpose of meeting such a contingency. Its object was doubtless to reward the claimant who had been diligent, the claimant who had acted himself in order to receive the benefits of the insurance company's obligation, as distinguished from the party who presumably had no knowledge of the benefits to be derived from the payment of the insurance policy until advised of the bequest after the policy had become payable. The party to whom the assignment was made, and accepted by the insurance company, received a vested right to the payment of the fund. This right to payment vested under such an assignment prior to death of the insured. Therefore the liability of the insurance company to the assignee was fixed. The payment only was subject to the happening of an event which was certain, though the time thereof, the death of the insured, might be indefinite. In my opinion the venue of plaintiffs' suit is clearly indicated in the proviso found in the last clause of the statute, in the nature of an exception, viz.:

"Provided, that in all cases where a beneficiary or beneficiaries are named in the policy, * * * or where the same has been assigned and written notice thereof shall have been given to the insurance company, * * * the bill of interpleader shall be filed in the district where (such) the beneficiary or beneficiaries may reside."

The record shows that Otto Joseph Dus had assigned the policy to Winifred Henderson, and notice thereof had been given to the insurance company The proviso would seem to recognize the residence of the beneficiary named in the policy or his assignee designated to the company as fixing the district of proper venue for plaintiffs' suit. Interpreting the act as a whole, it is obvious that the word "the" was used by the lawmakers as the equivalent of "such." This meaning is consistent with, and more in harmony with, the apparent purpose of the act.

The plaintiff failed to complete the jurisdiction of this court by not making the required deposit, the sine qua non for power in this court to issue process. The court is without jurisdiction of the subject-matter. The restraining orders will be dissolved, and the bill dismissed.

HOWARD DUSTLESS DUSTER CO. v. CARLETON et al.

(District Court, D. Connecticut. October 6, 1916.)

No. 1342.

1. TRADE-MARKS AND TRADE-NAMES ⟸98—UNFAIR COMPETITION—RECOVERY OF PROFITS—SHOWING OF LOST SALES.
   A showing of lost profits in a trade-mark or unfair competition case is not the foundation of plaintiff's right of recovery, and in an unfair competition case plaintiff was entitled to recover profits though it did not show any lost sales.
2. TRADE-MARKS AND TRADE-NAMES ⟸93(1)—UNLAWFUL COMPETITION—PRESUMPTION.
   There was a prima facie presumption that the sales of all dust cloths by defendants bearing wrapper, packing, etc., infringing on the wrapping and packing of plaintiff's goods, and so constituting unfair competition, were due to the wrapping, packing, etc., and any contrary evidence should have been produced by defendants.
3. TRADE-MARKS AND TRADE-NAMES ⟸98—UNLAWFUL COMPETITION—DISALLOWANCE OF COST ITEMS TO DEFENDANT.
   In a suit for unlawful competition by selling dustless dusters in wrapper, packing, etc., resembling those on plaintiff's, the master properly disallowed all cost items of the defendant which manufactured the infringing goods, such defendant stating in its affidavit that it was unable to state the exact profits on any one branch of goods manufactured, since damages in unfair competition suits include all sales made of the goods sold in the simulated trade-mark or package in violation of the original proprietor's rights, so that the question as to the exact profits of any one branch of the goods manufactured is immaterial, especially where it could not be ascertained with any reasonable certainty how much was due to the trade-mark and how much to the intrinsic value of the commodity.
4. TRADE-MARKS AND TRADE-NAMES ⟸98—UNFAIR COMPETITION—PRIMA FACIE ACCOUNT.
   In a suit for unfair competition by selling dustless dusters packed so as to simulate plaintiff's, defendant's account and affidavit, presented before the master under Court Rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii), showing first, the amount of sales, second, that some profits were made and third, that defendant's treasurer could not more than estimate the amount, made a prima facie account for plaintiff, casting the burden of proof on defendant.

In Equity. Suit by the Howard Dustless Duster Company against L. Clinton Carleton and the Tate Manufacturing Company. On defendants' exceptions to the report of the master. Order directed overruling the exceptions and confirming the report.

See, also, 219 Fed. 913.

Oliver Mitchell, of Boston, Mass., for plaintiff.

Willard B. Luther, of Boston, Mass., for defendants.

THOMAS, District Judge. This case is now before the court on defendants' exceptions to the report of the master, to whom it was referred after the entry of the interlocutory judgment awarding the plaintiff an injunction. The injunction was granted on the theory that although the defendant the Tate Manufacturing Company had the full

right to manufacture and sell its black dust cloth so long as it did not furnish it in a package resembling that of the plaintiff, yet—

"if the Tate Manufacturing Company has made and sold its dust cloths to Carleton, which the latter sold, so that they may or have been actually used by Carleton so as to mislead the public, it became a joint tort-feasor with Carleton and is guilty of contributory infringement of plaintiff's rights, * * * the means of deceiving purchasers giving a right of action."

The defendants thereupon presented before the master their account in the form of debit and credit, following the practice as directed in Equity Rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii), and no examination was had vive voce or upon interrogatories, and no evidence was offered by the plaintiff.

The master thereupon filed his report, finding profits due from the Tate Manufacturing Company in the sum of $434.63, and from Carleton in the sum of $90. The Tate Manufacturing Company has alone excepted to this report, filing two exceptions which raise substantially the following points: First, that the plaintiff, not having shown that it has lost any sales it otherwise would have made but for the acts of this defendant, is entitled to a merely nominal award for damages, and is not entitled to recover any profits whatever; and, second, that the master erred in finding on the uncontroverted affidavit of the Tate Manufacturing Company, the same being incorporated in his report, that its affidavit of cost in connection with the manufacture of dust cloths was too indefinite and uncertain to be allowed as to any of its items, whereas most of these are entirely definite and all are uncontradicted.

[1] 1. The defendant bases its argument upon the erroneous assumption that the showing of lost profits in a trade-mark or unfair competition case is the foundation of the plaintiff's right of recovery. In Benkert v. Feder (C. C.) 34 Fed. 534, Judge Sawyer held that there was no just analogy between the infringement of a patent for a machine and a trade-mark (and trade-mark infringement is but a specific form of unfair competition), and that the owner of a trade-mark is entitled to recover of an infringer, the profits arising from the sale of the spurious goods with the trade-mark impressed upon them, and is not limited to the difference between the price for which the spurious goods would sell with, and the price of the same goods without the trade-mark impressed upon them. In the course of his opinion (34 Fed. at page 535), the learned judge said:

"To adopt as the measure of compensation for such injuries the difference between the price for which the spurious goods would sell without the trade-mark and for which they will sell with it imprinted thereon would be a mockery of justice. In my judgment the infringer should at least account for the entire profits made upon the goods wrongfully sold with the trade-mark impressed thereon. And this is the rule established, after mature consideration, in Graham v. Plate, 40 Cal. 598 [6 Am. Rep. 639], and Sawyer v. Kellogg (C. C.) 9 Fed. 601. There may also be damages beyond the mere profits resulting to the owner of the trade-mark infringed, which he may recover. See, also Cod. Trade-Marks, pars. 237, 246. I do not think there is any just analogy with respect to profits and damages between the infringement of a trade-mark and a patent for an improvement in a machine. A machine may embrace inventions for half a dozen improvements, for each of which there is a patent held by different individuals. One machine might infringe them all. In such case, each would be entitled to recover the profits attributable to his own inven-

tion, and not the profits made upon the machine as an entirety. There is no analogy to such a case on the infringement of a trade-mark. The infringer fraudulently attaching another man's property to his own occasions only a confusion of property with a view of taking advantage of that other's property. The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount. At least that is the fraudulent purpose, and the natural tendency, whether always accomplished or not; and the injured party should have at least the whole profit resulting from the wrongful act, and such I understand and hold the rule to be. The damage may be much more arising from destroying the reputation of the owner's goods."

This opinion was subsequently affirmed by the Circuit Court of Appeals for the Ninth Circuit in 70 Fed. 613.

To the same effect is the decision of the Supreme Judicial Court of Massachusetts in Reading Stove Works v. Howes, 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979, where it is held that a manufacturer of detachable parts of stoves, who wrongfully sells such parts as the product of another manufacturer by making them with the trade-mark and trade-name of such other manufacturer, is liable in a suit in equity to account for the entire profits, if any, which he has derived from the sale of parts bearing the infringing marks. Another case directly in point is W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960, where it is held, as well settled, that the profits recoverable in equity for unfair competition are governed by the same rule as the cases of trade-marks, and that:

"The rule which now prevails in the equity courts, respecting the wrongdoer's accountability for the 'profits and damages' resulting from his unlawful acts, requires the master not only to take an account of all profits made by the defendant, but also to make an inquiry in regard to all damages sustained by the plaintiff on account of the defendant's wrongful acts, and since it cannot be ascertained with any reasonable certainty how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity, the whole will be awarded to the plaintiff. It is equally well settled that the profits recoverable in equity for unfair competition are governed by the same rule as in cases of infringement of trade-marks, and are not limited to such as accrue from sales in which it is shown that the customer is actually deceived, but include all made on the goods sold in the simulated dress or package, and in violation of the rights of the original proprietor. Fairbank Co. v. Windsor [C. C.] 118 Fed. 96; Benkert v. Feder [C. C.] 34 Fed. 534; Williams v. Mitchell, 106 Fed. 168 [45 C. C. A. 265]; Sawyer v. Kellogg [C. C.] 9 Fed. 601; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19 [21 Sup. Ct. 7, 45 L. Ed. 60]; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169 [16 Sup. Ct. 1002, 41 L. Ed. 118]; Graham v. Plate, 40 Cal. 593 [6 Am. Rep. 639]; Avery v. Meikle, 85 Ky. 435 [3 S. W. 609, 7 Am. St. Rep. 604]; McLean v. Fleming, 96 U. S. 437 [(245) 24 L. Ed. 828]."

Other decisions bearing out this proposition are Regis v. Jaynes, 191 Mass. 245, 249, 77 N. E. 774; Lever v. Goodwin, 36 Ch. Div. 1; Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 261, 36 Sup. Ct. 269, 60 L. Ed. 629.

Under this rule it seems clear that there was no error on the part of the master in refusing to rule that the plaintiff, not having shown that it would have sold to any of the parties to whom Carleton sold, is not entitled to recover any profits whatsoever.

[2] Moreover, there was the prima facie presumption that the sales

of all dust cloths bearing the infringing wrapper, packing, etc., were due to the wrapping, packing, etc., and any evidence to the contrary, if such there was, should have been produced by the defendants, for they are the only persons who know the facts, or could make the proof.

[3] 2. In my opinion the master did not err in disallowing all cost items of the Tate Manufacturing Company. In its affidavit it stated that it was unable to state the exact profits on any one branch of goods manufactured, and the master's conclusion was that this statement was "so indefinite and uncertain * * * as to render it utterly impossible to determine with any approach to accuracy any approximation of the profits." As was said by Judge Sawyer in Benkert v. Feder, supra:

"The trade-mark sells the whole article, however inferior or injurious in that particular, and prevents the sale of the owner's goods of equal amount," and "the injured party should have at least the whole profit resulting from the wrongful act."

The vice of the defendant's argument is that it erroneously assumes that the profits recoverable in equity for unfair competition do not include all sales, and are limited to such as accrue from sales in which it is shown that the customer is actually deceived. The authorities cited show that this is not the law, but that the damages do include all sales made of the goods sold in the simulated trade-mark or package, and in violation of the rights of the original proprietor. If that is so, the question as to the exact profits on any one branch of goods manufactured is immaterial. Especially is this the case here, where it cannot be ascertained, with any reasonable certainty, how much of the profit is due to the trade-mark and how much to the intrinsic value of the commodity.

[4] The real fact is that the facts admitted by the defendant in its account and affidavit made a prima facie account for the plaintiff, viz.: (a) The amount of sales; (b) that some profits were made; and (c) the defendant's treasurer was unable, from the books or otherwise, to more than estimate the amount of profits, and the defendant has not discharged itself of the burden of proof cast upon it.

Let an order be entered overruling the exceptions and confirming the report of the master.

In re D. & E. DRESS CO., Inc.

(District Court, S. D. New York. June 26, 1916.)

BANKRUPTCY ⊂⊃20(1)—GENERAL ASSIGNMENT FOLLOWED BY PETITION—EXCLUSIVE JURISDICTION OF DISTRICT COURT.

Where a general assignment for the benefit of creditors is followed by an involuntary petition in bankruptcy against the assignor, the federal District Court in bankruptcy obtains exclusive jurisdiction, and has power to remove the assignee, irrespective of his good faith and standing, and to appoint a receiver, if such course will be a better assurance of a satisfactory administration.

In Bankruptcy. In the matter of the D. & E. Dress Company, Incorporated, alleged bankrupt. On motion to remove an assignee for the benefit of creditors and to appoint a receiver in the bankruptcy proceeding. Motion granted.

James N. Rosenberg and Maurice Shaine, both of New York City, for the motion.

Louis H. Strouse and Rudolph Marks, both of New York City, opposed.

MAYER, District Judge. This is a motion to remove an assignee for the benefit of creditors and appoint a receiver in the bankruptcy proceeding. The assignee is a reputable member of the bar and experienced in the practice of the bankruptcy law, and there is not the slightest suggestion in the moving papers that the assignee is other than an upright and capable practitioner. The motion is brought essentially to invoke a decision from this court, in view of the constantly increasing practice of making general assignments for the benefit of creditors. This practice is condemned by many reputable merchants, and I annex to this opinion communications from the Merchants' Association and the Merchants' Protective Association, and I am satisfied that other well-recognized trade associations entertain, from the practical standpoint, the same views as are expressed in these two communications.

It is desirable not to temporize with a situation of this kind, and therefore I am glad that this case presents a state of facts, where the court is called upon to place its decision upon broad grounds. There are some incidental questions, which are not waived; but these I need not consider, in view of the ground upon which my decision will rest.

On June 19, 1916, the assignee was requested by the attorney for the bankrupt to serve as assignee for the benefit of creditors under a general assignment. At that time the assignee had met the attorney for the bankrupt for the first time, and this request came from the attorney for the bankrupt presumably largely because of the experience of the assignee in matters relating to general assignments in bankruptcy. The assignee having consented, the general assignment was made to him. Thereafter a petition in involuntary bankruptcy was filed. This petition was not a so-called friendly petition, but was a hostile petition, filed at the instance of creditors who presumably preferred to see this administration conducted under the federal stat-

ute rather than the state statute. The motion for the appointment of a receiver was made by an independent creditor, in the sense of a creditor not one of the three petitioning creditors.

We have thus a case where no suspicion can arise because of previous relations between the parties, where the assignee was not in any manner theretofore connected either with the assignor or his attorney, and where there has not been any doubtful act relating to the making of the general assignment, but where creditors desire that the administration from start to finish shall be conducted in accordance with the practice and rules of this court and under the supervision incident thereto.

Judge Augustus N. Hand, in Matter of Federal Mail & Express Co. (D. C.) 233 Fed. 691 (which will probably be filed contemporaneously herewith), has carefully analyzed and considered the Oakland Lumber Company Case, 174 Fed. 634, 98 C. C. A. 388, which, in the opinion of many members of the bar, has stood in the way of this court acting to remove assignees. I agree with Judge Augustus N. Hand that, if a general assignment is followed by a petition in bankruptcy, this court obtains exclusive jurisdiction.

I am satisfied that, in view of the Gutwillig Case (D. C.) 90 Fed. 475, and 92 Fed. 337, 34 C. C. A. 377, and the expression in In re Watts & Sachs, Petitioner, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, and the purpose, intent, and structure of the Bankruptcy Act, this court has power to remove an assignee under a general assignment, entirely irrespective of the personnel of the assignee, and has power to appoint a receiver, if, in its opinion, such course will be a better assurance of a satisfactory administration.

In addition to what is set forth in Judge A. N. Hand's opinion, there are many practical reasons which are entitled to strong consideration. In this jurisdiction the prompt and efficient action of a receiver often results, not merely in affirmative benefit to the estate, but in preventing fraudulent and criminal acts, such as the removal or concealment of assets. In my own experience I recall a number of such instances. Where an assignee is selected by the assignor, it is but natural that the creditors should not have the same confidence in the administration of the estate as they would have if the administrator were either an independent appointee of the court, or some one appointed as the result of a practically unanimous recommendation of reliable creditors.

In the case at bar it is asserted that the alleged bankrupt made a written statement in July, 1915, to a commercial agency, in which it claimed to have total assets of $30,400, to owe only $12,900, and to have a net worth of $17,594. The present condition of the bankrupt's assets is such that within one year its entire surplus has been wiped out, and thus the case is one which, according to the face of the allegations, requires serious inquiry.

An exceedingly annoying practice has developed by which, after the making of the general assignment, this court is nevertheless appealed to, either by the assignee or by creditors, to assist in the speedy administration of the estate, which often is both necessary and important in connection with summary proceedings by landlords, sales of perishable or seasonal stocks, and the like.

By virtue of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544), and the rules and practice of this court, a complete machinery has been erected. There are several standing referees, whose familiarity with the subject-matter enables them to pass promptly upon questions referred to them as special masters; the office of the clerk is peculiarly equipped to deal with all matters coming before it in connection with the Bankruptcy Act; various charges and fees, when not regulated by statute, are regulated by court rules; certain limitations are placed upon attorney's fees, either by rule or by practice; a definite scale of charges is provided in respect of the official auctioneer; a special day is set for motions in bankruptcy, and one member of the court is assigned to matters coming up in bankruptcy, and is available at any time for that purpose.

With a limited number of judges, all of whom are familiar with the subject-matter, and especially with the administrative side of the Bankruptcy Act, it is possible to obtain quick action when necessary, and to have prompt hearings, on a notice so short as an hour or less, if deemed desirable. Sales cannot be made without appraisal, and the amount realized must be at least 75 per cent. of the appraised value. Attorneys may only act for receivers upon satisfying the court that they have no interest inconsistent with such service. Certain other rules, such as advertisement before sale in two standing designated papers, are intended to safeguard a proper administration.

Under the state law (Consol. Laws N. Y., c. 12) there is no express provision requiring appraisals, the fees of assignees under the statute are not to exceed 5 per cent. of the whole amount which will come into the hands of the assignee, with a minimum fee of $200 and up to 10 per cent. allowed, in the court's discretion, where the business is continued, as contrasted with the lesser fees provided for by the Bankruptcy Act. The compensation of state court referees rests in the discretion of the court, and there are no standing referees. I am told, also, that surety bonds charge heavier premiums on assignee's bonds, due probably to the fact that, where an administrator is not selected by the court, the moral hazard is greater. The procedure on sales in the state courts takes much longer and is more complicated than that in the federal courts, and the result is that applications are frequently made to the federal courts for leave to sell on the ground that longer delay will be prejudicial to the interests of the estate.

There are many practical points which must be considered in connection with the administration of bankrupt estates. The problem is naturally not so great in smaller communities. Here, however, the cost of heavy rentals, insurance, when it can be obtained, proper protection, either in the way of burglary insurance or custodians, all combine to render an expeditious administration vital to the welfare of creditors.

Much more could be said, but enough has been pointed out to show that, where the estate is ultimately to be administered in bankruptcy (and such is the case in nearly every instance), it is desirable that the administration should be in the bankruptcy court from the outset, and that the general assignment practice, which in some instances, at least,

is merely a device, should be discouraged in so far as this court has jurisdiction.

I do not wish for a moment that any one should construe what has been here said as doubting the ability and desire of the state courts to administer insolvent estates to the best possible advantage; but the state courts labor under the disadvantage of a statute which is not nearly as effective as the Bankruptcy Act, and probably labor also under certain practical disadvantages.

Any one familiar with the long and varied motion calendars at Special Term, and the assignment of judges to different parts of the court, must realize that the state court judges have not the opportunity for that continuous attention which is possible in a court composed of only four judges, who, among other things, by reason of their small number, are able to consult frequently and to adopt a practically uniform practice, not only in respect of larger questions, but also in regard to smaller detail.

In order not to disturb existing conditions, this decision will be regarded as not retroactive, in affecting cases where general assignments were made prior to the date of that in the case at bar. I may also add that there may, of course, be cases where the selection of an assignee at a meeting of reliable creditors may be had under circumstances practically equivalent to the election of a trustee; but, reserving the discretion which may be necessary for exercise in any given case, I announce the general policy of removing assignees and appointing receivers in their stead, quite irrespective of the good faith and standing of the assignee. This I think is the only means whereby the Bankruptcy Act can be carried out in accordance with its intent and spirit. In order to make perfectly plain that the course pursued in this case is in no manner a reflection on the assignee, I have appointed his partner as the receiver; but this, of course, will not be a precedent.

The motion is granted.

In re NEWBOLD. In re HORSLEY. In re WOMAN'S SHOP.

(District Court, D. Utah. July 7, 1917.)

Nos. 4550, 4682, 4698.

1. CLERKS OF COURTS ⟸54—DISTRIBUTION—COMMISSION TO CLERK OF COURT.
The clerk of the District Court is not entitled to any commission, where, under order of court, he distributes the consideration deposited on a composition in bankruptcy.

2. BANKRUPTCY ⟸385—DISTRIBUTION OF COMPOSITIONS—POWER OF COURT.
The clerk of the District Court is not charged with the distribution of the consideration in cases of compositions, except under a special order of the court, as Bankr. Act July 1, 1898, c. 541, § 12, subsec. "b," 30 Stat. 549 (Comp. St. 1916, § 9596), providing for the confirmation of compositions, and subsection "e," providing that on confirmation the consideration shall be distributed as the judge shall direct, and General Order No. 29 (87 Fed. xii, 32 C. C. A. xii), put such consideration in the control and direction of the court, and the referee in bankruptcy, entitled,

under the statute, to one-half of 1 per cent. commission upon the amount distributed, should hold the consideration in a composition case pending the confirmation, and should be designated to make the distribution and a report thereon.

In Bankruptcy. In the matter of the distribution of the consideration upon a confirmation of compositions in bankruptcy in the cases of Joseph N. Newbold, D. H. Horsley, and the Woman's Shop, involuntary bankrupts. Demand of clerk of District Court for 1 per cent. commission on the amounts deposited on compositions, and for receiving, keeping, and paying out the same, denied.

Booth, Lee, Badger & Rich, D. A. Skeen, Gillette, Gustin, Brayton & Cluff, Thomas O. Sheckell, and H. S. Daynes, all of Salt Lake City, Utah, for claimant.

JOHNSON, District Judge. The question has been raised in a number of cases in bankruptcy whether or not the clerk of the court is entitled to charge 1 per cent., or any amount, for the distribution of the consideration paid in compositions effected in bankruptcy proceedings, or whether it is necessary that such distribution be made by the clerk of the court. I have reached the following conclusions respecting the above questions:

[1] First. That the clerk is not entitled to charge a 1 per cent. commission, or make any charge whatever in such matters, when he acts as distributing agent under the direction of the court. I reach this conclusion upon the consideration that the bankruptcy statute nowhere provides for such a charge by the clerk, while it does provide for a specific charge or allowance, under certain conditions, to be made to a trustee in bankruptcy, and in all cases to the referee.

[2] Second. I do not find that the clerk is charged with the duty of making the distribution of the consideration in cases of compositions, and I am of the opinion that the law does not contemplate that such distribution shall be made by him, except under a special order of the court made in any particular case. Section 12, respecting compositions, subsection "b," provides:

"An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge."

Under the paragraph above quoted the bankrupt is required to deposit the agreed consideration "in such place as shall be designated by and subject to the order of the judge." Congress evidently intended that, before an application for the confirmation of a composition should be filed in the court, the bankrupt must place the consideration to be paid by him to his creditors subject to the order of the judge of the court and in such place as the court should designate. There is nothing in this section which indicates that the court is limited to the designation of any particular place, as, for instance, a United States de-

positary, or to the clerk; the purpose evidently being to make the consideration available for the benefit of the creditors in case a confirmation of the composition by the court is made.

Subsection "e" provides:

"Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed."

Considering the two subsections above quoted together, it appears that it was the intention of Congress that the consideration to be paid by the bankrupt to his creditors should, from the time of the filing of his application for confirmation, be subject to and under the control of the judge of the court, and by the court held for the creditors at such place (or by such person) as the judge should designate, and that, on the confirmation by the court, the consideration so held subject to the order of the judge should be distributed in such manner and by such person as the judge shall direct. It is apparent that there is no limitation placed upon the court, or the judge, as to the person by whom the consideration shall be distributed. The consideration may be, and oftentimes is, in property other than money, and the distribution of such property would consist of its manual delivery to the various creditors entitled thereto, and there is no occasion, I apprehend, for making any distinction with respect to the distribution of property other than money and money itself when it constitutes the consideration to be received by the creditors.

General Order No. 29 (89 Fed. xii, 32 C. C. A. xii) has no application to, and was not intended to apply to, the consideration paid upon a composition, inasmuch as the court is not limited to a depositary designating a place where the consideration shall be deposited by the bankrupt for the benefit of his creditors before the filing of his application for confirmation of composition; nor do I think rule No. 63, which provides that the distribution of the deposit shall be made by the clerk of the court, etc., is or was intended to be other than suggestive. I am of the opinion that the judge of the court is at liberty to designate any suitable place or person to hold the consideration pending confirmation, and is at liberty to designate any suitable person to make the distribution after confirmation.

As a matter of practice I think the referee in bankruptcy who has the matter in charge, and who, under the statute, is entitled to one-half of 1 per cent. commission upon the amount distributed, is the person who should hold the consideration pending the confirmation, and should be designated afterwards to make the distribution. When the whole fund, or other property, has been fully distributed, and any remaining funds or property returned to the bankrupt, if such is the case, the referee should make a full report, and return the same, with vouchers attached, to be filed with the original papers, as is the rule in regular bankruptcy proceedings.

The proceedings now pending in this court involving the matters above discussed will be disposed of in the manner as above suggested.

EUBANKS v. SOUTHERN RY. CO.

(District Court, S. D. Florida. August 29, 1917.)

1. CARRIERS ⇐234—CONTRACTS—VALIDITY—LAW GOVERNING.
The validity of a contract made in Florida by plaintiff, a Pullman Company employé, exempting any railroad company over whose line the car on which he was employed might run from liability on account of any personal injury to him, when brought in question in an action in a federal court in Florida, is to be determined by the law of that state, although the injury sued for was sustained in another state.

2. CARRIERS ⇐307(5)—INJURY TO PULLMAN PORTER—CONTRACT EXEMPTION—VALIDITY.
Gen. St. Fla. § 3148, providing that a railroad company shall be liable for any damage done to persons by the running of its trains, or by its employés, unless absence of negligence is shown, does not declare a public policy of the state, which renders void a provision in the contract of employment of a Pullman porter, exempting any railroad company over whose lines the car on which he is employed may run from liability on account of any injury to him, and in the absence of statute, or a decision of the Supreme Court of the state, establishing such a public policy, such a contract is valid.

At Law. Action by E. F. Eubanks against the Southern Railway Company. On demurrer to third amended plea. Demurrer overruled.

Miller & Fowler, of Jacksonville, Fla., for plaintiff.

John C. Cooper & Son and Martin H. Long, all of Jacksonville, Fla., for defendant.

CALL, District Judge. This cause comes on to be heard upon the demurrer to the third amended plea. On February 10th, last, a demurrer to the third plea was sustained (by mistake called "second"). By the memorandum then filed I reached the conclusion that the contract set up was void, being against the public policy of this state. By the filing of the amended plea, and demurrer thereto, that question is again investigated.

Robinson v. B. & O. R. R. Co., 237 U. S. 84, on page 91, 35 Sup. Ct. 491, on page 492, 59 L. Ed. 849, is relied upon by the defendant to sustain its contention that the contract set up is a bar to plaintiff's recovery. Justice Hughes uses this language:

"It is also clear that unless condemned by statute, the contract [meaning the very contract here set out in the plea] was a valid one and a bar to recovery."

This case holds the plaintiff therein was neither a passenger nor an employé of the railroad company, and was followed by the Circuit Court of Appeals of the Seventh Circuit, in 1915, in Lindsay v. C. B. & Q. R. R. Co., 226 Fed. 23, 141 C. C. A. 131.

[1] The point is made in defendant's brief that the question of the validity of the contract shall be tested by the law of Georgia, the place of the happening of the accident, rather than by the law of Florida, the place the suit was brought. The decisions of the Courts of Appeals are not uniform on this subject, but I feel that the decision of the Circuit Court of Appeals for the Fifth Circuit, in Mexican Nat. R. R.

Co. v. Jackson, in 118 Fed. 549, 55 C. C. A. 315, is to be followed by me in the decision of this case. The contract in question is a Florida contract, and the suit is brought in this court, sitting in Florida.

The plaintiff contends that the contract is void, because it violates the public policy of the state as exemplified by the statute law, and cites many cases from other states to sustain such contention. This question has never been directly adjudicated by the Supreme Court of Florida, under section 3148 of the General Statutes. That section provides that a railroad company shall be liable for any damage done to persons by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employ of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company.

Sections 3148 and 3150 provide for the apportionment of damages and liability for injury to employés. The presumption spoken of in section 3148 refers to negligence. Section 3150, as to employés, has a provision that no contract to limit the liability therein provided for shall be valid; but this provision has no reference to the liability declared in section 3148. Nor do I think can it be appealed to to determine the policy of the state in regard to such contracts. The Supreme Court of Florida, in A. C. L. R. R. Co. v. Beazley, 54 Fla. 311, 45 South. 761, says:

"A contract is not void, as against public policy, unless it is injurious to the interests of the public or contravenes some established interest of society. It is the province of a court to expound the law only, not to speculate upon what is the best, in its opinion, for the advantage of the community; hence the public policy of a state or nation should be determined by its Constitution, laws, and judicial decisions. * * * Judicial tribunals should hold themselves bound to the observance of rules of extreme caution when called upon to declare a transaction void on the grounds of public policy, and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing the transaction void on this account."

This quotation is from the fourteenth headnote. 54 Fla. on page 314, 45 South. 761. These headnotes are prepared by the justice rendering the opinion, and are therefore authority. In this case, which was that of employé brought under section 3150, the court held (headnote 15) a benefit contract, by which the receipt of certain benefits should relieve the railroad of responsibility for an injury, was not void as against public policy—and that, where the section under which the suit was brought contained the provision that no contract which restricts the liability shall be legal or binding.

[2] In the absence of any decision of the Supreme Court of Florida, on the public policy of the state, as indicated by the adoption of section 3148, General Statutes, I am to arrive at that public policy by a consideration of that section, and the principle that all parties who are sui juris are free to make whatever contracts they please, so long as no fraud or deception is practiced, and the subject-matter legal and not immoral. With these rules as guides, what is the effect of section 3148? It is, as I understand the decisions of the Supreme Court of Florida construing the section, a declaration of the common-law lia-

bility, with the addition that the presumption of negligence is cast upon the defendant, and it must meet and overcome this presumption by showing that its agents and servants exercised all ordinary and reasonable care and diligence.

There is no inhibition here on the right to contract as to liability for injury. Nor does the plaintiff occupy the relation of passenger to the defendant. as before seen. I can find no law of Florida which evidences the policy of the state to make such contracts void, and under the decision in Robinson v. B. & O. R. R. Co., supra, such a contract is valid, unless forbidden.

I am of opinion, therefore, that the amended third plea states a good defense to the action.

COMMUNITY CHAUTAUQUAS, Inc., v. CAVERLY et al.

(District Court, D. Vermont. July 28, 1917.)

1. HEALTH ⟸11—REGULATIONS BY BOARDS OF HEALTH—REVIEW BY COURTS.
   Regulations made by a state board of health under legislative authority may be reviewed by the courts only upon the question of their reasonableness, and if a responsible, honest, and presumably reasonable body of professional opinion is found on the side of the regulation, it must be upheld.

2. CONSTITUTIONAL LAW ⟸117—HEALTH ⟸21—OBLIGATION OF CONTRACTS —POLICE POWERS OF STATES.
   A regulation promulgated by a state board of health, composed of physicians from different localities in the state, prohibiting "fairs, Chautauquas, street carnivals or circuses" until further notice, when based on the professional opinion of the members of the board that such gatherings are likely to cause the spread of infantile paralysis, is a reasonable regulation within the police powers of the state, and not invalid as in violation of the constitutional provision against impairment of the obligation of contracts, although its effect may be to prevent the performance of contracts.

3. CONSTITUTIONAL LAW ⟸63(2)—LEGISLATIVE POWERS—DELEGATION TO LOCAL AUTHORITIES.
   Laws 1917, Vt., c. 194, authorizing local health officers to "forbid and prevent the assembling of people in any place where the state board of health deems that the public health and safety so demand," *held* not unconstitutional as a delegation of lawmaking powers.

In Equity. Suit by the Community Chautauquas, Incorporated, against Charles S. Caverly and others. On motion for preliminary injunction. Denied.

Motion to continue restraining order and for preliminary injunction. Action to restrain the enforcement of an order of the board of health of the state of Vermont, order dated July 17, 1917, and directing that "no fairs, Chautauquas, street carnivals or circuses be held in the state of Vermont until further notice."

Plaintiff owns and gives that form of entertainment known as a Chautauqua, and has made a large number of contracts to give such entertainments in the state of Vermont during the present summer season. This order of the board of health prevents all persons from attending these performances and so in effect prevents the performances themselves. It has been assumed by the parties that the order in question not only does this, but terminates the contracts themselves, or so abrogates them as to inflict upon plaintiff a

total loss of the amounts expended in preparing to give said entertainments in pursuance of said contracts. It was admitted that the reason for the order of the board of health was, and is, as set forth in the order itself, to wit, a belief that "large general gatherings of people * * * have distributed" the infection of infantile paralysis. It was not alleged in the bill, nor urged in argument, that the defendants (who are all the health officers in the state in regions in which it was intended to hold chautauquas) were actuated by any malice or intended, wantonly or otherwise, to injure plaintiff, but solely by their own opinion of what is desirable from a sanitary and prophylactic standpoint.

Dunnett & Shields, of St. Johnsbury, Vt., for plaintiff.
Herbert G. Barber, Atty. Gen., for defendants.

HOUGH, Circuit Judge (after stating the facts as above). The sole ground of jurisdiction set up in this bill is diversity of citizenship, and the prayer of the bill is that defendants "be restrained from making or enforcing any order designed to prevent the performance of the contracts" of plaintiff to give chautauquas in Vermont. The reason of the bill and this prayer is that the order in question "unjustly discriminates against the plaintiff and against the entertainments to be given by the plaintiff." It appears from argument, however, that the discrimination complained of is not thought to rest upon any personal prejudice against plaintiff or its entertainments, but upon the proposition outlined in the bill, asserted in affidavits, and presented in argument, that public gatherings induced by an intellectual entertainment such as a chautauqua do not tend to spread infection, and that such is the opinion of some doctors.

[1] Thus the question primarily presented to this court is whether the professional opinion of a board of doctors, honestly exercised, shall be overturned by the chancellor on the ground that it is "unreasonable." It is said that State v. Speyer, 67 Vt. 502, 32 Atl. 476, 29 L. R. A. 573, 48 Am. St. Rep. 832, upholds this view. Undoubtedly there are cases (and the case cited is one of them) wherein police regulations cannot be held justifiable "unless there are reasonable grounds for a belief that the necessary protection of the public health" requires their passage. This is a simple doctrine, and means no more than that it is the duty of the court to examine into the facts of every case, and if a responsible, honest, and presumably reasonable body of professional opinion is found on the side of the regulation, it is the duty of the court to uphold it, even though the chancellor should entertain the view of professional dissidents.

The point is not whether the court agrees with the professional conclusion of a body of doctors, or engineers, or clergymen, but whether it is evident that the professional view is a reasonable view for men of the proper profession to entertain. They may be wrong, but is there any reasonable probability of their being right? If that question is answered in the affirmative, the professional regulation cannot be said to be unreasonable, as a matter of law. This is the view taken in State v. Morse, 84 Vt. 387, 80 Atl. 189, 34 L. R. A. (N. S.) 190, Ann. Cas. 1913B, 218, and the whole matter is covered by the remarks of Holmes, J., quoted, at page 397, from Laurel Hill Cemetery v. San Francisco, 216 U. S. 358, 30 Sup. Ct. 301, 54 L. Ed. 515.

I am therefore not called upon to come to any conclusion as to whether the propagation of poliomyelitis is actually assisted by crowds, but I am persuaded: (1) That a very responsible body of professional opinion is that way; (2) that the Vermont board of health shares that view; (3) that it has just as much right to entertain that view as I have to entertain an opinion upon a point of law; and (4) that such a point of view cannot be held to be unreasonable.

[2] Although the bill does not in terms rest upon any constitutional point, such point is necessarily presented. Thus the bill prays to have certain contracts preserved—preserved from what? From an exercise of the police power of the state in accordance with a responsible body of professional opinion. An act of the Legislature thus impairing a contract is not unconstitutional. Manigault v. Ward (C. C.) 123 Fed. 707, affirmed 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274. That the prevention of disease, or its spread, by any means based on responsible medical opinion is a competent and constitutional exercise of police power is a proposition so plain as scarcely to require citation. The Legislature might have said that there should be no gatherings at all except by license (Davis v. Commonwealth, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 71), and discrimination or classification is frequently based, not on medical opinion, but merely on matters of taste. Of this perhaps the best illustrations are the "Ice Cream Cases," of which Hutchinson Ice Cream Co. v. Iowa, 242 U. S. 153, 37 Sup. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643, is the latest so far as I know. That the board of health acted within its statutory authority is, I think, plain from chapter 194, Vermont Laws of 1917, which explicitly authorizes local health officers (such as most of the defendants herein) to "forbid and prevent the assembling of people in any place, when the state board of health deems that the public health and safety so demand."

[3] This is not a delegation of lawmaking authority, for the Assembly laid down the law, but intrusted its application to medical men who would presumably be better informed as to local conditions. If this matter be regarded as one of local law, only cognizable in the United States courts because of diversity of citizenship, I think the matter fairly within the ruling in State v. Morse, supra; if (looking beyond the form of pleading) other questions be considered, no constitutional rights of plaintiff have been invaded. Therefore the application cannot be granted, a result the more willingly reached because the papers presented (especially the results of poliomyelitis observations in Vermont for some years past) conclusively show to me that the moves of this mysterious disease are so little understood that any honest medical efforts to effect its extermination should meet with assistance rather than hostility.

The restraining order is dissolved, and preliminary injunction denied.

A motion to amend the bill was made at the hearing, and no objection made thereto. If the form of the amendment is transmitted to me through the clerk of court, it will be formally allowed so far as can now be seen.

In re JULES BOUY & CO., Inc.

(District Court, S. D. New York. February, 1917.)

1. BANKRUPTCY ⊂=326—SET-OFF—CLAIM OF ACCOMMODATION INDORSER OF BANKRUPT'S NOTE.
   The trustee in bankruptcy, having paid the note of the bankrupt, cannot set off the amount thereof against the claim of an accommodation maker or indorser of the note.
2. SUBROGATION ⊂=2—APPLICABILITY—ACCOMMODATION INDORSER.
   The doctrine of subrogation cannot be invoked to render the accommodation maker or indorser of a note liable to the person who was primarily obligated.

In Bankruptcy. In the matter of Jules Bouy & Co., Incorporated, bankrupt. Review of an order of the referee denying a set-off. Referee's report confirmed.

Leo Oppenheimer, of New York City, for trustee.
Charles E. Le Barbier, of New York City, for Charles S. Allen.

AUGUSTUS N. HAND, District Judge. Charles E. Allen had a claim of $9,952.71 against the bankrupt, which he assigned to his wife more than four months prior to the filing of the petition in bankruptcy. He was indorser or maker of certain notes, aggregating $8,500, which were issued in the course of business transactions of Jules Bouy et Cie., a partnership, the assets and liabilities of which the bankrupt corporation took over. The trustee in bankruptcy was obliged to pay these notes to the holders, and now wishes to offset them against the above claim of $9,952.71.

[1] The referee held that this could not be done, and I think he was right. As between the bankrupt and Allen, he was an accommodation maker or indorser; Jules Bouy et Cie., the old partnership, being the party primarily liable. While Allen would be liable to the holder of the notes, he was not liable as between himself and that firm, or as between himself and the bankrupt corporation, who succeeded to their liabilities.

[2] The doctrine of subrogation is invoked, and it is urged that the trustee is subrogated to the rights of the holders of the note. The rule of subrogation, however, cannot properly be invoked to render the accommodation maker or indorser liable to the person who was primarily obliged as between these parties to meet the obligation.

The right of offset, therefore, does not exist, and the referee's report should be confirmed.

HART et al. v. ADAIR et al.

W. C. HARDING LAND CO. v. HART et al.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917.)

No. 2686.

1. PRINCIPAL AND AGENT ⟸8—CREATION OF AGENCY—CONSTRUCTION OF CONTRACT.
The owners of a tract of land made a contract with a land company by which the latter agreed to subdivide, improve, and sell the land at its own expense, at not less than a fixed minimum price per acre, for which it was to receive a share of the proceeds. Sales were to be made by the company in its own name, and the owners were not to be responsible for its contracts to make improvements, nor were they to receive any benefit from the enhanced price obtained by reason of such contracts. *Held*, that such contract did not make the company the agent of the owners for the sale of the land, nor render them liable for fraudulent misrepresentations made by the company to purchasers.

2. CANCELLATION OF INSTRUMENTS ⟸43—SUIT FOR RESCISSION—DEFENSES—PLEADING.
In a suit for rescission of a contract for fraud, ratification, if relied on as a defense, must be pleaded.

3. APPEAL AND ERROR ⟸173(1)—REVIEW—ERRORS NOT ASSIGNED.
Under rule 11 of the Circuit Court of Appeals (208 Fed. vii, 124 C. C. A. vii), that court is not required to consider a defense which was not pleaded, nor brought to the attention of the trial court, nor made the subject of any assignment of error, and it will not do so unless the error is plain and a failure to notice it will result in a miscarriage of justice.

4. CANCELLATION OF INSTRUMENTS ⟸17—RIGHT OF ACTION—RATIFICATION.
Ratification, to bar a suit for rescission of a contract for fraud, must have been after the party had knowledge of the facts which entitled him to rescind.

5. CANCELLATION OF INSTRUMENTS ⟸17—RIGHT OF ACTION—RATIFICATION.
The mere assignment by the purchaser of a contract for the sale and purchase of land is not a ratification of the contract which precludes a suit for rescission for fraud in its inception, but vests such right of action in the assignee.

6. COURTS ⟸372(1)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
A federal court is not bound by a decision of the highest court of a state upon a question of general law, which was not rendered until after the commencement of the suit in which it is invoked.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in equity by Mrs. Glenn D. Hart and Glenn D. Hart against the W. C. Harding Land Company, Walter Adair, J. T. Epperly, James P. Burns, F. S. Green, and L. B. Wallace. Decree for complainants against the corporation defendant, from which it appeals, and for the individual defendants, from which complainants appeal. Affirmed.

Glenn D. Hart and his wife brought a suit against the Harding Land Company, a corporation, and the individual defendants, Adair and others, for the rescission of three contracts for the sale and conveyance of three 10-acre tracts within a larger tract of land, and for the recovery of the installments of purchase money paid under the contracts. The individual defendants had

purchased the larger tract, consisting of 461 acres, had made a cash payment thereon, and had given a mortgage to secure deferred payments. They entered into a contract with the Harding Land Company for the subdivision and sale of the land. The contract provided that the minimum price per acre to be charged to purchasers should be $200; that the first "$13,061 of sale contracts" should be placed in escrow for the original owners of the land; that the next "$10,000 of contracts" should become the property of the individual defendants; and that the balance realized should be equally divided between those defendants and the Land Company. The Land Company was to bear all expenses of the sales, and to receive a commission of 17½ per cent., to be deducted from the first cash received. The Harding Company proposed to plant orchards on the land, and the individual defendants stipulated that they should not be held responsible in any way for the Land Company's contracts for planting and care of trees, and they were to receive no benefit from the added price to be put on the land through such planting and care. The tracts were to be sold under the name of the Land Company, but the deeds were to be given by the individual defendants.

The tract was subdivided by the Land Company, and in the year 1910 lots Nos. 19 and 18 were sold to Hart and his wife respectively. Lot 17 was sold to Ella Peterson. These sales were made under an agreement on the part of the Land Company to plant the land with certain kinds of trees, and to cultivate the same for a period of 3 years. The plaintiffs alleged that they and Ella Peterson were induced to purchase the lands by certain fraudulent representations on the part of the Land Company, the representations being set forth in detail, and they alleged that Ella Peterson had transferred to the plaintiff Mrs. Hart all of her rights under her contract of purchase. The court below found that the evidence sustained the allegations of the complaint as to the fraudulent representations, and entered a decree of rescission on behalf of the plaintiffs, and adjudged that they recover from the Land Company the money advanced by them on account of their contracts of purchase; that the contract of Ella Peterson be rescinded, and that the money paid by her be recovered by Mrs. Hart; but adjudged that the individual defendants did not participate in the fraud, and are not answerable for the moneys so paid to the Land Company. From that portion of the decree discharging the individual defendants from liability, the plaintiffs have appealed. From the portion decreeing the rescission of the contracts and the return of the purchase money to the plaintiffs, the Land Company has appealed. Both appeals are presented in one record.

E. A. Lundburg, of Portland, Or., for appellants Hart.

O. P. Coshow, of Roseburg, Or., for appellant W. C. Harding Land Co.

B. L. Eddy, of Roseburg, Or., for appellees Adair and others.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] We find no error in that portion of the decree which discharges the individual defendants from liability for the moneys due the plaintiffs from the Land Company. It is contended that they are liable on the ground that the Land Company was their agent. We think that the Land Company was not the agent of the owners in dealing with purchasers of the land. The owners were not parties to any contract which the Land Company made with the purchasers. They stipulated that every contract made by the Land Company for sale of any of the land should be made in its own name. The Land Company was to survey, plat, and plant the land, and sell it at its own expense. The owners were not to be responsible for any of the expense of planting

or cultivating fruit trees. This is not a case of a broker negotiating sales as the agent of the owner. The Land Company was acting and selling in its own name. It had a contract which enabled it to deal with the property as its own. It is true that restrictions were placed on its power to sell, but this was only for the protection of the owners. It had no power to bind the owners by any representations of the quality of the land, or by promises of future improvement thereof. "An agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representations as to the quantity or quality of the land." National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331; Samson v. Beale, 27 Wash. 557, 68 Pac. 180; Mayo v. Wahlgreen, 9 Colo. App. 506, 50 Pac. 40; Tucker v. Gibson, 80 Kan. 90, 101 Pac. 633; Kern v. Feller, 70 Or. 140, 140 Pac. 735.

Nor can we sustain the Land Company's contention that the evidence does not support the finding of the court below that the plaintiffs and their assignor were induced to enter into the contracts of purchase by means of false and fraudulent representations. The Land Company made these contracts with the plaintiffs and their assignor by agents in Dakota and Colorado. The agents represented to them that the land was worth $350 an acre; that it was choice orchard land; that it had been examined by an expert orchardist; that the soil was a sandy loam, and easily cultivated; that it was well drained and needed no irrigation; and they exhibited to them literature containing glowing representations of the profits to be realized on raising fruit on the lands, and assured them that is was unnecessary for them to come to Oregon to see the land; that they could rely upon the statements of the agents and the representations of the company, and that the expense of a trip to Oregon would be useless. There was evidence that the plaintiffs and their assignor, relying on these statements, entered into the contracts and made payments thereon. There is abundance of evidence that these representations were false and fraudulent, and, although the evidence is conflicting, the case is clearly one for the application of the rule that the finding of the court of first instance, who saw and heard the witnesses, will not be disturbed on appeal.

The Land Company contends that the plaintiffs should have been denied relief in equity for the reason that they and their assignor ratified the contracts of purchase; citing Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, in which it was held 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, and that, if he be silent and continues to treat the property as his own, he will be held to have waived the objection.

[2] To this it is to be said, first, that in order to avail itself of the defense of ratification it was necessary for the Land Company to plead it. 9 C. J. 1246, § 181; Northern Pac. R. Co. v. Kindred (C. C.) 14 Fed. 77. In its answer it pleaded no such defense, and even if it should be held that the evidence, which was admitted without objection tending to show ratification, might be sufficient to have authorized the court below to pass upon that question, it still does not appear that

the question was ever brought to the court's attention. Nor is it now suggested by any of the Land Company's assignments of error.

[3] The purpose of our rule 11 (208 Fed. vii, 124 C. C. A. vii) is to permit us to notice palpable error not assigned, where the failure to consider it would result in injustice. Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 89 C. C. A. 103; United States v. Bernays, 158 Fed. 792, 86 C. C. A. 52; Baltimore & O. R. Co. v. McCune, 174 Fed. 991, 98 C. C. A. 561; and P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 83 C. C. A. 157, a case in which the court said: The object of the rule "is to prevent the miscarriage of justice from oversight." It will hardly be contended that the alleged error is plain, or that our failure to take notice of it will result in a miscarriage of justice.

But, notwithstanding the absence of an assignment, we have examined the record, and we find it insufficient to show ratification. It is the Land Company's contention that in July, 1912, two years after they entered into the contracts, Hart and his wife acquired knowledge of the condition of the land, and that thereafter Hart's conduct was such as to show that he recognized the validity of the contract, he being his wife's agent. But the proof does not show that in 1912 either Hart or his wife acquired definite knowledge of the fraud that had been practiced upon them. In July of that year, in company with the secretary of the Land Company, they saw the land for the first time. Their testimony is that when they arrived at the land the secretary began to apologize for its condition, saying that the company had been hard up, and could not get help to take care of the land, and could not plow it, "and made all kinds of excuses"; that they found a few trees scattered over the tract; that weeds were higher than the trees; and that the secretary said: "Let's forget this; I will take you over to Garden Valley and show you some good land;" that when they went to the Land Company's office, Harding, the president, said: "I want to apologize to you people for the condition that land is in. I am going to try to sell that land for you people and locate you over in Garden Valley." Now, it appears that subsequent to that date, on November 6, 1912, Hart wrote to the secretary, stating that he was thinking seriously of caring for his wife's tract the coming year, and that on March 20, 1913, he wrote to Harding, asking after the growth of the trees, and the condition of the land and Mrs. Hart's lot, and saying:

"I am still figuring that I can sell some of your tracts this coming summer. I am for you all the time. I hope that you will prosper and that your company will be the biggest in the world in a few years."

The facts which the plaintiffs discovered when they visited the land in 1912 should not be taken as going to show more than that the Land Company had not kept its promises to plant trees on the land, and properly till and care for the same. In May, 1913, Mrs. Hart came again to Oregon and met Ella Peterson, and, in consequence of what she heard from her, Mrs. Hart placed the matter in her attorney's hands, and they caused an investigation of the facts to be made. That

investigation resulted in evidence that the land was wholly unfit for orchard purposes, owing to its poor drainage and the nature of the soil, and that its value was far less than it had been represented to be. Hart testified that he first learned of the falsity of the statements made by the Harding Land Company after Mrs. Hart's attorneys had caused an investigation to be made in May, 1913. He said: "Down to then I believed this land was as represented."

[4] The burden of proof to establish ratification was upon the Land Company. Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420. Ratification waives rescission only—

"where a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same." 9 C. J. 1198, § 77.

In Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420, the court said:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

In Ward v. Sherman, 192 U. S. 168, 175, 24 Sup. Ct. 227, 230 (48 L. Ed. 391), the court cited with approval the following from Pollock's Principles of Contracts:

"The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that, under the circumstances of the particular case, the other party may fairly infer that the right of rescission is waived."

In 9 C. J. 1200, § 80, it is said:

"Equivocal acts which do not clearly evince a purpose, with complete knowledge of the fraud, to retain the property as his own, will not defeat the right of the person defrauded to rescind."

This rule was applied in Watts v. British, etc., Mortage Co., 60 Fed. 483, 9 C. C. A. 98; Tarkington v. Purvis, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607; Allen v. Railroad, 106 N. C. 515, 11 S. E. 576, 826; McLean v. Clark, 47 Ga. 24; and Whitcomb v. Sager, 82 Wash. 572, 144 Pac. 922.

[5] Nor can we assent to the proposition that Mrs. Peterson ratified her contract by the mere act of assigning it to Mrs. Hart.

[6] The Land Company cites and relies upon Cooper v. Hillsboro Garden Tracts, 78 Or. 74, 152 Pac. 488. That decision is not binding upon this court. It does not construe or apply any state statute. Nor does it create a rule of property. And, even if it did, it would not be controlling authority here; for it was not rendered until a year after the court below decided the case which is now before us, and not until long after the rights of the plaintiffs had accrued under the assignment. A federal court is not bound by the decision of the highest court of the state in such a case. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Carroll County v. Smith, 111 U. S. 556, 562, 4 Sup. Ct. 539, 28 L. Ed. 517; Julian v. Central Trust Co., 193

U. S. 93, 103, 24 Sup. Ct. 399, 48 L. Ed. 629; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778; Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108; City of Mankato v. Barber Asphalt Paving Co., 142 Fed. 329, 73 C. C. A. 439. Prior to the decision in Cooper v. Hillsboro Garden Tracts, it had been the law in Oregon, as held by the Supreme Court of the state, that such a contract as the one here under consideration was assignable. The general rule is expressed in 5 C. J. 891, as follows:

"In the absence of such statutory regulations, a right of action for fraud or deceit is generally held * * * assignable where the injury is regarded as affecting the estate, or as arising out of contract. The mere fact that the right to enforce a claim which is itself assignable depends upon showing fraud incidentally, does not make such right of action nonassignable."

To that text one of the authorities cited is Sperry v. Stennick, 64 Or. 96, 129 Pac. 130, a case in which it was held that a right of action for money received, arising from defendants' false representations with reference to the purchase of certain land, by reason of which plaintiff's assignor was induced to pay the defendants money for an interest in real property, was a cause of action that would survive and was therefore assignable. The decision in Cooper v. Hillsboro Garden Tracts should be confined in its effect to the question actually decided, which was that a mere naked right to sue for a fraud cannot be transferred alone and by itself. In that case the court relied upon what had been said in Scott v. Walton, 32 Or. 460, 52 Pac. 180, a case in which the opinion was written by Judge Bean, who decided the case which is now before us. That decision went no further than to hold that there is waiver of the right to rescind for fraud, if the defrauded party remains in possession of the land received by him in exchange, and endeavors to dispose of it, and exercises full and complete ownership over it. That was held in view of the facts in the case which indicated that the plaintiff, after discovering the fraud, had collected the proceeds of a lease on the property, and had tried to sell the land. The present case is not such a case. Mrs. Peterson did not exercise rights of ownership over the land or attempt to sell it, nor did she sell it to Mrs. Hart. What she did was to assign to Mrs. Hart all her rights under her contract.

We find no error. The decree is affirmed.

BAUER et al. v. MYERS et al.

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

No. 4532.

1. WILLS ⇐166(4)—VALIDITY—CONSTRUCTION OF STATUTE—"PRINCIPAL BENEFICIARY."

Gen. St. Kan. 1909, § 9787, provides that "in all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the

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

testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto." *Held*, that one who, by the will of a testatrix, was made trustee of a large part of her estate, to invest and reinvest the same and pay over the income for certain stated purposes, but whose only pecuniary interest was under a provision that he should "be paid reasonable compensation for his services," was not the "principal beneficiary" in the will, within the meaning of the statute, and that such statute had no application to him.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Principal Beneficiary.]

2. PERPETUITIES ⟸8(1)—EXCEPTION TO RULE AGAINST TRUSTS FOR PUBLIC CHARITABLE USES.

At the common law and in the federal courts, the rule against perpetuities has no application to a bequest for charitable uses, and a bequest of a sum of money in trust, the net income to be paid over annually to the mayor of a city, to be by him "expended in the assistance and support of the poor of said city," creates a trust for a public charitable purpose, and is valid, although the trust is in perpetuity; and such trust is not invalidated by the fact that the principal sum does not go to charity, or because the state cannot directly appropriate money for the support of the poor.

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Suit in equity by Caroline Bauer and others against John Q. Myers and others. Decree for defendants, and complainants appeal. Affirmed.

J. G. Hutchison, of Kansas City, Mo. (J. E. Boruff and Ray R. Boruff, both of Bedford, Ind., and Wm. T. Jamison and Howard L. Jamison, both of Kansas City, Mo., on the brief), for appellants.

James A. Troutman, of Topeka, Kan., for appellee Board of Foreign Missions of Methodist Episcopal Church.

F. T. Woodburn and Charles Hayden, both of Holton, Kan. (E. D. Woodburn, of Holton, Kan., on the brief), for other appellees.

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

PER CURIAM. This was brought as an action in equity in the United States District Court of Kansas to set aside the will and the probate thereof of Mrs. Louise Sitzler, who died on Monday, April 15, 1912. The will was executed Saturday, April 13, 1912. It is alleged in the bill of complaint that the will was offered for probate and probated in common form in the probate court of Jackson county, Kan., in April, 1912. The bill in this case was filed January 31, 1914, and all the defendants were served with chancery subpœnas, either personally or by publication, or not found, within the two-year statute of limitations. The District Court rendered a decree in favor of the defendants, and the plaintiffs appeal.

The evidence shows that the deceased was born in the town of Martinshohe, Pfalz, Bavaria, now in the Empire of Germany, in Feb-

ruary, 1834. She attended school in Germany from her sixth to her thirteenth year. She came to the United States about 1853, at about 19 years of age and has lived in the United States until her death, or about 59 years. She moved to Pennsylvania and there married John Sitzler, and moved with her husband to Kansas about 1858, when she was about 24 years old, and continued to live there until her death, a period of 54 years. She conversed in German or English, and read Bibles in both languages. Her English speech was characterized as broken. She had during most of her life no lucrative calling, except as she was an aid to her husband. It appears that John Sitzler in his lifetime had converted substantially his whole estate, except his homestead and household furniture, into money and turned it over to Mr. John Q. Myers, as president of the State Bank of Holton, who is the same person named as defendant in this action, with an agreement that it should be loaned upon security approved by Sitzler; that Myers, as president, would account for 4 per cent. interest upon it. At the time of his death he had been acquainted with Myers about a quarter of a century, and twice a year Myers called upon Sitzler at his home to settle up this interest charge. John Sitzler died January 23, 1912, leaving a will in favor of his wife, Louise Sitzler, of all his worldly goods. His estate was inventoried at $48,393.34. After his death his widow, Louise Sitzler, renounced her right to be appointed administratrix, there being no executor named in the will, and the defendant Myers was appointed administrator c. t. a. He was in possession of the estate as such administrator when Louise Sitzler died. Of course he never took possession of the home or household furniture of the parties. John Sitzler was in the habit of advising with John Q. Myers about all his investments of the sum turned over by Sitzler to Myers. The deceased took her bed Thursday evening, April 11, 1912, and died of pneumonia the following Monday. Katie Grauer had lived with this old couple for about 11 years before their deaths. She testified:

"She [testatrix] and her husband and I composed the family. She did what business was done. She generally done the counting. When he came home from town, she generally counted things up."

This old couple left no children surviving them, and Mrs. Ray testifies concerning deceased:

"I call her a bright business woman. * * * She could read English. She could read out of the Bible to me; read it in English; read it in German. * * * Of course, she read our home papers, and have heard her read the dailies. I heard her talk about the disposition of her property she intended to make. * * *"

The same witness testified:

"Mrs. Sitzler didn't say the amount; she said she and her husband had agreed to treat the relatives equally; to divide equally between his people and her people, whatever they gave hers; to give the same to her relatives and to his."

Lelia Lindley called on deceased at 3 or 4 o'clock on Saturday before her death. She had known the deceased ever since the witness

was a child. She had been a school-teacher for 36 years at the time she testified. She said the deceased was an intelligent woman, and she was just as bright at this last interview as she ever was.

Mrs. Sigmund testified:

"I heard the discussion of the lawyers to draw the will. Mr. Price's name was mentioned first; wanted to send for the lawyers, and Mr. Price's name was mentioned first, and then another man's, but I don't remember; and then some one suggested Mr. Crane, and they decided on Mr. Crane; and then Mr. Myers' name was mentioned, but I couldn't say whether it was Mrs. Nauheim or who mentioned the names. In this conversation about the lawyers and Mr. Myers, they were all three kind of talking, Mrs. Sitzler, Mrs. Nauheim, and Dr. Seavers."

When the deceased was about and well, she promised Mr. Morton Maiers and wife some potatoes for seed, saying that she had more than she needed now that Mr. Sitzler was dead. Between 3 and 4 o'clock on Saturday, the 11th of April, 1912, on the day she made her will, at about 4 or 5 o'clock, they called to see her. Katie Grauer asked Mrs. Maiers if they had bought any seed potatoes, and Mrs. Maiers having answered they had bought some, the deceased spoke up and said to give her some. After the discussion testified to by Mrs. Sigmund, some one telephoned to Mr. Myers, and he took Mr. Crane down to the house, and Mr. Crane made full notes of what Mrs. Sitzler wanted to do with her property, went back to his office, and left the notes of the proposed will with Mr. Woodburn and went to the courthouse to try a case. Upon his return Mr. Woodburn had the will drawn, and they then compared the will with the notes, then Mr. Crane went to the bank, saw Mr. Myers, and they got in the buggy and drove back down to the house of Mrs. Sitzler. Mr. Crane testified he then read every word of the will to Mrs. Sitzler.

The first item of the will was a direction for the payment of all her just debts, including funeral expenses. The second and third items of the will gave to Katharine Grauer, being the one heretofore referred to as Katie Grauer, the homestead of the parties and the household goods and furniture. The fourth to the fourteenth items of the will gave to the relatives of herself and of her husband $500 each. The fifteenth item gave a like sum to Lawrence Whitcroft, who was the child of a foster daughter of the deceased. The sixteenth item, as originally prepared, read as follows:

"I do give and bequeath to John Q. Myers the sum of ten thousand dollars ($10,000.00) in trust, nevertheless, to and for the following uses and purposes, that is to say: The said trustee, and his successors in trust, shall invest and reinvest the said sum of ten thousand dollars ($10,000.00) in such securities as will bring the largest income, consistent with perfect security, giving preference to first real estate mortgages and shall pay the net income thereof to Katharine Grauer for her support and maintenance during her natural life and at and forever after death the net income thereof shall be paid annually on December 1st of each year to the Board of Foreign Missions of the Methodist Episcopal Church."

When this was read to the deceased she said that:

"She had been thinking about that matter during the day, and that she didn't want that money held in perpetual trust after the death of Katie Grauer, but that she wanted it paid at her death to the church absolutely."

Mr. Crane testified:

"She asked me if I could change that will without too much trouble. I said, 'Yes, I can interline it.' And I asked for a pen and ink, and a pen and ink was brought, and I wrote. * * * That is my handwriting; I made that change at her request. She said she thought it over and concluded she wanted it that way, and she said the will was all right, just as she wanted it, and then we got Mrs. Nauheim, who is now dead, and Mrs. Morrow, she said they were satisfactory to her as witnesses, and we asked them if they would sign as witnesses, and they did, and it was signed there in the presence of everybody."

This item, as thus amended, read when signed:

"Item XVI. I do give and bequeath to John Q. Myers the sum of ten thousand dollars ($10,000.00) in trust, nevertheless, to and for the following uses and purposes, that is to say:

"The said trustee, and his successors in trust, shall invest and reinvest the said sum of ten thousand dollars ($10,000.00), in such securities as will bring the largest income, consistent with perfect security, giving preference to first real estate mortgages and shall pay the net income thereof to Katharine Grauer for her support and maintenance during her natural life, and at her death to be paid to the Board of Foreign Missions of the Methodist Episcopal Church to promote its purposes."

Items 17 and 18 of the will are as follows:

"Item XVII. I do further give and bequeath to the said John Q. Myers the further sum of three thousand dollars ($3,000.00) in trust for the following uses and purposes, to wit: The said trustee and his successors in trust shall invest and reinvest said sum in good securities such as will yield the largest income, consistent with perfect safety, giving preference to first real estate mortgages and shall annually pay the net income thereof to the mayor or other chief municipal officer of the city of Martinshohe, Pfalz, Bavaria, to be by him expended in the assistance and support of the poor.

"Item XVIII. I do further give, devise and bequeath to the said John Q. Myers, all of the rest and residue of my estate remaining after the payment of the preceding bequests in this will made, in trust, however, for the following uses and purposes, to wit:

"The said trustee and his successors in trust shall invest and reinvest the said remainder of my estate in good securities, such as will bring the best income consistent with perfect security, giving preference to first real estate mortgages and shall annually pay the net proceeds thereof to the mayor of the city of Holton, Jackson county, Kansas, to be by him expended for the assistance and support of the poor of said city."

Item 19, the last, appoints John Q. Myers executor of the will.

The bill sought the relief asked upon numerous grounds: First, want of testamentary capacity. The evidence that the deceased at the time of the making of the will was of sound and disposing mind and memory is overwhelming, and without saying there was absolutely no evidence of lack of testamentary capacity we are compelled to say that the finding of such capacity is not only abundantly sustained by the evidence, but it is gravely doubtful whether any other finding on that subject would be sustained by an appellate court.

Second, undue influence; third, fraud; fourth, that because of her extremely weakened physical condition, limited education and experience, imperfect knowledge of the English language, she could not and did not understand its contents. All of these contentions were overruled by the trial court on the evidence, and rightly so.

It was quite natural for the deceased to send for the defendant, John Q. Myers, who was the long-time friend of her late husband and his trusted agent in the handling of all the estate she was about to devise and bequeath. There is no evidence that he even offered suggestions as to the will, much less that he urged anything with reference to it. It is true that one of the counsel for the defendant in the opening statement said:

"On Saturday preceding her death, she was ill, quite ill, and expressed a desire to execute a will, and requested that Mr. John Q. Myers, who was the administrator with will annexed of her husband's estate, should be sent for. Mr. Myers, upon receiving this word by telephone, called up his attorney, Mr. A. E. Crane, who is, of course, well known to your honor, and these two gentlemen went down together to the residence of Mrs. Sitzler," etc.

We realize that in Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539, it was held that the court could direct a verdict for the defendant upon the opening statement of counsel for the plaintiff, if it showed his client was not entitled to a verdict, and we shall assume that the same rule applies to a defendant's opening statement, and that, if it showed the defendant was not entitled to a verdict, a motion for a directed verdict for the plaintiff should be sustained. We are aware that this case has been cited and followed by the Supreme Court some eight times, but in the original opinion the court said:

"Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain and qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare, and give such direction as will dispose of the action."

The evidence of the witness Sigmund clearly showed that before the deceased saw the defendant Myers at all on the subject Mr. Crane was selected to draw this will, and it was therefore not in his capacity as attorney for Myers, but in his capacity as attorney for Mrs. Sitzler, that he attended and drew the will, and the fact that Mr. Myers was utilized to call him does not change the fact. The statement that "Mr. Myers, upon receiving this word by telephone, called up his attorney, Mr. A. E. Crane," does not say he called him up in his capacity as his attorney; but aside from this there is no evidence of any undue influence upon the part of Mr. Crane in the matter of the drawing of the will, save that it is claimed that the creation of Myers as trustee under the sixteenth, seventeenth, and eighteenth items was suggested by him. This will be considered later.

The deceased made this will in accordance with her previous agreement with her husband, and displayed great intelligence in its drafting, which she absolutely dictated, with the possible exception hereafter noted. There was no fraud practiced upon her, and the court was absolutely right in rejecting the second, third, and fourth objections made.

[1] The Kansas General Statutes of 1909 contained the following:

"Sec. 9787. That in all actions to contest a will, if it shall appear that such will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent

or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall be affirmatively shown that the testator had read or knew the contents of such will, and had independent advice with reference thereto."

It is upon this statute that the fifth objection is based:

"That it [her will] was prepared by, or under the direction of, the principal beneficiary, and procured by him to be signed and declared by Louise Sitzler to be her last will and testament, without her having independent advice, as required by section 9787, General Statutes of Kansas of 1909."

The appellants say this raises the following questions: First, was the will written or prepared by the defendant Myers, within the meaning of this statute? Second, is he the principal beneficiary in the will, within the meaning of this statute? Third, was he the confidential agent of, or did he sustain any other relation of confidence or trust to, the testatrix? Fourth, did she have any independent advice concerning said will?

These questions can all be readily answered. The will was not written, prepared, or dictated by the defendant Myers. It was written and prepared solely by Mr. A. E. Crane, who was the individual attorney of the testatrix, and engaged solely in that capacity, although he may have also been the regular attorney of Mr. Myers. Mr. Myers is not the principal beneficiary in the will, as that term is used in the statute. While he is made trustee of much of the property, it is not at all for his benefit; but he would be held strictly to account for the whole thereof by the court having the matter in charge. We can well accept the definition contended for of "beneficiary." A beneficiary is defined as one who receives a benefit or advantage, according to Webster's International Dictionary, or one who is in the receipt of benefits, profits, or advantage, according to the Century Dictionary. It is said by appellants:

"The word has no fixed or technical meaning, and may mean one thing in one place and another in another."

Myers was not the principal beneficiary, and there is nothing in Kelty v. Burgess, 84 Kan. 678, 115 Pac. 583, to indicate otherwise.

It is claimed that the provision that Mr. Myers "be paid reasonable compensation for his services," makes him the principal beneficiary. Of course, as trustee he would be entitled to reasonable compensation from the court administering the trust, in the absence of any such provision in the will, so the provision gave him absolutely nothing; but there is another reason the amount allowed him was to be just compensation for services rendered, and he was to receive nothing except as he earned it. So while he might owe a debt of gratitude to the testatrix for appointing him to this office in preference to another, and thus giving him an opportunity to earn this money, he would owe this money to his time and labor expended, and not to the bequest under the will. The method by which the appellants compute the probable amount he will get per annum, and then estimate the receipts during his lifetime from this sum, is ingenious, but not persuasive.

The third and fourth questions propounded under this statute might both be assumed to be answered in the affirmative, without admitting

that such assumption is necessary, and still the statute has nothing to do with the case. The property covered by this will was all primarily the earnings of John Sitzler, and he had arranged his widow should have it all, and divide such as was left, and she wished to so divide equally between each individual relative of his and hers. This she did, and gave a part to one who, when all her own relatives had remained away from her in her extreme age, had stayed and cared for her for 12 years. Her relatives now seek to deprive his relatives and this good woman, who cared for her, of any portion of this estate, and absorb it all on specious complaints of undue influence, fraud, etc. Mrs. Sitzler had earned no part of this money, except as a good helpmeet. This court is not predisposed to reverse the court below merely because it refused to rob the heirs of John Sitzler, who earned the money, and the woman who had cared for John Sitzler and his old wife, to give it to the heirs of Louise Sitzler.

[2] The only serious questions which arise on this appeal are with reference to items 16, 17, and 18 of the will. Aside from other questions, they are all assailed as in violation of the law against perpetuities. The Supreme Court of Kansas, in Keeler v. Lauer, 73 Kan. 389, 393, 85 Pac. 541, 543, speaking of the law against perpetuities, said: "Having no statute on the subject, the common-law rule prevails." It is therefore best to see what the common-law rule is, as determined by the federal courts, unhampered by state court decisions under statutes modifying the common law, and if the result should be found to be not settled by the United States courts we may then turn to the decisions of the state courts.

In Potter v. Couch, 141 U. S. 296, 314, 11 Sup. Ct. 1005, 1010 (35 L. Ed. 721), it is said that the rule against perpetuities was one which "prohibits the tying up of property beyond a life or lives in being and 21 years afterwards." In Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 144 (7 L. Ed. 617) Mr. Justice Johnson said:

"It is altogether an act of judicial legislation, operating as a proviso to the statute of wills; a restriction upon the testamentary power. The authority from which the exception emanated could certainly limit it, so as to prevent its extension to an object under the care of the sovereign power."

It was apparently in recognition of what was thus said by Mr. Justice Johnson that the Supreme Court in Fitchie v. Brown, 211 U. S. 321, 334, 29 Sup. Ct. 106, 110 (53 L. Ed. 202) said:

"It is not necessary to find in the will, in so many words, the selection of lives, but that such selection is good if from a consideration of the whole will that selection can be ascertained."

In Ould v. Washington Hospital, 95 U. S. 303, 313 (24 L. Ed. 450) it is said:

"Charitable uses are favorites with courts of equity. The construction of all instruments where they are concerned is liberal in their behalf. Mills v. Farmer, 19 Ves. 487; McGill v. Brown, supra [Brightly, N. P. (Pa.) 346, note]; Perry on Trusts, § 709. Even the stern rule against perpetuities is relaxed for their benefit."

In Russell v. Allen, 107 U. S. 163, 166, 2 Sup. Ct. 327, 330 (27 L. Ed. 397), it is said:

"By the law of England from before the Statute of 43 Eliz. c. 4, and by the law of this country at the present day (except in those states in which it has been restricted by statute or judicial decision, as in Virginia, Maryland, and more recently in New York), trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery; and an omission to name trustees, or the death or declination of the trustees named, will not defeat the trust, but the court will appoint new trustees in their stead."

For the reasons indicated in this opinion the opinions in New York, Maryland, and the District of Columbia, which is governed by the laws of Maryland at the date of its cession to the United States subject to subsequent modifications, will not need to be considered by us in this opinion.

In Jones v. Habersham, 107 U. S. 174, 185, 2 Sup. Ct. 336, 346 (27 L. Ed. 401), it is said in reference to a bequest to a charity and upon its termination to another charity that:

"If those conditions are valid, the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for as the estate is no more perpetual in two successive charities than in one charity, and as the rule against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency which may or may not take place within the limit of that rule, the limitation over to the second charity is good."

In Hopkins v. Grimshaw, 165 U. S. 342, 352, 17 Sup. Ct. 401, 405 (41 L. Ed. 739), it is said:

"The first inquiry which naturally arises is whether the deed was for a charitable use, in the legal sense. If it was, the conveyance would not be open to any legal objection by reason of the length of time during which the trust might last, or because of the society named not being a corporation. Ould v. Washington Hospital, 95 U. S. 303 [24 L. Ed. 450]; Russell v. Allen, 107 U. S. 163, 171 [2 Sup. Ct. 327, 27 L. Ed. 397]. And the trustees, although the deed did not in terms run to their heirs and assigns, would take the legal estate in fee. Russell v. Allen, above cited; Potter v. Couch, 141 U. S. 296, 309 [11 Sup. Ct. 1005, 35 L. Ed. 721]; Easterbrooks v. Tillinghast, 5 Gray [Mass.] 17, 21."

To the same effect are Duggan v. Slocum, 34 C C. A. 676, 92 Fed. 806; Brigham v. Peter Bent Brigham Hospital et al., 67 C. C. A. 393, 134 Fed. 513; White v. Keller, 15 C. C. A. 683, 68 Fed. 796. See Handley v. Palmer, 43 C. C. A. 100, 103 Fed. 39.

In Wood v. Paine (C. C.) 66 Fed. 807, it is declared that a charitable trust will not be held void because of uncertainty of beneficiaries or incapacity of the trustees to take, as a court of chancery will not permit a charitable trust to fail for want of a trustee or because its particular purposes are uncertain.

It thus seems clear that, however the law may be elsewhere in the federal courts, the rule against perpetuities has no application to a bequest for charitable uses. All gifts for the promotion of education are charitable ones. Russell v. Allen, 107 U. S. 163, 172, 2 Sup. Ct. 327, 27 L. Ed. 397. And the term "charitable uses" embraces a wide scope, including religious uses.

In Ould v. Washington Hospital, 95 U. S. 303, heretofore cited, on page 310 (24 L. Ed. 450), it is said that the Statute of 43 Elizabeth, c. 4, names 21 distinct charities: "They are * * * (10) of churches" and refers apparently with approval to the opinion of Mr. Justice Baldwin in McGill v. Brown, Brightly, N. P. (Pa.) 346, note, in which he found that there were 46 specifications of pious and charitable uses recognized as within the protection of the law in which were embraced all that were enumerated in the Statute of Elizabeth. In Perry on Trusts it is said that charitable trusts include all gifts in trust for religious and educational purposes, and in 1 Beach on Trusts, § 322, it is said:

"In distinction from an express private trust, which, by the definition, is designed for the benefit of one or more individuals, the trust for charitable purposes is a public trust, and from the nature of the case the beneficiaries are, to a greater or less extent, unknown or indefinite. Ordinarily the trust is designed for the benefit of a class, the individuals of which can be designated only in general terms. In a private trust, if the beneficiary or beneficiaries are not definitely and positively named, the trust fails on the ground of indefiniteness. But in a charitable trust the beneficiaries need not be definitely named, and even where there is no adequate designation of a cestui que trust, the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt. Trusts for charitable purposes are regarded by courts of equity with special favor, and a much more liberal construction will be put upon an instrument creating such a trust than upon one creating a trust for individuals. A will creating a trust for a charitable purpose will receive, where there is occasion for it, a construction differing very widely from that which would be applied to a trust for an individual."

In Jackson v. Phillips, 14 Allen (Mass.) 539, 550, Mr. Justice Gray said:

"By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and 21 years afterward; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees."

In Pomeroy's Equity Jurisprudence, § 1018, it is said:

"In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified cestui que trust clearly identified or made capable of identification by the terms of the instrument creating

the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain—a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi public character. The most patent examples are 'the poor' of a certain district in a trust of a benevolent nature, or 'the children' of a certain town, in a trust for educational purposes. In such a case it is evident that all the beneficiaries can never unite to enforce the trust; for even if all those in existence at any given time could unite, they could not include nor bind their successors. It is a settled doctrine in England and in many of the American states that personal property and real property, except when prohibited by statutes, may be conveyed or bequeathed in trust, upon charitable uses and purposes, for the benefit of such uncertain classes or portions of the public, and that if the purposes are charitable, within the meaning given to that term, a court of equity will enforce the trust. Furthermore, it is one of the most important and distinctive features of charitable trusts that, however long the period may be during which they are to last, even though it be absolutely unlimited in its duration, they are not subject to nor controlled by the established doctrines, nor even the statutes which prohibit perpetuities. Indeed, it may be said that the full conception of a charitable trust includes the notion that it is or may be perpetual."

It has been repeatedly held that trusts for the benefit of sectarian churches are charities. Note II, 6 L. R. A. (N. S.) 321. In 5 Ruling Case Law, page 291, a charity is defined:

"It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition, capable of being easily understood and applied, is that given by Lord Camden as follows: 'A gift to a general public use, which extends to the poor as well as the rich.' The theory of this is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way, it has the essentials of a charity. Again, charity has been declared to be active goodness; the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind."

And on page 293:

"The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. * * * Notwithstanding these general rules, it is usually held that a charity is none the less public because it is limited in its operation to the members of a particular sect or society, so long as it is wholly altruistic in the end to be attained and no private or selfish interest is fostered under the guise thereof."

And again on page 295:

"The requisites of a valid private trust, and of one for a charitable use, are materially different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified cestui que trust, clearly identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members and partaking of a quasi public character. The most important distinction, however, between charities and other trusts is that in the time of duration allowed and the degree of definiteness required. Trusts for public charitable purposes, being for objects of permanent interests and benefit to the public, and perhaps being perpetual in their duration, are upheld under circumstances under which private trusts would fail."

We have said enough to indicate that in our judgment these three items all created trusts for support of public charities and wholly di-

vested any right which the plaintiffs and others may have had in the residue of the property, and the plaintiffs have no interest in the method by which a court of equity will work out the details of the trust created.

It is very strenuously insisted that the testatrix did not contemplate these trusts at all. She did contemplate, according to the evidence, that Mr. Myers should be the executor of the will, as that was discussed. Mr. Crane advised her these trusts were necessary to make the will legal, and especially as to the trust for the benefit of the poor of Martinshohe; that interest rates in Kansas were higher than interest rates in Bavaria, and that it would increase the amount of her charity given to the poor at Martinshohe to create a trust in America and keep the funds loaned here. For the purpose of disposing of this point, and for no other, we will assume that Mr. Crane was mistaken in his suggestion that a trustee was necessary in order to make the items legal; still there is nothing to indicate he was not honest in his advice. The testatrix, when the sixteenth item was read, said she wanted that money to go to the Board of Foreign Missions of the Methodist Episcopal Church at the death of Katie Grauer, and did not want it held in perpetual trust, and Mr. Crane corrected the will for the purpose of carrying out her purpose. Every word of the will was read to the testatrix, and her action in relation to the sixteenth item shows she knew and understood the appointing Myers trustee. Being of the opinion a trustee was necessary in these items, Mr. Crane asked Mr. Myers, who had already been designated by Mrs. Sitzler as executor of the will, on their way back from the consultation at the deceased's house, if he would act as trustee.

The evidence shows that Mr. Myers' relations to the parties and the estate were such that he would be the one she would naturally have selected for that office. This opinion might well end here with an affirmance; but appellants filed an elaborate argument to prove that as changed the language of item 16 is not ambiguous. Let it be conceded that upon its face it is not. Then appellants argue that, if there is an ambiguity, it is patent, not latent, and cannot be explained by parol evidence. These two positions are inconsistent with one another. In the recent case of David Graham et ux. v. National Surety Co., 244 Fed. 914, —— C. C. A. ——, we reviewed a number of text-book authorities on this subject, and without further discussion, if, as contended, the will is not ambiguous on its face, the evidence showing clearly that the change was made for the purpose of vesting the principal of the bequest in the Board of Foreign Missions of the Methodist Episcopal Church, the instrument will be so construed, even if it becomes necessary to construe the will by other than the rules of English grammar. 2 Underhill on Law of Wills, page 1385.

It is strenuously insisted that the seventeenth and eighteenth items constitute trustees to turn the money over annually to the mayors of Martinshohe and Holton, to be by them used for the relief and assistance of the poor, and that this creates trustees of the mayors of the two places, and the use of the term "mayor" is descriptio personæ, and so the mayors for the time being take the whole interest in trust for the

uses indicated. This might be true under the holding in Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. Ed. 617, and similar cases, were it not that in each case the direction is, not only to turn over the profits of the bequest to the mayor of the town named, but to turn it over annually to the mayor of the town named. It would therefore be no defense in any year, if the mayor of the town in question should claim his annual payment, for the trustee to say that he had turned it over to some ex-mayor of 10 years before. If any part of appellants' contention in this regard is true, the subordinate trusts are annual in duration, and as many are created as there may be years in which the principal trust exists.

It is contended that, because no part of the money bequeathed goes to the charities, they are not charitable bequests. The earnings of the bequests go to the charities, and that is sufficient to stamp the character of charitable bequests upon the principal.

It is claimed that under the Constitution and laws of Kansas that state cannot provide for the poor of a city except through the county. Nearly every state by Constitution or statute prohibits the imposition of taxes for the support of churches, and yet generally it is regarded as a proper charity for a testator to give his property for the support even of sectarian churches. It is no part of the power of one by will to turn his property over for the support of a public charity, that the charity is one to which the state could contribute its support.

The decree of the District Court is right, and is affirmed.

GRAHAM et ux. v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1917.)

No. 4687.

1. HOMESTEAD ⟸118(5)—CONVEYANCE—VALIDITY.
   Under Gen. St. Minn. 1913, § 6961, declaring that if the owner be married no mortgage of a homestead except for purchase money unpaid thereon, nor any sale or other alienation thereof will be valid without the signature of both husband and wife, a conveyance by a husband or wife without the spouse joining is void as to the homestead though it may be valid as to other property included therein.

2. DESCENT AND DISTRIBUTION ⟸52(2)—SURVIVING WIFE—RIGHTS OF.
   Where land mortgaged by a husband alone was sold on judicial sale before his death, his widow will not, under Gen. St. Minn. 1913, § 7238, relating to descent and distribution, take any interest therein.

3. EVIDENCE ⟸451, 452—PAROL EVIDENCE RULE.
   Parol evidense is admissible to explain a latent ambiguity in a deed, though not to explain a patent ambiguity, for that would practically abolish the sanctity of deeds.

4. EVIDENCE ⟸462—PAROL EVIDENCE RULE—ADMISSIBILITY.
   A firm of contractors suffered considerable loss on a contract, the performance of which was guaranteed by plaintiff surety company. Thereafter one of the partners and his wife executed a trust deed in favor of plaintiff surety, reciting that the property should be held in trust for the purpose of securing the surety against any and all liability of

every kind that may arise by reason of any bond or indemnity of any kind or nature which the surety may hereafter execute indemnifying or securing, or in any manner obligating it to pay as surety or otherwise any sum of money on account of any contract of the contracting firm. The partner's wife had declined to sign a deed of trust upon the family domicile for any past indebtedness, but she executed the above deed of trust which was prepared by the surety. After execution of the deed of trust, the trustee gave indemnifying bonds to firm creditors who were induced to accept firm notes payable in one year for the claims arising under the contract. *Held*, that the deed of trust was ambiguous, and parol evidence was admissible to show its scope as to the wife.

5. HOMESTEAD ⇐115(1)—DEEDS OF TRUST—CONSTRUCTION.
In such case, as the trust deed should be most strongly construed against the trustee, it having been prepared by it, and as its agent knew of the wife's refusal to sign a deed which should subject her homestead to claims for past indebtedness, the homestead is not, despite the execution of new bonds which covered the past indebtedness, and the surety's satisfaction of claims arising on such bonds, subject to foreclosure under the deed of trust.

6. MORTGAGES ⇐114—DEEDS OF TRUST—CONSTRUCTION.
In such case, as the husband and partner consented to subjecting his homestead to past indebtedness, and as he could validly incumber other portions of his real property without the consent of the wife, such deed of trust is valid as to property other than the homestead, the husband having after the execution of the trust deed consented to the trustee's construction by executing notes for the past indebtedness to secure payment of which the trustee executed new bonds, this being particularly true as the lands were located in Minnesota, and Gen. St. Minn. 1913, § 7907, declaring that any judgment of the federal District Court shall become a lien on such lands of the judgment debtor as are located in the county where it is docketed and lands in any other county when duly docketed with the clerk of the district court in the county in which they are located, made the judgment against the husband a lien on such lands.

7. SUBROGATION ⇐7(1)—SURETY—RIGHT TO.
A surety paying an obligation of the principal is entitled to be subrogated to the rights of creditors.

Hook, Circuit Judge, and Amidon, District Judge, dissenting in part.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action by the National Surety Company, a corporation, against David Graham and Mrs. Minnie A. Graham. From a decree for plaintiff, defendants appeal. Reversed and remanded, with directions to dismiss as to Mrs. Minnie A. Graham and to grant a decree of foreclosure against David Graham.

M. E. Louisell, of Duluth, Minn. (Victor L. Power, of Hibbing, Minn., on the brief), for appellants.

Oscar Mitchell, of Duluth, Minn. (W. D. Bailey and A. C. Gillette, both of Duluth, Minn., on the brief), for appellee.

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

SMITH, Circuit Judge. June 28, 1910, a copartnership composed of David Graham and John J. Young, under the firm name of Graham-Young Company, entered into a written contract to build a high

school in Gilbert, Minn., with district township No. 18 of St. Louis county, in that state, for $87,992. On July 27, 1910, the Graham-Young Company gave to the school district a bond in the sum of $87,992, being the full amount of the contract price, for the performance of said contract, with the National Surety Company as surety. The bond contained the following provisions:

"Now therefore, if the said principals shall pay as they become due all just claims for all work, tools, machinery, skill and materials furnished under said contract and shall complete said contract in accordance with its terms and shall save the obligee harmless from all costs and charges that may accrue on account of the doing of the work specified in said contract and shall comply with all laws appertaining thereto, then this obligation shall be void, otherwise to remain in full force and effect.

"This bond is given for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery or materials, under or for the purpose of this contract."

Thereupon the Graham-Young Company entered upon the performance of said contract. As the building was nearing completion, it became manifest they were going to lose heavily on the contract. A meeting of the creditors was called by Mr. John C. Bennett, the superintendent of claims of the surety company for the territory that included Minnesota. An arrangement was then made that the balance in the hands of the school district should be paid pro rata to the creditors and that they should extend the time of payment of the balance for one year at 7 per cent. After crediting the amount then in the hands of the school district, there was due in the aggregate by the Graham-Young Company to their creditors on this building $13,567.71. On April 28, 1911, David Graham and his wife executed a trust deed to the National Surety Company of lots 4 and 5, block 3, Southern addition to Hibbing, according to the recorded plat thereof, and lots 2 and 3, of section 30, in township 59 north, of range 22 west, all of the above described lands being in St. Louis county, and the east half of northeast quarter of section 25, in township 59 north, of range 23 west, in Itasca county, all in the state of Minnesota. This trust deed was upon the following conditions:

"The above-described property is conveyed by the parties of the first part to the party of the second part to be held in trust for the purpose of securing the party of the second part against any and all liability of every kind and nature that may arise by reason of any bond of indemnity or other instrument of security of any kind or nature which the party of the second part may hereafter execute, indemnifying or securing, or in any manner obligating itself to pay as surety or otherwise, any sum of money on account of any contract, agreement or obligation of Graham-Young Company, a copartnership consisting of said David Graham and one John J. Young, it being understood and agreed, however, that the party of the second part does not, by accepting this security, obligate itself in any manner to execute any bond of indemnity, or other instrument of security for the said Graham-Young Company."

The National Surety Company brought suit to foreclose said trust deed in the United States District Court, and after a trial a decree was entered, September 9, 1915, that the surety company was entitled to $17,312.73 and interest and costs, and that the property described in the trust deed be sold to satisfy said claim, and the de-

fendants in that suit, David Graham and Minnie A. Graham, his wife, appeal.

It appears that subsequent to the execution of this trust deed and on July 1, 1911, Mr. David Graham, in the name of the Graham-Young Company, executed notes to the various creditors on the Gilbert schoolhouse to the aggreate amount of $13,567.71 bearing 7 per cent. interest, and the firm of Graham-Young Company, by David Graham, and the National Surety Company, as surety, gave a bond of indemnity to each of said creditors that his note would be paid within one year of its date. The Graham-Young Company failed to pay any of the said notes, and the surety company was compelled to do so, and upon these payments the decree of the District Court is based.

The surety company was liable immediately for the whole of these claims upon its original bond which is conceded was not within the terms of the trust deed, and the principal question is as to whether by extending its liability for a year and agreeing to pay 7 per cent. interest the new bonds were bonds it "may hereafter execute," as provided in the trust deed. It appears that the trust deed covers lots 4 and 5 in block 3, Southern addition to Hibbing. Upon these lots is the homestead of the parties, and it has been actually occupied by them as such for twelve years or more.

[1] It was provided by section 3456 of the Revised Laws of Minnesota of 1905, now section 6961 of the General Statutes of Minnesota of 1913, that:

"If the owner be married, no mortgage of the homestead, except for purchase money unpaid thereon, nor any sale or other alienation thereof shall be valid without the signatures of both husband and wife."

Under this statute while a conveyance of a homestead by the husband or wife without the spouse joining is void as to the homestead, if other property be included in the same deed the instrument is not void as to such other property. Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.

[2, 3] Mr. David Graham testified: That he first had a talk with Mr. Bennett on the subject of the trust deed at Hibbing; that:

"The first time that Mr. Bennett put the proposition up to me, he outlined the trust deed to cover past indebtedness incurred by the Graham-Young Company and also to cover future business so as we could go along and do business in the future. He stated that my wife would have to sign the instrument. * * * I told Mr. Bennett that I would take the matter up with my wife, and if she would sign a deed of that kind I would do so—I was positive we could go ahead and make good. There was a lot of big contracts that were to be let on some buildings, and we thought we would stand a good show in getting those contracts. I told my wife what Mr. Bennett told me. She absolutely refused to sign any trust deed of that kind but would sign one for future business—promised to sign one if it was made to cover future business. In regard to past indebtedness she said this: 'In case you wouldn't be able to make good this is my home—we have to raise our children, and I am going to protect them.' She said at that time that she positively refused to sign any deed that would cover past indebtedness."

Mrs. Minnie A. Graham testified:

"I had a talk about this trust deed before signing it with Mr. Graham, my husband. He asked me to sign a trust deed that would cover all past indebt-

edness and also the future. He asked me to do that at my home in Hibbing. Mr. Graham told me that Mr. Bennett said if I would sign this trust deed to cover past indebtedness he was sure that they would make good as there was another contractor that had made good and he was sure he could make good for me. I told Mr. Graham that then I would sign away everything and I did not like to sign away our home. * * * I said then our children came first and I refused to sign it."

Both Mr. Graham and Mr. Young testified that this was all communicated to Mr. Bennett at Duluth on the day of the meeting of the creditors there, and Mr. Bennett frankly admits that Graham so told him. After the meeting of the creditors, Mr. Bennett and Mr. Graham went to a lawyer's office in Duluth who was employed by Mr. Bennett for the surety company, and this lawyer drew the deed of trust in question. There is nothing in the record which in any way reflects upon him. Mr. Graham then took the deed home and told his wife that this deed was so drawn up as to cover future business. Mrs. Graham testified that her husband so told her and she then read the instrument, and, believing that it covered only future indebtedness and did not have anything to do with past indebtedness, she signed it.

It is strenuously contended that the evidence on this subject was inadmissible to vary the terms of a written instrument. We have no desire to in any manner infringe upon the well-settled and salutary rule upon that subject and do not deem it necessary to review the authorities thereon. The real question is whether the case is within the equally well-recognized exception to this rule on ambiguities and, if it is, what is the situation of the parties?

Under the laws of Minnesota, David Graham alone could have executed the trust deed in question as to all but the homestead, and if the property was sold on judicial sale before the death of the husband his widow would take no interest in it. Revised Laws of Minnesota, 3648; General Statutes of Minnesota, 7238.

The case therefore presents the question as to whether the trust deed should be construed to cover at all liabilities incurred upon bonds executed subsequent to the date of the trust deed to secure a pre-existing liability of the National Surety Company. That is, as to such liability was it a binding obligation as to either David Graham or his wife Minnie A. Graham? If the last question should be answered in the affirmative as to either of the defendants, should it be so answered as to both? Assuming the obligation to be a valid one as to one or both of the defendants, was it valid as to their homestead?

In Greenleaf on Evidence (16th Ed.) § 297, it is stated:

"It may be proper to consider the case of ambiguities, both latent and patent. The leading rule on this subject is thus given by Lord Bacon: 'Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.' Upon which he remarks that: 'There be two sorts of ambiguities of words; the one is ambiguitas patens and the other latens. Patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. Ambiguitas patens is never holpen by averment; * * * for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which

the law appointeth shall not pass but by deed. Therefore, if a man give land to J. D. and J. S. et hoeredibus, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was (that) the inheritance should be limited.' 'But if it be ambiguitas latens, then otherwise it is; as if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all. But if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the party intended should pass.'"

In Wigmore on Evidence, § 2472, it is said:

"Declarations of intention, though ordinarily excluded from consideration, are receivable to assist in interpreting an equivocation; that is, a term which, upon application to external objects, is found to fit two or more of them equally. This rule dates at least as far back, in recognition, as Lord Coke's time; the only difference being that it was then the sole permissory exception to a general prohibitory rule against looking at any extrinsic circumstances (as noticed ante, section 2470), while now it is a permissory exception to a prohibitory rule which is itself an exception (ante, section 2471) to a general permissory rule.

"The reason for the present exception to that exception is plain enough. The original prohibitory exception is based on the risk of allowing an extrinsic utterance of intent to come into competition with the terms of the document on the same subject, and perhaps to prevail against them (ante, section 2471). Now in the case of an equivocation this risk does not exist. Since the term of the document describes equally two objects, and since it was used to designate one only, there can be no competition with the words of the document by declarations which merely expand and make more specific those words. The sense of the words can be interpreted without restriction, because the data offered cannot be used for any purpose but that of interpretation. Hence the reason for the original prohibitory rule falls away, and the general principle of interpretation resumes its full range."

In Chamberlayne on the Modern Law of Evidence, in section 2654, it is said:

"An ambiguity in a contract may be so (by unsworn statements) explained."

In Rice on Evidence, vol. 1, p. 276, it is said:

"A latent ambiguity created by parol proof is open to explanation, and this in no sense infringes upon the rule that a written contract cannot be altered by parol, but that such writing is to be deemed to express the intent of the parties; where such an ambiguity is created by the parol evidence in the case it may be explained by any evidence, written or unwritten, within the reach of the parties."

See Jones on Evidence, § 453 et seq., Id., §§ 472 and 473.

[4] The trust deed recited that it was given to secure the surety company against all liability that may arise on any bond it may hereafter execute. That seems plain and unambiguous, but when it appears that the surety company had previously executed a bond upon which its liability had arisen in the past and after the execution of the trust deed it in effect renewed the old bond and signed some new ones wholly independent of this transaction, and it claims that the renewal bonds were hereafter executed and its liability arose on the renewals, it becomes manifest that there are two ambiguous phrases used in the contract. This deed of trust was for the purpose of securing against all liability that may arise. The liability of the company having already arisen under the prior bond, can it be said that

its renewed liability upon the new bond was within the language may arise, and when the two thoughts are coupled together that the trust deed is to secure liability that may arise on bonds hereafter executed it becomes plain that the deed of trust contained an ambiguity as to whether these new bonds were included therein. Not only does an ambiguity appear, but an ambiguity "latens" as distinguished from an ambiguity "patens." Did the trust deed apply to only one class of bonds "hereafter" executed and having their origin after the deed or did it include those and any renewal bonds executed after and for old pre-existing debts at the time of the execution of the trust deed?

[5] This contract was drawn by the National Surety Company by its attorney and upon direction of the superintendent of its claims department and must be most strongly construed as against it. With the evidence offered there can be no doubt that Minnie A. Graham, the wife, had no idea that the contract was subject to the second construction indicated, and there was no reason why she should have such idea when she read and signed the instrument. Properly construed as against her, the trust deed secured only bonds or other instruments executed in the future and did not include re-execution of bonds to secure pre-existing debts upon other bonds and the liability on new bonds could not be said to arise on them, but it originally arose on a bond "heretofore" executed and renewed and re-evidenced by the new bond. While there was nothing fraudulent in the execution of the contract, as the company knew that she had refused to sign this trust deed to secure the indebtedness on the high school, the attempt of the company after the execution of the deed to make antecedent obligations into subsequent obligations would operate as a fraud and would not be tolerated. The plaintiff therefore was not entitled to a decree as against her or as against the homestead for the amount it paid upon the individual bonds given to secure the debts upon which it was liable at the date of the execution of the trust deed upon the bond of the 27th of July, 1910. See United States v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731; Lowrey v. Hawaii, 206 U. S. 206, 221, 27 Sup. Ct. 622, 51 L. Ed. 1026. A more difficult question arises with reference to defendant David Graham and the property other than the homestead.

[6, 7] That David Graham is liable for the amount paid by the National Surety Company upon the obligations of the Graham-Young Company is beyond dispute. The bill sets forth the execution of the several bonds by the Graham-Young Company, which was a partnership of which David Graham was a member, by David Graham as principal, and by the National Surety Company as surety, and the default of the principals and the payment on the notes the bonds were to secure by the surety company, and prayed the foreclosure of the trust deed and to have judgment for any deficiency after applying the proceeds of the trust deed, against both defendants, and for general equitable relief. Included in the prayer was necessarily a prayer for subrogation to which the surety company was clearly entitled. Cooper v. Jewett, 233 Fed. 618, 147 C. C. A. 426. We have no doubt of the court's power to render a decree against David Graham for the amount paid by the surety company on the obligations of the firm

of which he was a member upon which it was surety. A more difficult question arises as to the validity of the trust deed as between the surety company and David Graham as to this indebtedness. He never objected at any time to giving on his own behalf a trust deed to secure past indebtedness, and he could alone mortgage any property other than the homestead although it is probable that if he died before judicial sale under foreclosure his widow would have been entitled to a distributive share in the property under General Statutes of Minnesota, 7238. His wife, for aught that appears, had no knowledge that it was planned to give new bonds for the old ones but David Graham, with presumptive knowledge of the terms of the deed of trust, executed in the name of his firm the new bonds upon which this suit is brought. These new bonds were within the very terms of the trust deed as "hereafter" executed. By so doing he acquiesced in the construction of the surety company as to the meaning of the trust deed. If it is thought that there is any inconsistency in construing this trust deed to cover only new obligations as to Minnie A. Graham but to include pre-existing debts as to David Graham, the explanation is to be found in the different evidence as to these parties. The moment that it is conceded that parol evidence is admissible to aid in construing a latent ambiguity, it necessarily follows that the finding of facts may not be the same as to all the parties as the evidence may not be alike as to them all. Perhaps a fair illustration may be found in a criminal case against two parties for a joint offense. Take for example adultery. If one of them is guilty, in the absence of force both must be guilty, but it does not follow that both must be convicted or both acquitted. The evidence may be sufficient to justify a conviction against one and not against the other. In addition to other pointed evidence but not enough to require conviction, one of the parties may have made no declaration on the subject at all, while the other may have expressly admitted the illicit commerce. Clearly a jury should convict the latter and acquit the former. State v. Caldwell, 8 Baxt. (Tenn.) 576; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207. So, having found that the trust deed contains a latent ambiguity, we find the evidence requires a finding as against Minnie A. Graham and the homestead that the contract was only with reference to new bonds "hereafter" executed, but as to David Graham we find that he was willing in the first place to give security for pre-existing debts and subsequently executed new bonds for pre-existing debts with the National Surety Company as surety and thereby acquiesced in the construction of the surety company that the ambiguity should be solved as contended by it.

Entirely aside, however, from this question, the lands covered by the trust deed are all in either St. Louis or Itasca counties in the state of Minnesota. They are both in the Fifth Division of the Minnesota District Court, and the court in which this case was tried is held in St. Louis county, while Itasca joins it immediately on the west. It is provided by section 7907 of the General Laws of Minnesota that:

"Every judgment requiring the payment of money rendered in a Circuit or District Court of the United States within this state shall be, from the docketing thereof in said court, a lien upon the real property of the judgment debtor

situated in the county in which it is so docketed, the same as a judgment of a state court. And a transcript of such docket may be filed with the clerk of the District Court of any other county, and shall be docketed in his office as in the case of judgments of the state courts, and with like effect."

If a decree was therefore entered in this case for the National Surety Company against David Graham for the amount due it on their bonds which it would clearly be entitled to, it would at once become a lien on the lands in St. Louis county and become a lien on the lands in Itasca county with the filing and docketing of the judgment with the clerk of the state district court.

There is no proof that there have been any intervening rights and there seems therefore to be no possible prejudice to any other person in holding that the trust deed is valid as against David Graham and the lands other than the homestead.

It is therefore ordered that the case be reversed and remanded, with directions to the District Court to set aside the decree heretofore rendered and to dismiss this case as to the homestead and as to Minnie A. Graham and grant a decree of foreclosure for the amount paid by the National Surety Company upon the bonds executed by it as surety for the Graham-Young Company, with the protest fees, interest, and costs, against David Graham and the property other than the homestead.

HOOK, Circuit Judge (dissenting in part). I am unable to concur in the reversal of the decree below as to the homestead. I think the trial court was right in all respects; that all parties knew the terms of the adjustment with the creditors and what the surety company was to do and what was intended by the mortgage; also, that the terms of the mortgage were not latently ambiguous but conformed precisely to the intention and understanding.

AMIDON, District Judge. I concur in that part of the foregoing opinion which reverses the decree of the trial court as to the homestead, but I am of the opinion that the reasoning which compels that result also compels a reversal of the entire decree.

A careful consideration of the trust deed and of the evidence convinces me that it was the intent of Mr. Bennett and of Graham and Young that the trust deed should not secure the indebtedness for the Gilbert schoolhouse. That question was paramount in the negotiation of the parties for a considerable time prior to the meeting of the creditors and prior to the preparation of the trust deed. Mr. Bennett testified frankly that he understood that Mrs. Graham refused to mortgage her homestead to secure the indebtedness for the Gilbert school. That subject was fully discussed both before and after the meeting of creditors. Nothing passed between the parties to justify the inference that it was ever the intent of either Mr. Bennett or Mr. Graham that the deed should be binding upon Mr. Graham but not upon his wife. Or that it should not be a lien upon the homestead but should be a lien upon the other tracts described in it. The agreement for the giving of the notes to the creditors and the securing of

the same by a bond to each creditor, signed by the firm and by the surety company, as surety, was fully settled at the meeting of the creditors, and agreed to by all parties. This was before the trust deed was executed. I am unable, therefore, to see how the signing of the notes and of the bond securing the same by Mr. Graham can be given any ex post facto effect to modify the terms of the trust deed.

I am therefore of the opinion that the decree of the trial court should be reversed with directions to dismiss the bill.

KANAKANUI et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. August 6, 1917.)

No. 2935.

1. EMINENT DOMAIN ⟸246(2)—"TAKING" OF PROPERTY—ABANDONMENT OF PROCEEDING.
   The institution and prosecution by the United States of a proceeding for the condemnation of property is not a "taking" of the property, and the proceeding may be abandoned at any time.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Taking.]
2. EMINENT DOMAIN ⟸122—COMPENSATION FOR PROPERTY TAKEN—"JUST COMPENSATION."
   "Just compensation" means the full equivalent for the property taken.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Just Compensation.]
3. EMINENT DOMAIN ⟸167(1)—CONDEMNATION PROCEEDINGS BY UNITED STATES—CONFORMITY TO LOCAL LAWS.
   The provision of Act Aug. 18, 1890, c. 797, § 1, 26 Stat. 316 (Comp. St. 1916, § 6911), that proceedings for the condemnation of property for military purposes shall be prosecuted in accordance with the laws of the states wherein they are instituted, applies only to matters of procedure.
4. EMINENT DOMAIN ⟸246(4)—CONDEMNATION PROCEEDINGS BY UNITED STATES—EFFECT OF ABANDONMENT.
   Rev. Laws Hawaii 1905, § 505, providing that, unless an award of damages made in condemnation proceedings shall be paid within two years, the defendant shall be entitled to recover his costs, reasonable expenses, and damages sustained, does not apply to a proceeding by the United States to condemn property for a public use, and any expense or damages sustained by the defendant in such case, where the proceeding is abandoned, is damnum absque injuria.

In Error to the District Court of the United States for the Territory of Hawaii; Chas. F. Clemons, Judge.

Action by S. M. Kanakanui, William R. Castle, and William R. Castle, as trustee for S. M. Kanakanui, against the United States. Judgment for the United States, and plaintiffs bring error. Affirmed.

The court below sustained a demurrer to the complaint of the plaintiffs in error in an action which they brought against the United States, in which it was alleged that in a prior action between the same parties the United States had sought to condemn, for the erection of a military post and fortification, a tract of land consisting of 4.3 acres, together with water, riparian, and fish-

ing rights, belonging to the plaintiffs in this action; that in said condemnation suit it was finally decreed that, upon payment into the registry of the court of the sum of $5,000, all the right, title, and interest of the owners of said property should vest absolutely in the United States; that said money has not been paid, or any part thereof; that two years have elapsed since final judgment; that all the rights of the United States in the judgment have been lost to it; that at no time during said two years following said final judgment did the United States notify the plaintiffs, or either of them, that it did not claim under said judgment, "but at all times did suffer said judgment to remain, and did claim under the same"; that the plaintiffs paid the sum of $1,100 attorney's fees in the preparation of their defense to said condemnation suit and the trial thereof, and the further sum of $64.85 for witness fees, and other expenses, all of which were reasonably incurred; and that they were damaged in the sum of $5,000 for the loss of the use of said property. For these sums, and for interest, the plaintiffs demanded judgment under the provisions of Act March 3, 1887 (24 Stat. 505, c. 359), known as the Tucker Act, and under the provisions of section 505 of the Revised Laws of Hawaii of 1905, which provides as follows: "The plaintiff must within two years after final judgment pay the amount assessed as compensation or damages; and upon failure so to do all rights which may have been obtained by such judgment shall be lost to the plaintiff; and if such payment shall be delayed more than thirty days after final judgment, then interest shall be added at the rate of seven per cent. per annum. Such payment shall be made to the clerk of the court rendering the judgment, who shall distribute the same in accordance with the order of the court. If the plaintiff shall fail to make such payment as aforesaid, the defendant shall be entitled to recover his costs of court, reasonable expenses and such damage as may have been sustained by him by reason of the bringing of the action."

David L. Withington, of Honolulu, T. H. (William R. Castle, W. A. Greenwell, and Alfred L. Castle, all of Honolulu, T. H., of counsel), for plaintiffs in error.

John W. Preston, U. S. Atty., and Ed. F. Jared, Asst. U. S. Atty., both of San Francisco, Cal., and S. C. Huber, U. S. Atty., of Honolulu, T. H.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The only limitation upon the power of the United States to exercise the right of eminent domain is that just compensation shall be made for property taken. Just compensation means the full equivalent for the property taken. Monongahela Navigation Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463. By the terms of the judgment of condemnation as it is here pleaded, and by the rule sustained by the weight of authority, there was no taking of the property which was sought to be condemned. Lewis on Eminent Domain, (3d Ed.) § 655. The United States had the right to and did abandon the proceeding. The complaint in the present action clearly shows that the plaintiffs suffered substantial damage by reason of the action of the defendant, and it must be conceded that the statute of Hawaii is just and equitable, in that it permits recovery for such damages.

[3] The question here, however, is whether the United States has subjected itself to liability under that statute. Congress might have enacted that the condemnation suit be conducted according to common law, or by a procedure wholly irrespective of that of the territory of

Hawaii. By the act of August 18, 1890 (26 Stat. 316), Congress made the general provision under which the condemnation suit was brought, which was that condemnation shall be conducted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted. By virtue of that statute the federal courts are required to follow the local practice, pleadings, forms, and proceedings so enjoined. They are not required to observe any provision concerning any matter of substance prescribed in the local procedure. Such is the doctrine of the decisions wherever the question has arisen. Thus Judge Wallace held that the requirements of a local statute that there must first be a reasonable attempt to acquire the land by purchase is a matter of substance, and not of form, practice, or pleading, and need not be regarded by a federal court. In re Secretary of Treasury (C. C.) 45 Fed. 396, 11 L. R. A. 275. In that case it was said:

"The right of eminent domain may be exercised by the general government within the several states without their permission, and cannot be trammeled by any obnoxious restrictions by state laws, and, in the absence of regulation by Congress, may be asserted by any method to obtain lands for public use which was recognized as appropriate when the federal Constitution was adopted."

So in High Bridge Lumber Co. v. United States, 69 Fed. 320, 16 C. C. A. 460, Judge Lurton said:

"It is not to be conceived that Congress intended that a legislative requirement, giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn land necessary for the improvement of navigation."

In Carlisle v. Cooper, 64 Fed. 472, 12 C. C. A. 235, the court held that condemnation procedure prescribed by Act Aug. 1, 1888, c. 728, 25 Stat. 357 (Comp. St. 1916, §§ 6909, 6910), added nothing to Conformity Act June 1, 1872, c. 255, 17 Stat. 196, and said:

"It has never been supposed that the act of June 1, 1872, was intended as a consent by Congress to waive the immunity of the government from judgments for damages or costs. * * * Congress could not have supposed that its remedial legislation would permit judgments against the government for damages or costs."

In Luxton v. North River Bridge Co., 147 U. S. 337, 13 Sup. Ct. 356, 37 L. Ed. 194, it was said that the act of June 1, 1872, must—

"give way whenever to adopt state practice would be inconsistent with the terms, and defeat the purpose, or impair the effect, of any legislation of Congress."

In Transportation Co. v. Chicago, 99 U. S. 635, 642, 25 L. Ed. 336, the court said:

"But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority."

[4] The plaintiffs contend that the action is maintainable under the Tucker Act as an action to recover damages in a case "not sounding in tort." It is true that under the allegations of the complaint the case does not sound in tort, for it is not alleged that the condemnation suit was not brought or prosecuted in good faith, and no negligence is imputed to the officers of the government. But the controlling fact is that the claim for damages rests wholly upon a local statute. Such a statute cannot create a liability against the United States. If, as an incident to the right which the United States properly exercised to condemn property to a public use in a proceeding which was subsequently abandoned, the defendants were required to incur expenses, or were incidentally injured, it was a case of damnum absque injuria, and comes within—

"the universally recognized principle of law which exempts from liability for loss or damage incidentally resulting from the proper exercise of a legal right." Ford v. Park Com'rs, 148 Iowa, 1, 126 N. W. 1030, Ann. Cas. 1912B, 940; Petition of Pittsburgh, 243 Pa. 392, 90 Atl. 329, 52 L. R. A. (N. S.) 262; United States v. Dickson (C. C.) 127 Fed. 774; McCready v. Rio Grande Western Ry. Co., 30 Utah, 1, 83 Pac. 331, 8 Ann. Cas. 732.

The judgment is affirmed.

MITCHELL, United States Marshal, v. DEXTER.

(Circuit Court of Appeals, First Circuit. June 27, 1917.)

No. 1286.

1. COURTS ⇐266—FEDERAL COURTS—ISSUANCE OF PROCESS—TERRITORIAL LIMITATIONS.

A contempt proceeding originated in a petition brought by the complainants in an equity suit, alleging a violation by the defendants of an injunction granted in such suit and asking that defendants be ordered to appear and show cause why they should not be attached and punished for contempt for such violation. Such an order to show cause was issued and served, and answers filed, and thereafter a notice, signed by plaintiff's solicitors, was addressed to those for defendants, stating that the petition and answer in the contempt proceedings pending in "said cause" would be called up for hearing, and that the depositions of certain defendants would be read and one of the defendants examined. An order was entered, reciting the various proceedings, finding that certain of the defendants had violated the injunction, and ordering that an attachment issue for their arrest. All of such orders and papers were entitled and numbered in the equity suit. *Held*, that the proceeding was civil in its nature, and, under Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1916, § 1033), providing that, except as otherwise provided, no person shall be arrested in one district for trial in another in any civil action, the District Court for the Eastern District of Wisconsin had no authority to issue its writ to the marshal for the district of Massachusetts for the arrest of certain defendants and their removal to Wisconsin.

2. COURTS ⇐266—FEDERAL COURTS—ISSUANCE OF PROCESS—TERRITORIAL LIMITATIONS.

Judicial Code, § 262 (Comp. St. 1916, § 1239), authorizing the District Courts to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and

agreeable to the usages and principles of law, did not authorize the Wisconsin court to issue its writ for the arrest of defendants in Massachusetts and their removal to Wisconsin, even though the proceeding was a criminal one, as that section does not authorize the issuance of process to run beyond the limits of the court's territorial jurisdiction, but merely designates the form or character of writs which the court may issue within such territory.

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

Habeas corpus by Alvin S. Dexter against John J. Mitchell, United States Marshal. From a decree discharging the petitioner, the respondent appeals. Affirmed.

Sherman L. Whipple and Alexander Lincoln, both of Boston, Mass. (George W. Anderson, U. S. Atty., Daniel A. Shea, Asst. U. S. Atty., and Leo A. Rogers, all of Boston, Mass., on the brief), for appellant.

Robert Cushman, of Boston, Mass. (Odin Roberts, Charles D. Woodberry, and Roberts, Roberts & Cushman, all of Boston, Mass, on the brief), for appellee.

Before BINGHAM, Circuit Judge, and BROWN and MORTON, District Judges.

BINGHAM, Circuit Judge. The questions in this case arise on the petition of Alvin S. Dexter, of Manchester, in the district of Massachusetts, for a writ of habeas corpus. In the court below a writ of habeas corpus was issued and the marshal made his return, in which he set forth that he arrested and took Dexter into custody by virtue of process issued by the District Court of the United States for the Eastern district of Wisconsin, a copy of which he annexed thereto.

By the writ it appears that the process was issued from the District Court for the Eastern district of Wisconsin, directed to the marshal for the district of Massachusetts, or his deputy, or either of them, directing them to take Dexter and others mentioned, if found in the Massachusetts district, and have them before the court for the Eastern district of Wisconsin, that they might be dealt with according to law. It recites that Dexter and others named in the writ had been adjudged guilty of contempt of the District Court in Wisconsin, in that they had violated the injunctional order of the court of August 9, 1916, in a case therein pending, entitled "North American Chemical Company and George H. Maxwell, Plaintiffs, v. Alvin S. Dexter, Dexter Manufacturing Company, Fibrehide Filler Company, Braintree Rubber Cement Company, Joseph E. Peckham, A. B. Alden, Henry G. Halloran and Harry Wilson, Defendants"; that the court issued a writ of attachment for the arrest of said persons, directed to the marshal of the Western district of Wisconsin, requiring them to be brought before the court; that the marshal made a return upon the writ that he was unable to find said persons within his district, and that he believed them to reside in or near Boston, in the Massachusetts district, and could there be found.

In the court below it was assumed, for the purposes of the case, that the contempt proceeding, instituted in the District Court of Wis-

consin for the violation of the injunctional order, was criminal; and it was held that section 262 of the Judicial Code (R. S. § 716 [Comp. St. 1916, § 1239]) did not authorize the issuance of a writ in a criminal case for the arrest of a citizen of one judicial district, while within that district, and his removal to the judicial district of another state. An order discharging the petitioner was entered, and this appeal was taken.

In the argument of the case upon this appeal, it was conceded that, if the contempt proceeding was civil in nature, the court did not err in discharging the petitioner. Judicial Code, § 51; R. S. § 739 (Comp. St. 1916, § 1033); Toland v. Sprague, 12 Pet. 300, 328–330, 9 L. Ed. 1093; Ex parte Graham, Fed. Cas. No. 5,657; Picquet v. Swan, Fed. Cas. No. 11,134. But it was contended on behalf of the appellant that the proceeding was criminal in nature, and the District Court for Wisconsin was authorized to issue its writ to the marshal of Massachusetts for the arrest and removal of Dexter to Wisconsin under the authority conferred by section 262 of the Judicial Code (R. S. § 716).

[1] As bearing upon the nature and purpose of the contempt proceeding, evidence was introduced from which it appeared that the original proceeding in which the injunctional order was made was an equity suit numbered 684, brought by the North American Chemical Company and George H. Maxwell against Alvin S. Dexter, Dexter Manufacturing Company, Fibrehide Filler Company, Braintree Rubber Cement Company, Joseph E. Peckham, A. B. Alden, Henry G. Halloran, and Harry Wilson, alleging infringement of certain letters patent; that the contempt proceeding originated in a petition brought by the North American Chemical Company and George H. Maxwell against the defendants named in the equity suit; that the petition was also numbered 684 and filed in said suit; that it contained a recital setting forth the proceedings in the equity suit, to wit, the appearance and answers of the defendants and the injunctional order, and alleged that the defendants, in disregard and defiance of the injunction and in contempt of the authority of the court, had continued to infringe the letters patent. In the concluding paragraph the petitioners prayed that the defendants be ordered to appear before the court and show cause why they "should not be attached and punished for contempt of court" for violating the injunction. Upon the petition being filed an order was issued, also numbered 684 and entitled as of the equity suit, directing the defendants to appear before the court to show cause "why they should not be attached and punished for contempt of court," and that the defendants be served with a copy of the petition and order. The petition and order to show cause having been served, an order was entered on the 14th day of October, 1916, entitled as of the equity suit, directing the defendants to answer or demur to the petition not later than October 18, 1916, and that a hearing be had thereon October 28, 1916. Answers to the petition, entitled as of the equity suit, were filed in said cause on the 18th and 20th of October, 1916; and on October 25, 1916, a notice, entitled as of the equity suit and signed by the "solicitors" for the plaintiffs, was addressed to the "solicitors" for the defendants, notifying them that on October

28th, they should call up for hearing and disposition before the court "the petition and the answer thereto in the contempt proceedings now pending in said cause, and that we shall read in support of said petition the depositions of Joseph E. Peckham, Henry G. Halloran, and Alvin S. Dexter on file in said cause, and shall call and examine as witness, Harry Wilson, one of the defendants in said cause, and shall read in support of said petition the affidavits of Oliver D. Hogue and Frank O. Hatch." Under date of October 28, 1916, an order was entered, entitled as of the equity suit, in which it was recited that the plaintiffs and defendants, by their counsel, appeared before the court under the rule to show cause, and the matter came on to be heard on the petition and answers and the depositions taken in the cause and testimony in open court, and, the matter having been argued and submitted, it was ordered that Harry Wilson be discharged, and that, as to the other defendants, the plaintiffs will prepare findings holding them guilty of contempt of court. December 9, 1916, an order drafted in pursuance of the order of October 29, 1916, entitled as of the equity suit, was filed, which, after reciting the various proceedings had with reference to the petition for contempt, including the hearing, the reading of the depositions, affidavits, etc., and a finding that the defendants had deliberately and willfully violated the injunction of the court, it was ordered that "an attachment issue forthwith for the arrest of the defendants, and that they be brought before the court to do and receive what the court may further order and decree in the premises."

In Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the question was presented whether the proceeding for contempt in that case was civil or criminal, and, after adverting to the fact that "the alleged contempt did not consist in the defendants refusing to do any affirmative act required, but rather in doing that which had been prohibited," and that all the sentences imposed were for fixed terms in jail for 6, 9, and 12 months, which sentences, under the circumstances, did not afford remunerative relief to the complainant, but were wholly punitive, the court proceeded to consider the nature of the proceeding in which the punishment was imposed for the purpose of determining whether the punishment was one which it could impose; and, having arrived at the conclusion that the proceeding was one in equity for civil contempt where, under the circumstances of the case, there could be no coercive imprisonment, and the only remedial relief possible was a fine payable to the complainant, it held that the punishment imposed was without authority.

The facts in that case, which led the court to the conclusion that the proceeding for contempt was civil, and not criminal, differ in no material respect, save one, from those in this case. All the proceedings, orders, and decrees there, as here, were entitled as in the original equity suit, and the proceeding was prosecuted throughout by the complainants, and not by the law officer of the government. There, as here, the defendants were required to testify against themselves, a thing which they would not have submitted to, and the court would not have required, if it had been understood that the proceeding was

criminal, and not civil; for, as stated in the Gompers Case (221 U. S. at page 444, 31 Sup. Ct. at page 499, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874):

"In proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

To the extent that the petition prays that the defendants "should show cause * * * why they * * * should not be attached and punished for contempt of court" it does not differ from the prayer in the Gompers Case. The petition in the latter case, however, contained the additional prayer "that petitioner may have such other and further relief as the nature of its case may require," indicating that it was seeking remedial relief. But, inasmuch as a petition for contempt, whether civil or criminal, must contain a prayer that the defendant be attached and punished for the alleged contempt (Gompers v. Buck Stove & Range Co., supra, 221 U. S. at p. 441, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), the most that can be said for the prayer in the present petition is that it is equivocal and without force as evidence bearing upon the character of the proceeding.

There is, however, in this case an additional piece of evidence not present in the Gompers Case, to wit, the notice of October 25, 1916, sent by the solicitors for the plaintiffs to the solicitors for the defendants, notifying them that they should call up for hearing and disposition before the court "the petition and answer thereto in the contempt proceedings now pending in said cause," meaning the original equity cause, which is very persuasive as to what counsel and the parties understood was the nature of the proceeding.

See, also, as bearing on this question, In re Kahn, 204 Fed. 581, 123 C. C. A. 107; Stewart v. United States, 236 Fed. 838, 150 C. C. A. 100.

We are therefore of the opinion that the proceeding for contempt was civil in its nature, and that the District Court of Wisconsin was without authority to issue the writ for the arrest of the petitioner in the district of Massachusetts.

[2] But, if it could be found that the petition for contempt was a criminal proceeding at law, we are still of the opinion that the District Court of Wisconsin was without authority under section 262 of the Judicial Code (R. S. § 716) to issue its writ for the arrest of Dexter in Massachusetts and his removal to the district of Wisconsin.

The Court of Appeals for the District of Columbia, in Palmer v. Thompson, 20 App. D. C. 273, expressly held that, in the absence of an act of Congress conferring the power, the federal court in one district had no authority in a criminal case to issue its writ to the marshal of another federal district, commanding him to arrest a person within his jurisdiction, but outside that of the court issuing the writ, and that such power was not conferred by section 716 of the Revised Statutes. What is said in Re Christian (C. C.) 82 Fed. 885, as to the power of a court under this section of the statute, was disapproved by the Court of Appeals in the Palmer Case, and we do not regard it as authority upon the proposition here in question.

Furthermore, we do not think section 262 of the Code (R. S. § 716; Judiciary Act Sept. 24, 1789, c. 20, § 14, 1 Stat. 73) gives authority to a federal District Court to issue processes to run beyond the limits of the territory in which it is established, but rather that it is a designation of the form or character of writs which such court may issue within the territory where it is established. Hills & Co. v. Hoover, 220 U. S. 329, 336, 337, 31 Sup. Ct. 402, 55 L. Ed. 485, Ann. Cas. 1912C, 562; McClellan v. Carland, 217 U. S. 269, 279, 30 Sup. Ct. 501, 54 L. Ed. 762.

Entertaining these views, we are of the opinion the court below did not err in discharging the petitioner.

The decree of the District Court is affirmed, with costs to the appellee.

DAVIS et al. v. CARNEGIE STEEL CO.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1917.)

No. 2983.

1. APPEAL AND ERROR ⟸927(7)—REVIEW—DIRECTED VERDICT—PRESUMPTIONS.

On appeal from a judgment on a directed verdict for defendant, it must be assumed that plaintiffs' testimony is true, and plaintiffs are entitled to the benefit of every fair inference therefrom.

2. DAMAGES ⟸190—SUFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

In an action for breach of an agreement by defendant that plaintiffs could have two large dumps of furnace slag for keeping the slag out of defendant's way, evidence as to the value of crushed slag was not a sufficient basis for a recovery for loss of profits, in the absence of evidence as to the cost of crushing and marketing the slag; it appearing that a considerable portion required such treatment to make it marketable.

3. DAMAGES ⟸176—EVIDENCE ⟸317(6)—ADMISSIBILITY OF EVIDENCE—LOSS OF PROFITS—HEARSAY.

Testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in handling and marketing slag, was properly excluded, where there was no showing that the profits derivable from treating and marketing the dumps in question bore sufficient relation to the profits derivable from the uses to which the slag was put in Detroit; and, moreover, such testimony was secondhand information.

4. DAMAGES ⟸190—SUFFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

Evidence that the value of the slag in the two dumps was in excess of $2,500 was not sufficient to support a verdict for $2,500 damages, in the absence of any evidence as to what it would have cost plaintiffs to perform their duty of keeping the slag out of defendant's way, not only during the time when there was a demand for slag, but during the entire year.

5. DAMAGES ⟸190—SUFFICIENCY OF EVIDENCE—LOSS OF PROFITS.

Evidence as to the price quoted by defendant on rough slag, uncrushed and unscreened, delivered f. o. b. cars to certain railroads, would not support a recovery for loss of profits, in the absence of evidence as to the cost of delivery to such railroads, or evidence that there was a market at that price for the full amount of slag.

6. APPEAL AND ERROR ⟸719(8)—ASSIGNMENT OF ERRORS—NECESSITY.

A judgment will not be reversed for failure to allow nominal damages, in the absence of a specific assignment or complaint on that ground.

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7. FRAUDS, STATUTE OF ⟸63(1), 72(1), 82—NATURE OF PROPERTY—"GOODS."
Where defendant orally agreed to turn over a slag-crushing plant to plaintiffs, to be operated by them, and to give them two large dumps of slag, covering several acres of ground, if they would remove the slag and keep the slag dumped by defendant out of defendant's way, the agreement was either a grant of, or contract for, an interest in lands, tenements, or hereditaments, within the statute of frauds (Gen. Code Ohio, §§ 8620, 8621), or a contract for the sale of goods, within section 8384, in view of section 8456, defining "goods" as embracing all chattels and personalty other than things in action or money.

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

8. FRAUDS, STATUTE OF ⟸83—NATURE OF CONTRACT—SALE OR MANUFACTURE.
The contract was not one of manufacture by plaintiffs for defendant, but one for the passing of title in payment for services, as defendant was not concerned with the crushing of the slag, except as a means for getting it out of the way, and the fact that payment was to be made in services, rather than in money, did not take the case out of the statute.

9. FRAUDS, STATUTE OF ⟸90(1)—SALES OF GOODS—ACCEPTANCE AND RECEIPT.
Under Gen. Code Ohio, § 8384, subsec. 1, providing that a contract to sell, or a sale. of goods or choses in action of the value of $2,500 or upwards, shall not be enforceable, unless the buyer shall accept part of the goods and actually receive them, or give something in earnest, etc., and subsection 3, providing that there is an acceptance when the buyer, before or after delivery, expresses his assent to become the owner of the specific goods, an acceptance of the goods without actual receipt is insufficient.

10. FRAUDS, STATUTE OF ⟸130(1)—EFFECT OF STATUTE—CONTRACTS IN PART WITHIN STATUTE.
Where defendant agreed to turn over a slag-crushing plant to plaintiffs, and to give them two large dumps of slag, for removing the slag and keeping that dumped by defendant out of its way, but the agreement was not in writing, and plaintiffs had rendered no services under it, no recovery could he had for its breach; an essential part of the entire contract being void.

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

Action by Frank B. Davis and another against the Carnegie Steel Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Theodore A. Johnson, of Youngstown, Ohio, and Warren Thomas, of Warren, Ohio, for plaintiffs in error.

C. A. Manchester and Hine, Kennedy & Manchester, all of Youngstown, Ohio, and Squire, Sanders & Dempsey, of Cleveland, Ohio (Leroy A. Manchester, of Youngstown, Ohio, and Wm. C. Boyle, of Cleveland, Ohio, of counsel), for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error (defendant below) had at its McDonald site, near Girard, Ohio, a large dump of furnace slag, amounting to many thousand tons and covering several acres; it had in connection with its Ohio steel plant, near Youngstown (a few

miles from the McDonald site), another slag dump, much larger than the one at the latter site. Its daily dump of slag from the Ohio plant alone was from 1,000 to 1,500 tons. Plaintiffs brought suit to recover damages for the breach of an alleged oral contract, whereby defendant, in consideration of plaintiffs' agreement to remove from defendant's premises the two piles of slag, and to keep out of defendant's way the furnace slag dumped by defendant at both sites, agreed to put in a slag-crushing plant and turn the same over to plaintiffs, to be operated by them; they to have the slag to dispose of as they pleased.

Plaintiffs' testimony showed that prior to the making of the alleged contract there had been conferences between plaintiffs and defendant's engineers looking to the installation by plaintiffs on defendant's premises of a slag-crushing plant, estimated by plaintiffs to cost about $75,000, for the crushing and removal of the slag dumps. There is no claim that any contract was entered into until plaintiffs' subsequent interview with defendant's president in November, 1912, at the close of which interview defendant's president is alleged to have said: "It would never do to have you put a slag-crushing plant on our ground; * * * you need screens and crushers; there is a steam shovel up there; we will put the plant in there, and you can have the slag so long as you keep it out of our way." To which plaintiffs replied: "We will keep the slag out of your way. * * * We are satisfied to go ahead and keep the slag out of your way." Thereupon defendant's president said: "This is out of the wind." This comprises the express proof of the contract relied upon. The alleged contract is interpreted by both plaintiffs as requiring the slag (including daily product) to be kept out of defendant's way; by one as requiring the removal of accumulations at both sites, if defendant so desired; by the the other as permitting it (at plaintiffs' option), but not requiring it.

The alleged arrangement was entirely oral; it was never subsequently reduced to writing; no payment was ever made to bind the alleged bargain; nothing was ever done under it; no part of the slag was ever delivered to or received by plaintiffs. On the contrary, the defendant built a crushing plant and operated it on its own account; plaintiffs never had any possession of, or anything to do with, defendant's plant, or with its appurtenances, equipment, or operation.

The defendant, by its answer, denied the alleged contract in toto, urging also the invalidity of the alleged contract not only for lack of mutuality, but also because it related to an interest in lands, and because not to be performed within a year from its making, and so void under the statute of frauds (G. C. Ohio, §§ 8620 and 8621); also, because, considered as a sale, or a contract of sale, of goods of the value of $2,500 and upwards, void under the Ohio Sales Act (G. C. § 8384). Defendant also denies here the authority of its president to make the alleged contract. At the close of the testimony the presiding judge (the present Mr. Justice Clarke) directed verdict for defendant. This writ is to review the judgment entered thereon.

[1] We must assume, on this review, that plaintiffs' testimony is true, and that they are thus entitled to the benefit of every fair inference therefrom. Shadoan v. C., N. O. & T. P. Ry. Co. (C. C. A. 6) 220 Fed.

68, 71, 135 C. C. A. 636. We accept their interpretation that the plant was to be operated by them.

[2, 3] The specific ground on which verdict was directed seems to have been lack of proof that plaintiffs were damaged by the breach of the alleged contract. We think the direction sustainable on this ground. There is no claim of damages (except as involved in loss of profits), or of money expended on faith of the contract. The sole basis of plaintiffs' claimed right of recovery is loss of profits, by being denied the right to perform. While plaintiffs showed the value of the crushed slag, there was no evidence of the cost of crushing and marketing it, and it seems to be assumed that a considerable portion at least required such treatment to make it marketable. The proof of profits lost was speculative and conjectural. Plaintiffs' testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in the handling and marketing of slag, was properly excluded; for not only was it secondhand information, but there was no showing that the profits derivable from treating and marketing the dumps in question bore sufficient relation to the profits said to be derivable from the uses to which the slag was put in Detroit. Unless, therefore, there was other evidence taking it out of the general rule, the failure to show cost of operation was fatal to recovery. Anvil Mining Co. v. Humble, 153 U. S. 540, 549, 14 Sup. Ct. 876, 38 L. Ed. 814; McCornick v. Mining Co. (C. C. A. 8) 185 Fed. 748, 751, 108 C. C. A. 86; Magnolia Co. v. Gale, 189 Mass. 124, 132–133, 75 N. E. 219; Bristol R. Co. v. Bullock, 101 Va. 652, 44 S. E. 892; Klingman v. Racine Co., 149 Iowa, 634, 128 N. W. 1109; Bartow v. Erie R. R. Co., 73 N. J. Law, 12, 62 Atl. 489.

[4] One of the plaintiffs, however, upon cross-examination apparently designed to bring the case within the Ohio Uniform Sales Act, testified that "the value of that slag that we were to take away and in those piles would exceed the sum of $2,500"; and plaintiffs urge that this testimony is enough to support a verdict for at least $2,500 damages. We are unable to accept this view. It by no means follows that, because the slag was worth $2,500, plaintiffs were damaged in that amount by not getting it; for the contract was an entirety, and plaintiffs could not take away the slag, except by complying with the obligations imposed upon them, namely, the keeping of the slag out of defendant's way, not only during the demand for uncrushed slag, but during the entire year. In other words, plaintiffs had a duty to perform by way of payment for the slag; and the cost of performing that duty and making such payment does not appear.

[5, 6] Nor is the situation changed by the fact that defendant, during its subsequent operation, quoted "rough bank slag, uncrushed and unscreened," at the price of 30 cents per net ton delivered f. o. b. cars to either of three specified railroads; for the cost of such delivery does not appear, nor that there was a market at that price for untreated slag in the full amount which plaintiffs were required to take away. The failure to show the cost of plaintiffs' proposed operation, and the alleged loss of profits, is emphasized, and the correctness of the direction of verdict made especially apparent, by the indefinite and uncertain terms of the alleged contract, which render its validity extremely

doubtful, to say the least. It does not appear that the parties reached agreement on all essential features involved. For example: No provision was made for transporting the slag from the dumps to the proposed crusher and thence to the cars; defendant (for the purpose of its own operation) later put in a railroad track for the purpose first mentioned; and the petition alleges that defendant was to furnish plaintiffs, not only with the crushing plant and steam shovel, but also "locomotive and use of defendant's railroad." But, if such latter provision were to be assumed, it still remains that the method and terms on which defendant should furnish power, railroad and shipping facilities, and the extent of plaintiffs' specific rights in and control over defendant's land and equipment, do not appear to have been considered. Even were we to assume that plaintiffs were entitled to recover nominal damages, the judgment should not be reversed for failure to allow such recovery, in the absence of specific assignment or complaint on that ground. Lawrence v. Porter (C. C. A. 6) 63 Fed. 62, 68, 11 C. C. A. 27, 26 L. R. A. 167.

[7-10] But, assuming that there was rational basis for ascertaining plaintiffs' alleged loss of profits, we think the direction of verdict was nevertheless proper. The slag dumps were either part of the real estate, or they were personalty. If part of the real estate, the agreement, not being in writing, was void under the statute of frauds (sections 8620 and 8621, O. G. C.), as a grant of or a contract for an interest in lands, tenements or hereditaments. If personalty, the contract was void under the Ohio Sales Act (section 8384, G. C.); for (as declared by section 8456) the term "goods" embraces "all chattels and personalty other than things in action or money" (Laundry Co. v. Whitmore, 92 Ohio St. 44, 52, 110 N. E. 518, Ann. Cas. 1917C, 988); the alleged contract was not one of manufacture by plaintiffs for defendant; the latter was not concerned with the crushing of the slag, except as means for getting it out of its way. Its agreement was essentially for the passing of title in payment for services, and the fact that payment was to be made in services, rather than in money, does not take the case out of the statute. Franklin v. Matoa Gold Mining Co. (C. C. A. 8) 158 Fed. 941, 943, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, 14 Ann. Cas. 302. The "dumps" were of the conceded value of $2,500. There was no note or memorandum in writing, and no earnest money or part payment; and, assuming that the identification of the goods amounted to their acceptance, under subsection 3 of section 8384 (Williston on Sales, § 76, p. 86), plaintiff did not "actually receive" them, and, under subsection 1, acceptance without actual receipt was futile. An essential part of the entire contract being void, and plaintiffs having rendered no services under it, no recovery can be had for its breach. Snow Storm Mining Co. v. Johnson (C. C. A. 9) 186 Fed. 745, 754, 108 C. C. A. 615; Smith on Fraud, § 355.

These conclusions make it unnecessary to consider the other defenses urged, or the remaining assignments of error presented.

The judgment of the District Court is affirmed.

HARPER TRANSP. CO. v. JOHNSON & HIGGINS.

(Circuit Court of Appeals, First Circuit. September 25, 1917.)

No. 1268.

1. FRAUDS, STATUTE OF ⊂=44(1)—CONTRACTS—PERFORMANCE WITHIN A YEAR.
Plaintiff, a corporation engaged in the business of marine insurance brokerage, in 1911, placed the insurance on defendant's vessels covering their voyage from the Great Lakes to the seacoast, and also covering their operation on the coast. Plaintiff was personally liable for the premium on only some of the policies; defendant being directly liable to the insurers for other premiums. In November, 1911, premiums for that year not having been paid, plaintiff and defendant, after various negotiations, agreed that plaintiff should have defendant's marine insurance business for the next two years, subject to defendant's approval of the rates at which the insurance should be written, and that plaintiff should forbear immediate suit for premiums paid by it, and should pay the underwriters, on defendant's account, the balance of the 1911 premiums. The agreement also provided that defendant should have an extension of credit until July, 1912, or thereabouts; payments being made at such times and in such amounts as defendants reasonably could, the whole indebtedness to be discharged by July, 1912. *Held* that, as the number of defendant's vessels might vary from time to time, and as plaintiff was to have the business of insuring such vessels subject to approval of rates, the contract was not one to be performed within a year.

2. FRAUDS, STATUTE OF ⊂=113—MEMORANDA—SUFFICIENCY.
Where the only memoranda of the terms of the contract were contained in letters, which did not set forth the terms of the contract as to the extension of credit and did not provide for payment by the plaintiff of the premiums on policies, where defendant was directly liable, the memoranda were not sufficient to take the case out of the New York statute of frauds, declaring that every agreement, promise, or undertaking not to be performed in one year from the making thereof is void, unless it or some note or memorandum be in writing and subscribed by the party to be charged, or by his agent.

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Action by Johnson & Higgins against the Harper Transportation Company. There was a judgment (228 Fed. 730) for plaintiff, and defendant brings error. Reversed, with directions.

Robert E. Goodwin, of Boston, Mass. (Floyd G. Blair, George K. Gardner, and Goodwin, Procter & Ballantine, all of Boston, Mass., on the brief), for plaintiff in error.

John G. Palfrey, of Boston, Mass. (Pierpont L. Stackpole and Warner, Stackpole & Bradlee, all of Boston, Mass., on the brief), for defendant in error.

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

BINGHAM, Circuit Judge. This is a writ of error from a judgment of the United States District Court of Massachusetts, entered in

favor of Johnson & Higgins in an action brought by them against the Harper Transportation Company for breach of contract. The plaintiffs are a New Jersey corporation doing business in New York as marine insurance brokers. The defendants are a Maine corporation, with offices in New York and Boston, and operate a fleet of steamers and barges in the coastwise trade. They are lessees, not owners, of the vessels; the legal title to the same being held by the Philadelphia Trust, Safe Deposit & Insurance Company. Their fleet was built on the Great Lakes, and completed during the summer and fall of 1911; it consisted originally of four steamships and seven barges. In 1911 the plaintiffs placed the insurance on the defendants' vessels covering their voyages from the Great Lakes to the seacoast, and also covering their operation on the coast. The policies covering the voyages were known as voyage or trip policies, and those covering their operations on the coast as annual policies. The trip policies expired on the completion of the voyages, and the annual policies at various dates, beginning August 21, 1912, and ending some time in November, 1912. Some of the 1911 insurance was placed abroad, and the plaintiffs were liable for the premiums on such policies, and were also liable for the premiums on the policies which they had procured to be written by the Atlantic Mutual Insurance Company of New York. As to the premiums on the balance of the policies, the defendants were directly responsible to the underwriters. The plaintiffs received their compensation for placing the insurance from the underwriters; it being a certain percentage of the premiums.

In November, 1911, the premiums on the 1911 policies had not been paid, and the plaintiffs were pressing for payment and threatening suit. After various interviews and much correspondence had taken place, about an extension of credit as to premiums overdue and the placing of the insurance for the years 1912 and 1913, it was found by the court below that the parties, within a few days after January 12, 1912, entered into a contract whereby it was agreed that the plaintiffs should have the defendants' marine insurance business for the next two years, subject to the latter's approval of the rates for which the insurance should be written; that the plaintiffs should forbear immediate suit and pressure, should pay the underwriters on the defendants' account the balance of the 1911 premiums, and should grant the defendants an extension of credit to July 1, 1912, or thereabouts; that the defendants should make payments on their 1911 premium account at such times and in such amounts as they reasonably could from the receipts of their business; and that the account should be paid in full by July 1, 1912, or thereabouts. It was also found and ruled that the contract for placing the insurance for the years 1912 and 1913 was an entire contract; that the defendants, by placing the insurance for 1912 with another broker and refusing to permit the plaintiffs to place it, were guilty of a breach of contract going to the essence; that the plaintiffs were not in default; that the contract was not by its terms to be performed within one year, and was within the statute of frauds, but that it was sufficiently evidenced by writings to take it out of the statute.

Various errors are assigned, but we do not deem it necessary to

consider them all, if the contract was not to be performed within a year, and the writings did not sufficiently evidence the contract which the court found the parties entered into.

[1] It does not seem to us that the court erred in ruling that the contract was not one to be performed within a year. By its terms the plaintiffs acquired the right to place the insurance on the fleet through the years 1912 and 1913, provided it procured a rate agreeable to the defendants; and the defendants bound themselves to accept the plaintiffs' services on those terms. The contract did not relate simply to renewals of the 1911 and of the 1912 insurance as the fleet was constituted at the time of making the contract, but obligated them to procure insurance on the defendants' fleet, whether it was made larger or smaller, at any time within the two years. Until that period had expired, it could not be determined whether the plaintiffs would or would not have to render further service under the contract; for the defendants might increase or reduce the number of their vessels, or might desire to increase their insurance, or otherwise change any of their outstanding policies, during the specified period. If it would have been possible for the plaintiffs to have placed the renewals of the 1912 insurance within a year from the making of the contract, it would not have been possible for them to have rendered all the service within that period which they contracted to perform.

[2] No question is raised but that the contract is governed by the law of the state of New York, and that, under the statute of frauds of that state:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: (1) By its terms is not to be performed within one year from the making thereof." Laws N. Y. 1897, vol. 1, p. 510.

And, as we are of the opinion that the contract, by its terms, is not one to be performed within one year from the making thereof, the question remains whether it was evidenced by some note or memorandum in writing sufficient to take it out of the statute.

In Poel v. Brunswick-Balke-Collender Co., 216 N. Y. 310, 110 N. E. 619, the Court of Appeals for that state, in the year 1915, in considering a similar question involving the interpretation of its statute of frauds, said:

"In order to satisfy the requirements of the statute of frauds, the written note or memorandum must include all the terms of the completed contract which the parties made. It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it should completely evidence the contract which the parties made. If, instead of proving the existence of that contract, it establishes that there was in fact no contract, or evidences a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute."

It is therefore necessary, in considering this question, to keep in mind the terms of the contract which the court found the parties actually made, in order to ascertain whether the writings upon which

the plaintiffs rely, either expressly or by implication, embody all of its terms so as to take it out of the statute.

There is no question but that, both by the terms of the contract as found by the court and the proposals as evidenced by the writings, it was understood and agreed that the plaintiffs should have the defendants' marine insurance business for the years 1912 and 1913, subject to the latter's approval of the rate. It also seems to us that it is reasonably certain, both from the contract as found and the writings, that the plaintiffs were to forbear immediate suit and grant an extension of credit; but in the contract the terms upon which the credit was to be given, both as to the times of payment and amounts, differed materially from those stipulated in the writings. According to the contract, the defendants were to have an extension of credit until July 1, 1912, or thereabouts, and in the meantime were to make payments on their 1911 premium accounts, at such times and in such amounts as they reasonably could from the receipts of their business; but no writing was put in evidence which reasonably can be construed as embodying such an agreement. The letter of November 18, 1911, upon which the plaintiffs chiefly rely, is the only writing in which terms for an extension of credit are specified. But this writing does not aid the plaintiffs, for the terms of credit there proposed are widely different from those found to have been finally agreed to by the parties. The terms of payment were vital elements of the contract, and, unless evidenced by writing, render the contract void under the New York statute.

It further appears that, under the contract as found by the court, the plaintiffs were to pay the underwriters the 1911 premiums on the domestic policies upon which the defendants were directly responsible to the underwriters. This obligation was not expressly provided for in any of the writings put in evidence, and it may be doubtful whether it was involved by necessary implication in any of the propositions which the writings contained. Moreover, the writings that passed between the parties embodied terms that were in no way contained in the contract as found by the court, and the letters of January 17, 1912, and January 18, 1912, disclose that the parties' minds had not met upon the terms proposed in the writings; that the conditions upon which payment was to be made of the balance due the plaintiffs had not then been agreed upon.

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

CHIN AH YOKE v. WHITE, Immigration Com'r.

Ex parte CHIN AH YOKE.

(Circuit Court of Appeals, Ninth Circuit. August 20, 1917. Rehearing Denied October 8, 1917.)

No. 2859.

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

Evidence *held* to sustain a finding by immigration officers that a Chinese woman, arrested for being unlawfully in the United States, was an alien, and not, as claimed, a native citizen.

2. ALIENS ⟸32(5)—PROCEEDINGS FOR DEPORTATION OF CHINESE—JURISDICTION—BURDEN OF PROOF.

The fact that a Chinese woman is arrested as an alien practicing prostitution in this country, in violation of the immigration laws, is sufficient to give the immigration officials jurisdiction to hear and determine the case, and on the hearing the burden of proof is on the defendant on all issues, including a claim to American citizenship.

3. ALIENS ⟸32(9)—PROCEEDINGS FOR DEPORTATION OF CHINESE—FAIRNESS OF HEARING.

That a witness, examined in deportation proceedings against a Chinese person, had left the state for his home, and could not be recalled by the commissioner for cross-examination, when requested by defendant, did not invalidate the proceedings, where the commissioner offered to hear the witness, if produced by defendant.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Habeas corpus by Chin Ah Yoke, alias Jane Doe, against Edward White, Commissioner of Immigration for the port of San Francisco. From an order dismissing the petition, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

GILBERT, Circuit Judge. The appellant appeals from the order of the court below sustaining a demurrer to a petition for a writ of habeas corpus. She had been arrested on the charge that she was an alien who had been practicing prostitution since her entry into the United States, and had been ordered deported. On the application for the writ the proceedings before the immigration officials were taken as part of the petition. It appeared therefrom that the appellant was

taken into custody on September 1, 1915; that she was examined on September 7, and again on September 20, 1915, at which examinations she refused to answer questions as to her identity, but asserted that she was born in the United States and was a citizen thereof, and that her father was looking after her case. On December 20, 1915, there were filed on her behalf her own and four other affidavits: The affidavit of Chin Duck Quong, who deposed that he was the appellant's father, and that she was born March 23, 1896, at a given number on Commercial street, San Francisco, that Lee Shee was her mother, that Lee Shee died on or about June 20, 1900, and that the appellant had never been out of the United States; the affidavit of Ho Shee, who stated in detail her knowledge of the fact that the appellant was born in San Francisco, that the affiant resided in the same building, and that she knew the appellant until the death of Lee Shee, the appellant's mother, and that the appellant was then placed in the custody of affiant, who cared for and raised her under the supervision of Chin Duck Quong, appellant's father; the affidavit of Chin Shee, who testified that he knew the appellant and her parents, that the appellant continued to reside with her parents until her mother's death, and thereafter was placed in the custody and care of Ho Shee, who lived in the same building; the affidavit of Chin Pak, who deposed that he had known the appellant since she was 2 or 3 years of age, that she was then living with her parents, Chin Duck Quong and his wife, Lee Shee, in San Francisco, and that he had seen the appellant at frequent intervals from that time to the present. None of these Chinese persons who so deposed was called or examined before the immigration officials.

[1] There can be no doubt that there was evidence sufficient to justify the conclusion that the appellant was practicing prostitution at the time when she was taken in custody. The question whether she was an American citizen was decided adversely to her upon the following evidence: Robinson, one of the commissioners, certified on January 5, 1916, that he had "received information from a Chinese source" that the woman under arrest came to the United States a few years ago as the wife of a "Lim" man; and another inspector, in his memorandum for the commissioner, stated that information had been conveyed to him from several sources after her arrest that the appellant was a prostitute, and that she came to this country as the wife of a "Lim" man, who had since departed for China. Upon the information thus received from anonymous sources, the immigration records were searched, and a photograph was found upon which the immigration officials reached the conclusion that the appellant was Wong Ah Muy, who came to the United States on October 7, 1912, and that she was therefore a Chinese alien. The photographs of Chin Ah Yoke and Wong Ah Muy were presented to the court below on the petition for the writ, and to this court on the appeal. We think that they afford substantial evidence to sustain the conclusion of the immigration officials. Not only is there a general resemblance between the photo-

graphs, with such difference as might be produced by three years of fast living, but the peculiar significance of the photographs is in the fact that in each there are two pits or pock marks, plainly visible, found in the identical position on each face.

[2] The appellant cites Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85, and Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493, to the proposition that under her claim of citizenship she cannot be deported without an adjudication in a court, and that the burden is upon the government to prove that her claim of citizenship is unfounded. The doctrine of the cases so cited has not been accepted by other courts. In neither of the cases did the court take note of Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121, in which the court said:

"By the law the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.'"

See, also, Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, and United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354.

In United States v. Too Toy (D. C.) 185 Fed. 838, Judge Hand refused to follow the rule of Moy Suey v. United States, holding that in United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, it had been decided that the United States has the power to determine through the Executive Department the very issue of fact upon which its power of exclusion depends, and that it is not enough to give jurisdiction to a court that that issue involves citizenship. In Yee Ging v. United States (D. C.) 190 Fed. 270, Judge Maxey refused to follow Gee Cue Beng v. United States, notwithstanding that it was a decision of the Circuit Court of Appeals of his circuit, and held that the burden of proof was upon the Chinese person to prove, as he claimed, that he was a natural-born citizen. The fact that the appellant here is charged with being a Chinese prostitute in the United States in violation of the Immigration Act of 1907 (Act Feb. 20, 1907, c. 1134, 34 Stat. 898) is sufficient to show the jurisdiction of the immigration officials. United States v. Wong You, 223 U. S. 67, 32 Sup. Ct. 195, 56 L. Ed. 354. And we hold that the burden of proof is not shifted upon the United States by the fact that the appellant claims to be a citizen of the United States. Lee Yuen Sue v. United States, 146 Fed. 670, 77 C. C. A. 96; Yee King v. United States, 179 Fed. 368, 102 C. C. A. 646.

[3] The appellant contends that the hearing was unfair in that her counsel was afforded no opportunity to cross-examine Wong Him Sing, who had given testimony on September 1 and 2, 1915, tending to show that the appellant was a prostitute. Wong Him Sing was an American citizen, and after his examination he returned to his home at Yuma, Ariz. It was explained to appellant's counsel that owing to that fact, Wong Him Sing could not be produced for cross-examina-

tion; but the immigration officials offered to hear the cross-examination of the witness, if the appellant had means by which to accomplish the opportunity. That was all that they were required to do, or could do. Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

The judgment is affirmed.

INDIANA HARBOR BELT RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. July 24, 1917.)

No. 2457.

1. MASTER AND SERVANT ⟸13—EMPLOYÉS—HOURS OF SERVICE ACT.
Under Hours of Service Act March 4, 1907, c. 2939, § 3, 36 Stat. 1416 (Comp. St. 1916, § 8679), declaring that the provisions for penalty for keeping employés on duty for longer than allowed shall not apply in case of casualty or unavoidable accident, or 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 the employé left the terminal, and which could not have been foreseen, a railroad company cannot excuse the keeping of train employés on duty for longer than 16 hours, though the derailment of a car in a train ahead caused a delay which resulted in keeping the employés on duty for longer than the period allowed; it not appearing that after the derailment the company exercised a high degree of diligence to avoid the effect thereof.

2. MASTER AND SERVANT ⟸17—OPERATION—HOURS OF SERVICE ACT.
In an action for violating the Hours of Service Act by keeping train employés on duty for more than 16 hours, evidence *held* insufficient to show that the company's agents exercised a high degree of care to prevent employés from being on duty longer than the period allowed.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by the United States against the Indiana Harbor Belt Railway Company for violation of the Hours of Service Act. There was a judgment for the United States, and defendant brings error. Affirmed.

F. Harold Schmitt, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Frederick Dickinson, both of Chicago, Ill., and Philip J. Doherty, of Washington, D. C., for the United States.

Before KOHLSAAT and EVANS, Circuit Judges.

PER CURIAM. [1] The railroad crew, consisting of five men in charge of a freight train running from Blue Island to Chicago and return, a distance of 63 miles, and which train was engaged in interstate commerce, was in continuous service for a period varying from 17 hours 5 minutes to 17 hours 35 minutes. In justification for such hours of service the plaintiff in error showed that, by reason of a derailment of a car in a train ahead, there was a delay of 2 hours and 20 minutes.

The first contention of the plaintiff in error is that delay being of such origin comes within the exception of section 3 of the act, and the maximum period of 16 hours was thereby automatically extended 2 hours and 20 minutes. This position must be rejected upon the authority of San Pedro, Los Angeles & Salt Lake R. R. Co. v. United States, 220 Fed. 737, 136 C. C. A. 343; Atchison, Topeka & Santa Fé R. R. Co. v. United States, 220 Fed. 748, 136 C. C. A. 354; United States v. Atchison, Topeka & Santa Fé R. R. Co. (D. C.) 236 Fed. 154; Northern Pacific R. R. Co. v. United States, 213 Fed. 577, 136 C. C. A. 157; United States v. Southern Pacific Co., 220 Fed. 748, 136 C. C. A. 351; Chicago & Northwestern R. R. v. United States, 234 Fed. 268, 148 C. C. A. 170; Baltimore & Ohio R. R. Co. v. United States, 243 Fed. 153, — C. C. A. — (decision of Circuit Court of Appeals, Sixth Circuit, decided May 8, 1917).

The defense of the carrier in a case like the present one is not complete by showing a delay which was "the result of a cause not known to the carrier or its officers or agents in charge of such employés at the time said employés left a terminal and which could not have been foreseen." The carrier was required to show, in addition thereto, that it exercised a high degree of diligence to overcome the effect of the delay and relieve its employés from continuous service over 16 hours. See cases cited above.

[2] The second contention of the plaintiff in error is that the evidence showed affirmatively a high degree of diligence displayed on its part to prevent continuous service beyond 16 hours. The case was tried by the court without a jury upon stipulation of the parties. The record fails to show any effort on the part of the carrier to relieve its servants from employment upon the expiration of the maximum time limit during which they might be continuously in service. In fact, it was admitted on the trial that no effort was made by the train dispatcher or any other representative of the carrier to relieve the crew after it learned of the accident and resulting delay. The train dispatcher labored under the impression that the 16-hour limit was extended for a period of 2 hours and 20 minutes, due to excusable delay, and that no violation of the law would occur until the crew had been in continuous service for 18 hours and 20 minutes, and such misapprehension of the law explains, at least in part, the failure of the carrier to take any steps to relieve the crew. We conclude the evidence supports the finding of the learned trial judge.

This being the situation disclosed by the record, there is no need of considering the government's contention that the evidence utterly fails to disclose any such a delay as is defined in the exception appearing in section 3 of the act.

Judgment is affirmed.

CHICAGO & A. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. July 12, 1917.)

No. 2447.

MASTER AND SERVANT ⊂=13—HOURS OF SERVICE—SWITCH TENDERS—TELEPHONE ORDERS.

Switch tenders, who regularly conduct the movements of the trains in and through a yard, receiving the yardmaster's telephone orders in their shanties, and executing them by transmitting them verbally or by signal to the engine or train crews, and by manipulating switches, are within the proviso of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1916, § 8678), § 2, limiting to nine hours the service of an employé who by use of the telephone receives orders pertaining to or affecting train movements.

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois.

Action by the United States against the Chicago & Alton Railroad Company. Judgment for the United States, and defendant brings error. Affirmed.

William L. Patton, of Springfield, Ill., for plaintiff in error.

Philip J. Doherty, of Washington, D. C., for the United States.

Before KOHLSAAT, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. The action was for violation of the Hours of Service Act of March 4, 1907. The facts were stipulated, and the question here is whether the 16-hour limit applies, or the 9-hour limit of the proviso, which is applicable to "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." Section 2 (Comp. St. 1916, § 8678).

The employés involved are the so-called switch tenders in defendant's 7¾-mile long Bloomington-Normal yard, who conduct the movement in and through that yard of all of defendant's trains, passenger and freight, and who were working 12 consecutive hours without emergency necessitating service beyond 9 hours. The train dispatchers and operators who direct the movement of the trains elsewhere on the road outside of the yard limit have no function within it. Therein the yardmaster has the general direction of all train movements; his orders being communicated to and executed by his subordinates, the switch tenders, who are stationed at various switch shanties within the yard, each switch tender having special charge of certain switches in the immediate vicinity of his particular shanty, and the service being continuous night and day. The orders for the movement of the trains are transmitted by the yardmaster from his central office by tele-

phone to the various switch shanties, where the switch tenders, at phones therein, receive them, and execute them by transmitting them verbally or by signal to the engine or train crews, and by manipulating the switches, so that trains may take their proper tracks without coming in contact with each other or with the various switch engines and cars being switched and moved thereabout. Defendant had a rule requiring trains passing through the yard to reduce speed and proceed only after the way is seen or known to be clear. This use of the telephones by the switch tenders in connection with the movement of the trains was not occasional or exceptional, but was part of their general and usual duties; each train movement so communicated to the crews, or participated in by the switch tender, being preceded by his reception of a telephoned order directing it.

Our decision of August 6, 1915, in Chicago, Rock Island & Pacific Ry. Co. v. United States, reported in 226 Fed. 27, 141 C. C. A. 135, and followed by us in Chicago & Northwestern Ry. Co. v. United States, 226 Fed. 30, 141 C. C. A. 138, is against the proposition, advanced for plaintiff in error, that the 16-hour limit, and not the 9-hour limit, applies; and upon the authority of those cases the judgment of the District Court must be and is affirmed.

FOSTER v. T. L. SMITH CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 1, 1917. Rehearing Denied July 26, 1917.)

No. 2360.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
   The Smith patent, No. 803,721, for a concrete mixing machine, while for a combination of old elements, covers a new and useful combination, not anticipated, and discloses invention; also *held* infringed as to a number of claims, but claim 5 *held* invalid, as a duplication of another claim.

2. PATENTS ⟸27(1)—INVENTION—ADAPTATION TO ANOTHER ART.
   It is usually true that the observation and the imagination of the inventor are required to make adaptations from one art to another.

3. PATENTS ⟸234—INFRINGEMENT—FORMAL CHANGES.
   Infringement is not avoided by changes in the mechanism of the patented device, so as not to literally conform to the language of the claims, if the defendant has appropriated the real substance of the invention.

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

Suit in equity by the T. L. Smith Company, the Jaeger Machine Company, and the Waterloo Cement Machinery Corporation against

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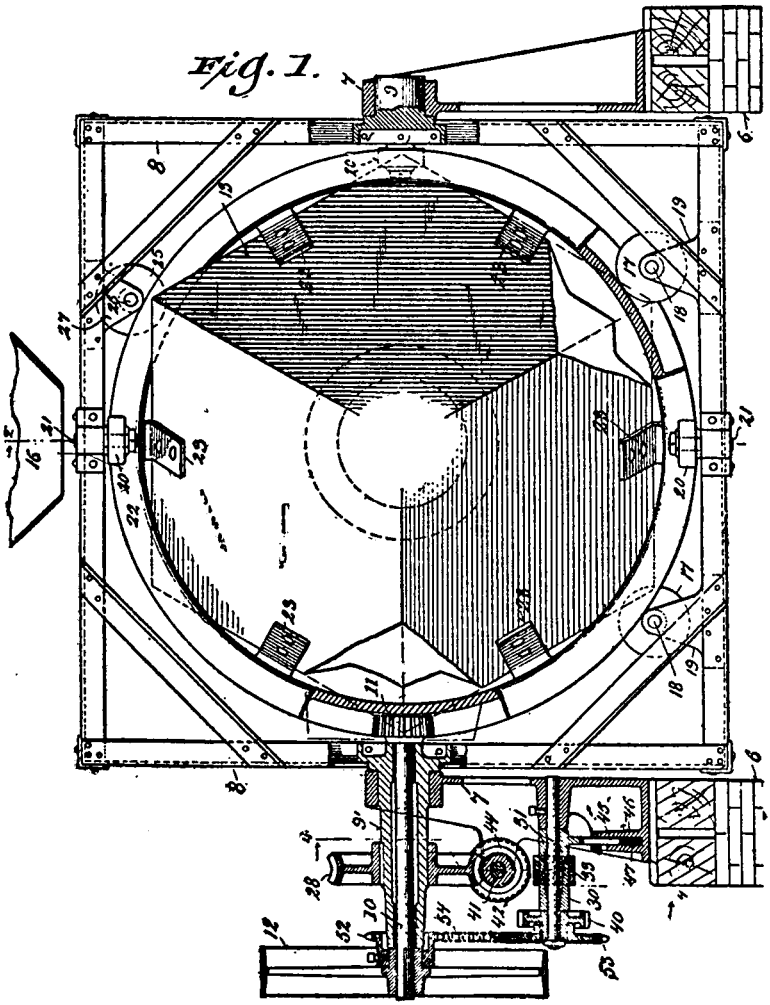
Edward Foster. Decree for complainants, and defendant appeals. Affirmed in part.

By the decree of the District Court appellant is enjoined from continuing the infringement of claims 5, 16, 17, 18, 28, 30, 31, and 32 of patent No. 803,721, issued on November 7, 1905, to appellee the T. L. Smith Company, as assignee of the applicant, Thomas L. Smith, for a machine to mix concrete. The other appellees are joint, exclusive licensees of the Smith Company. Appellant is the owner and user of a single machine, which was manufactured and sold to him by the Cement Tile Machinery Corporation of Waterloo, Iowa, which is defending this suit.

Figures 1 and 3 of the drawings are as follows:



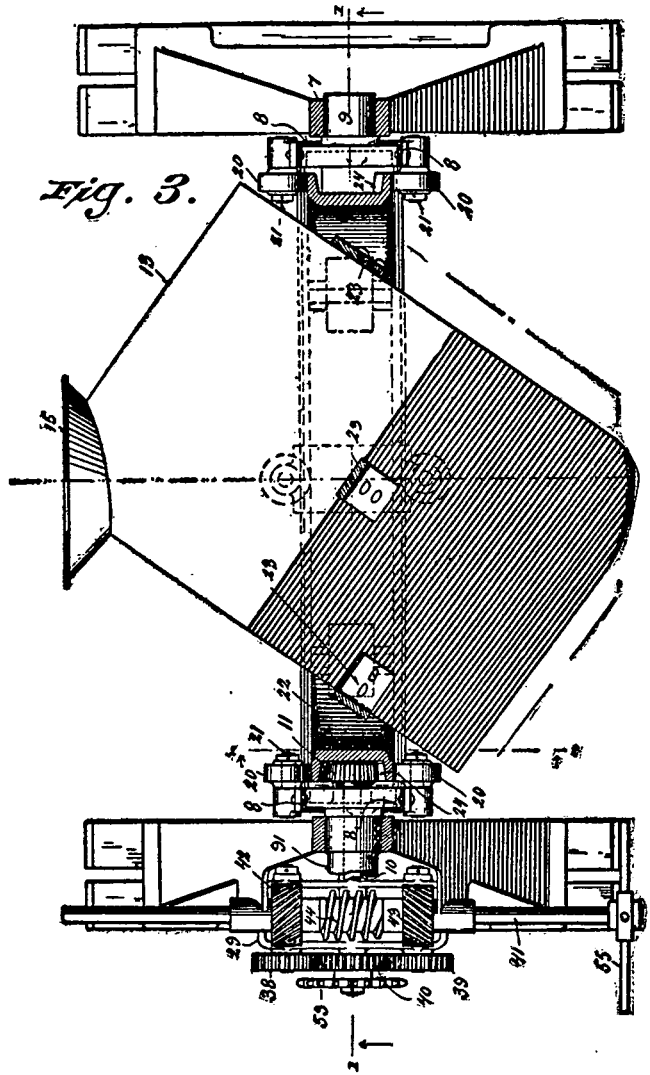


Fig. 3.

Smith's specific description of the form which is stated in the patent to be the preferred form discloses a polyhedric mixing receptacle and a tiltable supporting frame which is in a plane at right angles to the receptacle's axis of revolution. To the specific details of this preferred form many claims were addressed, of which claim 24 may be taken as illustrative:

"In a mixing machine, the combination of a polyhedric mixing receptacle, a tiltable frame supporting said receptacle, means for tilting said frame to any position in the entire circle of its revolution, a gear attached to the periphery of said receptacle, said gear having supporting surfaces and guiding surfaces whereby said receptacle is completely centered and guided, and means for applying the power to said gear in any position of said receptacle and tiltable frame."

But the specification pointed out that the form of the mixing receptacle was not of the essence of the general inventive concept, and stated that a receptacle of any desired shape might be employed. Likewise, with respect to the preferred form of frame which entirely surrounds the revolving receptacle and supports it by means of rolls *17* fitting into the U-shaped annulus *22*, the specification stated that the invention in its general aspect might be enjoyed by the use of a tiltable frame of "any desired form adapted for supporting the mixing receptacle."

None of the claims counted on in this suit is limited to the specific form of receptacle or tiltable frame or of the annulus on the receptacle.

Claim 5: "In a mixing machine, the combination of a receptacle provided with means for charging and discharging the same, a ring or annulus around the receptacle and provided with teeth forming an annular rack, a tiltable frame in which the receptacle is revolubly supported, said frame provided with projecting trunnions mounted rotatably in suitable bearings, one of said trunnions being tubular, a shaft extending through the tubular trunnion and provided on its inner end with a gear-wheel engaging the annular rack bar of the ring or annulus, and means for rotating said shaft."

Claim 16: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge, concentric, or substantially so, with the axis of revolution, a tiltable frame in which the receptacle is revolubly supported, means for tilting the frame to any position in the entire circle of its revolution, whereby the receptacle may be filled from any point above it and discharged either from the right-hand side, or the left-hand side of the machine."

Claim 17: "In a mixing machine, the combination of a mixing receptacle, means for imparting to said receptacle a continuous rotation, a tiltable frame revolubly suporting such receptacle, means for tilting said frame to any position in the entire circle of its revolution, and means for holding said frame in any position."

Claim 18: "In a mixing machine, the combination of a mixing receptacle, a tiltable frame revolubly supporting said mixing receptacle, means for tilting said frame to any position in the entire circle of its revolution, and means for continually revolving said receptacle while in any tilted position, or while moving from one position to another."

Claim 28: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge, concentric or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear on said mixing receptacle, and means for applying power to said gear in any position of said frame and receptacle."

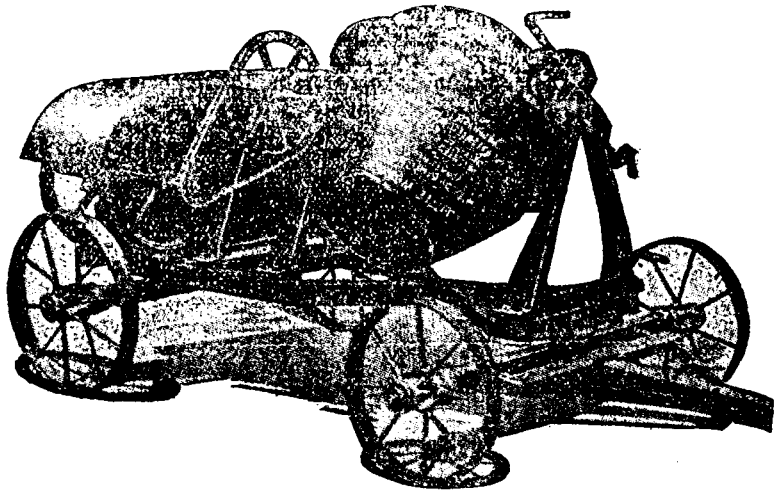
Claim 30: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear disposed around the middle of said receptacle, and means for applying power to said gear in any position of said receptacle and tiltable frame."

Claim 31: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric, or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a gear on the largest diameter of said receptacle, and means for applying power to said gear in any position of said frame and receptacle."

Claim 32: "In a mixing machine, the combination of a mixing receptacle having one clear and unobstructed opening for feed and discharge concentric, or substantially so, with the axis of revolution, a tiltable frame supporting said receptacle, means for tilting said frame either to the right or to the left of the loading point, a circular toothed rack disposed around the middle of said receptacle, a bevel pinion engaging said toothed rack and journaled in

the tilting axis; and means for connecting said pinion with the source of power."

The commercial machines of the respective parties are substantially alike. We subjoin a cut of the Waterloo mixer:



George C. Kennedy, of Waterloo, Iowa, and John E. Stryker, of St. Paul, Minn., for appellant.

George L. Wilkinson, of Chicago, Ill., for appellees.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). [1] I. Utility is presumed; but if we first apprehend the nature and advantages of the machine which Smith conceived, we shall be in a better position to understand and apply the prior art.

Smith's most general conception of his machine as an entirety is probably best stated in claim 32. There, the only limitations upon the form of the mixing receptacle are that it shall have but one opening, which must be clear and unobstructed and substantially concentric with the axis of revolution, and that it shall have a recognizable "middle." The advantages of the one clear and unobstructed opening are that it may be used both for feed and discharge; that the feed may be one side where the materials are gathered and the discharge on the other side where the mixed concrete is being used; and that thereby a form of receptacle is provided wherein more than 50 per cent. of the cubic capacity can be occupied by the ingredients that are being mixed, as against 10 or 15 per cent. in the cylindrical or horizontal drum machines which have openings at each end, one for feeding and the other for discharging. The saving of size and weight, in relation to the capacity of the machine, smaller cost of manufacture, lower selling price, decreased expense of operation, are of advantage both to the maker and the user. By having a "middle" part, as in a pot or jar, the tilting means and likewise the rotating means are applied

substantially in line with the center of gravity of the loaded receptacle and therefore both movements may be most readily effected; and also the driving pinion, journaled in the tilting axis, may thus engage the toothed rack on the periphery of the receptacle without the use of intermediary gears or other driving means.

In the practical art of building and using concrete mixing-machines these advantages, and the type of machine which made them possible, were unknown prior to Smith's disclosure.

II. Anticipation. We have examined all the prior patents in the record. Two are especially relied upon. If these do not anticipate Smith's conception and disclosure of means, it is needless to set forth the particulars of the other prior patents.

Day and Lampard's British patent, No. 441 of 1878, exhibits a concrete mixer of the horizontal drum type. The receptacle is supported at its right-hand end by a series of rollers which are attached to the tilting frame. The left-hand end is supported by a shaft which is journaled in the tilting frame. The tilting frame is rectangular and entirely surrounds the drum receptacle. By means of trunnions at the middle of the sides the tilting frame is supported within a stationary rectangular frame. Materials are fed into the right-hand end of the drum through a circular opening, concentric with the axis of the drum. Attached to the right-hand end of the tilting frame is a hopper that extends into the feed opening. The drum is rotated by means of a toothed rack which encircles the drum and engages with a driving pinion journaled in one of the trunnions. When the material is mixed it is discharged through an opening at the left-hand end of the drum. For this purpose the receptacle and its tilting frame may be depressed at the left until the end of the drum strikes the ground at an angle of about 45°. The second claim covers "the combined arrangement, substantially as hereinbefore described and illustrated in the drawing annexed, wherely the mixing box can be revolved and at the same time tilted to and fro to any desired angle." In the specification the reference to "tilting to and fro" is that "the mixing box as the mixing progresses may also be rocked or oscillated on the trunnions to insure the perfect mixing of the materials." When we look to the arrangement described and illustrated in the drawing, we find that the tilting to the right is very limited; it can proceed only to the point where the hopper which is permanently attached to the tilting frame strikes the right-hand end of the supporting frame. And even if the tilting axis were elevated so high that the left-hand end of the drum would not strike the ground the feed opening could not be carried below the horizontal position at the left on account of the hopper striking the fixed supporting frame at that end. Day and Lampard's combination does not include a mixing receptacle having one clear and unobstructed opening for feed and discharge, nor means for tilting the frame to any position in the entire circle of its revolution whereby the receptacle may be filled from any point above it and discharged either from the right-hand side or the left-hand side of the machine.

Taylor's patent, No. 433,663, August 5, 1890, is for a tumbling box to clean castings. The machine is supported upon a fixed frame.

A tiltable yoke is supported by means of trunnions upon the fixed frame. Within the yoke is supported a receptacle of the pot or jar form. To the bottom of the receptacle is attached a beveled gear, which is engaged by a beveled pinion on a shaft which is housed in the tilting yoke and carries at its outer end a spurred gear which in turn engages another spurred gear mounted to rotate around the axis of one of the trunnions. The receptacle is thus rotated by means of two parallel shafts, two spurred gears, and two beveled gears. As the spurred gears are outside and the beveled gears inside of the stationary frame, the shaft which is housed in the tilting yoke limits the tilting so that the receptacle can be loaded and discharged only on one side of the stationary frame. This Taylor structure lacks the Smith purpose and means of tilting, and likewise the simple and direct rotating means, both of which are essential elements of the Smith combination.

[2] III. Invention. The prior art beyond question shows that each element of the Smith combination was old. Even if this were not true, and if Smith had in fact created a new element, he would not secure a monopoly of it by putting it into a combination claim. If he did not separately claim it, he would by putting it into a combination donate it to the public. So the fact that the elements were old is not material, for the combination is itself the entity with which we are now concerned. We have found that this entity is new. In the light of the prior art, was the use of the inventive faculty required in its production? The prior art must be examined with the view of determining the purposes and laws of operation of the prior structures. If the idea of the patent in suit so obtruded itself from the prior art that the ordinary mechanic could not help from stumbling upon it, then of course no invention was involved. While it may be easy enough now, after we have comprehended Smith's purpose and means, to read a part of Smith's total conception into the Day and Lampard patent, and another part into the Taylor patent, we are unable to find in either of them, when they are taken in the light of their purposes and laws of operation, the conception of Smith and his combination of means for embodying it. The Day and Lampard structure was of the horizontal drum type. Smith produced an essentially different type. Nothing of the sort had before appeared in the practical or even in the paper art of making and using concrete mixers. Granting, as we do, that tumblers for castings in foundries and puddling furnaces in steel mills are in analogous arts, and therefore must be taken into account, yet it is evident that the strongest of such references, the Taylor patent, would have to be reorganized and materially modified in order to adapt it to Smith's conception. And usually it may be taken as true that the observation and the imagination of the inventor are required to make adaptations from one art to another. Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Wold v. Thayer, 148 Fed. 227, 78 C. C. A. 350. When one has conceived a new entity he may go where he pleases for his materials with which to give it a body. Here the act of the inventor consisted of picturing in the creative imagination the new result, the

new machine for achieving it, and the way to build the machine, rather than of the selection and rearrangement of the elements which may be found singly or in partial groups in concrete mixers of the horizontal drum type or in the tumblers for casting in foundries or in the puddling furnaces in steel mills. Indiana Mfg. Co. v. J. I. Case Co., 154 Fed. 365, 83 C. C. A. 343; Railroad Supply Co. v. Hart Steel Co., 222 Fed. 261, 138 C. C. A. 23.

If the mechanics of the case left us in doubt, certain matters disclosed by the record should cause us to resolve that doubt in favor of the patentee. First. The usual presumption of validity is greatly fortified by the fact that all of the prior art patents which are now called to our attention were before the Patent Office when that tribunal was weighing the question of invention. Second. The great length of time that elapsed between the publication of the prior patents most strongly relied on and the application for the patent in suit. Those prior patents never made any impress upon the practical art of building and using concrete mixers, and are now brought to light only for purposes of defense. Third. Assuming for the moment that appellees' structure has not departed from their patent, a large and successful business has been built up; and machines of this type (made only by the parties involved in this cause) have taken, according to the evidence, a prominent place in the market for small portable concrete mixers.

IV. Infringement. There is no contention that appellees' commercial machine does not conform to the claims in suit in all respects except one; and that is in respect to "the tiltable frame in which the receptacle is supported." In the specific claims, which are addressed to the preferred form of structure, the tiltable frame is required to be in a plane to which the axis of the receptacle's revolution is perpendicular. In the claims in suit there is no limitation with respect to the relation of the plane of the frame and the line of the axis of revolution. And if the preferred form of tiltable frame were placed in a plane in which the line of the axis of revolution would lie, there would seem to be no basis whatever for saying that the structure would not be within the letter and spirit of the claims in suit. The real defense of noninfringement is that what is called a yoke in the commercial structure is not the tiltable frame of the claims in suit. The yoke has three sides. The portion of it at the bottom of the receptacle is longer than the diameter of the receptacle. From that portion uprights extend at each end up to the middle or largest diameter of the receptacle. It is evident that a pot-shaped receptacle, having about its middle a toothed gear to be driven directly by a pinion journaled in a supporting trunnion, could not be supported by a tilting structure having less than three sides. If the two parallel arms of the yoke were extended and a fourth side added, so as completely to embrace the receptacle, there could be no question that the frame was present. The function of the "frame" is solely to afford a tiltable support. In the yoke, or frame of three sides with one side omitted, there is plainly the essential supporting means of the claims in suit, for the receptacle is prevented from falling out of the open end of the three-sided frame

by means of a bolt which extends from the center of the bottom of the receptacle through the long member of the yoke and upon the end of which is threaded a nut. This nut manifestly opposes the movement of the receptacle in the fourth direction just as clearly as would a fourth side to the frame.

It is to be remembered that the specification told the persons who proposed to use the invention as described in the claims in suit that they could employ a frame of any form adapted for supporting the receptacle. Not only are the two forms the same in furnishing the tiltable support for the revoluble receptacle, but at the time Smith was speaking in his application the prior art showed that both forms were old and that each was adapted to afford a tiltable support for a revoluble receptacle. This fact is exhibited in the examinations we have hereinbefore made of the Day and Lampard and Taylor patents. Therefore we find that appellees' commercial structure was within their patent.

[3] Appellant's structure very plainly has been taken from appellees' commercial structure. They are exactly the same in operation and result. Two small differences appear. One is that the circular toothed rack is placed slightly away from the exact "largest diameter" or "middle" of the receptacle. The other is that the mouth of the pot-shaped receptable is prolonged so that the receptacle cannot be revolved through the 360 degrees by reason of striking the bottom of the circle. But the circular toothed rack is so near the largest diameter of the receptacle that all of the advantages of the patent are secured in that respect. And with respect to tiltability, all of the advantages of loading on one side and discharging on the other are obtained as fully as in the patented structure. Further, while claim 16, for example, speaks of tiltability throughout "the entire circle," that expression is modified by the clause, "whereby the receptacle may be filled from any point above it and discharged either from the right-hand side or the left-hand side of the machine." Crane Co. v. Baker, 125 Fed. 1, 3, 60 C. C. A. 138. These changes impress us as having been intentionally devised for the purpose of creating a verbal differentiation. But infringement is not thereby escaped, if the defendant has actually appropriated the real substance of the invention. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540; United States Metallic Packing Co. v. Hewitt Co. (D. C.) 220 Fed. 171.

We conclude that all of the claims in suit are valid and infringed except claim 5. That claim calls for a receptacle provided with "means for charging and discharging the same." "Means" is at once the singular and plural form. If this claim contemplates a receptacle with two openings, the claim reads literally upon the Day and Lampard structure. It seems to us however that the word, in view of the purposes and law of operation of the patent device, should be taken as the singular form; but when so taken the claim becomes in essence identical with claim 32. Lamson Store Service Co. v. Hillman, 123 Fed. 416, 59 C. C. A. 510; Veneer Machinery Co. v. Grand Rapids Chair Co., 227 Fed. 419, 142 C. C. A. 115.

The decree, except as to claim 5, is affirmed.

LE ROY et al. v. NICHOLAS POWER CO.

(District Court, S. D. New York. July 20, 1917.)

No. 121.

1. PATENTS ⇐328—INVENTION—KINETOSCOPE.
The Le Roy patent, No. 1,075,215, for a kinetoscope, relating especially to the fire shutter, *held* void for prior public use of the shutter by others, and more than two years before the application, and also for lack of invention in view of the prior art.

2. PATENTS ⇐75—VALIDITY—PRIOR "PUBLIC USE."
The use of a device on a machine in a public place with the consent of the inventor is a "public use," although no charge was made by the inventor therefor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]

In Equity. Suit by Jean A. Le Roy and Chester R. Baird against the Nicholas Power Company. On final hearing. Decree for defendant.

Hillary C. Messimer, of New York City, for plaintiffs.

Marshal Stearns, of New York City (Selden Bacon, of New York City, of counsel), for defendant.

MANTON, District Judge. [1] Plaintiff sues for infringement of patent No. 1,075,215 granted October 7, 1913, to Jean A. Le Roy for a kinetoscope on an application, the original of which was filed March 12, 1908. The defense is prior use, and that the claims are so limited by the prior art and the application proceedings as not to be infringed by the defendant's structure. The plaintiffs rely on the following claims:

"(1) In a motion picture projecting machine having a light aperture; a shutter movably mounted in front of the aperture; a rotatable shaft; centrifugal members carried by said shaft; a shell adapted to oscillate upon said shaft and mounted about said centrifugal members to be engaged thereby; and engaging means connected to said shell and disconnected from said shutter but adapted to engage the same."

"(4) In a motion picture projecting machine having a light aperture; a shutter movably mounted in front of the aperture; a rotatable shaft; frictional engaging means carried by said shaft; a shell adapted to oscillate upon said shaft and mounted about said frictional means to be engaged thereby; an arm extending laterally from said shutter; and an arm depending from said shell adapted to engage the said laterally extending arm only when the shell is oscillated in a predetermined direction."

It is claimed that Le Roy's application showed nothing of invention, mere substitution of mechanical equivalents in well-known mechanisms. His claim of invention must necessarily be very much restricted by the prior art disclosed by the patents and the applications in evidence, and particularly by the applications which were cited by the Patent Office against Le Roy's application and not contested by him. The defendant's device is known as type "B" shutter, and it is this that plaintiffs claim infringe their patent.

The defendant's claim is that the patent as actually used, was designed in 1905 and actually made in December, 1905, and partly in January, 1906; that it was used in a moving picture machine during the week of February 19, 1906, the week of February 23, 1906, and March 4, 1906, giving exhibitions in Brooklyn, and March 11, 1906, in Newark, N. J. The evidence supports this claim. This was all two years prior to filing Le Roy's application, and the defendant invokes the statutory bar (section 4886, Revised Statutes, as amended by the act of March 3, 1897, c. 391, § 1, 29 Stat. 692 [U. S. Compiled Statutes 1916, § 9430]) as a defense irrespective of any prior work or invention of Le Roy's. Smith was a disinterested witness. His diary kept, corroborated this testimony. The places where the machine was used and exhibited were given in detail and were public places.

I am satisfied that the machine used had the shutter "B" on at the time. This is corroborative of the claim of defendant that the invention was made by Mr. Nicholas Power with the assistance of his workmen in the shop in December, 1905, and January, 1906. Mr. Power is supported by Mr. Uhlmann, who assisted him in making parts. We therefore, have the testimony of four witnesses, one disinterested, the other workmen of defendant, to the effect that the shutter was made at Power's place of business and used publicly prior to the date Le Roy filed his application. The only contradiction of this is the testimony of Bogdanffy, a former employé of Power, who claimed that he made the drawing for this shutter and showed it to Mr. Power and directed its construction. The record of the city water department shows that shutter "B," which Bogdanffy says he suggested to Mr. Power in April, 1907, was submitted to the department for approval or disapproval in December, 1906, and the witness called from that department is therefore confirmatory of the claim that it was made prior to March 12, 1908. In addition thereto, Mr. Power, in May, 1907, filed an application verified April 24, 1907, for a patent on "B" shutter, and he testified that it was being marketed in May, 1907. There is a long descriptive article in the Motion Picture World in November, 1907. Defendant issued its catalogue the same year, showing public sale and use of the defendant's device long prior to Le Roy's application for his patent.

Power's application was abandoned for the reason that the Aiken application of July 14, 1906, No. 937,746, was cited against Mr. Power. It was likewise cited against Le Roy. An arrangement was made to permit Power to operate under a license with the Aiken patent.

[2] The use by Smith on the occasion mentioned was a public use such as is contemplated by the statute. There were no restrictions placed on Smith's use of the machine with the "B" shutter on it, nor were there any restrictions placed on Houn's use of the machine. Each used the machine with the shutter, in giving moving picture performances. The machine was in a position where it could be observed by all present. One of the purposes was the illustrating of the shutter, and it was a necessary part of the apparatus for making the exhibition of the pictures, and the fact that no charge was made by Power to Smith for putting and using the shutter on his machine does not alter

the public use. Egbert v. Lippman, 104 U. S. 333, 26 L. Ed. 755; Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L. Ed. 160; Manning v. Cape Ann Co., 108 U. S. 462, 2 Sup. Ct. 860, 27 L. Ed. 793; Eastman v. City, 134 Fed. 844, 69 C. C. A. 628; Bradley v. Eccles Co., 144 Fed. 90, 75 C. C. A. 248. In Egbert v. Lippman, supra, it was said:

"If an inventor, having made his device, gives [it] or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use may be confined to one person."

I regard Bogdanffy's claim that he made a drawing of the parts in co-operation with Mr. Power (indeed, it is even claimed that he was the real inventor of the Power shutter "B") as not well founded. His testimony is in direct conflict with many circumstances portrayed by the evidence which cannot be erroneous and point with unerring certainty to the untruthfulness of his claim.

If it be true that Le Roy used his shutter on the machine at an exhibition of motion pictures before the Carlstadt Society on February 26, 1906, such use was more than two years before he filed his application for the patent, and his patent would therefore be void under the United States Revised Statutes, § 4886 (Comp. St. 1916, § 9430).

The claim that Le Roy's patent is anticipated by the prior art, and therefore devoid of invention, may now be examined. The essential elements for a speed operated fire shutter are: (1) The shutter itself mounted for movement into and out of the path of light rays focused on the aperture or sight opening of the machine; (2) the speed control device driven from the film moving mechanism of the projector; and (3) the operating connections between the shutter and the speed control device for shifting the former from its position in front of the aperture to a position beyond the aperture when the speed of the film is sufficient for it not to be ignited by the concentrated light rays.

The Moy & Harrison, British patents granted in 1892, shows in figure I of the drawings the slotted handle and push-in driving shaft shutter actuating mechanism employed in the Power "A" shutter. Figures 2 and 3 show the friction disk arrangement for operating the shutter, while the remaining figures show various types of centrifugally operated shutter, which was the type of device approved by the board of water supply in the Power shutter. While the Moy patent does not disclose the specific devices employed by Le Roy, it discloses a combination of equivalent elements for obtaining the same result. There is a difference in the specific devices employed. The Moy patent employs as the shutter a metal plate mounted to swing in its plane and transverse to the light rays. Le Roy swings his shutter out of the original plane. This does not affect the utility of operation of the shutter, as its sole function is to be interposed to the light rays when the machine is below operative speed; its manner of interposition and the character of its movement being entirely immaterial. The speed control member of the Moy patent employs the well-known ball governor, while the Le Roy uses the centrifugal clutch. This was known to the prior art as advanced by the Malcolmson patent since 1883; the ball governor was used more universally. Moy used a crank arm of the shutter shaft,

having a pin and slot connection with the shiftable member of the ball governor, while Le Roy employs the engaging arms on the clutch shell and shutter respectively.

The particular advantages claimed are not a superior operation of the shutter. For this purpose they are in all respects merely the equivalent of the pin and slot connection of the Moy patent, each of which fully served its intended purpose and transmitted the motion of the speed control device to the shutter. Le Roy's invention must be limited to the combination of the exact elements disclosed by him. Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978, 30 L. Ed. 1008; Cummings v. Baker, 144 Fed. 395, 75 C. C. A. 373.

There were a number of other applications for patents for fire shutters filed in the Patent Office which were cited against Le Roy, and in each of these prior devices (prior to the date of Le Roy's application) the same combination of the three essential elements of the Moy shutter are found. Each specific element of Le Roy's construction and the exact form used by him is found operating to effect the same function in the same combination, and for the same purpose. The plaintiff urges that the use of the centrifugal clutch in place of a ball-bearing governor and the arrangement of the shutter on the gate, with its operating mechanism designed to permit the opening and closing of the gate without interference with the other parts of the machine, distinguishes his shutter from the Moy, but the advantage of the centrifugal clutch over the ball governor is the substitution of one mechanical equivalent for another; it is a mechanism in itself, and was used prior to Le Roy's invention. His claim of the invention of the centrifugal clutch was disallowed by the Patent Office.

There were four patents cited in the Patent Office proceedings. Two are in evidence as part of the prior art; one Spalding and Smith No. 867,682, dated October 8, 1907, and Aiken, No. 937,746, dated October 26, 1909. In the first, there is disclosed the same combination of the three essential elements found in the Moy patent. This employed the ball governor in place of a centrifugal clutch, but Le Roy was not the inventor of a centrifugal clutch, and he admits that an Edison machine in use prior to his contained centrifugal devices. Then there is the Aiken patent, which was cited against both Power and Le Roy, and is described in the evidence "that the connection between the centrifugal and the shutter consists of an arm (*39*) depending from and wholly supported on the shell (*42*) provided in its end with a socket adapted to be sprung over the crank at the end of the shutter supporting shaft." The shutter is carried by the gate and the centrifugal by the framing machine just as in the Le Roy structure. The parts are not supported by the relative vertical movement as is the Le Roy machine. The engaging means connected to the shell is the depending arm or link (*39*), which is disconnected, and must be disconnected, from the shutter to permit the opening and closing of the gate when the machine is threaded for operation, but is adapted to engage the same; that is, through the shutter shaft when the machine is to be operated.

The cases are uniform in holding that there is no invention in merely selecting and fitting together the most desirable parts of different ma-

chines in the same art, if each operates the same in the new machine as it did in the old and effects the same result. In view of this condition of the prior art, I am of the opinion that the claim of the defendant that Le Roy's patent is anticipated by the art, and is therefore void of invention, is well founded.

The bill will therefore be dismissed.

In re J. W. LAVERY & SON.

(District Court, D. Massachusetts. July 23, 1917.)

No. 20338.

1. BANKRUPTCY ⟸98—PETITION TO REVIEW—FINDINGS OF REFEREE.
Where the evidence is not reported, a finding by the referee on the facts is conclusive on the court of bankruptcy.

2. BANKRUPTCY ⟸95—PROCEEDINGS—REPORT OF REFEREE.
An involuntary petition in bankruptcy was contested, and at a hearing before a special master to state the facts it appeared that the petitioning creditor had recovered judgment against the bankrupt in the state court, which had been satisfied. The referee suspended the hearing and filed a preliminary report, in effect requesting instruction whether to proceed. The case was returned to him for further hearing and report, and the petitioning creditor offered no further evidence, whereupon the referee filed a report, stating there was no evidence of insolvency and that he found the alleged bankrupt was not insolvent. *Held*, that under the circumstances, and in the absence of a report of any evidence heard by the referee, such report was justified, and the involuntary petition in bankruptcy will be dismissed.

In Bankruptcy. In the matter of the involuntary petition against J. W. Lavery & Son, alleged bankrupts. On objections to the report of the referee finding that the alleged bankrupts were not insolvent. Report confirmed, and petition dismissed, with costs.

See, also, 235 Fed. 910.

Stoneman, Gould & Stoneman, of Boston, Mass., for petitioners.
Dolan, Morson & Stebbins, of Boston, Mass., for alleged bankrupts.

MORTON, District Judge. This is an involuntary petition in bankruptcy. The respondents answered under oath, denying that they were insolvent, that they had committed the acts of bankruptcy alleged, or that the petitioners were creditors, and the case was referred to Referee Warner as special master to state the facts.

At the hearing before him (which was not until a considerable time after the proceedings had been instituted), it appears that, subsequent to the filing of the petition, the principal petitioning creditor had sued the respondents in the state court upon the claim stated in the petition, and had recovered judgment thereon, and that the judgment had been satisfied. The learned referee suspended the hearing and filed a preliminary report, in effect asking for instructions whether to proceed. By order of court the case was sent back to him for further hearing and report, either from evidence submitted by the parties, or upon

such investigation as he himself might think it advisable to make, whether the respondents were insolvent as alleged in the petition.

Under this order the referee notified the attorneys for the petitioners that he was ready to proceed with the hearings, and was informed by them that the petitioners did not intend to offer any evidence, nor desire to be further heard. The referee thereupon filed the present report, in which, after stating that no evidence was produced to sustain the allegations of insolvency, he concluded: "And I therefore find the alleged bankrupts were not insolvent."

The only question now raised is whether this finding is proper and justified. The petitioners contend that the referee should have gone no further than to state that there was no evidence that the respondents were insolvent. It is extremely doubtful whether there is any legal difference between the report as it stands and the language which the petitioners contend should have been used. As to what took place there is no dispute. The legal effect of it is probably the same, however it may be described.

[1, 2] The order under which the referee acted in making the present report was for "further hearing." He was proceeding with a case already opened and partially heard. What was done amounted to setting the case for hearing, and a failure by the petitioners either to appear at the appointed time or to take steps to dismiss the petition of their own accord. When they notified the referee that they did not desire to go on with the matter, he was justified in interpreting their conduct in the light of such facts as had appeared at the previous hearing, and such other facts (e. g., the long time that the petition had been pending, the failure of other creditors to intervene, and the fact that a judgment of substantial amount had been paid by the respondents) as appeared to him significant on the question whether the respondents were in fact insolvent. On this view of the case, it is clear that the referee had the power to make an absolute finding on the merits against the petitioners, and, the evidence not being reported, that his finding is conclusive. He does not appear to have made any independent investigation.

There is doubt whether the learned referee in fact decided the case on such grounds. But, taking the bare record as it stands, viz., that the case was referred, that the hearings were begun and suspended, that a partial report was filed, that the case was recommitted, and that the petitioners declined to go on, the referee was, in my opinion, justified in reporting, not merely that there was no evidence to sustain the allegation of insolvency in the petition, but that the respondents were not insolvent.

Report confirmed; petition dismissed, with costs.

UNITED STATES v. ONE BUICK ROADSTER AUTOMOBILE.

(District Court, E. D. Oklahoma. July 7, 1917.)

No. 2574.

1. STATUTES ⟸225¾—PRESUMPTIONS TO AID CONSTRUCTION.
Congress must be presumed to have enacted the proviso of Indian Appropriation Act March 2, 1917, c. 146, 39 Stat. 969, 970, for the forfeiture of vehicles used in introducing intoxicants into the Indian country, whether used by the owner thereof or other persons, with knowledge of the construction placed by the courts upon Rev. St. § 2140 (Comp. St. 1916, § 4141), as not authorizing the forfeiture of anything but the interest of the guilty person in such vehicles.

2. INDIANS ⟸35—INTRODUCING LIQUOR INTO INDIAN COUNTRY—FORFEITURE OF VEHICLES.
In the light of the construction placed by the courts upon Rev. St. § 2140, the proviso of Indian Appropriation Act March 2, 1917, authorizes the forfeiture of automobiles and other vehicles used in the introduction of liquor into Indian country, whether the one so using them was the owner or his agent or servant, or some person who, having secured possession of the vehicle from the owner, was using it in this unlawful purpose without the owner's knowledge or consent; and hence, where a mortgagee of an automobile permitted the mortgagor to retain possession, his interest as mortgagee did not prevent the forfeiture of the automobile, because used by the mortgagor in introducing such liquor into Indian country.

3. INDIANS ⟸35—INTRODUCING LIQUOR INTO INDIAN COUNTRY—STATUTORY PROVISIONS.
Act March 1, 1895, c. 145, 28 Stat. 693, 697, prohibiting the introduction of liquor into Indian Territory, is still in force, so far as it relates to shipments from points outside the state of Oklahoma into any portion thereof formerly constituting Indian Territory.

4. INDIANS ⟸35—INTRODUCING LIQUOR INTO INDIAN COUNTRY—STATUTORY PROVISIONS.
The proviso of Indian Appropriation Act March 2, 1917, authorizing the forfeiture of automobiles or other vehicles used in introducing intoxicants into Indian territory, or where such introduction is prohibited by treaty or federal statute, whether used by the owner or other person, was within the power of Congress to enact.

5. INDIANS ⟸35—INTRODUCING LIQUOR INTO INDIAN COUNTRY—SEARCHES.
The proviso of Indian Appropriation Act March 2, 1917, does not enlarge the right of officers to search for intoxicating liquors without warrant in other than Indian country.

At Law. Proceeding by the United States for the forfeiture of one Buick roadster automobile. On demurrer to portions of the interplea of E. C. King. Demurrer sustained.

J. C. Wilhoit and Archibald Bonds, Asst. U. S. Attys., both of Muskogee, Okl.

Jas. C. Denton, of Muskogee, Okl., for intervener.

CAMPBELL, District Judge. The question arises on the demurrer of the plaintiffs to certain portions of the interplea of E. C. King, wherein he asserts an interest in or lien upon the automobile in controversy, by virtue of a mortgage executed to him by C. C. Latta, the owner of the car. 'From the information it appears that on the 20th of

March, 1917, certain officers of the United States for the suppression of the liquor traffic among the Indians seized the car, which was found by them in the possession and under the control of one C. C. Latta, who, it is alleged, was then using the car for the purpose of introducing, transporting, and conveying from without the state of Oklahoma into the Eastern district of the state of Oklahoma, formerly Indian Territory, certain whisky, in violation of law; that the car, at the time of the filing of the information, was in the custody of a special officer of the government for the suppression of the liquor traffic among the Indians, held by him subject to libel, forfeiture, and sale by the United States for the benefit of the United States and other persons, as by law provided. Prayer for usual process and monition, for decree of the court condemning the automobile as forfeited to the United States of America, and that the same be sold and the proceeds distributed according to law.

In due time one E. C. King filed his interplea herein, wherein he alleges that he is not possessed of sufficient knowledge to affirm or deny whether or not C. C. Latta was using said automobile, at the time it was seized, for the purpose of introducing intoxicating liquor from without the state of Oklahoma into the Indian Territory portion of this state, and asks that the plaintiff be held to strict proof of such allegation. As a second ground for his interplea, he alleges that he has a special ownership in said automobile by virtue of a chattel mortgage executed by Latta to him to secure the payment of a promissory note of even date with the mortgage, for the sum of $400, due six months from date, executed for borrowed money, which note is unpaid; that said chattel mortgage was duly filed for record in the office of the county clerk of Rogers county, Okl., on November 16, 1917, and copies of the note and mortgage are attached as exhibits to the interplea. For his third ground of interplea he alleges that said automobile was never used for the introduction of intoxicating liquor in violation of law in the manner alleged in the information with his knowledge or consent, and that if the same was so used by said Latta, or any other person, it was against his (interpleader's) will, knowledge, or consent, and that said automobile is not subject to libel, forfeiture, and sale by the United States as against the rights, interest, and ownership of the interpleader, and that he is entitled to the return of the automobile to him for the purpose of foreclosing his said mortgage, in order that the proceeds of the sale of the car under such foreclosure may be applied to the payment of this mortgage indebtedness. The fourth and fifth grounds of the interplea raise the question of the constitutionality of the act under which this forfeiture is sought to be enforced, in so far as it is sought to be applied to that portion of what was formerly Indian Territory, not now "Indian country," as that term is defined by law and controlling decisions of the Supreme Court.

The plaintiff demurs to the second and third grounds relied upon by the interpleader; that is, his assertion of his claim under the mortgage and the fact that, if the automobile was being used in the unlawful manner alleged in the information, it was against his will and without his knowledge or consent.

In the Indian Appropriation Act, approved March 2d, 1917, it is provided:

"That automobiles or any other vehicles or conveyances used in introducing or attempting to introduce intoxicants into the Indian country, or where the introduction is prohibited by treaty, or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States." 39 Stat. 970.

Section 2140 of the Revised Statutes (Comp. St. 1916, § 4141) provides that, if certain officers therein named have reason to suspect or are informed that any white person or Indian is about to or has introduced any spirituous liquor or wine into the Indian country, in violation of law, such officer may cause the vehicles or place of deposit of such person to be searched, and, if any such liquor is found therein, the same, together with the vehicles used in conveying the same, and the goods, packages, and peltries of such person shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one half to the informer and the other half to the United States. By act of Congress of March 1, 1907 (United States Compiled Statutes 1916, § 4142), the authority conferred upon the several officers named in Revised Statutes, § 2140, was also conferred upon the special agent of the Indian Bureau for the suppression of the liquor traffic among the Indians and in the Indian country, and his duly authorized deputies working under his supervision.

[1, 2] Section 2140, it will be noted, enumerates "boats, teams, wagons, and sleds" as the things which, if caught illegally conveying liquor, may be seized and forfeited. Shortly prior to the enactment of this proviso in the last Indian Appropriation Act, it had been decided that this statute did not authorize the forfeiture of an automobile under the same circumstances. United States v. One Automobile et al., 237 Fed. 891, decision by District Judge Bourquin, for the District of Montana, rendered November 25, 1916. In this case, and by the same court in United States v. Whiskey, 213 Fed. 986, it had also been decided that only the interest of the person who actually violated the law by bringing in the liquor, if any such interest he had, in the vehicle sought to be condemned, could be forfeited; that if the owner of the vehicle was another person, who had intrusted him with the vehicle for some lawful purpose, and who neither consented to nor knew of the illegal use to which it was being put, a forfeiture could not be had. Congress must be presumed to have placed this proviso in the Indian Appropriation Act with knowledge of these decisions. The proviso effected an amendment of section 2140, in so far as it relates to seizures in the Indian country, by adding automobiles to the list of vehicles subject to forfeiture. It also extended the provisions of 2140, as so amended, so that as to seizure, libel, and forfeiture of all such vehicles it was operative, not only in what is strictly Indian country, as that term has come to be defined, but also in any other places where the introduction of such intoxicants is prohibited by treaty or federal statute.

Further, it will be noted that section 2140 provided that the liquor found, together with the boats, teams, wagons, and sleds used in conveying same, and also the goods, packages, and peltries of such person, might be forfeited. This had been held to confine the forfeiture to the interest only of the person guilty of the introduction, so that only where the vehicles were actually owned by the person using them in such law violation could they be condemned and forfeited. But by the proviso under consideration this was amended, so that:

"Automobiles or any other vehicles or conveyances used in introducing or attempting to introduce intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140."

Construed in the light of the judicial construction placed by the courts upon the language of section 2140, and giving the proviso the effect which its language plainly imparts, I have no doubt that Congress intended by this legislation to subject to seizure and forfeiture all automobiles and other vehicles caught being used in the introduction of liquor in violation of the laws and treaties mentioned, regardless of whether the one so using them was the owner or the agent or servant of the owner, or whether he was some person who, having secured possession of the vehicle from the owner for a lawful purpose, was using it in this unlawful purpose without the knowledge or consent of the owner. It is a harsh law, but Congress was dealing with an evil which requires harsh measures in its suppression. It is a notorious fact, no doubt well known to Congress, that particularly in this district, which comprises what was formerly Indian Territory, with a far greater Indian population than any other equal area in the United States, and which is prohibited territory by federal statute so far as the introduction of liquor from other states is concerned, violators of this law by the hundreds have availed themselves of the facility for carrying liquors in large quantities and evading detection which automobiles afford to carry on this nefarious traffic. It has long presented a serious problem to the officers charged with the enforcement of the law, and has glutted the docket of this court with criminal prosecutions. If, in addition to the loss of the liquor and the hazard of a criminal prosecution, the automobile used in this law violation may also be confiscated, regardless of whether the law violator is the owner or some one to whom the owner has intrusted it, there will have been added an additional deterrent of considerable moment.

[3, 4] Nor can the power of Congress to enact such legislation be successfully questioned. It is now settled beyond controversy that the act of March 1, 1895, prohibiting the introduction of liquor into Indian Territory, is still in force so far as relates to shipments from points outside of this state into any portion thereof formerly Indian Territory. Joplin Merc. Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705. In this case it is said:

"The authority of Congress to preserve in force existing laws or enact new ones after statehood with reference to traffic or intercourse with the Indians,

including the liquor traffic, was well established; the power of Congress over such commerce being plenary and independent of state boundaries."

If Congress may prohibit the introduction of liquor from outside the state into the Indian Territory portion of the state, it can certainly, as a means of enforcing this law and subserving the public policy which is involved in it, provide that the vehicles used in such illegal introduction shall be forfeited to the government, regardless of ownership, just as it has by numerous acts ever since the institution of this government provided for the forfeiture of articles used in violation of the customs and revenue laws. That it has such power in the enforcement of the customs and revenue laws is settled by a long line of decisions.

In this case, as in those cases, so far as the forfeiture proceedings are concerned, the thing involved, and not its owner, is the offender, and is proceeded against, just as the wagon, boat, or other conveyance used in violation of the customs or revenue laws. The person who uses the thing in violation of the law against introducing liquor violates that statute, and is subject to criminal prosecution; but that is another and distinct proceeding. As said by the Supreme Court in Dobbins Distillery v. United States, 96 U. S. at page 399, 24 L. Ed. 637 et seq.:

"Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed, and in that state of the pleadings it is clear that the proceeding is one of a criminal character; but where the information, as in this case, does not involve the personal conviction of the wrongdoer for the offense charged, the remedy of forfeiture claimed is plainly one of a civil nature, as the conviction of a wrong-doer must be obtained, if at all, in another and wholly independent proceeding. 1 Bish. Crim. Law (6th Ed.) § 835, note 1; United States v. Three Tons of Coal, 6 Biss. 371 [Fed. Cas. No. 16,515]. Forfeitures, in many cases of felony, did not attach at common law, where the proceeding was in rem, until the offender was convicted, as the crown, Judge Story says, had no right to the goods and chattels of the felon, without producing the record of his conviction; but that rule, as the same learned magistrate says, was never applied to seizures and forfeitures created by statute in rem, cognizable on the revenue side of the exchequer court, for the reason that the thing in such a case is primarily considered as the offender, or rather that the offense is attached primarily to the thing, whether the offense be malum prohibitum or malum in se; and he adds that the same principles apply to proceedings in rem in the admiralty. The Palmyra, 12 Wheat. 1 [6 L. Ed. 531]. Corresponding views were expressed by the same learned judge in a case decided at a much later period, in which he remarked that the act of Congress in question made no exception whatsoever, whether the alleged aggression was with or without the co-operation of the owners. Nor, said the judge in that case, is there anything new in a provision of that sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof, a wrong or offense has been committed, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof; the necessity of the case requiring it as the only adequate means of suppressing the offense or wrong, or of insuring an indemnity to the injured party. United States v. Brig Malek Adhel, 2 How. 210 [11 L. Ed. 239].

"Beyond all doubt, the act of Congress in question attaches the offense to the distillery, and the real and personal property connected with the same;

the words of the act defining the offense being that if any such false entry shall be made in said books, or any entry shall be omitted therefrom, with intent to defraud or to conceal from the revenue officers any fact or particular required to be stated and entered in either of said books, or to mislead the revenue officers with reference thereto, or if any distiller shall omit or refuse to produce either of said books, or shall cancel, obliterate, or destroy any part of either of said books, or any entry therein, with intent to defraud, or shall permit the same to be done, or such books or either of them be not produced when required by any revenue officer, * * * the distillery, distilling apparatus, and the lot or tract of land on which it stands, and all personal property used in the business, shall be forfeited to the United States. 15 Stat. 133. Nothing can be plainer in legal decision than the proposition that the offense therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery. Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault; and Judge Story remarked, in the case last cited, that the doctrine is familiarly applied to cases of smuggling and other misconduct under the revenue laws, as well as to other cases arising under the embargo and nonintercourse acts of Congress. Controversies of the kind have arisen in our judicial history; and it has always been held in such cases that the acts of the master and crew bind the interest of the owner of the ship, whether he be innocent or guilty, and that in sending the ship to sea under their charge he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by means of their unlawful or wanton misconduct."

If the government has the broad power of forfeiture outlined above, where it is necessary to subserve the public good in the enforcement of the revenue, customs, and admiralty laws, it must, I think, be conceded the same power to subserve the public good in the enforcement of the laws against illegal traffic with the Indians.

[5] The question of unlawful search is not involved in this case. Therefore it is immaterial that the automobile may have been seized upon other than technically Indian country. The interpleader was not in possession of the automobile at the time of the seizure, but his mortgagor, Latta, was. It was he, and not the interpleader, who was subjected to any search which may have been made that resulted in the discovery of the liquor in the car leading to its seizure and this forfeiture proceeding. The proviso of the Indian Appropriation Act under consideration does not attempt to enlarge the right of the officers to make search without warrant in other than Indian country. But whenever, by search or otherwise, a user of an automobile or other vehicle is apprehended in the act of violating the statute against introducing, then a case of seizure and forfeiture of such vehicle is presented.

I conclude that the automobile is subject to forfeiture, notwithstanding any special interest King may have in it by virtue of his mortgage. By the terms of his mortgage he intrusted the possession of the automobile to his mortgagor, Latta. Had he been the owner, and so intrusted it to Latta's possession and control, whereby he might devote it to unlawful traffic, he could not, when Latta had done so,

assert his ownership as a defense to such forfeiture proceeding. Neither does the special interest or lien he claims by virtue of his mortgage place him in any more favorable position.

The demurrer will be sustained.

Ex parte MONTGOMERY.

(District Court, S. D. New York. July 13, 1917.)

No. 118.

1. CONSPIRACY ⟸40—PERSONS LIABLE—NECESSITY OF PRESENCE.
   To be legally charged with the crime of conspiracy, a person need not have been at the place or within the state in which the conspiracy is alleged to have been committed.

2. EXTRADITION ⟸30—PERSONS SUBJECT TO EXTRADITION—"FUGITIVE FROM JUSTICE."
   While a person may do something in one state resulting in the commission of a crime such as conspiracy in another state and may be indicted therefor, he cannot be extradited as a "fugitive from justice" under the constitutional provisions and the statute providing for extradition unless physically present in the state in which the crime is alleged to have been committed at the time it was committed.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

3. EXTRADITION ⟸21—NATURE AND GROUNDS.
   The right of extradition is not founded on any state statute, comity, or contract, but upon the Constitution and laws of the United States.

4. EXTRADITION ⟸30—PERSONS SUBJECT—"FUGITIVE FROM JUSTICE."
   When an alleged fugitive from justice was in the demanding state at the time when the offense was committed, he is, when thereafter found in another state, presumed to be a fugitive from justice, no matter for what purpose or reason nor under what circumstances he left the demanding state.

5. CONSPIRACY ⟸43(12)—EXTRADITION ⟸32—INDICTMENT—VARIANCE.
   Conspiracy is a continuing offense, and the demanding state is not bound either upon the trial or in extradition proceedings by the specific date laid.

6. EXTRADITION ⟸30—PERSONS SUBJECT—"FUGITIVE FROM JUSTICE."
   Where an indictment found in Pennsylvania charged a conspiracy on March 1, 1917, and at other times before and after that date, and within two years of the date of the indictment, a New York citizen who within the time laid in the indictment was in a portion of the state of Pennsylvania remote from the place where the crime is alleged to have been committed, on business foreign to the subject-matter of the conspiracy, and who on another occasion passed through the state of Pennsylvania on a through interstate train in company and in conference with one of his alleged coconspirators, is a "fugitive from justice," and subject to extradition on demand of the state of Pennsylvania.

7. HABEAS CORPUS ⟸103—SCOPE OF INQUIRY—EXTRADITION PROCEEDINGS.
   On habeas corpus by a person arrested under an extradition warrant for surrender to another state for trial for conspiracy, the questions whether he committed any criminal act in the demanding state, or was in fact a coconspirator, are not involved, as those are questions to be determined upon the trial.

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8. HABEAS CORPUS ⇐85(2)—EVIDENCE—EXTRADITION PROCEEDINGS.

On habeas corpus by one arrested under an extradition warrant of the Governor, the warrant establishes a prima facie case that the arrest and direction for surrender to the demanding state are lawful and valid, and the burden is on the prisoner to show that he is not in fact a fugitive from justice, and such burden requires evidence practically conclusive.

Application by George F. Montgomery for a writ of habeas corpus to obtain his release from detention under a Governor's extradition warrant. Discharge denied.

Herbert Noble and Henry D. Estabrook, both of New York City, for relator.

R. H. Jackson, Dist. Atty., of Pittsburgh, Pa., and Robert S. Johnstone, of New York City, for the Commonwealth of Pennsylvania.

MANTON, District Judge. This relator, with Clarence F. Birdseye, Kellogg Birdseye, Joseph C. Watson, Robert R. Moore, and William D. MacQuestion; has been indicted by the grand jury of the county of Allegheny, state of Pennsylvania, on a charge of conspiracy under a Pennsylvania statute. The indictment charges that:

They "unlawfully did, on the 1st day of March in the year of our Lord one thousand nine hundred and seventeen, and at other times before and after said date, and within two years of the day of the taking of this inquisition, at the county aforesaid, and within the jurisdiction of this court, falsely and maliciously conspire and agree together to cheat and defraud the Pittsburgh Life & Trust Company, a body corporate, of its goods, moneys, chattels, and other property, and other dishonest, malicious, and unlawful acts then and there to do to the prejudice of the said Pittsburgh Life & Trust Company with intent in them then and there and thereby to defraud the said Pittsburgh Life & Trust Company, contrary to the form of the act of the General Assembly in such case made and provided and against the peace and dignity of the commonwealth of Pennsylvania."

The substance of the charge further is that the conspirators were to purchase a controlling interest of the stock of the Pittsburgh Life & Trust Company, the old board of directors were thereupon to resign, the conspirators were then to elect a board of dummy directors, and this board of directors, without adequate knowledge of the values of the respective properties to be exchanged, and deceived as to the real values of such properties by the conspirators, were to authorize the purchase of the bonds of the Dare Lumber Company, issued or about to be issued, and, to provide money for such purpose, they were to order the sale of certain of the assets of the said trust company, and all this notwithstanding the property covering the bonds of the Dare Lumber Company were either of no value or of inadequate value to secure the bonds. The indictment is questioned by Clarence F. Birdseye, who has made a similar application on a writ of habeas corpus. The result there expressed in an opinion will be handed down simultaneously with this.

This relator makes the point that he is not a fugitive from justice, and therefore should be discharged from custody. The crime charged is alleged to have been committed in the city of Pittsburgh on March 1, 1917, and "at other times before and after said date within two years of this date." In addition to a denial of his guilt, and, in fact,

of any of the transactions through which it is alleged the company was cheated or defrauded and of acquaintance with any of the board of directors, save one, he makes the point: First, that he was not physically present in the county of Allegheny on the 1st of March, 1917, nor in fact was he in said county from that day to the present time, nor for five years prior thereto; second, that he was not physically present anywhere in the state of Pennsylvania during any of the time except as a passenger on a through interstate railroad train on the 7th of February, 1917, going to and from points outside of the state of Pennsylvania, to wit, Baltimore, Md., and the city of New York, and this in company with Clarence F. Birdseye, his alleged coconspirator, and at one time in December, 1916, when he stopped at Philadelphia attending to some lumber business which did not have to do with the affairs of the Pittsburgh Life & Trust Company.

The relator testified that while on the train with Birdseye he discussed with him Birdseye's purpose of formulating in writing an option for the purchase of the properties of the Dare Lumber Company and the properties of the East Lake Lumber Company, so as to permit Birdseye to place the bonds of the Dare Lumber Company when issued; Birdseye representing that his client who would take the bonds was the Manhattan Life Insurance Company of New York City, and the Pittsburgh Life & Trust Company was not mentioned on this occasion.

I am not called upon on this application, to determine anything other than this question, whether a citizen of New York, indicted for the statutory crime of conspiracy in Pittsburgh, Allegheny county, Pa., who is conceded not to have been physically or personally present in that city or county within the time alleged in the indictment, or at any time since the alleged commission of the crime or prior thereto, shall nevertheless be deemed a fugitive from justice of Pennsylvania if it appears on several occasions during the time alleged in the indictment that he was a passenger on a through interstate railroad train bound for points outside of the demanding state, said trains running through a portion of the state remote from the locus in quo, on one occasion he having stopped at the city of Philadelphia to attend to some business foreign to the subject-matter of the indictment, and on another occasion he having been a fellow passenger with an alleged coconspirator. Both occasions were prior to the filing of the indictment charging crime.

[1, 2] It is not necessary that the relator should have been at the place where the crime is alleged to have been committed to be legally charged with the crime of conspiracy. He may be guilty without having either engaged in the conspiracy or done anything in pursuance of it while physically in the state of Pennsylvania. There are various crimes, including conspiracy, where a person may do something in one state which would result in a crime committed in another state. But he may be indicted in a given case in which he cannot be extradited. Under the constitutional provision and the statute providing for the extradition of fugitives from justice from one state to another, it is necessary that the defendant should have been physically present in the

state in which it is alleged that the crime was committed at the time when it was committed, in order to make him, by his subsequent departure from the state, a fugitive from justice. Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; Ex parte Hoffstot (C. C.) 180 Fed. 242. As was said by Judge Holt in Ex parte Hoffstot, supra:

"The question in this case, therefore, is whether there was any proof before the Governor that Hoffstot was in the state of Pennsylvania when the crime or any material part of the crime with which he is charged was committed."

[3, 4] The right of extradition is not founded on any state statute, comity, or contract, but upon the Constitution and laws of the United States. Cockran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774. In the Hyatt Case, which went to the Supreme Court of the United States, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, it was held that the defendant could not be extradited where it was conclusively shown upon conceded facts that he was not within the demanding state at the time stated in the indictment nor at any time when the acts were, if ever, committed; in other words, that constructive presence will not suffice as a basis for extradition. The law is well settled that, if the alleged fugitive was in the demanding state at the time when the offense was committed, he is, whenever he is thereafter found in another state, presumed to be a fugitive from justice within the meaning of the Constitution and the laws of the United States, no matter for what purpose or reason nor under what circumstances he left the state. Appleyard v. Mass., 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; McNichols v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; Marbles v. Creecy, 215 U. S. 63, 30 Sup. Ct. 32, 54 L. Ed. 92; Reed v. United States, 224 Fed. 381, 140 C. C. A. 64.

[5, 6] While the indictment here mentions specially but a single day, it also alleges a conspiracy claimed to have been hatched during two years preceding the indictment. Conspiracy is a continuando crime, and the rule is now well settled that the demanding state is not bound either upon the trial or in the extradition proceedings by the specific date laid. While the relator was not in the locus in quo during the period it is alleged the crime was committed, he was within the demanding state and in the presence of a coconspirator on an interstate train. The circumstances of the relator's presence in the demanding state during this period do not establish the impossibility of his participation in the conspiracy. The crime charged did not require his presence in the locus in quo. A conspiracy may be a continuing offense. Indeed, it has been held to be a purely continuous offense. United States v. Kissel, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168; Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614; United States v. Greene (D. C.) 115 Fed. 343.

Learned counsel for the relator have referred to Judge Holt's reference in the Hoffstot Case of the refusal of Governor Fort of New Jersey upon an application for requisition upon the Governor of Illinois for extradition of J. Ogden Armour. Armour, with others, was indicted in New Jersey for conspiracy to produce an artificial scarcity

in the supply of meats and to increase the price thereof. The proof upon which it was claimed that he was a fugitive from the justice of New Jersey was contained in an affidavit of the chief steward of the steamship Kaiser Wilhelm II that on April 28, 1908, Armour left the city of Hoboken upon that ship on a voyage to Bremen, and that he returned passing through Hoboken on his way to Chicago. Judge Holt said:

"In this case, if the only evidence of Hoffstot's presence in Pennsylvania during the time in which it is alleged that he engaged in the conspiracy had been that he passed through the state as an incident of a journey, as, for instance, that he went from Chicago to New York over the Pennsylvania Railroad, I should have no doubt that the proof of his commission of the crime, or any material part of it, in the state of Pennsylvania, was insufficient."

And counsel argued that the case supposed by Judge Holt is the one judicial utterance that they are able to find that is absolutely in point. The difference, however, is that in this relator's case it is established by his own admission that the defendant was in conference with the coconspirator on an interstate train passing through Pennsylvania, although distant from the county where he is charged with crime, during the period mentioned in the indictment as the time the crime was committed.

As Judge Shearn said in People ex rel. Ireland v. Woods, 177 App. Div. 1, 163 N. Y. Supp. 991:

"True, his stay was short on each occasion, but there was abundance of opportunity during his stay, not only to confer with his alleged confederate, but to hand to his confederate the letters of credit and the bogus checks which, it is alleged, were used to accomplish the overt criminal acts."

The same reasoning was applied in Meeker v. Baker, 142 App. Div. 598, 127 N. Y. Supp. 382.

[7, 8] We are not here concerned whether or not Montgomery committed any criminal act in the state of Pennsylvania or whether he was in fact a coconspirator. These are questions which can only be determined upon the trial. Munsey v. Clough, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515; In re Strauss, 197 U. S. 324, 25 Sup. Ct. 535, 49 L. Ed. 774. Whether Montgomery is innocent or guilty must be heard in the court where he is charged with the crime. He is now demanded by Pennsylvania under an indictment filed in one of its counties which sufficiently charges him with a crime. The courts have repeatedly stated that the warrant of the Governor establishes a prima facie case that the arrest and direction for surrender are lawful and valid. The burden is upon the prisoner to show that he is not in fact a fugitive from justice, and that burden requires evidence which is practically conclusive. Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; McNichols v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121.

Therefore, in view of Montgomery's own admissions upon the hearing, of his presence in the demanding state, with opportunity for and actual conference with a coconspirator during the period in which it is charged in the indictment the crime was committed, I am obliged to hold that he is a fugitive from justice within the meaning of the

law, and that he should be delivered up in accordance with the demand of the rendition warrant.

If counsel representing the relator feel aggrieved by these conclusions, they may have a stay pending such proceedings as they may be advised are necessary to take the case to the Supreme Court.

Ex parte BIRDSEYE.

(District Court, S. D. New York. July 16, 1917.)

No. 119.

1. HABEAS CORPUS ⟸13—GROUNDS OF REMEDY—DETENTION ON EXTRADITION WARRANT.
   A person held on an executive warrant for extradition to another state may test the legality of his detention under article 4, § 2, of the federal Constitution by habeas corpus proceedings in a federal court.
2. HABEAS CORPUS ⟸30(2)—EVIDENCE—EXTRADITION PROCEEDINGS.
   If any one count in an indictment charges a crime under the laws of the state, it is sufficient to sustain extradition proceedings against the accused, when attacked in a habeas corpus proceeding.
3. HABEAS CORPUS ⟸92(2)—SCOPE OF INQUIRY—EXTRADITION PROCEEDINGS.
   In habeas corpus proceedings for the discharge of a prisoner held on an extradition warrant, the technical sufficiency of the indictment on which the warrant was issued is not open to question, but is a matter to be determined by the courts of the demanding state.
4. CONSPIRACY ⟸23—DEFINITION.
   Conspiracy exists where two or more persons combine and agree together to do an unlawful act, or to do a lawful act by the use of unlawful means.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

Petition by Clarence F. Birdseye for writ of habeas corpus to obtain release from detention on a Governor's extradition warrant. Dismissed.

James A. Foley and Charles L. Craig, both of New York City, for relator.

R. H. Jackson, Dist. Atty., of Pittsburgh, Pa., and Robert S. Johnstone, of New York City, for the Commonwealth of Pennsylvania.

MANTON, District Judge. [1] This relator is charged with the crime of conspiracy by an indictment filed in the county of Allegheny, state of Pennsylvania. He contests the right of extradition by Pennsylvania on the ground that various counts of the indictment and the indictment as a whole do not charge a crime against him. The Governor of the state of New York has issued his warrant against this relator and his fellow defendants. He may contest this right through the medium of a writ of habeas corpus, assailing the legality of his detention under the executive warrant. Article 4, § 2, of the federal Constitution provides:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Under this provision an alleged fugitive can be delivered up only: First, if he is charged in one state with treason, felony, or other crime; and, second, he has fled from justice; and, third, that the demand for his delivery to the state wherein he is charged with the crime is made. If either of these conditions is absent, the Constitution affords no warrant for the restraint of the liberty of any person. Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544.

So the question here is whether this relator, who does not dispute having been in the demanding state, is sufficiently charged with crime by the information or indictment here presented by Pennsylvania; in other words, is the information or indictment sufficient in law as a criminal pleading? For it is obvious that such an objection, if well founded, would entitle the relator to his discharge for it would destroy its effect in charging a crime. Learned counsel for the relator urge that a charge of crime is not alleged sufficiently clear and comprehensive in this indictment so as to permit an intelligent defense, and a bar to a second prosecution. This right to be so charged, is accorded every defendant charged with crime. United States v. Greene (D. C.) 115 Fed. 343; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

[2] The indictment here consists of 11 counts. If one of these counts is sufficient to charge a crime, the relator must fail. Commonwealth v. Church, 17 Pa. Super. Ct. 39; Commonwealth v. Gouger, 21 Pa. Super. Ct. 217. The Pennsylvania statute alleged to have been violated by the relator is known as the act of March 31, 1860 (P. L. 413, § 128), and reads:

"If any two or more persons shall falsely and maliciously conspire, and agree to cheat and defraud any person, or body corporate, of his or their moneys, goods, chattels, or other property, or to do any other dishonest, malicious and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years."

And the act of March 31, 1860 (P. L. 433, § 11), further provides:

"Every indictment shall be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the Act of Assembly prohibiting the crime, and prescribing the punishment, if any such there be, or if at common law, so plainly that the nature of the offense charged may be easily understood by the jury. Every objection to any indictment for any formal defect, apparent on the face thereof, shall be taken by demurrer, or on motion to quash such indictment, before the jury shall be sworn, and not afterward; and every court, before whom any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, by the clerk or other officer of the court, and thereupon the trial shall proceed as if no such defect appeared."

[3] Counsel for the relator have made a very serious attack upon this indictment. In a very learned brief they have reviewed the authorities at considerable length in the attempt to make good on this attack. But on this application, and particularly in view of the statutes above referred to, the court is called upon only to ascertain if the crime is substantially charged. The technical accuracy of the pleading must be left to the courts of the demanding state. Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Drew v. Thaw, 235 U. S. 439, 35 Sup. Ct. 137, 59 L. Ed. 302; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113; Munsey v. Clough, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515. As was said by Justice Holmes in Drew v. Thaw, 235 U. S. 439, 35 Sup. Ct. 138, 59 L. Ed. 302:

"The most serious argument on behalf of Thaw is that, if he was insane when he contrived his escape, he could not be guilty of crime, while, if he was not insane, he was entitled to be discharged, and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime (article 4, § 2). Pettibone v. Nichols, 203 U. S. 192, 205 [27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047]. There is no discretion allowed; no inquiry into motives. Kentucky v. Dennison, 24 How. 66 [16 L. Ed. 717]; Pettibone v. Nichols, 203 U. S. 192, 203 [27 Sup. Ct. 111, 51 L. Ed. 148, 7 Ann. Cas. 1047]. The technical sufficiency of the indictment is not open. Munsey v. Clough, 196 U. S. 364 373 [25 Sup. Ct. 282, 49 L. Ed. 515]. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide."

In Pierce v. Creecy, 210 U. S. at 401, 28 Sup. Ct. 718, 52 L. Ed. 1113, the court said:

"The counsel for the petitioner disclaim the purpose of attacking the indictment as a criminal pleading, appreciating correctly that the point here is not whether the indictment is good enough, over seasonable challenge, to bring the accused to the bar for trial. Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack, though narrow, is clear. But it will not do to disclaim the right to attack the indictment as a criminal pleading and then proceed to deny that it constitutes a charge of crime for reasons that are apt only to destroy its validity as a criminal pleading. There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending. We are unable to adopt the test suggested by counsel, that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime. Not to speak of the uncertainty of such a test, in view of the varying practice in the different states, there is nothing in principle or authority which supports it. Of course, such a test would be utterly inapplicable to cases of a charge of crime by affidavit, which was held to be within the Constitution. In the Matter of Strauss, 197 U. S. 324 [25 Sup. Ct. 535, 49 L. Ed. 774]. The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the state from which he has fled."

[4] But the counsel for the relator contend that the indictment does not, in any of its 11 counts, charge the statutory crime of conspiracy to cheat and defraud, and that therefore the indictment charges no crime whatever which warrants holding the relator for extradition. A conspiracy, at common law is a much broader offense than that provided by statute. Conspiracy has been so often defined as a case where two or more persons combine and agree together to do an unlawful act, or to do a lawful act by the use of unlawful means. This is the substance of the offense under the Pennsylvania statute. Relator says that the indictment fails to set forth the elements of the crime sought to be charged, and says that it does set forth a number of overt acts which are mere surplusage. Many authorities are cited for the proposition that an indictment charging conspiracy and fraud must set forth the acts which the accused is claimed to have agreed to commit, and which, if committed, would constitute a criminal transaction. Such was the rule laid down in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; and United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135.

This indictment alleges that:

> The defendants "falsely and maliciously conspired and agreed together to cheat and defraud the Pittsburgh Life & Trust Company, a body corporate, of its goods, moneys, chattels, and other property and other dishonest, malicious, and unlawful acts. then and there to do to the prejudice of the said Pittsburgh Life & Trust Company with intent in them then and thereby to defraud the said Pittsburgh Life & Trust Company, contrary to the form of the statute," etc.

The various counts of the indictment, 11 in number, set forth the commission of acts, sufficient to charge a crime. After alleging in the first part of the indictment (count 1) the statutory conspiracy, it then charges that the defendants caused the board of directors to be supplanted by a board of dummy directors, and that they then caused the assets of the Pittsburgh Life & Trust Company to be exchanged for questionable and inadequate properties, and this while the dummy board of directors were without sufficient, or any knowledge of the true value of the assets of the Pittsburgh Life & Trust Company so disposed of. It alleges that the defendants profited by reason thereof, and that the various acts were done through a false and malicious conspiracy and agreement together to cheat and defraud the Pittsburgh Life & Trust Company. In this way, it is charged in the indictment, the Pittsburgh Life & Trust Company was looted. How this was accomplished is set forth in considerable detail.

All this, if true, would charge a crime under the Pennsylvania statute. The indictment is inartificially drawn, but it must be recalled that it is subject to amendment by the trial court of the demanding state. Under the rule referred to above, it is sufficient if the substance of the indictment charges a crime. The form of the indictment may be bad, or its subdivision into various counts may be bad, but if the power remains with the court of the demanding state to correct this defect, the rule laid down in the cases of Drew v. Thaw and Pierce v. Creecy, supra, must control, and the defendants are subject to extradition under

the Constitution and laws of the United States. It is the province of the state where the crime was committed to declare what its laws are and to determine that the particular acts on the part of the offender constitute a violation of the criminal law of that state. Commonwealth v. Supt. of County Prison, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939.

For these reasons, the writ must be dismissed, and the relator held for extradition.

MARTIN v. MATSON NAV. CO. et al.

(District Court, W. D. Washington, N. D. July 16, 1917.)

No. 3377.

MASTER AND SERVANT ⊂=354—RIGHT OF ACTION FOR WRONGFUL DEATH—CONSTRUCTION OF WORKMEN'S COMPENSATION ACT—"PLANT."

Workmen's Compensation Act (Laws Wash. 1911, p. 345) § 5, as amended by Laws 1913, p. 467, after providing that injured workmen shall receive compensation in accordance with a schedule, provides that, "except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." Section 3 of the act contains a proviso that, "if the injury to a workman occurring away from the plant of his employer is due to the negligence or wrong of another, not in the same employ, the injured workman, or, if death results from the injury, his widow, children or dependents, * * * shall elect whether to take under this act or seek a remedy against such other." Plaintiff's son, on whom she was dependent, while in the employ of a boiler making company, was sent to make repairs on the machinery of defendant's steamer, and while so engaged was fatally injured, as alleged in the complaint, through the negligence of an employé of defendant. *Held* that, while the word "plant," as used in section 3 of the act, included, besides the premises of the employer, such appliances and tools as were regularly used in the conduct of the business, it could not be extended in favor of defendant to the vessel on which the deceased was working, where the injury was not due to any defect in such appliances or tools, that deceased was "away from the plant of his employer," and that the action could be maintained under Rem. & Bal. Code Wash. §§ 183, 194, giving a right of action for wrongful death.

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

At Law. Action by Louise Martin against the Matson Navigation Company, Miles R. Clarke, and Charles W. Snyder. On demurrers to complaint. Demurrer of defendant Snyder sustained. Demurrer of defendant company overruled.

See, also, 239 Fed. 188.

Vanderveer & Cummings, of Seattle, Wash., for plaintiff.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for defendants Matson Nav. Co. and Snyder.

NETERER, District Judge. The plaintiff, mother of and a dependent upon William Brown, brings this action against the defendant corporation and Miles R. Clarke and Charles W. Snyder, alleging that,

through the negligence of the defendants, William Brown on the 3d day of March, 1916, while—

"employed by said Standard Boiler Works in making said repairs on said steamship Hyades, * * * and while he was engaged in putting certain bolts in the base of the engine in said steamship Hyades, * * * and had crawled down underneath the engines, condenser, and hotwell, a device employed in condensing steam into water for use in the boilers of said steamship Hyades, and while so employed, the defendant Miles R. Clarke, negligently and carelessly opened the valve controlling the flow of water in said hotwell and condenser in such a manner as to cause the same to overflow and flood the place where the said William Brown was engaged at his work, * * * and horribly burn and scald the body of said William Brown in such a manner that as the result thereof said William Brown died on the 5th day of March, 1916, at Seattle, Washington."

It is further alleged that the engines, boiler, and hotwell were under the supervision and control of the defendants Clarke and Snyder, and that it was the duty of said Clarke and Snyder to warn Brown of the danger, and that the danger was unknown to him and was known to them.

The cause was removed to this court from the state court, and motion to remand was denied, because the liability of the defendant Matson Navigation Company is under the doctrine of respondeat superior, and not by reason of any concurrent or wrongful act of the defendant company, and that it is affirmatively stated in the complaint that the injury was caused "by the defendant Miles R. Clarke negligently and carelessly opening the valve controlling the flow of water in said hotwell and condenser in such a manner as to cause the same to overflow and flood the place where the said William Brown was engaged in his work, * * *" etc., and that it was an act of commission on the part of Clarke, a servant, which was the cause of the injury, and not an act of omission on the part of Snyder, a fellow servant of the person who committed the act, and that the defendant Snyder was not a proper party, and the record is conclusive that the defendant Clarke is a resident of California, upon whom no process had been served, and that there is a diversity of citizenship, and the right of removal therefore obtained as to the defendant company.

The defendant Snyder and the defendant company have filed separate demurrers challenging the sufficiency of the complaint. What was said by the court in denying the motion to remand is conclusive upon this issue, that the complaint does not state a cause of action against the defendant Snyder. The defendant company contends that no cause of action survives to the plaintiff by reason of section 5 of the Workmen's Compensation Act, as amended by chapter 148, Laws 1913, page 468, which provides:

"Each workman who shall be injured, whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this act otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever."

The contention is that the plaintiff's rights are concluded by the clause "except as in this act otherwise provided," and that the right of action accruing to the plaintiff under sections 183 and 194, Remington & Ballinger's Code of Washington, is determined by the Workmen's Compensation Act, and that she does not come within any exception, because the death of Brown occurred at the plant of his employer. The position of the defendant as stated in its brief, is as follows:

"To us it seems beyond dispute that a workman engaged in an employment classified as hazardous under the act [section 3] is not 'away from the plant of his employer' when he is at the place of work where his employer directs him to be, or where by virtue of the character of the work, he must be to perform the work. That place may not be upon the premises of his employer, but it is not 'away from the plant of his employer.' The word 'plant,' as used in the act, is broad enough in meaning to include every place where the employé must be to carry on the work of his employer."

Emphasis is placed upon Meese v. Northern Pacific Railway Co., 211 Fed. 254, 127 C. C. A. 622, decided by Judge Cushman, and it is insisted that is decisive of this case, and clearly determines that the terms "plant" and "premises" are not identical, and that it shows that the intent of the act was not to limit the application to real property boundaries. There can be no dispute as to the fact that "plant" and "premises" as used in the act are not synonymous. "Premises" clearly refer to place and territory, and "plant," I think, might be said to include place and territory, together with the appliances and things which go to make up the facilities for the execution of the designs and purposes of the enterprise. There are many things which go to make up a "plant" which are not necessary to complete "premises." A wire, a wrench, a file, a crowbar, a derrick, an elevator, engines, boilers, and all kinds of machinery and tools, etc., go to make up a "plant"; and these, when employed in a community sense, if that term may be applied to inanimate things, may be said to comprise the "plant." Work done upon a vessel might be done at the plant, but the fact that work on a vessel may be done at the plant I do not think would imply that all work done on a vessel could be construed to be performed at the plant. The stepladder employed in Lipstein v. Provident Loan Society, 154 App. Div. 732, 139 N. Y. Supp. 799, I think, was very properly held to be a part of the plant. It was a necessary implement to perform the work required, and the defect in the ladder, the cause of the injury, would come within the provisions of the Workmen's Compensation Act of New York (Consol. Laws, c. 31, §§ 200–204, as amended by Laws 1910, c. 352), which provides:

"By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer * * *"

—and justified the court in saying:

"Applying, therefore, the various tests above suggested, we conclude that anything (as distinguished from persons), animate or inanimate, and whether fixed or movable, that is regularly used in the conduct of the business of an employer, and that is neither ways, works, nor machinery, and without which, or something of a similar character, such business could not be carried on in the usual and ordinary manner, may be deemed to be a portion of the plant connected with such business."

And for the same reason, under the same act, in McKeon v. Proctor & Gamble Co., 162 App. Div. 784, 147 N. Y. Supp. 1012, "chain tongs" were properly held a part of the plant; and in Kerwin v. Long Island Co., 157 App. Div. 898, 142 N. Y. Supp. 1125:

"The rope furnished by defendant for ordinary use upon its wagons for the purpose of securing the loads of said wagons was a part of the 'plant' within the meaning of the statute."

And likewise in Drury v. American Fruit Co., 163 App. Div. 509, 148 N. Y. Supp. 675, a plank skid, consisting of planks fastened together by iron cleats, which extended from a store platform to the floor of a car, and used to carry barrels from the car to the platform, was held to be at the plant, and that case is on "all fours" with Meese v. Northern Pacific Railway Co., supra; and upon the same theory, and for the same reason, in Wiley v. Solvay Process Co., 215 N. Y. 584, 109 N. E. 606, Ann. Cas. 1917A, 314, injury was predicated upon defective appliances, in that the facilities to properly perform the work were not furnished, and by reason of the defective tools recovery was permitted under the Compensation Act, the court saying:

"The words used in the act of 1902, namely 'ways, works, and machinery,' did not include everything furnished to the employé for his use in the business of the employer. * * * The word 'plant' was added to that section by chapter 352 of the Laws of 1910. It cannot be reasonably doubted that the change was made for the benefit of the employés, and to make certain that everything reasonably required for the safety of an employé in the conduct of the master's business would be included in the statute, by the use of the word 'plant.' * * * The word 'plant' in its ordinary acceptation, when used in connection with and relating to a business, includes everything other than supplies and stock in trade necessary and requisite to the carrying on of the business."

And for the same reason, in Riddle v. Bessemer Soil Pipe Co., 170 Ala. 559, 54 South. 525, recovery was permitted under the Alabama Workmen's Compensation Act, because of omission of the employer to furnish the proper facilities for greasing a running belt to keep it from slipping.

The complaint in this case is that the deceased was injured while making repairs on the steamship Hyades at Pier 9, Seattle, Wash., and away from the plant of said Standard Boiler Works. For the purposes of the demurrer this statement is admitted, and, if the fact is otherwise, it must be presented by answer. If the injury causing the death of Brown had been occasioned by reason of defect in the tools and apparatus furnished and necessary for the execution of the work in which he was employed, there might be reason for contending that the "plant" accompanied the employé to the place where the facilities of the enterprise were to be employed, and that as between the employé and employer the Compensation Act would be conclusive. But no reasonable construction, it seems to me, can be placed upon the language employed by the Legislature and the general terms of the act, which determines that the "plant" accompanies an employé wherever he may go to perform services for his employer, as against a third party.

BROWN et al. v. PENNSYLVANIA CANAL CO. et al.

(District Court, E. D. Pennsylvania. August 22, 1917.)

No. 677.

1. CORPORATIONS ⊂=486—MORTGAGES—CONTRACT WITH BONDHOLDERS OF SUBSIDIARY CORPORATION.

A canal company, organized and controlled by a railroad company, issued mortgage bonds upon which the railroad company indorsed an agreement to purchase such interest coupons as should not be paid at maturity by the canal company. The mortgage provided that from its net income the canal company should first set aside $20,000 annually, if the income amounted to so much, as a sinking fund for the payment of the principal of the debt, to be invested in the bonds or other good securities. In a foreclosure suit it was adjudged that the unpaid coupons, including those purchased and held by the railroad company, were entitled to priority of payment over the principal of the bonds from the proceeds of the mortgaged property. In a subsequent suit by bondholders it was found that net income which by the terms of the mortgage should have been paid into the sinking fund had been diverted to the payment of coupons, relieving the railroad company to that extent from its agreement to purchase the same, and the railroad company was required to restore such sums. *Held*, that such restored fund was applicable, first, to the principal of the bonds for whose payment it was created.

2. CORPORATIONS ⊂=486—MORTGAGES—SINKING FUND—DISTRIBUTION.

As the sinking fund was created for the benefit of the bondholders as a class, all bonds, including those held by the railroad company, were entitled to share in the restored fund.

3. CORPORATIONS ⊂=486—MORTGAGES—SUIT TO RECOVER SINKING FUND—EXPENSE OF RECOVERY.

The suit having been brought by one bondholder, for the benefit of all who might come in and share in the expense, to compel a restoration of the money diverted from the sinking fund, the railroad company, although the defendant from whom the fund was recovered, could only come in as a distributee on payment of its share of the expense of recovery.

4. CORPORATIONS ⊂=482(9)—REPRESENTATIVE SUIT BY BONDHOLDERS—COUNSEL FEES.

The allowance by the master of a fee to complainant's counsel, based on the entire amount which the decree required the railroad company to restore to the sinking fund, *held* excessive, where about one-fifth of the bonds were owned by the railroad company, and hence were not really in controversy.

In Equity. Suit by Alice F. Brown and others against the Pennsylvania Canal Company and others. On exceptions to master's report. Sustained in part.

See, also, 229 Fed. 444.

Thomas Raeburn White, of Philadelphia, Pa., for plaintiffs.

John Hampton Barnes and Francis I. Gowen, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The admirable discussion at bar of the questions presented to us in this case was based upon an analysis of the case so clear and satisfactory that the statement of what questions are now involved given to us in the discussion may be followed as complete. The report of the master is of such satisfactory full-

ness that nothing more than a statement of the conclusions reached is demanded of us.

[1] 1. The first question is that of the priority of interest over principal in payment out of the fund in court. Wrapped up in this is the query of whether this question is still an open one. We need not trouble ourselves with this latter question, because, if the door has closed, it has closed upon the exceptants, and if the finding of the master be correct, whether the ruling be that the question has been adjudicated in favor of the plaintiffs, or should be so determined, is of no practical importance. Assuming that the decree of the Circuit Court of Appeals was not the equivalent of a technical judgment upon this issue as now raised, it was decreed that the Pennsylvania Railroad Company should pay to the trustee under the mortgage, appointed by the decree to be the receiver of the fund, a sum of money equal to the sum which measured the extent to which the sinking fund had been depleted by what was done and what was omitted to be done. The ruling which resulted in this decree was expressly based upon the finding that the meaning of the agreement entered into was that prospective purchasers of the bonds of the Canal Company were assured of the prompt receipt of the interest which became due them through and by the obligation of the railroad company to purchase the coupons and were further assured of the payment of the principal of the bonds through and by the accumulation in the sinking fund of moneys (deemed to be sufficient) for this purpose.

The effect of the covenants of the mortgage, considered without any reference to the collateral agreement to which the Railroad Company was a party is one thing; the effect of this collateral agreement with respect to the rights of the parties affected by it is another thing. Accepting, as we do, the ruling of the state court (Rea v. Penn. Canal Co., 245 Pa. 589, 91 Atl. 1053) in the proceedings upon the mortgage, we are bound to conclude that under the terms of the mortgage the interest coupons have priority of payment over the principal of the bonds in the distribution of the proceeds of the mortgaged premises sold as the property of the Canal Company and as against the Canal Company. To hold, however, that the Railroad Company, in an action against it arising under the collateral agreement, is entitled as a purchaser of the coupons to a like priority of payment over the bondholders, would be to deny the soundness of the reasoning upon which the ruling already made in this case proceeded. This is clearly so because, treating the Railroad Company as the actor, the ruling that the company could not deduct interest from the earnings before paying $20,000 thereout into a sinking fund for the benefit of the bondholders, and then to rule that it might take this same money out of the sinking fund to pay the interest in preference to the bonds, is to make inconsistent rulings, the latter of which nullifies the former. The master was therefore, we think, entirely right in holding (whether the question was strictly res adjudicata or not) that the ruling already made, which resulted in the creation of this fund, compels the ruling that the fund created for the payment of the bonds cannot be diverted to the payment of the coupons.

[2] 2. Upon the second question we think the master to be also right. The covenant of the Railroad Company (still regarding it as the actor) was to create this annual $20,000 contribution to the sinking fund for the benefit of the bondholders as a class. There is no distinction made among the members of the class, and no convincing reasons advanced for not treating all the outstanding bonds as on the same footing. What bonds are outstanding and the holders thereof are questions wholly dependent upon the facts as they are found to be, and the master was the duly constituted tribunal to make these findings.

[3] 3. We think the master to be further right upon the third question, so far as affects the principle involved, although his ruling may be subject to modification in the application of the principle. We can contribute nothing of value to the discussion of the broad question contributed by the master and counsel. A few general observations may aid in clarifying our view of the broad equities arising out of the situation. Whatever might be said in support of the merits of the claim that a party who has been found to be entitled to redress for an injury should be awarded that redress, undiminished by the expense of securing it, there has in this jurisdiction never been given an allowance for such expense beyond the award of certain costs in addition to the redress awarded. That one member of a class, who shares in the fruits of a litigation carried on by another member for the benefit of the whole class, should contribute proportionately to the expense incurred, is a proposition which has so far been given judicial sanction as to have ripened into an accepted equitable principle. It may be planted upon an acceptance of the proffer made in bills of this kind (as was in fact made in the bill filed in this case) that any bondholder might become a party to the bill (which all of them have now in effect done) by contributing to the expense incurred by the original plaintiff. It may be rested on the broad ground that every member of the class has benefited.

We can easily enter into, and to that extent sympathize with, the feeling almost of resentment with which a defendant who had been compelled to pay money as a result of an action against him entertains, if it is suggested that he should contribute to the expense incurred by the plaintiff on the ground that the defendant had profited by the litigation. Such is the feeling of the Railroad Company in this case, and it must be admitted that from its point of view there is justification, or at least provocation, for the feeling. Room for the two points of view is afforded by the circumstance that the Railroad Company occupies a dual position. It is a bondholder for whose benefit this sinking fund provision was made in the collateral agreement. It is the one indirectly receiving the moneys which should have gone into the sinking fund, and, because of this, the one required to replace the moneys. If it had been wholly a bondholder, its liability to make contribution would not be denied. If it were wholly a defendant, such liability would not be asserted. It seems like a very narrow and technical ground upon which to base a ruling; but at the same time the position likewise seems to be one of compulsion that the question

must be determined according to the character of the Railroad Company at the time of the ruling, and at this time the Railroad Company is wholly a bondholder and distributee, and its character as a defendant is gone.

No one except the bondholders who were injured had a right of action against the Railroad Company for the diversion of the earnings of the Canal Company from the sinking fund, and, of course, it could not be said that the Railroad Company had injured itself. The action or proceeding might therefore have taken a course resulting in a judgment or decree that the injured bondholders recover the amount of the injury from the Railroad Company. The sum thus recovered they would have received, and would perforce have borne the whole expense themselves. The proceedings did not, however, take this course, but resulted in the creation of a fund to which likewise perforce the Railroad Company must resort, asking to share in the distribution as a bondholder. The different situation brings the like further consequence that all the bondholders share alike. As a bondholder the company is within the admitted principle of contribution, being one of those having "a similar interest in the subject-matter of the litigation." We are not concerned with them in any other character, and evidence of who are distributees of this fund is restricted to showing who are bondholders. The view taken by the master is, we think, unaffected by the comments quoted by defendant from Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940, or Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

[4] 4. The fourth question relates to the sum allowed counsel for plaintiff. As between counsel and client, it cannot be denied that the services rendered call for the fullest measure of compensation, limited only by what is just and reasonable. Just what sum measures this is a fact conclusion. What mete wand should be applied is a question of law. The result of the measuring is a fact. One of the elements which enters into the selection of the measuring rod is that of the size of the fund involved. Because of this, the measuring is frequently and properly done on a percentage basis. So far as the question before us is one of fact, the finding is based upon evidence consisting of testimony which is uncontradicted and which has been considered and weighed by the Master. There is concord upon the fact that the allowance made is large. This does not help us, because in the opinion of the plaintiff it ought to be large, and the exceptant has characterized it as "excessive." Criticism of an allowance as too large, unsupported by either evidence or suggestion of what a fair allowance would be, is not of much practical aid to any one whose duty it is to make a proper allowance. The master has allowed a sum which is the equivalent of slightly less than 13 per cent. of the whole fund found for distribution, exclusive of the interest accumulations. The latter is likely to be a considerable sum before this litigation is ended. In the view of the master, no client could reasonably complain of litigation charges which left him over 87 per cent. of his full claim, with interest accumulations added. The conclusion reached by him is more than supported by the evidence of what reasonable compensation to counsel would be.

A finding thus supported, with absolutely nothing to challenge its correctness, or by which to correct it, if thought to be excessive, we do not feel justified in disturbing.

It only remains, therefore, to apply it to the amount or sum really in controversy. The master has applied this percentage to the whole fund (less interest), or nearly $2,000,000. The total number of bonds outstanding, and prima facie having the right to share in the distribution, is 1,948. The contest waged, however, was waged on behalf of 1,564 only of these bonds; 384 of them being held by the Railroad Company. Even though the course of the proceeding was such as that the 384 shares figured in the recovery, and to this extent increased the total sum of the fund, the injury was an injury to the holders of the 1,564 shares, and the recovery was of the sum due them, and the 384 shares were no part of the sum "really in controversy." The sum thus really in controversy enters into the measure of compensation, unincreased by the sum which was due by the Railroad Company to itself. The allowance made by the master of counsel fees on the basis of the whole fund, rather than on the actual recovery, has much to support it, because it seems to be a logical corollary of the finding that the whole fund should contribute. The two thoughts seemingly move in opposition and in apparent conflict. We think, however, that, although they move in opposite directions, there is room for them to pass without collision. The case is somewhat analogous to that of a successful ejectment litigation waged to recover a four-fifths interest in a real estate property, the entire interest in which must be brought into the case for partition and distribution purposes. Accepting the finding made by the master on the changed basis of calculation, the allowance should be reduced from $250,000 to $200,000, and to this extent the exceptions are sustained.

The foregoing disposes, so far as concerns this court, of the exceptions filed on behalf of the Railroad Company. In discussing those filed on behalf of the plaintiff, we will again follow the order of questions into which the exceptions have been analyzed by counsel.

The key to the answer to the first question, raising the inquiry into the status of the Railroad Company as a bondholder, is to be found in this: The fund is the property of the Canal Company. It has, it is true, been set aside for the benefit of the bondholders; but this title is that of the bondholders as a class, and not the plaintiff or any particular bondholder. Every bondholder, it is true, has the right to resist his share being diminished by the participation of any one who is not a bondholder; but who is and who is not a bondholder is to be determined, as between the Canal Company and the claimant, and unless his status as a bondholder can be denied, his right to participate as such cannot. We see no wrong to any bondholder in the Canal Company directly or indirectly borrowing money to meet its interest obligations, or in issuing bonds therefor; nor do we see the right of any bondholder to complain if the Canal Company had issued bonds in payment of any indebtedness. This is predicated, of course, upon the silence of the mortgage contract. It is not intended by the presentation of this view to draw in question the correctness of the findings of the master upon

this branch of the case, but, on the contrary, to buttress them by supporting his conclusion in any event. The above propositions are accepted by counsel for plaintiff. They urge, however, that what was done "was in violation of the railroad's contract with the bondholders." The answer is summed up in a question, "Wherein?"

The remaining contention, that the costs of the reference should be imposed "in whole or in part" upon the Railroad Company, is met as to the latter by the observation that by placing the costs upon the fund the Railroad Company does pay the costs in part. The suggestion of a finding that the reference to a master was at the instance of the defendant we cannot accept. The reference grew out of the necessities of the case, and was fully justified by rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv). The slightest glance at the voluminous report of the master is sufficient to show that it would have been utterly impracticable for the court to have made the investigation into which the master has gone. There would be no justification whatever for imposing costs upon the defendant. The other matters affecting the costs of the reference we will not dispose of, until we learn whether counsel wish to be heard thereon. If so, the hearing may take place at any time. If no further hearing is desired, the remaining questions will be disposed of at once. The fund awaiting distribution is large, and counsel are invited to suggest any practicable method which may occur to them of making a partial distribution now, reserving such sum as will protect the parties in the assertion of their appellate rights.

A formal decree may be submitted, embodying the conclusions hereinabove stated.

IMPERIAL FILM EXCH. v. GENERAL FILM CO. et al.

(District Court, S. D. New York. December 14, 1915.)

1. CORPORATIONS ⟸617(1)—DISSOLUTION—EFFECT.
   The dissolution of a corporation is equivalent to the death of a natural person.

2. MONOPOLIES ⟸28—INJURIES—ACTION.
   An action under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1916, § 8829), for treble damages for injuries to person or property by reason of unlawful monopoly, is one for a personal wrong, and sounds in tort.

3. COURTS ⟸339—FOLLOWING STATE LAWS—ABATEMENT AND REVIVAL.
   Local state statutes in respect to abatement and survival of actions have no application to an action depending solely upon a statute of the United States.

4. COURTS ⟸339—SURVIVAL OF ACTION—COMMON LAW.
   Where there is no federal statute, either preventing or permitting the survival of an action depending solely on a federal law, the rules of common law, which include judicial opinions, even the most modern, on points not regulated by statute, must be looked to, to determine whether the action survives.

5. ABATEMENT AND REVIVAL ⟸57—SURVIVAL—COMMON LAW.
   An action for treble damages, brought under Sherman Anti-Trust Act, § 7, based on combinations in restraint of trade, survives the death of

the person or dissolution of a corporation injured, being an action for injuries to property, which might have been assigned; the modern rule being in favor of assignment of actions, and tort actions for injuries to property which were assignable surviving.

6. ABATEMENT AND REVIVAL ⟸73—CORPORATIONS—REVIVAL OF ACTION—PARTIES.

Where, on dissolution of a corporation, the state court appointed a trustee, who was in all respects the equivalent of an assignee, such trustee may be substituted as plaintiff in an action previously instituted by the corporation to recover treble damages under Sherman Anti-Trust Act, § 7, for injuries occasioned by a violation of the act.

At Law. Action by the Imperial Film Exchange against the General Film Company and others to recover treble damages under Sherman Anti-Trust Law, § 7. On motion by one appointed trustee of the property of plaintiff corporation to be substituted as party plaintiff. Motion granted.

Plaintiff is a New York corporation, which, pursuant to the General Corporation Law of that state (Consol. Laws, c. 23), applied for voluntary dissolution. The application was granted, and on May 20, 1913 (after the institution of this suit), an order was entered in the Supreme Court reciting that the plaintiff herein was insolvent, and that it would be for the benefit of its stockholders that it be dissolved; whereupon it was "ordered that the said corporation, Imperial Film Exchange, be and it hereby is dissolved." The order then proceeded to appoint Mr. Joseph R. Truesdale "permanent receiver of all the assets and property of said corporation, with all the powers conferred by law on permanent receivers." The statute above referred to (section 231 et seq.) provides that permanent receivers of New York corporations in dissolution "shall be trustees of the property [of the corporation] for the benefit of the creditors of the corporation and of its stockholders," and also that such receivers shall be "vested with all the property real and personal of the corporation," etc. Mr. Truesdale then moved in this count to be substituted as plaintiff herein and to amend the complaint in an appropriate manner. This motion is opposed on the ground that the right of action set forth in the complaint died with the death (i. e., the dissolution) of the plaintiff corporation; that therefore the action abated, and cannot now be revived, because the cause of action itself did not survive the dissolution aforesaid.

Laurence A. Sullivan and Eugene M. Gregory, both of New York City, for receiver.

Harold Nathan, of New York City, for defendants.

HOUGH, District Judge. The exact point of law raised by this motion has never been decided, nor, indeed, so far as my own investigations and those of counsel reveal, has it ever been mooted before. The very able and interesting briefs of counsel I have considered a long time, and yet after such lengthy reflection it appears to me that the matter must be decided by one's views of some elementary and fundamental propositions. To put the matter in another way, decision must be here arrived at, not by a nice consideration of closely joining decisions, but by the view entertained of the application of certain broad propositions, concerning the general correctness of which certainly no counsel here concerned could entertain any doubt. Defendants' position may I think be fairly outlined thus:

[1] 1. The dissolution of the plaintiff is equivalent to the death of a natural person. To this I agree, and consider the references made

in argument entirely sufficient, viz.: Greeley v. Smith, 3 Story, 657, Fed. Cas. No. 5,748; Pendleton v. Russell, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574; Matter of Stewart, 39 Misc. Rep. 275, 79 N. Y. Supp. 525; Id., 40 Misc. Rep. 32, 81 N. Y. Supp. 209; Id., 86 App. Div. 627, 83 N. Y. Supp. 1117; Id., 177 N. Y. 558, 69 N. E. 1131.

[2] 2. The cause of action set forth in the complaint herein (or any cause of action properly brought under section 7 of the Sherman Act) is certainly for a personal wrong, and therefore an action for tort. I agree to this as far as it goes, but do not think that it states the whole truth.

[3] 3. Since this suit depends for its vitality solely upon a statute of the United States, the statutes of the state of New York in respect of abatement and survival of actions or causes of action have no application. To this I agree, upon the authority of the cases cited: Michigan Central, etc., Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; Baltimore & Ohio R. R. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677.

[4] 4. There is no statute of the United States either preventing or permitting the survival of such a cause of action as this. Therefore the rules of the common law become applicable. Holding common law to include also judicial opinions, even the most modern, on points not regulated by statute, I agree to this.

[5, 6] 5. The dissolution (i. e., death) of this plaintiff corporation must have wholly abated this action, because the action is for tort, and the common-law rule regarding the death of personal actions still applies. To this conclusion I cannot agree, because of what I conceive to be the half truth heretofore alluded to. Such an action as this under the Sherman Law can only be brought when a person is "injured in his business or property." Section 7. The action is to recover "threefold the damages by him sustained"; i. e., sustained by and in the said "business" or "property."

Such an action as this might well be called sui generis, but surely the nearest approach to one of the old legal categories that can be made is to assign this new statutory cause of action to that of actions for a tort occasioning injury to property, of which perhaps the most ancient and familiar illustrations are trespass q. c. f. and trespass d. b. a. By a long list of decisions the general test of survivability of actions is their assignability. In fact, many, if not most, of the cases seem to reason in a circle; i. e., if the question is of assignability, a case of survival is thought to rule it, and e converso. See such decisions catalogued in 4 Cyc. 23. In short, assignability and the right of survival are attributes of causes of action discoverable by the same tests; as a general rule they are "convertible terms." Selden v. Ill. Trust, etc., Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180; Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. Supp. 1053; Morenus v. Crawford, 51 Hun, 89, 5 N. Y. Supp. 453; Grocers' National Bank v. Clark, 48 Barb. (N. Y.) 26.

Admitting that most actions for wrong to the person, or indeed to a person, are still subject to the common-law rule, it is several cen-

turies since an exception was established (in the language of Story) that:

"Vested rights ad rem and in re, possibilities coupled with an interest, and claims, growing out of and adhering to property may pass by assignment." Comegys v. Vasse, 1 Pet. at 213, 7 L. Ed. 108.

Sometimes this rule is covered up or disguised by an assignment of the property injured, as in Tome v. Dubois, 6 Wall. 548, 18 L. Ed. 943, where the defendant had wrongfully deprived the plaintiff's assignor of a quantity of sawlogs. The assignor sold the sawlogs to the plaintiff, though he had no possession of them, and the plaintiff maintained an action for conversion. In New York, not merely such property might have been assigned, together with the cause of action growing out of it, but the cause of action itself might have been directly assigned. Richtmeyer v. Remsen, 38 N. Y. 206.

Assuming that the cause of action set forth in this complaint, being statutory, is sui generis, the Congress has not prescribed whether said cause of action may be assigned or not. In the absence of such permission or prohibition, the question of assignability of rights conferred by statutes is to be governed by the general principles regulating that quality in choses in action in general. The general rule was laid down in Meech v. Stoner, 19 N. Y. 26, when Comstock, J., said, in speaking of the right to assign a claim under the statute for money lost at gambling:

"The assignability of things in action is now the rule, nonassignability the exception; and this exception is confined to wrong done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." 19 N. Y. 29.

Therefore, if this be regarded merely as a statutory claim, it is of such a nature as to be assignable. The chose in action alleged to exist in the complaint is undoubtedly property in the largest sense of that word, the test whereof is that it could by appropriate process be reached by the creditors of the Imperial Film Exchange. I do not think it open to doubt that a judgment creditor of this plaintiff could by proceedings supplementary to execution procure the appropriation of this cause of action to himself in satisfaction of his judgment. This is enough to prove that it is property.

The Supreme Court of the state by its order has, in obedience to the statute, preserved and handed on to Mr. Truesdale as trustee all the property of this plaintiff; that is, it has taken possession of everything that the plaintiff could have assigned and everything that the creditors of the plaintiff could hope to reach, either at law or in equity. This lawful action of the court having supervision of this corporation is the equivalent (at least) of an assignment.

Because, therefore, the permanent receiver, Mr. Truesdale, is the equivalent of an assignee, because the cause of action is capable of assignment, and Mr. Truesdale has become the owner of it, I regard the legal death of the corporation as an immaterial element in this application. Therefore the motion is granted.

STATE OF WASHINGTON ex rel. CITY OF TACOMA v. TACOMA RY. & POWER CO. (FITCH et al., Interveners).

(Circuit Court, W. D. Washington, W. D. January 7, 1910.)

No. 1607.

1. REMOVAL OF CAUSES ⊂=102—JURISDICTION—REMAND.

The state of Washington, on the relation of a municipal corporation, instituted a proceeding against a street railway company for a writ of mandamus to compel the street railway company, as a holder of a franchise, to operate cars on all of its lines, so as to render adequate service. The defendant company, which was a foreign corporation, filed a petition for removal on the ground of nonresidence, interveners in the suit also being nonresidents. Pierce's Code Wash. 1905, § 1408, authorizes the courts of the state to issue writs of mandamus to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. *Held* that, though the issuance of a writ of mandamus was prayed, the proceeding was in reality one of an equitable nature, the purpose being to compel a common carrier for the benefit of the public to render service as required by its franchise; and hence, after removal, the cause will not be remanded, though the federal court was without power to entertain a proceeding for a writ of mandamus pure and simple.

2. COURTS ⊂=265—FEDERAL COURTS—MANDAMUS—JURISDICTION.

The federal court is without jurisdiction to issue a writ of mandamus against a corporation to compel compliance with franchise obligations.

At Law. Proceeding by the State of Washington, on the relation of the City of Tacoma, a municipal corporation, for a writ of mandamus against the Tacoma Railway & Power Company, in which J. F. Fitch and others intervened. On petition of defendant, the cause was removed from the state court, where it was instituted, to the federal court. On motion to remand. Motion denied.

T. L. Stiles, City Atty., and F. R. Baker, Asst. City Atty., both of Tacoma, Wash., for relator.

Grosscup & Morrow, of Tacoma, Wash., for Tacoma Ry. & Power Co.

Harry G. Rowland and Hayden & Langhorne, all of Tacoma, Wash., for defendants Fitch and others.

Fitch & Jacobs and Lorenzo Dow, all of Tacoma, Wash., for interveners Fitch and others.

HANFORD, District Judge. This suit is in form a proceeding instituted by an affidavit, pursuant to the Code of the state of Washington, for a writ of mandamus to compel the holder of a street railway franchise to operate cars on one of its lines, so as to render an adequate service for the compensation of a single fare of five cents from each passenger carried for a single continuous trip from any part of the city to the terminus of said line. The proceeding was instituted by the

city of Tacoma, a municipal corporation, grantor of the franchise, and the defendant is a corporation organized under the laws of New Jersey, and the other parties to this suit are citizens of the state of Washington, composing a committee representing inhabitants of the district contiguous to the line of railway in question. The defendant filed a petition and bond for removal of the case into this court, alleging as the grounds for removal that the suit involves a controversy which is wholly between citizens of different states, and that the amount involved exceeds $2,000. The city of Tacoma moved to remand the cause, on the ground that this court does not have jurisdiction of an action, the primary object of which is to obtain a writ of mandamus.

[1, 2] The Code of the state of Washington authorizes the courts of the state to issue a writ of mandate—

"to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." Pierce's Code 1905, § 1408.

If this suit is such a proceeding as contemplated and authorized by the above-quoted section of the Code, for a writ of mandamus pure and simple, it is not cognizable in this court, and the motion to remand should be granted. It becomes necessary, however, for the court to examine the record and form its own conclusion as to the real nature of the proceeding, irrespective of the means by which the litigants propose to obtain the relief desired. The affidavit of the mayor, which stands as the complainant's pleading, does not set forth any duty specifically enjoined by law, nor any specific right or office, to the use or enjoyment of which any particular person is entitled, and from which he has been unlawfully precluded. On the contrary, the proceeding is in the interest of the general public, and the grounds of complaint are neglect and refusal to render the service of a common carrier in accordance with general principles of law and in the discharge of an obligation assumed by contract. In other words, the powers of a court of equity are invoked to compel the specific performance of a contract.

It is the opinion of the court that the substantial object of the suit, rather than the formalities, are of paramount importance, and, as the real object is to secure an adjudication of a 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 the parties, the motion to remand must be denied.

UNITED STATES v. REYNOLDS.

(District Court, D. Montana. August 23, 1916.)

No. 2851.

POISONS ⊂⊃9—PRESCRIBING OPIUM—INDICTMENT—"DISPENSE."

The Harrison Law (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]), requiring nothing of physicians issuing prescriptions for opium, save that the physicians be registered, and the prescriptions be signed by the physicians and dated, and not limiting the amount which may be prescribed, an indictment merely charging defendant with giving a prescription for and so dispensing pounds of opium charges no offense; "dispense," as used in the act, relating to the actual delivery of the drug.

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

J. B. Reynolds was indicted, and demurs to the indictment. Demurrer sustained.

B. K. Wheeler, U. S. Atty., of Butte, Mont.

J. G. Noren, of Great Falls, Mont., and S. C. Ford, of Helena, Mont., for defendant.

BOURQUIN, District Judge. The Harrison Law (Act Dec. 17, 1914) requires nothing of physicians issuing prescriptions for opium save that they, the physicians, be registered and the prescriptions be signed by the physicians and dated as of the day of such signing. By giving a prescription, the physician does not "dispense" opium, in the sense of the word as used in the said law. As therein used, "dispense" relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, though not excluding other actual delivery. As defendant is not charged with having failed to so register or to so sign the prescription, he is not accused of any offense or violation of said law.

In said law is nothing prescribing quantities or forbidding prescriptions for the drug in any quantity. Any attempt to find it therein by construction or implication does violence to that elementary principle that, when Legislatures undertake to create offenses, it must be by language clear and definite, making it obvious to ordinary intelligence that by certain conduct an offense, and the offense denounced by the statute, is committed. Hence such construction or implication is never permitted. See United States v. Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061; United States v. Friedman (D. C.) 224 Fed. 276.

Defendant, charged with giving a prescription for and so dispensing pounds of opium, is not charged with any offense known to the law.

Demurrer sustained.